STATE OF CONNECTICUT *v.* TONY ESPINAL
(AC 41554)

Alvord, Cradle and Suarez, Js.

Syllabus

Convicted of the crime of manslaughter in the second degree as a result of the stabbing death of the victim, the defendant appealed to this court, claiming, inter alia, that he was deprived of his right to present a defense when the trial court precluded certain evidence he claimed was vital to his defense of self-defense. The defendant had stabbed the victim

during an altercation on a highway exit ramp after the automobiles they were driving had collided. The defendant called 911 on his cell phone during the altercation but did not explain his situation to the dispatcher until he made a second 911 call after he was able to leave the victim and drive to another location. The trial court precluded the defendant from introducing evidence that, at the time of the altercation, a rearrest warrant had been issued for the victim in connection with pending motor vehicle violations against him. The defendant claimed that the victim was the initial aggressor and was motivated to attack him because he thought the defendant was talking on the cell phone to the police during the altercation and wanted to avoid an encounter with the police. The trial court also precluded the defendant from introducing into evidence as spontaneous utterances under § 8-3 (2) of the Connecticut Code of Evidence statements he made in his second 911 call and in a videotaped interview with the police when they told him that the victim had died. *Held*:

1. The defendant could not prevail on his claims that the trial court incorrectly determined that evidence of the victim's rearrest warrant was irrelevant and unduly prejudicial, and that his second 911 call and portions of his interview with the police did not constitute spontaneous utterances under § 8-3 (2):

a. The rearrest warrant and evidence of the victim's prior motor vehicle violations did not have a logical tendency to support a finding by the jury, as the defendant claimed, that the victim had a motive to be the initial aggressor, as it was not logical to infer that a person seeking to avoid the police following his involvement in a minor automobile accident would initiate a physical altercation in a public place with a person he believed to be summoning the police on a cell phone; moreover, evidence that the victim was an unlicensed driver who had an outstanding warrant for operating a motor vehicle while his driving privileges were suspended was unduly prejudicial in that it clearly portrayed him in a negative light and was likely to arouse the emotions of the jurors, and the exclusion of the proffered evidence did not deprive the defendant of his right to present a defense, as he was adequately able to present his claim of self-defense by way of his own testimony, by cross-examination of the state's witnesses, and through the opportunity to present other relevant and admissible evidence; furthermore, the court's ruling did not substantially affect the jury's verdict so as to constitute harmful evidentiary error, the state having presented a strong case and disproved the defense of self-defense beyond a reasonable doubt, and there was no dispute that the defendant and the victim engaged in a physical altercation in which the defendant used a knife and that the victim died of a stab wound.

b. The defendant's claim that the recording of his second 911 call was admissible under § 8-3 (2) was unavailing, the trial court having reasonably found that the call was not made in such close connection to the altercation with the victim as to negate the opportunity for deliberation

and fabrication: despite the defendant's belief that the second 911 call was a spontaneous utterance because it was made minutes after his first 911 call ended, it was eminently reasonable to infer that, by the time the defendant made the second call, he was aware of the seriousness of his predicament and that his statements to the 911 dispatcher could have serious consequences for him; moreover, the facts suggested that, after the defendant drove away from the scene of the altercation, he made the second call from a location of relative calm, where he no longer expected to encounter the victim and made factual statements concerning the altercation that were consistent with statements he made during the first 911 call; furthermore, because the court's evidentiary ruling did not reflect an abuse of discretion, the defendant could not prevail on the unpreserved constitutional aspect of his claim in which he asserted that the court's ruling infringed on his right to present a defense.
c. The undisputed circumstances surrounding the defendant's interview with the police amply supported the trial court's finding that his reaction to news of the victim's death did not constitute a spontaneous utterance: contrary to the defendant's contention that the startling event at issue was his learning from the police that the victim had died, the court properly considered the startling event at issue to be the altercation on the exit ramp many hours before the defendant's interview with the police, as the defendant had a lengthy opportunity to contemplate his predicament and craft a response to avoid prosecution, and was well aware that he was at police headquarters, was a suspect in a criminal case and that any statements he made concerning the altercation would likely affect his penal interest; moreover, the defendant's response to news of the victim's death was a self-serving expression of disbelief, which was analogous to a denial of culpability and consistent with his assertions to the police that he did not stab the victim in the chest, and, even if the defendant had been startled by news of the victim's death, his reaction was relevant to an assessment of his conduct during the altercation, including whether he caused the victim's death; furthermore, because the court properly precluded the admission of the interview on evidentiary grounds, the defendant could not prevail on the unpreserved constitutional aspect of his claim, in which he asserted that the court's ruling infringed on his right to present a defense.

2. The defendant's unpreserved claim that the trial court improperly instructed the jury as to the order of its deliberations and misled it as to the consequences of a finding that he acted in self-defense was unavailing: despite the defendant's contention that the jury could not have considered the lesser included offenses at issue if it found him not guilty of a greater offense on the basis of his defense of self-defense, it was not reasonably possible that the jury was misled, as the court's instructions led the jury to a correct understanding that self-defense was a complete defense to murder, the crime with which the defendant had been charged, and the lesser included offenses at issue, the court

instructed the jury that it had to evaluate the defense of self-defense before returning a verdict with respect to any of the offenses, and it instructed the jury that it was required to return a verdict of not guilty if it found that the state failed to disprove the defense of self-defense; moreover, although the jury was not instructed that the state's failure to disprove the defense of self-defense beyond a reasonable doubt required it to find the defendant not guilty of murder and all of the lesser included offenses at issue, the defendant's interpretation of the jury charge was belied by the court's repetitive and unambiguous instructions that conveyed the applicability of the defense of self-defense to every offense at issue, as well as the legal significance of a finding that the state failed to disprove the defense of self-defense; accordingly, the defendant failed to demonstrate that a constitutional violation existed that deprived him of a fair trial.

3. This court declined to exercise its supervisory authority over the administration of justice to require trial courts to instruct juries to consider the defense of self-defense prior to considering whether the defendant is guilty of the charged offense and any lesser included offenses, the defendant having failed to persuade this court that the procedure followed by the trial court in instructing the jury infringed on the integrity of the trial or the perceived fairness of the judicial system as a whole.

Argued January 5—officially released November 2, 2021

Procedural History

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Pavia*, *J.*; verdict and judgment of guilty of the lesser included offense of manslaughter in the second degree, from which the defendant appealed. *Affirmed.*

Pamela S. Nagy, assistant public defender, for the appellant (defendant).

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

Opinion

SUAREZ, J. The defendant, Tony Espinal, appeals from the judgment of conviction, rendered following a jury trial, of manslaughter in the second degree in

violation of General Statutes § 53a-56 (a) (1).[1] The defendant claims that (1) the trial court deprived him of his due process rights to present a defense and to a fair trial by precluding him from introducing evidence that was vital to his defense, (2) the court committed error with respect to its jury instructions concerning the defense of self-defense, and (3) this court, in the exercise of its supervisory authority over the administration of justice, should require trial courts, in cases in which self-defense is asserted as a defense, to instruct juries to consider the defense prior to considering whether the defendant is guilty of the charged offense and any lesser included offenses. We affirm the judgment of the trial court.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. On December 18, 2014, the defendant was living in Bridgeport with his parents and his girlfriend at that time, Nefertiti Green. That day, the defendant worked from 7 a.m. to 2 p.m. at a restaurant. The defendant then worked at his second job, from 4 to 11 p.m., at a different restaurant that was located in Trumbull. Between approximately 10 and 11 p.m., the defendant, while at the restaurant, consumed two beers with some of his coworkers. By the time the defendant left the restaurant at approximately 11 p.m., he felt as though he had been through "a very tough day," he was tired, and he wanted to get home.

In the parking lot of the restaurant, the defendant got into his automobile, which was registered to Green. He called Green on his cell phone to let her know that he was on his way home. The defendant continued his conversation with Green as he drove away from the

[1] The jury found the defendant not guilty of murder and the lesser included offense of first degree manslaughter. The trial court sentenced the defendant to a term of imprisonment of ten years, execution suspended after seven years, followed by five years of probation.

restaurant and proceeded along Route 25, a multilane state highway, toward Bridgeport.

As the defendant approached southbound exit 5 of Route 25, he and the victim, Bryant Kelly, were involved in a minor automobile collision. Thereafter, on exit 5, both drivers stopped their automobiles within several feet of each other. Before the defendant exited his automobile, he concealed a Swiss Army type knife in the pocket of his pants. Once they had exited their automobiles, the defendant and the victim began cursing and shouting at one another, and their encounter quickly escalated into a physical altercation. At no point did the victim display a weapon. The defendant reached into his pocket, opened his knife with his thumb, and used it to inflict multiple injuries to the victim. These injuries included multiple superficial wounds on the victim's arm, as well as a fatal wound that resulted from the defendant stabbing the victim in the left chest, thereby piercing the victim's left lung cavity, a major coronary artery, and his heart. Then, the defendant got back into his automobile and drove away from the scene.

At some point during his encounter with the victim on the exit ramp, the defendant ended his phone conversation with Green and used his cell phone to call 911. Although the defendant was connected to the 911 dispatcher for several minutes during his encounter with the victim, he did not explain his situation to the dispatcher until after he had driven away from the exit ramp. He informed the dispatcher that he would stop and wait for the police at the intersection of Lindley Street and Salem Street in Bridgeport. After the defendant ended his initial conversation with the dispatcher but before the police arrived, he concealed his knife under a spare tire in the trunk of his automobile. For approximately twenty minutes, the defendant waited for the police to arrive. As the defendant did so, he

called 911 a second time and was speaking with a 911 dispatcher when the police arrived.

During the course of his two conversations with a 911 dispatcher, the defendant did not state that he had been in fear for his life or that he had used a knife during his encounter with the victim. When the police, including Trooper Edmund Vayan of the state police, arrived at the defendant's location at the intersection of Lindley Street and Salem Street, they spoke with the defendant. Vayan noticed that the defendant was outside of his automobile holding a cell phone in his left hand. He also observed blood on the defendant's right hand. Despite the fact that the defendant saw the police searching his automobile, he did not immediately inform the police about the knife he had concealed in the trunk. Later, when Vayan asked the defendant if there was a knife in his automobile, he hesitated before responding that there was a knife in his trunk. The police later recovered the knife. The defendant voluntarily accompanied the police to the state police Troop G barracks in Bridgeport, where he was advised of his rights. Thereafter, the police interviewed him for several hours and obtained a written statement from him.

At trial, the defendant asserted that he had acted in self-defense. The defendant testified that, while he and the victim were operating separate automobiles in the southbound lanes of Route 25, prior to reaching exit 5, the victim passed him on his right side and "clipped" his front bumper. Once the victim's automobile was in front of the defendant's automobile, the defendant flashed his headlamps. Thereafter, the victim and the defendant were driving side-by-side in the southbound lanes. The victim began yelling and gesturing at the defendant. Then, the victim drove his automobile such that it was directly in front of the defendant's automobile, and the victim then slammed on his brakes, causing

another minor collision with the defendant. Both drivers stopped their automobiles on exit 5. The victim, who was larger than the defendant, exited his automobile and approached the defendant. Because the victim was angry, cursing, and yelling, the defendant put a knife in his pocket. The defendant, while still talking to Green on his cell phone, exited his automobile, and he began to inspect the damage to the automobile when the victim pushed him. The defendant told the victim not to touch him, and he used his cell phone to take a photograph of the victim's license plate. The victim pushed him onto the hood of the defendant's automobile. At this point, the defendant called 911.

The defendant testified that, after the victim pushed him this second time, he got up and told the victim "not to put your hands on me, not to touch me." The victim and the defendant exchanged insults, and the victim told the defendant, "I'm in your face. Put your hands up so I can knock you out." The victim and the defendant continued to yell at each other. The victim turned as though he was going to leave but then surprised the defendant by punching him in the jaw. The victim then started pushing the defendant even more, grabbing his sweatshirt and, in the defendant's words, "throwing [him] around." The defendant testified that, as other drivers were passing them on the exit ramp, he believed that the victim was either trying to throw him on the ground or into oncoming traffic. The defendant screamed, "let me go," several times, but the victim would not comply. Fearing for his life, the defendant reached into his pocket with his right hand and brandished his knife.

According to the defendant, he swung the knife twice "on [the victim's] shoulder" while intending to cause the victim to let go of him. The defendant testified that he did not know if he struck the victim with the knife, but it was possible that it may have made contact with

the victim's arm. The defendant also testified that, although he made a "short swing" with the knife in the direction of the victim's shoulder, at no point did he push the knife straight at the victim's body. The defendant testified that he "never stabbed [the victim] in the chest."

The defendant testified that, after he used the knife, the victim released him and stated, "you have a knife, I'll show you what I have in my car." As the victim turned and walked toward his automobile, the defendant got into his automobile, drove around the victim's automobile, and proceeded to the intersection of Lindley Street and Salem Street, where he waited for the police. The defendant called 911 during his encounter with the victim on the exit ramp, and he had his cell phone in his left hand during a portion of his encounter with the victim. It was not until the defendant drove away from the victim, however, that he was able to converse with the 911 dispatcher. The defendant testified that, while he was waiting for the police to arrive, he opened the trunk, and "threw [the knife] in there [and] closed the trunk." Additional facts will be set forth as necessary.

I

First, the defendant claims that, in three instances, the court deprived him of his due process rights to present a defense and to a fair trial by precluding him from introducing evidence that was vital to his defense. He claims that the court improperly precluded him from introducing evidence that was highly relevant to his claim of self-defense, including (1) evidence that, at the time of the encounter, the victim had an active rearrest warrant for motor vehicle violations and was driving while his right to operate a motor vehicle was suspended, (2) a recording of a phone call that the defendant made to 911 within minutes after his encounter

with the victim ended, and (3) a portion of his videotaped interview by the police at Troop G following the events at issue, which depicted his reaction upon being informed by the police that the victim had died. We disagree with these claims and will address them in turn.

We begin by setting forth legal principles common to the issues raised in this claim. "The sixth amendment right to compulsory process includes the right to offer the testimony of witnesses, and to compel their attendance, if necessary, [and] is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies. . . . Although we recognize that the right of a defendant to present a defense is subject to appropriate supervision by the trial court in accordance with established rules of procedure and evidence . . . we are also mindful that the fair opportunity to establish a defense is a fundamental element of due process . . . and that our rules should not be applied mechanistically so as to restrict unreasonably that important right." (Citation omitted; internal quotation marks omitted.) *State* v. *DeCaro*, 252 Conn. 229, 256, 745 A.2d 800 (2000). "A [criminal] defendant has a constitutional right to present a defense, but he is [nonetheless] bound by the rules of evidence in presenting a defense. . . . Although exclusionary rules of evidence cannot be applied mechanistically to deprive a defendant of his rights, the constitution does not require that a defendant be permitted to present every piece of evidence he wishes. . . . Accordingly, [i]f the proffered evidence is not relevant [or is otherwise inadmissible], the defendant's right to [present a defense] is not affected, and the evidence was properly excluded. . . . Thus, the question of the admissibility of the proffered evidence is one of evidentiary, but not constitutional, dimension." (Citations omitted; internal quotation marks omitted.)

State v. *Mark T.*, Conn. , , A.3d (2021). "We first review the trial court's evidentiary rulings, if premised on a correct view of the law . . . for an abuse of discretion. . . . If, after reviewing the trial court's evidentiary rulings, we conclude that the trial court properly excluded the proffered evidence, then the defendant's constitutional claims necessarily fail." (Internal quotation marks omitted.) *State* v. *David N.J.*, 301 Conn. 122, 133, 19 A.3d 646 (2011).

A

The defendant claims that the court improperly excluded evidence that, at the time of the encounter, the victim had an active rearrest warrant for motor vehicle violations and was driving while his right to operate a motor vehicle was suspended. We disagree.

The following additional facts and procedural history are relevant to this claim. On November 28, 2017, prior to the beginning of the defendant's case-in-chief and outside the presence of the jury, defense counsel informed the court as follows: "[W]e have evidence that the [victim], as of the date of this incident, was not only in under suspension status [with regard to his right to operate a motor vehicle in Connecticut], he actually was in a rearrest status having to do with . . . operating under suspension. In fact, the evidence that we would proffer is that he didn't have a Connecticut license, and his right to operate in Connecticut was under suspension. I don't know . . . if he ever had [a license]. . . . [W]e have someone from [the Department of Motor Vehicles (department)] who would be offering that evidence. And I would submit that it is, when combined with the evidence that . . . [the defendant] has already committed to by way of his rather lengthy [police] interview, namely, that the [victim] . . . got more and more upset about [the defendant] having . . . his phone and seemingly making a phone

call. And that's, to a large extent, precipitated . . . the further aggravation of hostilities by [the victim].

"So, it would relate to motive . . . as in someone who is . . . in a status of that they are not . . . not only not supposed to be driving a car, but they have a pending operating under suspension in rearrest status . . . supporting the reasonable inference that [the victim] would be particularly not interested in having the police involved in what was otherwise a very, very minor fender bender.

"[The defendant] described to the police that it was his intention to get the police involved [after the accident occurred] . . . just, basically, settle it, file whatever reports are necessary and deal with it that way. He did provide evidence to the police that he, in fact, took a photograph of [the victim's] license plate while out there. . . . And part of the time line that . . . the state provided to the defense . . . [was that the defendant was] on the phone with one person, terminating that call, taking the photograph, and initiating the call with the Connecticut state police.

"And so . . . the jurors, applying common sense, should be permitted to consider whether or not an individual in that status of a pending [operating] under suspension, while in a suspended status, with an outstanding warrant for not appearing under his suspension, whether that person, in fact, would be motivated to not want the police involved. That would be the relevance of it, and we're prepared to proffer . . . a recordkeeper from [the department who] will be prepared to testify regarding status and [the victim's] right to operate as of the date of the . . . [altercation involving the defendant and the victim]. I think I would separately need to either seek judicial notice at another time . . . in relation to [the victim's] rearrest status in

connection with what was . . . then pending, so the rearrest warrant, operating under suspension."

The prosecutor responded that, even if it were assumed that the defendant would testify in a manner consistent with defense counsel's representations, he objected to the evidence on the ground that it was inadmissible character evidence.

Defense counsel made an offer of proof by means of the testimony of Brian Clarke, a program coordinator employed by the department. Clarke testified that, as of December 18, 2014, the victim's driving privileges were under suspension as a result of his having received an infraction ticket in 2009 for driving without a license. According to Clarke, the victim's driving privileges were suspended in approximately October, 2010. Clarke also testified that the department's records reflected that the victim never had a valid driver's license, but that nondriver identification cards had been issued to him. Clarke testified that the mailing address the department had for the victim was in Bridgeport. The court deferred ruling on the admissibility of the evidence.

The next day, November 29, 2017, the defendant submitted a request for judicial notice pursuant to § 2-1 of the Connecticut Code of Evidence. The defendant asked the court to instruct the jury that, "[o]n December 18, 2014, the [victim] . . . had an outstanding rearrest warrant stemming from a matter [in the Superior Court] in New Haven, [geographical area number twenty-three], that was issued on August 12, 2014. The underlying charges were illegal operation motor vehicle under suspension in violation of [General Statutes §] 14-215, operating unregistered motor vehicle in violation of [General Statutes §] 14-12 (a), and failure to use seat belt in violation of [General Statutes §] 14-100a (c) (1)." The defendant attached to his request documents from the Judicial Branch website, reflecting that, in August,

2014, a rearrest warrant had been issued for "failure to appear," and that, in December, 2014, there were pending charges against the victim for, inter alia, operating a motor vehicle while under suspension.

Although the record does not reflect that the state filed a motion in limine with respect to the evidence at issue, on November 30, 2017, defense counsel filed a memorandum of law in response to what he characterized as the state's "motion in limine" to preclude the defendant from introducing evidence concerning the victim's status, as a result of his motor vehicle offenses, at the time of the incident. Defense counsel argued therein that evidence that the victim "was facing the potential consequence of incarceration as a result of operating a motor vehicle at the time of the incident" was relevant to demonstrating why the victim attacked the defendant, whom he believed to be in the process of summoning the police to the accident scene. Attached to this memorandum was the state's information in the 2014 case brought against the victim, a summons, a rearrest warrant application for the victim that was granted on August 14, 2014, and a motion filed by the victim on November 19, 2014, to vacate the rearrest warrant, which was denied on November 20, 2014.[2] The court did not rule on the admissibility of the evidence at that time.

During the defendant's testimony on November 29, 2017, he testified in relevant part that, following two minor automobile collisions caused by the victim, he and the victim stopped their automobiles on exit 5 of Route 25. Following the first minor collision, before stopping on the exit ramp, the victim acted aggressively toward the defendant by "yelling and gesturing" at him.

[2] The original information, summons, and rearrest warrant application set forth a Bridgeport address for the victim. The motion to vacate purportedly filed by the victim reflects the Bridgeport address as crossed out and a new address, in West Haven, handwritten in its place.

When the defendant exited his automobile on the exit ramp, he was using his cell phone to converse with Green. The victim commented on the fact that the defendant was using his cell phone. Specifically, the victim asked the defendant if he was speaking with the police. The defendant testified that he simply replied, "not to worry about that." According to the defendant, the victim thereafter assaulted him several times, and he used his knife to repel the victim because he feared for his life.

On November 30, 2017, the court revisited the evidentiary issue raised by the defendant. Initially, the court identified what it believed to be defense counsel's theory of admissibility, namely, that the proffered evidence about the victim's outstanding arrest warrant made it reasonable to infer that the victim was in a "state of turmoil" and acted angrily toward the defendant because he believed that the defendant either had or would summon the police to the accident scene. The court stated that there was no direct evidence that the victim asked the defendant *not* to call the police because he feared being arrested but understood the defendant's argument to rest on the inference to be drawn from the proffered evidence that the victim knew there was a rearrest warrant and that the existence of such warrant would lead to his arrest if the police arrived at the accident scene.

In its consideration of the proffered evidence, the court observed that the victim had listed a West Haven address on his motion to vacate the rearrest warrant. It then expressed its concern that, because Clarke testified that the department only had the victim's Bridgeport address on file, and it was reasonable to presume that any notices in the case would have been sent to the address on file, "[w]e have no idea whether [the victim] knew or was informed or received any notice

with regard to [his status after the court's denial of his motion to vacate the rearrest warrant]."

Defense counsel downplayed the significance of the fact that there was no evidence that the victim had received notice of the court's ruling on the motion to vacate the rearrest warrant. Defense counsel responded that the fact that the victim filed the motion to vacate the rearrest warrant was itself sufficient evidence to demonstrate that he knew that he had "a pending case," he was "under suspension," he should not be driving an automobile, and he was subject to rearrest. Although defense counsel argued that the jury reasonably could infer that the victim did not want to encounter the police following the accident because he did not have an operator's license, it was the goal of the defense to present evidence "that [the victim had] an outstanding arrest warrant." Defense counsel argued that, in the absence of any evidence that the victim had received notice of the court's denial of the motion to vacate the rearrest warrant, the court should not presume that the victim somehow believed that his motion had been granted and that he was not subject to arrest.

The state responded that, in essence, the defendant was attempting to introduce character evidence of the victim to prove something that was not a material issue in the case, namely, the victim's motive for behaving in an angry and agitated manner toward the defendant. The state argued that there was no legal basis to admit this character evidence under § 4-4 of the Connecticut Code of Evidence. The state also asserted that the evidence, which was prejudicial, did not have any probative value in light of the fact that there was no evidence that the victim had notice that his motion to vacate had been denied and his warrant was still outstanding. The state also posited that, in light of the defendant's testimony that, before the victim had asked him if he had called the police, the victim and the defendant were

engaged in a heated verbal exchange, the logical inference for which defense counsel sought to introduce the evidence was weak, at best. Stated otherwise, the state argued that the defendant's own testimony showed that the victim was agitated and angry prior to the time that he may have believed that the defendant was using his cell phone to summon the police.

Defense counsel responded by drawing an analogy between the evidence he sought to introduce and evidence that is admitted to prove consciousness of guilt of an accused. He argued that the jury could infer that someone who has an outstanding arrest warrant for operating while under suspension would be concerned if, at the scene of an accident, he observed the other driver with a cell phone in his hand. He also asserted that it was reasonable for the victim to infer that the defendant was calling the police. Defense counsel also stated his belief that the defendant's testimony, which was that the victim had asked him if he was on the phone with the police, supported counsel's theory of admissibility.

The court once again deferred ruling on the issue but, nonetheless, responded to defense counsel that, if his theory of admissibility rested on the fact that the victim was motivated to avoid the police at the scene of the accident, the defendant's testimony undermined this theory. The court explained that the defendant's testimony showed that "[the victim is] not an individual that's trying to get in his car and get out of there. He's an individual who's standing his ground and fighting, which is almost the opposite of what you're saying. There's no suggestion that he's trying to get out of there and get away from the police. So, I understand what you're trying to get in, but it also needs to be supported by the facts of this particular case."

The following day, the court disallowed the proffered evidence by means of an oral ruling. The court stated

that "the evidence that the defense is seeking, based upon the record of this particular trial, would really be, one, pure speculation; two, not supported by the evidence; and, three, more prejudicial than probative. So, in this court's opinion, putting in evidence of the decedent's arrest record or warrants for arrest or underlying charges really do[es] not support anything that the defendant indicated in terms of his version. . . . I know the defense position, that [the victim] is referencing the fact that he has a phone out. Even by the defendant's own testimony, all he says is that he had this phone out, that it's out while he's looking at damage to his car, that, at some point, the . . . decedent says to him something to the effect of, are you on the phone, or, are you talking to the police, and the defendant indicates not to worry about it, never says that the decedent is angry or yelling at him or there's any type of . . . behavior that supports what the defendant's argument is in this particular instance, which is that the decedent was so irate about the idea of the police possibly finding him, that that propelled him into some form of aggressive behavior toward the defendant.

"The . . . court's position is that, as I indicated yesterday, it's almost the opposite would be true because the evidence would be that the decedent would be trying to get away from the situation, as opposed to continuing to stay there knowing that the police were most likely going to be coming. And so I think, one, it's not supported by the case law; two, it's not supported by the facts of this particular case; three, it's pure speculation; and four, it's . . . more prejudicial than it is probative."

At the conclusion of the court's ruling, defense counsel clarified that the proffered evidence was not merely relevant with respect to the victim's motive, but that it impacted the defendant's self-defense claim. Defense counsel stated that the proffered evidence may have had only slight probative value, but that it was for the

jury, not the court, to determine the strength of the inferences to be drawn from it. The court responded: "[M]y ruling has, kind of, several layers to it. So, the first is that it's not supported by the case law, that, in terms of the decedent and his background and criminal record or behavioral patterns or character in a self-defense case, as I think we can all agree, this is, at this point, certainly there are times when that comes in. But in this instance, I think, we . . . all agree that that's not what the defense is seeking to put it in for. You're not trying to put it in toward a showing of the decedent's aggressive behavior. . . .

"[T]he other segment is, well, is it relevant to this particular case and the facts of this particular case. And . . . after reviewing again everything that the defendant has said, the court's position is that it is not. Now, having said that, I did not prevent, and I am not preventing . . . the defendant testifying to or any recitation by the defendant of what he believes was occurring, what he experienced and all of those things remain on the record. And the defendant and the defense obviously has an opportunity to argue that point to the jury and to ask the jury to draw any inference that they would like to. I am simply ruling that the admission of an outstanding arrest warrant that was pending against the decedent is not admissible at this time."

Having discussed the court's ruling, we turn to the applicable legal principles. We observe that the court's ruling is based primarily on its conclusion that, in light of the facts of this particular case, the proffered evidence was not relevant. The Connecticut Code of Evidence provides that " '[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. Section 4-2 of the code provides that, unless there

is a legal basis for its exclusion, "[a]ll relevant evidence is admissible . . . ." Conn. Code Evid. § 4-2. "Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . One fact is relevant to another if in the common course of events the existence of one, alone or with other facts, renders the existence of the other either more certain or more probable. . . . Evidence is not rendered inadmissible because it is not conclusive. All that is required is that the evidence tend to support a relevant fact even to a slight degree, [as] long as it is not prejudicial . . . ." (Internal quotation marks omitted.) *State* v. *Bonner*, 290 Conn. 468, 497, 964 A.2d 73 (2009). "The [trial] court has the discretion to exclude speculative evidence, expert or otherwise." *Message Center Management, Inc.* v. *Shell Oil Products Co.*, 85 Conn. App. 401, 421, 857 A.2d 936 (2004); see also *State* v. *Isabelle*, 107 Conn. App. 597, 607, 946 A.2d 266 (2008) ("[i]t is a reasonable exercise of judicial discretion to exclude . . . evidence the relevancy of which appears to be so slight and inconsequential that to admit it would distract attention which should be concentrated on vital issues of the case" (internal quotation marks omitted)).

Preliminarily, the defendant argues that, when a defendant claims to have acted in self-defense, "evidence of the victim's motive to attack the defendant is relevant." In support of this proposition, the defendant relies heavily on this court's analysis in *State* v. *Thomas*, 110 Conn. App. 708, 955 A.2d 1222, cert. denied, 289 Conn. 952, 961 A.2d 418 (2008). In *Thomas*, the defendant, who was charged with assault, raised the defense of self-defense. Id., 713. In furtherance of her claim of self-defense, the defendant attempted to demonstrate at her criminal trial that the alleged victim was the initial aggressor and that the victim's motive in assaulting the defendant was that she wanted to prevent the defendant from conveying certain information to the defendant's boyfriend about the victim's " 'illegitimate child' . . . ."

Id., 714; see also id., 717. The trial court disallowed the evidence on the ground of relevance. See id., 715.

The defendant in *Thomas* appealed to this court, claiming in relevant part that the trial court violated her constitutional right to present a defense by precluding her from presenting evidence that the victim had a motive to act as the aggressor. Id., 713. This court concluded "that the [trial] court improperly excluded evidence relevant to [the victim's] alleged motive to attack the defendant. Because the defendant raised the defense of self-defense at trial, the determination of whether [the victim] or the defendant was the initial aggressor was material. . . . Although the proffered evidence may have strained credulity, it tended to corroborate the defendant's assertion that [the victim] initially attacked her because it tended to show that [the victim] had a motive to attack the defendant to prevent her from relaying information about [the victim's] child to [the alleged father of the child, the defendant's boyfriend]. To be relevant, the evidence need not exclude all other possibilities; it is sufficient if it tends to support the conclusion [for which it is offered], even to a slight degree. . . . The odd nature of the offer does not detract from its ability to support the conclusion for which it was offered. Accordingly, we conclude that the evidence was relevant and that its exclusion constituted an abuse of the court's discretion." (Citations omitted; internal quotation marks omitted.) Id., 717. This court, however, went on to conclude that the trial court's ruling did not rise to the level of a constitutional violation because it did not foreclose an entire defense theory. See id., 718. This court also concluded that the ruling was not harmful because the exclusion of the evidence did not substantially affect the verdict. See id., 719.

In the present case, the defendant also argues that the evidence at issue "was highly relevant to show that

[the victim] had a motive for attacking the defendant. Just as in *Thomas*, the evidence corroborated the defendant's claims of self-defense and that [the victim] became aggressive because he thought the defendant was talking to the police. It certainly is reasonable to infer that this belief triggered [the victim's] aggression because he knew there was a warrant for his arrest and he had no driver's license." The defendant also argues that, pursuant to § 4-5 (c) of the Connecticut Code of Evidence, evidence of a person's other crimes is admissible to prove motive and that there was an evidentiary basis to admit the evidence in light of the defendant's testimony about the victim's statements to him at the scene of the crime after the victim observed the defendant using his cell phone.

We agree with the defendant that, because he raised the defense of self-defense, the issue of whether he or the victim was the aggressor was a material issue of fact for the jury's consideration in evaluating whether his use of physical force was justified under the circumstances. General Statutes § 53a-19 (a), which delineates the defense of self-defense, provides: "Except as provided in subsections (b) and (c) of this section, a person is justified in using reasonable physical force upon another person to defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force, and he may use such degree of force which he reasonably believes to be necessary for such purpose; except that deadly physical force may not be used unless the actor reasonably believes that such other person is (1) using or about to use deadly physical force, or (2) inflicting or about to inflict great bodily harm." See also *State* v. *Thomas*, supra, 110 Conn. App. 717. The issue in the present case may be distilled to whether the proffered evidence had a *logical tendency*, even to a slight degree, to support a finding that the victim was the initial aggressor.

Even if we assume, in the absence of any evidence that the victim knew that the court had denied his motion to vacate the rearrest warrant, that the victim was aware of an outstanding warrant for operating under suspension at the time of the accident, the proffered evidence does not logically tend to support the proposition for which it was introduced. Consistent with the defendant's view of the evidence, there was an evidentiary basis on which to conclude that the victim was under the belief that the defendant had summoned the police. The defendant testified that, after his automobile and the victim's automobile collided, the two men stopped their automobiles on the exit ramp. The defendant exited his automobile while on his cell phone. He used the cell phone to take a photograph of the victim's license plate. When the victim observed this conduct, he inquired whether the defendant had called the police, something that would be reasonable to presume in the immediate aftermath of an automobile accident that, as the defendant maintained, was caused by the victim. The defendant responded coyly, "not to worry about it." This vague response reasonably could have been interpreted by the victim as an affirmation that the police were on their way.

We agree with the court, however, that the proffered evidence tended to undermine the purpose for which it was introduced. The defendant argued that the evidence gave the victim a strong motive to be the initial aggressor to prevent detection by the police. If the victim wanted to avoid the police and evade arrest, it is reasonable to infer that he either would have not stopped his automobile on the exit ramp or that he would have fled the scene once he observed the defendant on his cell phone. The defendant testified unambiguously, however, that neither of these things occurred. It is not logical to infer that a person seeking to avoid the police following his involvement in a minor automobile acci-

dent would initiate a physical altercation, in a very public place, with a person he believed to be actively speaking with or summoning the police. Nothing in the defendant's testimony suggests that the victim acted in such a manner as to distance himself from the police when they arrived at the accident scene. Thus, we agree with the trial court's assessment that the evidence did not have a logical tendency, even to a slight degree, to support the proposition for which it was introduced. As a result, it was not relevant for the purpose for which it was introduced.

The court also concluded that the evidence was unduly prejudicial. The defendant challenges this aspect of the court's ruling in a cursory manner, simply arguing that there was "no merit to the court's finding that the evidence was prejudicial." The Connecticut Code of Evidence provides that "[r]elevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice . . . ." Conn. Code Evid. § 4-3. This court has described the familiar analysis to determine undue prejudice as follows: "Of course, [a]ll adverse evidence is damaging to one's case, but it is inadmissible only if it creates undue prejudice so that it threatens an injustice were it to be admitted. . . . The test for determining whether evidence is unduly prejudicial is not whether it is damaging to the defendant but whether it will improperly arouse the emotions of the jur[ors]. . . . The trial court . . . must determine whether the adverse impact of the challenged evidence outweighs its probative value. . . . Finally, [t]he trial court's discretionary determination that the probative value of evidence is not outweighed by its prejudicial effect will not be disturbed on appeal unless a clear abuse of discretion is shown. . . . [B]ecause of the difficulties inherent in this balancing process . . . every reasonable presumption should be given in favor of the trial court's ruling. . . . Reversal is

required only [when] an abuse of discretion is manifest or [when] injustice appears to have been done." (Internal quotation marks omitted.) *State* v. *Dillard*, 132 Conn. App. 414, 425–26, 31 A.3d 880 (2011), cert. denied, 303 Conn. 932, 36 A.3d 694 (2012).

In the present case, it was the state, not the defendant, that argued that the evidence was unduly prejudicial to the state's case. In light of our conclusion that the proffered evidence did not have any probative value with respect to the material issue for which it was offered, namely, whether the victim was the initial aggressor, we have little difficulty agreeing with the court that evidence that the victim was an unlicensed driver and that he had an outstanding warrant for operating under suspension was unduly prejudicial. Such evidence clearly portrayed the victim in a negative light and was likely to arouse the emotions of the jurors.

Even if we were to conclude that the court abused its discretion in concluding that the proffered evidence was not relevant and that it was unduly prejudicial, we nonetheless would conclude that the defendant is not entitled to a new trial. As we stated previously in this opinion, the defendant claims, in part, that the court's improper exclusion of the evidence was an impropriety of constitutional dimension, depriving him of his right to present a defense.[3] Our careful review of the record leads us to conclude that the exclusion of the evidence in question did not deprive the defendant of an opportunity to present a complete defense.

The defendant's position is that, had the evidence been admitted and credited by the jury, it could have supported his claim that the victim was the initial aggressor and, thus, that the defendant had acted in

[3] As we stated previously, defense counsel argued before the court that the proffered evidence was relevant to the defendant's ability to present his defense of self-defense.

self-defense. The defendant, however, had every opportunity, through his own testimony, to provide ample evidence that the victim was the initial aggressor and that the defendant used the knife under a belief that his life was in jeopardy. Because the defendant was adequately able to present his claim of self-defense by way of his own testimony, by cross-examining the state's witnesses, and through the opportunity to present any other relevant and admissible evidence with respect to his theory of defense, he is unable to demonstrate that the exclusion of this evidence deprived him of his right to present a defense. See, e.g., *State* v. *Shabazz*, 246 Conn. 746, 758 n.7, 719 A.2d 440 (1998) (no deprivation of constitutional right to present defense when "defendant was adequately permitted to present his claim of self-defense by way of his own testimony, by cross-examining the state's witnesses, and by the opportunity to present any other relevant and admissible evidence bearing on that question"), cert. denied, 525 U.S. 1179, 119 S. Ct. 1116, 143 L. Ed. 2d 111 (1999); see also *State* v. *Thomas*, supra, 110 Conn. App. 718 ("[b]ecause the theory in question provided at most merely one more motivation to attack, its exclusion did not foreclose an entire defense theory and, therefore, did not rise to the level of a constitutional violation"). In the present case, the exclusion of the evidence did not foreclose an entire defense theory, and its exclusion did not give rise to a constitutional violation.

We are left to address the defendant's alternative argument that, even if the court's ruling did not rise to the level of constitutional impropriety, it still constituted harmful evidentiary error warranting a new trial. "When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . [W]hether [an improper ruling] is harmless in a particular case

depends [on] a number of factors, such as the importance of the . . . testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the . . . evidence on the trier of fact and the result of the trial. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error. . . . Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) *State* v. *Courtney G.*, Conn. , , A.3d (2021).

Even if we were to assume that the court's ruling was erroneous, the defendant has not persuaded us that it substantially affected the verdict. As we stated previously, although the court, on relevancy grounds, excluded some of the evidence that the defendant sought to introduce, the defendant presented ample evidence in support of his defense of self-defense. The state, however, presented a strong case and disproved the defense of self-defense beyond a reasonable doubt. The defendant testified that he consumed two beers in less than one hour prior to driving home from the restaurant where he was employed. There is no dispute that the defendant and the victim were engaged in a physical altercation and that, during the altercation, the defendant used a knife that he had removed from his automobile. The victim died of a stab wound. There was evidence that, when the defendant called 911 from the scene, but prior to speaking with a dispatcher, he was shouting at and swearing at the victim. At one point, he was shouting, "[h]it me. Hit me . . . ." Although the

defendant testified that he swung the knife two times during the physical confrontation, there was evidence that the victim had been stabbed four times, which included the fatal thrust to his heart. There was evidence that, when the defendant spoke to a police dispatcher immediately after leaving the scene, he did not mention being in fear for his life, let alone state that he had used a knife. Moreover, the state presented evidence that, after the defendant left the scene, he concealed the knife in the trunk of his automobile. The state also presented evidence that, when the defendant was asked by the police whether there was a knife in his automobile, and after he observed the police searching the inside of the automobile, he hesitated before replying affirmatively. On the basis of the foregoing, we are not persuaded that the jury's verdict would have been different even if it had before it the precluded evidence that was related to the victim's rearrest status at the time of the accident.

B

Next, the defendant claims that the court improperly excluded a recording of the second 911 call he made after his encounter with the victim. This recording was purportedly made by the defendant after he left the victim and while he was waiting for the police to arrive at the intersection of Lindley Street and Salem Street in Bridgeport. The defendant argues that the recording was admissible under the spontaneous utterance exception to the rule against hearsay. We disagree.

The following additional facts are relevant to this claim. On the first day of the trial, November 27, 2017, the defendant filed a memorandum of law in support of the admissibility of the evidence at issue. He argued that it was admissible under the spontaneous utterance exception to the rule against hearsay; see Conn. Code Evid. § 8-3 (2); under the state of mind exception to

the rule against hearsay; see Conn. Code Evid. § 8-3 (4); and as part of the res gestae. Because, in the present claim, the defendant focuses on whether the court improperly determined that the evidence was not admissible under the spontaneous utterance exception, we will focus our attention on the arguments made and the court's ruling only with respect to that theory of admissibility.

In his memorandum of law, the defendant argued: "As the call demonstrates, the defendant's comments, tone and demeanor indisputably exhibit spontaneity, excitement and panic. The time frame was contemporaneous with, and part of, the event. The defendant placed the call to 911, thereby subjecting, knowingly, himself to identification on that recorded police line. The call was made by the defendant, initiated as a victim of the decedent's conduct, with the purpose of obtaining emergency assistance from [the] police. The reported event was certainly startling. In these respects, the defendant's 911 call is indistinguishable from other victim related 911 conversations that are routinely admitted in this state and others."

The following day, defense counsel indicated to the court that the defense intended to introduce the second 911 recording. The state indicated that it objected to the recording. The prosecutor stated that the state did not object to the initial 911 recording, which was admitted in evidence. The prosecutor argued that it was undisputed that the second 911 call, in contrast with the first 911 call, did not reflect spontaneous utterances but "self-serving inadmissible hearsay. . . . It's really a discussion about who you are, what was going on." The prosecutor relied on the undisputed facts surrounding the proffered evidence, namely, that the defendant made the second 911 call one to two minutes after the first 911 call ended, after he had left the scene of the stabbing and while he was waiting for the police

to arrive at the intersection of Lindley Street and Salem Street.

Defense counsel argued that the recording was admissible as a spontaneous utterance because it could be interpreted as a continuation of the first 911 call, which was made contemporaneously with the defendant's altercation with the victim on the exit ramp. Defense counsel essentially argued that, when the defendant made the second 911 call, he was still experiencing feelings of panic, nervousness, and upset. After the court reviewed the recording of the second 911 call, it excluded the evidence. The court explained its understanding of what constitutes a spontaneous utterance[4] and then turned to the specific evidence at issue as follows: "[W]e all have discussed and gone through the idea of what a spontaneous utterance is, and while I don't disagree, and counsel has reiterated the idea of it being a startling event, it has to have personal observation, but . . . the whole point of the idea of a spontaneous utterance is that it is deemed to have some level of trustworthiness because it's in a scenario where the individual who is uttering the statement has not had an opportunity to reflect on it or try to elicit a statement that is self-serving or motivated by any idea of being self-serving. . . .

"We've already heard . . . [the recording of the first 911 call]. The [recording of the] second . . . [call] is largely the defendant wondering where the police are and then kind of reiterating to the operator, you know, what his account is. It is self-serving. It is the defendant's own statement. It does not come in as a spontaneous utterance for all of the reasons that I have previously indicated."

[4] The court discussed the spontaneous utterance rule in the context of ruling on the admissibility of the evidence at issue in this claim as well as the admissibility of statements made by the defendant during his police interview, which the defendant also sought to introduce. We will discuss the latter evidence in part I C of this opinion.

Having set forth the court's ruling, we turn to the applicable legal principles. Hearsay is "a statement, other than one made by the declarant while testifying at the proceeding, offered in evidence to establish the truth of the matter asserted." Conn. Code Evid. § 8-1 (3). Generally, hearsay is inadmissible. Conn. Code Evid. § 8-2 (a). Spontaneous utterances are not excluded by the rule against hearsay, even though the declarant is available as a witness. Conn. Code Evid. § 8-3. A spontaneous utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress or excitement caused by the event or condition." Conn. Code Evid. § 8-3 (2). Our Supreme Court has explained that "the spontaneous utterance exception . . . applies to an utterance or declaration that: (1) follows some startling occurrence; (2) refers to the occurrence; (3) is made by one having the opportunity to observe the occurrence; and (4) is made in such close connection to the occurrence and under such circumstances as to negate the opportunity for deliberation and fabrication by the declarant. . . . [T]he ultimate question is whether the utterance was spontaneous and unreflective and made under such circumstances as to indicate absence of opportunity for contrivance and misrepresentation. . . . Whether an utterance is spontaneous and made under circumstances that would preclude contrivance and misrepresentation is a preliminary question of fact to be decided by the trial judge. . . . The trial judge exercises broad discretion in deciding this preliminary question, and that decision will not be reversed on appeal absent an unreasonable exercise of discretion." (Citations omitted; internal quotation marks omitted.) *State* v. *Wargo*, 255 Conn. 113, 127–28, 763 A.2d 1 (2000). To be admissible as a spontaneous utterance, "[t]he event or condition must be sufficiently startling so as to produce nervous excitement in the declarant and render [the

declarant's] utterances spontaneous and unreflective." (Internal quotation marks omitted.) *State* v. *Kirby*, 280 Conn. 361, 374, 908 A.2d 506 (2006).

In the present case, there appears to be no dispute that the second 911 call followed a startling occurrence, it referred to the occurrence, and it was made by one having the opportunity to observe the occurrence. The point of disagreement between the parties was whether the declaration was made in such close connection to the occurrence as to negate the opportunity for deliberation and fabrication. The court's ruling was based on its determination that the declaration was not made under circumstances that would preclude contrivance and misrepresentation. As we stated previously, the parties do not dispute the facts relevant to this inquiry, namely, that the defendant made the second 911 call one to two minutes after the first 911 call ended, after he had left the scene of the stabbing, and while he was waiting for the police to arrive at the intersection of Lindley Street and Salem Street.

The defendant's appellate argument is based largely on his belief that, because the second 911 call occurred "only a few minutes after the first [911] call ended," "there is no indication that the statements [in the second call] were anything other than spontaneous" and that the court erroneously excluded the recording. The defendant also argues that the fact that the declaration was a spontaneous utterance undermines the court's characterization of the declarations in the second call as "self-serving." The defendant asserts that relevant statements should not be excluded from the evidence as self-serving if, as here, they fall within an exception to the rule against hearsay.

As this court has stated, "[t]he relation of the utterance in point of time to the . . . occurrence, while an important element to be considered in determining

whether there has been opportunity for reflection, is not decisive. . . . Instead, [t]he overarching consideration is whether the declarant made the statement before he or she had the opportunity to undertake a reasoned reflection of the event described therein. . . . [W]e follow the rule embraced by the majority of jurisdictions that have addressed the issue of the effect of the time interval between the startling occurrence and the making of the spontaneous utterance, and conclude that there is no identifiable discrete time interval within which an utterance becomes spontaneous; [e]ach case must be decided on its particular circumstances." (Citation omitted; internal quotation marks omitted.) *State* v. *Dubuisson*, 183 Conn. App. 62, 76, 191 A.3d 229, cert. denied, 330 Conn. 914, 193 A.3d 560 (2018).

Having reviewed the proffered evidence and the undisputed circumstances concerning the making of the second 911 call, we agree with the court's determination that the statements therein did not constitute a spontaneous utterance. The defendant made the call after he had driven away from the scene of his altercation with the victim. It was eminently reasonable to infer that, by this time, the defendant was aware of the seriousness of his predicament and that his statements to the 911 dispatcher could have serious consequences for him. Despite the fact that the second call was made minutes after the first 911 call ended, the facts suggest that the defendant made the second 911 call from a location of relative calm where he no longer expected to encounter the victim, let alone have an opportunity to perceive any material facts related to his altercation with the victim. As the court observed, in the second 911 call, the defendant, among other things, told the dispatcher that he was still waiting for the police to arrive, asked the dispatcher when the police would arrive, stated that his automobile battery was malfunctioning, and made factual statements concerning his altercation with the

victim that were consistent with the statements that he made during his first 911 call. The defendant also expressed his regret that the automobile accident had escalated into a hostile event.[5] On this record, the court reasonably found that the second 911 call was not made in such close connection to the occurrence as to negate the opportunity for deliberation and fabrication and, thus, properly went on to conclude that the statements therein were self-serving and inadmissible hearsay.

Having concluded that the court's evidentiary ruling did not reflect an abuse of discretion, we likewise conclude that the ruling did not infringe on the defendant's right to present a defense. Although the defendant adequately preserved for appellate review his claim of evidentiary error, he did not claim at trial that the exclusion of the evidence infringed on his right to present a defense and seeks extraordinary review of this unpreserved aspect of the claim. As requested by the defendant, we will consider the constitutional aspect of the present claim under the bypass doctrine set forth in *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). Under this familiar doctrine, "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

[5] The defendant's own characterization of the second 911 call is that his statements therein "corroborated his account about the incident and, particularly, that [the victim] hit his car and cut him off. It also corroborated his testimony that he was waiting for the police after the incident. Importantly, he even stated to the operator that the whole incident was unnecessary and [that] they could have filed a police report and gone on their way." The defendant also asserts that the recording reflected his "evident shock and nervousness immediately after the incident."

subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis omitted; footnote omitted.) Id., 239–40. "The first two [*Golding*] requirements involve a determination of whether the claim is reviewable; the second two requirements involve a determination of whether the defendant may prevail." *State* v. *George B.*, 258 Conn. 779, 784, 785 A.2d 573 (2001). Here, the claim is of constitutional magnitude, alleging the deprivation of a constitutional right, and the record is adequate to review the claim because it is based on the evidentiary ruling. The claim fails under *Golding*'s third prong because, in light of our conclusion that the court properly excluded the evidence in applying the rules of evidence, the defendant is unable to demonstrate that a constitutional violation exists and that it deprived him of a fair trial. See, e.g., *State* v. *David N.J.*, supra, 301 Conn. 133.

C

Next, the defendant claims that the court improperly excluded a portion of his videotaped police interview that depicts his reaction upon being informed by the police that the victim had died. The defendant argues that the evidence was admissible under the spontaneous utterance exception to the rule against hearsay. We disagree.

The following additional facts are relevant to this claim. On the third day of trial, November 29, 2017, defense counsel informed the court that the defendant intended to present in evidence a portion of his videotaped statement to the police. Specifically, defense counsel referred to a portion of the recorded interview in which the police informed the defendant that the victim had died. Defense counsel stated that the videotape reflected the defendant's "strong emotional reaction to the receipt of the startling news in relation to

the death of [the victim]. And I think that portion of the tape would . . . qualify as excited utterances at that point in time." Defense counsel stated: "I'd simply indicate to the court, in looking at the video, you will hear things like [the defendant] indicating he can't even stand up, his knees are wobbly, he wants [the police] to dial the telephone for him, his emotional reaction, his crying, his indicating a 'no-no-no,' maybe [the police] . . . have to be mistaken, the [victim] was walking back to his car." Defense counsel stated that the defendant's reaction was "unguarded, unprepared, [with] . . . no opportunity to script what then happens . . . ." The state objected on the ground that the defendant's statements constituted self-serving hearsay and did not fall within the spontaneous utterance exception. The prosecutor argued, and it is not in dispute, that the utterances at issue occurred more than six hours after the defendant's altercation with the victim, while the defendant was being interviewed by the police.

After reviewing the portion of the videotape on which the defendant relied, the court stated that a spontaneous utterance that follows a startling event refers to the startling event and is made by one who personally observed the event. The court then stated that a spontaneous utterance had to be made under circumstances suggesting that the declarant lacked an opportunity to reflect on what he stated or to craft a self-serving declaration. The court also stated, "[s]o, in this particular instance . . . it's many hours after the incident occurred. It's a situation in which the defendant is reiterating, basically, what he feels happened. . . . [T]he defense is arguing that the startling event is really [the defendant] being told that the decedent had passed. . . .

"In this instance, it is reflecting back to something that occurred many hours before. In addition, the defendant clearly knows that he is being questioned and is

a suspect in a criminal case. He has been giving statements to the police for many hours. He has been advised of his rights, by his own testimony. So, all of that indicia of trustworthiness that would normally apply to a spontaneous utterance are not applicable in this particular scenario." In its ruling, the court discussed and relied on our Supreme Court's analysis of a similar claim in *State* v. *Kelly*, 256 Conn. 23, 59–62, 770 A.2d 908 (2001).

In our analysis of the defendant's claim, we rely on the legal principles set forth in part I B of this opinion, which pertain to the spontaneous utterance exception to the rule against hearsay. The defendant's appellate arguments mirror those that he raised at trial. In particular, he argues that the court improperly considered the startling occurrence to be the defendant's interaction with the victim on the exit ramp. Instead, the defendant argues, "the startling occurrence was [the defendant's] finding out that [the victim] had died when [the] defendant had no idea about the extent of his injuries during the entire interview. . . . [The] [d]efendant should have been able to show that he was genuinely shocked when he learned of it."

Like the trial court, we consider *Kelly* to be instructive and, thus, discuss that case here in some detail. In *Kelly*, the defendant, following his conviction of sexual assault in the first degree, claimed on appeal that the trial court improperly had excluded as hearsay a statement that he made to his father on the night of the assault. *State* v. *Kelly*, supra, 256 Conn. 58–59. The defendant argued that his statement was admissible under the spontaneous utterance exception to the rule against hearsay because he made this statement immediately after being awakened from a sound sleep and confronted with an accusation that he had sexually assaulted the female victim. Id., 59. Our Supreme Court set forth the relevant facts underlying the defendant's claim: "The state filed a motion in limine requesting

that the court exclude testimony by Joseph Kelly, the defendant's father, as to a statement made to him by the defendant. The state argued, in its motion in limine, that the defendant's statement was inadmissible hearsay. In response to the state's motion in limine, the defendant argued that this statement was admissible under the excited utterance exception to the hearsay rule, as it was made after the defendant was startled awake from a sound sleep and confronted with the victim's sexual assault allegations.

"The defendant proffered the following evidence. At approximately 1:30 a.m. on February 11, 1986, the defendant's father received a telephone call from the victim's father. During this telephone conversation, the victim's father told . . . Kelly that [Kelly's] son had just sexually assaulted the caller's daughter. Immediately after this telephone conversation . . . Kelly went into the defendant's bedroom and shook him awake. . . . Kelly then told his son that the victim's father had called, claiming that the defendant had sexually assaulted his daughter. The defendant then allegedly responded, 'Dad, I didn't rape his daughter . . . we had sex.'

"The trial court granted the state's motion in limine to exclude the testimony of . . . Kelly regarding the defendant's statement to him on the night of the assault, because it found that this statement constituted inadmissible hearsay. Subsequently, the trial court also denied the defendant's motion for reconsideration. Specifically, the trial court found that the sexual assault was the startling occurrence and the time that had passed between the assault and the defendant's statement to his father was sufficient to give the defendant an opportunity to fabricate the statement. In addition, the trial court held that even if the startling occurrence had been the defendant's father awakening the defendant from a sound sleep and confronting him with the accusation, the totality of the circumstances—especially that it was

a self-serving denial—strongly suggested that the defendant's statement was unreliable and inadmissible." Id., 59–60.

After setting forth applicable legal principles, our Supreme Court stated, "[i]n the present case, the trial court properly determined that, under the totality of the circumstances, the defendant's statement was not spontaneous, but was made with ample time for reasoned reflection . . . . More than one and one-half hours had passed between the time of the sexual assault and the defendant's statement to his father. During this time, the defendant had dropped the victim off at her home, gone to his own home, and gone to bed. The defendant argues that he did not have the opportunity to fabricate a story because he went home and immediately went to sleep. The defendant presented, however, no evidence to that effect. The defendant has not met his burden of proving that he did not have an opportunity to think about and fabricate a story that night after the assault. . . .

"The defendant also argues that the startling occurrence was not the sexual assault, but was the act of being awakened by his father and confronted with an accusation. The excited utterance exception requires, however, that the statement not only immediately follow a startling event, but that it must also relate to that startling occurrence. . . . Even if being awakened by his father was startling to the defendant, the defendant's statement did not relate to being awakened, but to the sexual assault that had occurred more than one and one-half hours earlier. Under the defendant's reasoning, any statements made by a defendant denying an accusation of criminal activity could qualify as an excited utterance and be offered for the truth of the matter asserted therein, namely, that the accused did not commit the offense. This would contravene the excited utterance exception, the purpose of which is to admit

inherently trustworthy statements made in response to a shocking event. . . . In light of the totality of the circumstances the trial court properly determined that in the present case, the defendant's self-serving exculpatory statement was not an excited utterance and therefore the trial court properly excluded the defendant's father's testimony regarding that statement." (Citations omitted; internal quotation marks omitted.) Id., 61–62.

Applying the reasoning of *Kelly* to the present claim, we conclude that the trial court properly determined that the statements at issue were not excited utterances. It is undisputed that the defendant made the statements at issue to the police several hours after his violent altercation with the victim. By this point in time, the defendant was well aware that he was a suspect in a criminal case, that he was at police headquarters, and that he was being interviewed by the police in connection with his altercation with the victim. These circumstances reflect that the defendant was aware that any statements concerning the encounter with the victim, including any statements about the victim's physical condition, would likely affect his penal interest. The defendant had a lengthy opportunity to contemplate the seriousness of his predicament and to craft a response that would tend to bolster his version of events and thereby help him avoid prosecution. Thus, the undisputed circumstances amply support a finding that the statements were not spontaneous. Moreover, we note that the defendant's response was self-serving. It was an expression of disbelief by the defendant that the victim had died and, thus, was consistent with his assertions to the police that he did not stab the victim in the chest and that, when he left the exit ramp, the victim was not merely alive but continuing to act in an aggressive manner.

We also reject the defendant's argument that the startling event was his being provided news that the victim had died and not, as the court reasoned, his altercation with the victim. The defendant's reaction to learning of the victim's death was relevant, if at all, to the extent that it shed light on the defendant's altercation with the victim. Stated otherwise, even if the defendant was startled by news of the victim's death, his reaction to this news was relevant to an assessment of his conduct during his altercation with the victim and, specifically, whether he had caused the victim's death. The defendant's expression of disbelief that the victim had died, therefore, is analogous to a denial of culpability in the victim's death. Thus, the court properly considered the startling event to be the altercation that had occurred many hours earlier on the exit ramp.

Considering the totality of the circumstances surrounding the statements at issue, we conclude that the defendant's self-serving statements of disbelief that the victim had died did not fall under the spontaneous utterance exception to the rule against hearsay and, therefore, the court properly excluded these statements. Having concluded that the court's evidentiary ruling did not reflect an abuse of discretion, we likewise conclude that the ruling did not infringe on the defendant's right to present a defense. Although the defendant adequately preserved for appellate review his claim of evidentiary error, he did not claim at trial that the exclusion of the evidence infringed on his right to present a defense and seeks extraordinary review of the unpreserved claim. As requested by the defendant, we will consider the constitutional aspect of the present claim under the bypass doctrine set forth in *State* v. *Golding*, supra, 213 Conn. 239–40.[6] The record is adequate to review the claim, which is based on the court's evidentiary ruling,

[6] We have set forth the parameters of the *Golding* doctrine in part I B of this opinion.

and the claim is of constitutional magnitude, alleging the deprivation of a constitutional right. The claim fails under *Golding*'s third prong because, in light of our conclusion that the court properly excluded the evidence in applying the rules of evidence, the defendant is unable to demonstrate that a constitutional violation exists and that it deprived him of a fair trial. See, e.g., *State* v. *David N.J.*, supra, 301 Conn. 133.

II

Next, the defendant claims that the court misled the jury by instructing it to consider lesser included offenses even if it found in its assessment of a greater offense that the state had failed to disprove the defense of self-defense. Arguing that the court did not properly instruct the jury with respect to the order of its deliberations, the defendant states, "[t]his was simply wrong. Because self-defense is a complete defense, the jurors could not have considered the lesser offenses if they acquitted the defendant of a greater offense on the basis of self-defense. By repeatedly giving this instruction, the court misled the jury about the consequences of a finding that the defendant acted in self-defense. In short, the jury could not have understood the true nature of self-defense and how it shielded the defendant from any criminal liability. His defense was rendered useless, and a new trial is warranted." We disagree.

In its charge, the court instructed the jury in relevant part: "The defendant has been specifically charged with the offense of murder. The very nature of this offense is such that it may include the elements of what are called lesser included crimes. The lesser included crimes that come under murder for purposes of this particular case are as follows: manslaughter in the first degree, manslaughter in the second degree, and criminally negligent homicide.

"Now, under the lesser offense doctrine, if and only if you unanimously find the defendant not guilty of this specifically charged offense, remember, in this case it's murder, you then go on to consider . . . whether the evidence is sufficient to establish beyond a reasonable doubt that the defendant is guilty of the lesser included offenses. And it begins in that order; the lesser included offense of manslaughter in the first degree and then you would move on to any further lesser included offenses, manslaughter in the second degree, criminally negligent homicide, in accordance with the lesser included offense charge that I'm going to be giving you.

"If you find that the elements of the crime of murder have been proved beyond a reasonable doubt . . . you shall then go on to consider the defense of self-defense . . . . If you unanimously find that the state has disproved beyond a reasonable doubt the defense of self-defense, you must reject that defense and find the defendant guilty. . . .

"If, on the other hand, you unanimously find that the state has not disproved beyond a reasonable doubt the defense of self-defense . . . then, on the strength of that defense alone, you must find the defendant not guilty, despite the fact that you have found the elements of the crime proved beyond a reasonable doubt. And this same analysis will apply to each of the named lesser included offenses should you reach deliberation on those charges."

After providing these instructions with respect to the offenses of murder and manslaughter in the first degree, the court stated, "[s]o you can see that you do the same analysis for each [offense]. You begin with the murder. If you find that the elements have been proved beyond a reasonable doubt, you move to consider self-defense. If you find that they have not been proven and you unanimously find the defendant not guilty of the crime

of murder, you move on to manslaughter in the first degree. That's the first lesser included offense, right? If you find that the state has proved beyond a reasonable doubt all of the elements of that lesser included offense of manslaughter in the first degree, you would then go on to consider the defense of self-defense . . . . So, again, it's the same analysis for . . . each of the offenses.

"All right. Now, if you . . . unanimously find the defendant not guilty of the lesser included offense of manslaughter in the first degree, you would then move to consider the second lesser included offense of manslaughter in the second degree.

"The second applicable lesser included offense is manslaughter in the second degree. If you unanimously have found the defendant not guilty of the crime of manslaughter in the first degree, you shall then consider this lesser included offense. Do not consider the lesser included offense until you have unanimously acquitted the defendant of the greater offense, okay?"

After the court delivered these instructions with respect to manslaughter in the second degree, it referred to self-defense, stating that, if "you unanimously find that the state has not disproved beyond a reasonable doubt at least one of the elements of the defense, or has not proved one of the statutory disqualifications of self-defense, then, on the strength of that defense alone, you must find the defendant not guilty despite the fact that you have found the elements of the crime proved beyond a reasonable doubt.

"If you have unanimously found the defendant not guilty of the crime of manslaughter in the second degree, you shall then consider the lesser offense of criminally negligent homicide. Do not consider the offense unless and until you have unanimously acquitted the defendant of the greater offense."

After the court instructed the jury with respect to criminally negligent homicide, it stated: "If you unanimously find that all of the elements of the crime of criminal negligent homicide have been proved beyond a reasonable doubt, you shall then consider the defense of self-defense . . . . If you unanimously find that the state has disproved beyond a reasonable doubt the defense of self-defense, you must reject the defense and find the defendant guilty of this offense. If, on the other hand, you unanimously find that the state has not disproved beyond a reasonable doubt the defense of self-defense, then, on the strength of the defense alone, you must find the defendant not guilty despite the fact that you have found the elements of the crime proved beyond a reasonable doubt."

The court provided lengthy instructions with respect to the defense of self-defense. The court reminded the jury that the defense applied to the charged offense, murder, and all of the lesser included offenses. The court then emphasized this point and stated: "Now, just as a general summary on your order of your deliberations. If, and only if, you unanimously find the defendant not guilty of the crime specifically charged, which, in this case is, murder, you then go on to consider whether the evidence is sufficient to establish beyond a reasonable doubt the defendant's guilt of the lesser included offenses. You begin with manslaughter in the first degree. . . . So, you only move on to the lesser included offenses if, and only if, you have unanimously found the defendant not guilty of the charged offense of murder, okay?

"If you do find that the state has proven all of the elements of the charged offense of murder . . . you will then go on to further consider the defense of self-defense . . . . So, you . . . unanimously find not guilty of the offense of murder, you move on to the

lesser included offense of manslaughter in the first degree. Okay.

"If you found that the state has proven beyond a reasonable doubt all of the elements of the offense of murder . . . then you move on to consider the defense of self-defense. And that same procedure applies to each and every one of the offenses charged because self-defense applies to each of them.

"So, you begin again with murder, you move on to manslaughter in the first degree. If, in fact, you have unanimously found, after consideration of the first lesser included offense instruction, that the state has failed to prove beyond a reasonable doubt the elements of that first lesser [included offense], manslaughter in the first degree, you would then, and only then, go on to consider the second lesser included offense, which is manslaughter in the second degree. . . .

"Same applies for manslaughter in the second degree. If you have unanimously found not guilty as to that offense . . . you then move on to the criminally negligent homicide. If you found all of the underlying elements proved beyond a reasonable doubt as to manslaughter in the second degree, you would then move on to self-defense. And the same applies, finally, to criminally negligent homicide; that, if you have found that the state has proven all of the elements of the underlying offense, you move on to self-defense and consider the defense of self-defense . . . . If you unanimously find that the state has failed to prove the elements of the crime of . . . criminally negligent homicide, that ends your deliberations there because that is the final lesser included offense, okay. So, I hope that assists you in terms of guiding you in terms of your deliberations."

For the first time, on appeal, the defendant argues that the court's instruction was misleading in that the

court suggested, but did not expressly state, that the jury should consider lesser included offenses even after finding that the state failed to disprove beyond a reasonable doubt the defense of self-defense. The defendant presently argues that, "[b]y repeatedly informing the jurors that they should consider the lesser offenses if they acquitted [the] defendant on the greater offenses, thereby suggesting that they do so even if the acquittal was due to the state's failure to disprove the claim of self-defense, the court misled the jurors. Clearly, if they acquitted on the basis of self-defense, then there was no need to consider the lesser offenses. The problem is that [viewed in isolation] . . . the self-defense instructions and instructions about when to consider the lesser offenses were accurate, [but] they became inaccurate when the jury was instructed to consider both of these [instructions]. . . . Here, by telling the jurors it was proper to consider the lesser offenses once there was an acquittal on the greater offense, *and by not specifying* [*that*] *they could do so only if the acquittal was due to the state's failure to prove all the elements of the crime*, the court negated the defendant's entire defense." (Emphasis added.)

The defendant did not preserve the present claim at trial, either by filing a written request to charge that covered the desired instructional language or by taking an exception to the charge on this ground immediately after the charge was delivered.[7] See Practice Book § 42-16 (requirements for preservation of claims of instructional error). The defendant expressly seeks review of

[7] We note that, in his written request to charge, the defendant asked the court to instruct the jury that, prior to its consideration of the charged offense and any lesser included offenses, it could consider whether the state had disproved beyond a reasonable doubt his defense of self-defense. Thus, the defendant asked the court to instruct the jury in relevant part: "As a practical matter, you can consider the question of self-defense first. If you find that the state has failed to disprove self-defense beyond a reasonable doubt, then you should find the defendant not guilty of murder and all of the other charges of homicide." The defendant argued that "jury consideration of an issue that equally addresses or defeats proof of the other lesser offenses

the claim under the bypass doctrine set forth in *State* v. *Golding*, supra, 213 Conn. 239–40.[8] Alternatively, the defendant argues that plain error exists. See Practice Book § 60-5.

We will review the claim under *Golding* because the record affords us an adequate basis on which to review the claim, and the claim is of constitutional magnitude because it implicates the defendant's fundamental due process right to establish a recognized legal defense. See, e.g., *State* v. *Ash*, 231 Conn. 484, 492–93, 651 A.2d 247 (1994) (defendant has fundamental due process right to proper jury instructions concerning self-defense). We conclude, however, that the claim fails under *Golding*'s third prong because the defendant is

promotes the worthwhile goal of judicial economy and efficiency. Conduct is not criminal if it is permitted or justified by law or statute. The issue of whether the defendant's actions were justified is an element of the state's burden of proof that can be considered before, after, or simultaneous to the various other elements."

During the charge conference, defense counsel asserted that an instruction permitting the jury to consider self-defense prior to considering the elements of the offenses of which he could be found guilty served the interest of judicial economy by avoiding the jury's "wast[ing] a lot of time" considering whether the state satisfied its burden of proof with respect to the essential elements of one or more crimes *if* it ultimately would find that the defendant's conduct was justified. The court declined to deliver this requested instruction. Immediately after the court delivered its charge, defense counsel reiterated his objection to the fact that the court declined to deliver the instruction concerning the "order of deliberations . . . ."

We discuss the defendant's written request to charge here because it is somewhat related to the present claim of instructional error, yet we do not view the request to charge as addressing distinctly the issue raised in present claim. The present claim is not simply limited to an evaluation of whether the court should have instructed the jury to consider self-defense prior to considering the charged offense and any lesser included offenses, but focuses on whether the court's charge misled the jury with respect to how the defense of self-defense, if not disproved beyond a reasonable doubt by the state, relieved the defendant of any criminal liability with respect to any of the homicide charges.

[8] We have set forth the parameters of the *Golding* doctrine in part I B of this opinion.

unable to demonstrate that a constitutional violation exists and that it deprived him of a fair trial.[9]

"An improper instruction on a defense, like an improper instruction on an element of an offense, is of constitutional dimension. . . . In either instance, [t]he standard of review to be applied to the defendant's constitutional claim is whether it is reasonably possible that the jury was misled. . . . In determining whether it was indeed reasonably possible that the jury was misled by the trial court's instructions, the charge to the jury is not to be critically dissected for the purpose of discovering possible inaccuracies of statement, but it is to be considered rather as to its probable effect upon the jury in guiding [it] to a correct verdict in the case. . . . The charge is to be read as a whole and individual instructions are not to be judged in artificial isolation from the overall charge. . . . The test to be applied to any part of a charge is whether the charge, considered as a whole, presents the case to the jury so

[9] The state does not argue that the defendant implicitly waived the present claim of instructional error following a review of the court's proposed charge. Nor do we reach such a conclusion on the basis of our independent assessment of the claim under *Golding* and our review of the record. In *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011), our Supreme Court concluded that, "when the trial court provides counsel with a copy of the proposed jury instructions, allows a meaningful opportunity for their review, solicits comments from counsel regarding changes or modifications and counsel affirmatively accepts the instructions proposed or given, the defendant may be deemed to have knowledge of any potential flaws therein and to have waived implicitly the constitutional right to challenge the instructions on direct appeal." Id., 482–83. The doctrine of implied waiver, when applicable, bars recourse to *Golding*. Id., 467. As we have previously discussed; see footnote 7 of this opinion; following a meaningful opportunity for review of the court's proposed charge, defense counsel repeatedly expressed his dissatisfaction with the fact that the court did not deliver his requested instruction concerning the order of deliberations. Although defense counsel's request to charge and his objections to the charge did not address distinctly the issue raised in the present claim, they nonetheless preclude, for *Kitchens* purposes, a determination by this court that defense counsel affirmatively accepted the instructions proposed or given.

that no injustice will result." (Citations omitted; internal quotation marks omitted.) *State* v. *Prioleau*, 235 Conn. 274, 284, 664 A.2d 743 (1995).

"[A] legally adequate instruction as to the defense should convey that the effect of a finding that the state has failed to disprove the defense requires the jury to render a verdict in the defendant's favor. The court must unambiguously instruct the jury that it must find the defendant not guilty if it finds that the state has not disproved the defense. . . . A proper self-defense instruction must inform the jury that the defense not only justifies conduct that would otherwise be criminal in nature, but that it is a complete defense in a criminal proceeding." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Terwilliger*, 105 Conn. App. 219, 235–36, 937 A.2d 735 (2008), aff'd, 294 Conn. 399, 984 A.2d 721 (2009).

We now turn to the charge at issue. As the defendant correctly observes, the court did not instruct the jury that, if it found that the state failed to disprove self-defense beyond a reasonable doubt, such finding with respect to the defense required it to find the defendant not guilty of murder and all of the lesser included offenses at issue in this case. The defendant urges that the lack of such a clear instruction, which would have been legally accurate, made it possible for the jury to conclude that self-defense was not a "complete defense" that applied to each and every lesser included offense, including manslaughter in the second degree. We conclude that this possibility is negated by the fact that the court specifically instructed the jury to consider the defense of self-defense not only with respect to the charged offense, murder, but to the lesser included offenses of manslaughter in the first degree, manslaughter in the second degree, and criminally negligent homicide. Beyond the fact that the court delivered this instruction with respect to the four homicide offenses

addressed in its charge, it also unambiguously reiterated at the conclusion of its charge that, if the state had proven all of the essential element of any of the offenses at issue, "you move on to self-defense and consider the defense of self-defense . . . ."

Our interpretation of the likely effect of the charge is not merely informed by our careful review of the court's instructions concerning the jury's order of deliberations and its specific instructions with respect to murder and the lesser included offenses, but by the court's self-defense instruction itself, which followed its instructions with respect to the homicide offenses. In relevant part, the court stated: "Self-defense applies to the charge of murder and all of the lesser included offenses that I've just charged you on; that includes manslaughter in the first degree, manslaughter in the second degree and criminally negligent homicide. And I think you know that by now because, in each of those instances, I told you that you would go on to evaluate self-defense. But remember, it applies to each of them.

"After you have considered all of the evidence in this case, if you find that the state has proved beyond a reasonable doubt each element of a crime to which self-defense applies, you must go on to consider whether or not the defendant acted in self-defense. In this case, again, you must consider the defense in connection with the charged offense of murder, as well as all of the lesser [included offenses]—manslaughter in the first degree, manslaughter in the second degree, and criminally negligent homicide."

The court unambiguously instructed the jury that self-defense was "a compete defense to certain crimes, including murder and the lesser [included offenses], manslaughter in the first degree, manslaughter in the second degree, and criminally negligent homicide . . . ." The court also stated, "[i]f you unanimously find

that the state has failed to prove beyond a reasonable doubt any [of the] elements of the crime to which self-defense applies, you shall then find the defendant not guilty and not consider the defense. If you unanimously find that all of the elements of a crime to which self-defense applies have been proved beyond a reasonable doubt, you shall then consider the defense of self-defense."

Our careful review of the court's charge, in its entirety, leads us to conclude that it is not reasonably possible that it misled the jury in the manner suggested by the defendant. The defendant's interpretation of the charge is belied by the court's repetitive and unambiguous instructions that conveyed the applicability of the defense of self-defense to each and every offense at issue, as well as the legal significance of a finding that the state had failed to disprove the defense. We are satisfied that the charge led the jury to a correct understanding of the fact that self-defense was a complete defense to murder and the lesser included offenses, that it had to evaluate the defense before returning a verdict with respect to any of the offenses, and that a finding that the state failed to disprove the defense required the jury to return a verdict of not guilty. Accordingly, the defendant has failed to demonstrate that a constitutional violation exists and that it deprived him of a fair trial.[10]

III

Finally, the defendant claims that this court, in the exercise of its supervisory authority over the administration of justice, should require trial courts, in cases in which self-defense is asserted as a defense, to instruct

[10] Because we concluded in the context of our *Golding* analysis that the court's instructions were legally correct and that it was not reasonably possible that the court's charge misled the jury in the manner claimed on appeal, this finding undermines the defendant's argument that plain error exists. Accordingly, we reject the defendant's argument that he is entitled to relief under the plain error doctrine.

juries to consider the defense prior to considering whether the defendant is guilty of the charged offense and any lesser included offenses. We disagree.

As we discussed in part II of this opinion, the defendant submitted a request to charge in which he asked the court to instruct the jury that it may consider the defense of self-defense *prior* to considering whether the state proved the essential elements of the charged offense, murder, or the three lesser included offenses at issue in this case. See footnote 7 of this opinion. The court denied that request and, as we discussed in part II of this opinion, the defendant attempted to demonstrate that the court's charge possibly misled the jury with respect to the defense of self-defense. In the present claim, the defendant argues that an instruction similar to the one he sought "is warranted to eliminate any confusion about the legal effect of self-defense that stems from instructions, like those given by the trial court [in the present case], that direct the jurors to consider the lesser included offenses in the case of an acquittal." The defendant, correctly observing that a defendant who acts in self-defense is not guilty of *any* offense to which the defense applies, argues that an instruction requiring juries to consider self-defense at the outset of their deliberations "would streamline deliberations and potentially save judicial resources by cutting down on the amount of time jurors spend deliberating." The defendant also argues that this court should exercise its supervisory powers so that trial courts "avoid confusing jurors about the legal effect of a finding that [a] defendant acted in self-defense, and to prevent unwarranted convictions of lesser included offenses, even though the jurors might have believed a defendant acted in self-defense."

"It is well settled that [a]ppellate courts possess an inherent supervisory authority over the administration of justice. . . . Supervisory powers are exercised to

direct trial courts to adopt judicial procedures that will address matters that are of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole. . . . Under our supervisory authority, we have adopted rules intended to guide the lower courts in the administration of justice in all aspects of the criminal process. . . . The exercise of our supervisory powers is an extraordinary remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole. . . . Indeed, there is no principle that would bar us from exercising our supervisory authority to craft a remedy that might extend beyond the constitutional minimum because articulating a rule of policy and reversing a conviction under our supervisory powers is perfectly in line with the general principle that this court ordinarily invoke[s] [its] supervisory powers to enunciate a rule that is not constitutionally required but that [it] think[s] is preferable as a matter of policy." (Citations omitted; internal quotation marks omitted.) *State* v. *Elson*, 311 Conn. 726, 764–65, 91 A.3d 862 (2014).

We are not persuaded that the exercise of our supervisory powers is warranted in the present case. Setting aside a consideration of the merits of the requested instruction, the defendant has not demonstrated that the absence of the instruction resulted in a constitutional violation in the present case or that there existed a serious risk that his conviction was unjust. The defendant has not established that the procedure followed by the trial court in instructing the jury infringed on the integrity of the trial or the perceived fairness of the judicial system as a whole. Accordingly, we decline to

afford the defendant any relief with respect to this claim.

The judgment is affirmed.

In this opinion the other judges concurred.

BENJAMIN F. ET AL. *v.* DEPARTMENT OF DEVELOPMENTAL SERVICES ET AL.*
(AC 44025)

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

Syllabus

The plaintiffs, B and his mother and guardian D, appealed to this court from the judgment of the trial court dismissing their administrative appeal from the decision of the defendant Commissioner of Developmental Services, concluding that B was not eligible for services from the defendant Department of Developmental Services. D filed an application with the department on B's behalf, seeking services related to B's intellectual disability and autism spectrum disorder. The department informed D that B was not eligible for services, and she requested a formal eligibility hearing. Following the hearing, the department's hearing officer issued a proposed decision concluding that B was eligible for services. After reviewing the record, however, the commissioner issued a final decision determining that, as a result of B's test scores, when viewed in their totality in accordance with our Supreme Court's decision in *Christopher R.* v. *Commissioner of Mental Retardation* (277 Conn. 594), B did not meet the eligibility criteria for an intellectual disability as defined in the applicable statute (§ 1-1g). The plaintiffs appealed from the commissioner's decision to the Superior Court, which concluded that there was substantial evidence in the record supporting the commissioner's final decision, and the plaintiffs appealed to this court. *Held*:

1. The plaintiffs could not prevail on their claim that an amendment to § 1-1g in 2012 (Public Acts 2012, No. 12-136), which, inter alia, replaced the term "one or more" with the word "tests" with respect to the manner in which the existence of an intellectual disability was to be determined, precluded the department from considering more than one intelligence test in its eligibility determinations when the applicant presents one full-scale IQ test score below 70: following the statutory amendment, *Christopher R.* remained good law and continued to control the meaning

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* The defendants filed with the Superior Court a motion to seal portions of the administrative record containing confidential information. The Superior Court granted the motion.

of § 1-1g, as, in that decision, our Supreme Court did not rely solely on the legislature's use of the term "one or more" but also relied on common sense and logic to determine that multiple tests could be considered; moreover, this court did not read the substitution of the word "tests" for the term "one or more" to evidence an intention to eliminate the plural nature of the phrase, and the plain meaning of the term "tests" refers to more than one test.

2. The plaintiffs' claim that, if the commissioner were permitted to consider multiple IQ test scores, he was required to analyze all full-scale IQ scores and that he failed to consider B's 2016 score in violation of § 1-1g was unpersuasive: although the commissioner deleted the finding pertaining to B's 2016 full-scale IQ score from his final decision, he added detailed findings regarding the report that contained the 2016 score and those findings were supported by substantial evidence in the record.
3. The Superior Court properly declined to take judicial notice of certain documents relating to B's guardianship hearing in the Probate Court, including an assessment by two members of the department, which indicated that B was a person with an intellectual disability as defined in § 1-1g: the plaintiffs failed to file an application for leave to present additional evidence with the Superior Court to introduce the Probate Court documents, despite there being a deadline explicitly provided in the scheduling order for such a filing; moreover, if the Superior Court had taken judicial notice of the Probate Court documents, it would have weighed the evidence in violation of the applicable statute (§ 4-183 (j)), which prohibits the court from substituting its judgment for that of the department.
4. The Superior Court properly declined to invoke the doctrine of judicial estoppel: the plaintiffs' claim that the defendants were estopped from taking the position that B did not have an intellectual disability as defined in § 1-1g was premised on representations made by the department to the Probate Court, the Probate Court documents containing the representations were not part of the administrative record, and the Superior Court properly declined the plaintiffs' request to take judicial notice of such documents.
5. The commissioner's decision denying the plaintiffs' application was supported by substantial evidence in the record taken as a whole: the commissioner's reliance on B's test scores from 2010 and 2013 was not arbitrary or capricious because his decision explicitly stated that the department had reviewed all of B's testing, which also included his 2016 and 2018 scores; moreover, the plaintiffs' argument that the Superior Court should have remanded the case due to the commissioner's invalid and insufficient factual findings was unavailing, as this court could not conclude that the commissioner's misstatement relating to the department's 2011 denial of B's prior application for benefits prejudiced the plaintiffs, the commissioner's decision directly referenced the report containing the results of B's cognitive assessment in addition to the

allegedly subjective testimony of a department official regarding such results, the commissioner's consideration of subtests, in addition to B's full-scale IQ scores, was supported by substantial evidence and did not run afoul of *Christopher R.*, the commissioner's identification of a statement in the cognitive assessment as being "significant" was not improper, and this court could not substitute its own judgment on the weight of the evidence for that of the commissioner.

Argued May 25—officially released November 2, 2021

Procedural History

Appeal from the decision of the defendant Commissioner of Developmental Services denying the application for services submitted on behalf of the named plaintiff, brought to the Superior Court in the judicial district of New Britain, where the court, *Hon. Henry S. Cohn*, judge trial referee, rendered judgment dismissing the appeal, from which the plaintiffs appealed to this court. *Affirmed.*

Benjamin M. Wattenmaker, with whom, on the brief, was *John M. Wolfson*, for the appellants (plaintiffs).

Emily V. Melendez, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Clare Kindall*, solicitor general, for the appellees (defendants).

Opinion

ALVORD, J. The plaintiffs, Benjamin F. and his mother and guardian Denise F., appeal from the judgment of the Superior Court dismissing their administrative appeal from the decision of the defendant Commissioner (commissioner) of Developmental Services, concluding that Benjamin is not eligible for services from the defendant Department of Developmental Services (department). On appeal, the plaintiffs claim that (1) the final decision of the commissioner violates the plain language of General Statutes § 1-1g, on the basis

that the amended version of the statute no longer permits the commissioner to consider more than one intelligence test where the applicant has presented a full-scale intelligence quotient (IQ) score below seventy, (2) alternatively, that if the statute permits consideration of more than one test, the commissioner is required to consider all full-scale IQ scores, (3) the Superior Court erred in refusing to take judicial notice of certain Probate Court records, (4) the Superior Court erred in declining to apply the doctrine of judicial estoppel, and (5) the final decision was not supported by substantial evidence in the record. We affirm the judgment of the court.

The record reveals the following facts and procedural history. On February 1, 2018, Denise filed an application on behalf of Benjamin, seeking services related to his intellectual disability and autism spectrum disorder. By letter dated April 5, 2018, the department communicated to Denise that Benjamin was not eligible for department services. Denise thereafter requested a formal eligibility hearing, which was held in October, 2018.

On October 29, 2018, the department's hearing officer issued a proposed decision (proposed decision) concluding that Benjamin was eligible for services. The hearing officer made the following findings of fact. Denise had filed two previous applications for department benefits on behalf of Benjamin, which had been denied in 2011 and 2015. In 2016, a cognitive assessment was completed by Chris Abildgaard, a psychologist with Benhaven Learning Network (Abildgaard report). "[Benjamin's] full-scale IQ score was 65 on the [Wechsler Adult Intelligence Scale—Fourth Edition (WAIS-IV)], his [Verbal Comprehension Index (VCI)] score was 74 (which falls in the borderline range), his [Perceptual Reasoning Index (PRI)] score was 73 (which falls in the borderline range), his [Working Memory Index (WMI)] score was 74 (which falls in the borderline range), and

his [Processing Speed Index (PSI)] score was 59 (which fell in the extremely low range and is effected by his seizure disorder)." On July 3, 2018, an evaluation of cognitive functioning was completed by Andrew R. Moyer, a school psychologist and behavior analyst (Moyer report). "His [Woodcock-Johnson Test of Cognitive Abilities—Fourth Edition] was 66, which is in the very low range." "On May 28, 2018, a transition planning evaluation was completed by Margaret Kardos, PhD of Kardos Educational Consulting, LLC [(Kardos report)]. . . . On the Adaptive Behavior Assessment System—3rd Edition (ABAS-3) his skills fall in the extremely low range. Areas of significant weakness were noted in all domains across all settings." "On February 20, 2018, an Autism Spectrum Assessment Program Evaluation report was prepared by Kerri Byron, CCC-SLP of Connecticut Children's Medical Center. His diagnoses were epilepsy, learning disability and autism. . . . On October 4, 2018, a letter was prepared by Mark Schomer, M.D., Pediatric Epilepsy and Neurology of Connecticut Children's Specialty Group, Department of Neurology, recommending that [Benjamin] receive full disability benefits [(Schomer letter)]. . . . On October 30, 2008, an educational evaluation was prepared by Cheryl Carroll, special education teacher at Salem Board of Education, Department of Special Education. . . . In October of 2008, a psychological evaluation was prepared by Donna Zuber, school psychologist at Salem Public Schools. . . . His overall memory ability is in the very deficient range. . . . On April 16, 2008, a pediatric neuropsychology consultation was prepared by Marisa Spann, PhD, clinical neuropsychologist at Yale University School of Medicine. . . . His full-scale IQ was 52." (Citations omitted.)

In the discussion of his findings, the hearing officer noted that Benjamin suffers from a variety of medical

conditions, including "autism, attention deficit/hyperactivity disorder, and a significant seizure disorder," which "make it very difficult for the department to determine whether [he] should receive [department] services." The hearing officer explained that the department had found in 2011, 2015, and 2018, that he did not qualify for services primarily on the basis of a disparity in scores on his intelligence tests during the developmental period.[1] The department's psychologists concluded that his other medical conditions were interfering with his cognitive functioning and caused the variations in his test scores. The hearing officer then stated that "one could reasonably conclude that [Benjamin] at the end of the developmental period has an IQ that does qualify him for [department] services." The hearing officer explained: "The psychological report prepared by Dr. Chris Abildgaard . . . is a comprehensive and thorough report that finds that [Benjamin's] IQ is 65, which puts him below the level needed to qualify for [department] services. . . . The report was prepared on July 14 and 16 in 2016, when [he] was seventeen years, eleven months old and at the end of the developmental period. The examiner in the report states that, 'there is about a 90 percent chance that his true score is between 62 [and] 69 on any given day.' He classified his overall performance in the extremely low range, which is equal to 1 percent of people his age." (Citation omitted.)

The hearing officer further explained: "The [Abildgaard] report also summarizes [Benjamin's] performance on the Vineland Adaptive Behavior Scales . . . [which is a standardized interview that] was completed

[1] Pursuant to General Statutes § 1-1g (a), " 'intellectual disability' means a significant limitation in intellectual functioning existing concurrently with deficits in adaptive behavior that originated during the developmental period before eighteen years of age."

by his mother, and his scores were as follows: Communication 64, Daily Living 66, Socialization 65 and a Composite score of 67, which [Abildgaard] found to be consistent with his current cognitive potential. These scores would qualify [Benjamin] for [department] services. A more recent analysis of [Benjamin's] adaptive skills was done on May 8, 2018, by Dr. Margaret Kardos, when [he] was age twenty and outside of the developmental period. Even though outside of the developmental period, this report demonstrates that his adaptive skills have remained consistent from the evaluation done in 2016, which was at the end of the developmental period. The summary in the report finds that [Benjamin's] adaptive skills fall in the extremely low range as reported by both his mother and his teacher. In this report, we have the benefit of his teacher's analysis, which, although [it reflected numbers that were] higher than the scores [recorded] by his mother . . . still indicated that [Benjamin] was in the extremely low range. . . .

"The most recent intellectual evaluation of [Benjamin] by Apex Educational Solutions was done on July 3, 2018, when [he] was twenty years, four months [old] and outside of the developmental period [(Apex report)]. The report finds that [Benjamin's] General Intellectual Ability was 66 in the very low range. The examiner noted that [Benjamin] worked very hard and exerted himself on all aspects of the test, but his overall level of intellectual functioning fell in the very low range, which is consistent with the [Abildgaard report prepared] when [he] was at the end of the developmental period." The hearing officer determined that the two most recent reports supported the findings in the two reports performed at the end of the developmental period that Benjamin's IQ and his adaptive skills met the requirements of § 1-1g and entitled him to department services.

After reviewing the record, on January 28, 2019, the commissioner issued a final decision (final decision) notifying Denise that he did not concur with the hearing officer's determination that Benjamin is eligible for department services. In his final decision, the commissioner deleted several of the hearing officer's findings of fact and added other findings of fact. Specifically, the commissioner deleted the findings of fact regarding the Abildgaard, Moyer, and Kardos reports, and the Schomer letter. The commissioner added the following findings of fact: "In the cognitive assessment that Dr. Chris Abildgaard completed towards the end of the developmental period when [Benjamin] was seventeen years, eleven months [old], the doctor found that [his] '[full-scale IQ] falls within the borderline range and is consistent with his current adaptive functioning.' . . . Significantly, in the assessment, Dr. Abildgaard advised: 'For a more complete developmental history, the reader is encouraged to reference the psychoeducational evaluation conducted by Dr. Erik Mayville in 2013.' . . . The assessment noted that all but one of the WAIS-IV index scores, the [PSI], fell in the borderline range and that '[d]ifficulties in scanning large amounts of visual stimuli and visual motor coordination may have impacted . . . [the PSI] results.' . . . The assessment indicated, 'By parent report in the last six months, [Benjamin] has experienced twenty-six seizures. Several required immediate medical support.' . . . Dr. Abildgaard recommended that [Benjamin] 'benefits from longer amounts of processing time . . . when presented with tasks or directives . . . [he] also benefits from being allowed to get verbal information out at a slower pace . . . [and] often knows what he wants to say, however it will take him slightly longer to get all those thoughts out.' . . . He also recommended that [Benjamin's] 'program at the Benhaven Academy is appropriate at this time and day-to-day programming

should not change based on these results.' . . . Accordingly, [Benjamin's] primary disability of autism and his programming subsequently did not change. . . .

"In 2011, [Benjamin] was denied eligibility for [department] services because, on a May, 2010 [Weschler Intelligence Scale for Children—Fourth Edition (WISC-IV) test], he obtained a full-scale IQ of 87 and he was functioning in the average range of intelligence. Moreover, there was 'cognitive testing indicating he [was] functioning within at least the high borderline to average range of measured intelligence.' . . . In 2015, [Benjamin] was denied eligibility for [department] services because '[his] intellectual functioning [was] in the average range, which is significantly above the intellectual disabled range.' On a 2013 psychological evaluation, upon administration of the Stanford Binet [Intelligence Scales]-V, he 'earned a full-scale IQ score of 90.' On a 2013 Wechsler Individual Achievement Test-III (WIAT-III), 'his Total Reading Composite Standard Score was 91, Reading Comprehension and Fluency Composite was 84, Mathematics Composite was 81, and Written Expression Composite was 91. Of the twenty-six subtest scores generated by the WIAT-III, twelve were in the average range, eleven were in the low average range, and three were in the borderline range." (Citations omitted; emphasis in original.)

The commissioner replaced the discussion section of the proposed decision with a summary of our Supreme Court's decision in *Christopher R.* v. *Commissioner of Mental Retardation*, 277 Conn. 594, 893 A.2d 431 (2006). Ultimately, the commissioner concluded: "The record in the present case simply does not meet the burden of . . . § 1-1g. Pursuant to [*Christopher R.*], the expert staff for [the department] has the authority as granted by the state legislature to determine whether [Benjamin's] scores during the developmental period, and the testing conducted after, when viewed in their totality

meet the eligibility criteria for an intellectual disability. [The department] has reviewed all testing and determined that the test scores do not meet the requisite criteria. Accordingly, [Benjamin] is not eligible for [department] services based upon an intellectual disability, as he does not meet the criteria for services as defined in . . . § 1-1g."

Pursuant to General Statutes § 4-183, the plaintiffs appealed from the commissioner's decision to the Superior Court. The plaintiffs' appeal raised four issues: whether (1) the department failed to apply § 1-1g as amended in 2012, (2) the department failed to consider Benjamin's 2016 full-scale IQ score, (3) the department's denial of benefits was not supported by substantial evidence, and (4) the department was estopped from concluding that Benjamin is ineligible for services on the basis of statements made by department representatives in a 2016 Probate Court proceeding. Following briefing and oral argument, the Superior Court, *Hon. Henry S. Cohn*, judge trial referee, dismissed the appeal in a February 24, 2020 memorandum of decision. The court rejected the plaintiffs' arguments and concluded that there was substantial evidence in the record supporting the final decision of the commissioner. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The plaintiffs' first claim on appeal is that the final decision violates § 1-1g. Specifically, the plaintiffs contend that under the plain language of § 1-1g as amended, the department "no longer has the discretion to consider more than one intelligence test where, as here, the applicant presents one full-scale IQ score below 70." We disagree.

We first set forth our standard of review. Although § 1-1g was subjected to prior judicial scrutiny in *Christopher R.*, the present case requires us to determine the

effect of subsequent legislative action on our Supreme Court's holding in that case. "[W]e do not defer to the [agency's] construction of a statute—a question of law—when . . . the [provisions] at issue previously have not been subjected to judicial scrutiny or when the [agency's] interpretation has not been time tested." (Internal quotation marks omitted.) *Brennan* v. *Waterbury*, 331 Conn. 672, 683, 207 A.3d 1 (2019). "In such a case, our review of those provisions is plenary." *Christopher R.* v. *Commissioner of Mental Retardation*, supra, 277 Conn. 604. We therefore apply plenary review and established rules of construction.

"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. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider 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. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and [common-law] principles governing the same general subject matter . . . ." (Internal quotation marks omitted.) *Meriden* v. *Freedom of Information Commission*, 338 Conn. 310, 320–21, 258 A.3d 1 (2021).

We next set forth the statutory and regulatory scheme. General Statutes § 17a-212 directs the commissioner of the department to "adopt regulations . . .

establishing . . . criteria for . . . determining eligibility for services provided by the department . . . ." The commissioner promulgated a regulation stating in relevant part that "[a] person is eligible for services of the department if he: (1) is a resident of the State of Connecticut; and (2) has mental retardation. . . ." Regs., Conn. State Agencies § 17a-212-2 (b). The regulation uses the same definition of "mental retardation" as provided in General Statutes (Supp. 2012) § 1-1g. Regs., Conn. State Agencies § 17a-212-1 (10).

Section 1-1g (a) defines " 'intellectual disability' "[2] as "a significant limitation in intellectual functioning existing concurrently with deficits in adaptive behavior that originated during the developmental period before eighteen years of age." That section further defines " 'significant limitation in intellectual functioning' " as "an intelligence quotient more than two standard deviations below the mean as measured by *tests* of general intellectual functioning that are individualized, standardized and clinically and culturally appropriate to the individual . . . ." (Emphasis added.) General Statutes § 1-1g (b). The statutory phrase " 'an [IQ] more than two standard deviations below the mean' " refers to an IQ below seventy. *Christopher R.* v. *Commissioner of Mental Retardation*, supra, 277 Conn. 597–98.

Prior to October 1, 2012, General Statutes (Supp. 2012) § 1-1g defined " 'mental retardation' " as "a significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." It further defined " 'general intellectual functioning' " as "the results obtained by assessment with *one or more* of the individually administered general intelligence tests

[2] In 2015, the legislature amended § 1-1g (a) to replace the term "mental retardation" with "intellectual disability," among other amendments that are not relevant to this appeal. See Public Acts 2015, No. 15-54, § 1.

developed for that purpose and standardized on a significantly adequate population and administered by a person or persons formally trained in test administration . . . ." (Emphasis added.) General Statutes (Supp. 2012) § 1-1g (c).

We next turn to a discussion of our Supreme Court's decision in *Christopher R.* v. *Commissioner of Mental Retardation*, supra, 277 Conn. 596–97, which addressed the 2003 revision of § 1-1g. See id., 596 n.2. In that case, the department initially determined that the plaintiff was ineligible for services on the basis of a disparity between the plaintiff's verbal and performance scores on the 2002 Weschler Intelligence Scale for Children—Third Edition (WISC-III) test and on previous tests on which the plaintiff scored within a normal or average range. Id. On appeal, our Supreme Court first considered the question of whether the commissioner "may consider more than one general intelligence test to determine whether an applicant is mentally retarded and, therefore, is eligible for the department's services." Id., 606. The court analyzed General Statutes (Rev. to 2003) § 1-1g, which used the term "mental retardation"; see footnote 2 of this opinion; and found persuasive that the statute referred to "the results obtained by assessment with *one or more of the individually administered general intelligence tests* developed for that purpose . . . ." (Emphasis in original; internal quotation marks omitted.) *Christopher R.* v. *Commissioner of Mental Retardation*, supra, 607–608. The court reasoned: "By construing the phrase 'one or more' to mean that *more than one* general intelligence test should be considered, if available, we give effect to each word in the statute. By contrast, in order to adopt a construction under which an applicant must be deemed mentally retarded upon submitting one test with a full scale score below seventy, irrespective of other test scores—we would have to read [the] words 'or more'

out of the statute. Indeed, we essentially would have to read the phrase as if it stated 'at least one' general intelligence test, instead of 'one or more' intelligence tests. This court, however, will not substitute language for that chosen by the legislature. . . .

"Moreover, '[i]n construing a statute, common sense must be used and courts must assume that a reasonable and rational result was intended.' . . . Consider, therefore, a hypothetical situation in which an applicant has taken four general intelligence tests over a period of several years, with the three most recent tests reflecting full scale scores of ninety, and the earliest test reflecting a full scale score of sixty-nine. It would be illogical to require that the department deem an applicant eligible for services, as the plaintiff contends, simply because of one anomalous test score." (Citations omitted; emphasis in original; footnote omitted.) Id., 608–609.

The court next turned to the question of whether the commissioner exceeded his authority when, in light of conflicting test results, he considered evidence other than general intelligence test full-scale scores. Id., 611. The court stated: "Faced with such conflicting scores, the defendant necessarily was required to make a determination as to whether the plaintiff's general intellectual functioning was in fact significantly subaverage. Nothing in the statutes or regulations limits the defendant's discretion in this regard, and the defendant is especially qualified to make such a determination. . . . Indeed, we generally defer to an agency with expertise in matters requiring such a technical, case-by-case determination." (Citations omitted.) Id.

Noting that "such a factual determination must be sustained if it is reasonably supported by substantial evidence in the record taken as a whole"; id.; the court considered the conclusions of Virginia Wohlstrom, the

school psychologist who administered the 2002 WISC-III test and determined that the plaintiff had the ability to function at a general intellectual level that was higher than his full-scale score of sixty-six on that test. Id., 612–13. Wohlstrom highlighted several issues regarding the test results. Id. Specifically, Wohlstrom concluded "that the plaintiff's low performance score was reflective more of the fact that it took the plaintiff an excessive amount of time to complete his work, than that he actually was performing in the intellectually deficient range. She also noted that the plaintiff's verbal score was skewed downward because of a significantly weak score in a subtest measuring comprehension. Wohlstrom opined that the plaintiff's pervasive developmental disorder affected that score, and concluded that [the plaintiff's] verbal functioning in non-social situations, such as the classroom, is in the [a]verage range. Wohlstrom also noted that the plaintiff was functioning at the upper level of his classes, typically getting B grades." (Internal quotation marks omitted.) Id. The court noted that Wohlstrom's assessment was consistent with previous intelligence tests administered to the plaintiff, on which the plaintiff had scored within the average range. Id., 613.

The court next turned to the commissioner's decision to examine separately the tests' verbal and performance scores, as well as subtests within those scores. Id., 614. Specifically, the department's psychologist, in his initial determination of ineligibility, had referenced, inter alia, the plaintiff's average score on a 1998 Test of Nonverbal Intelligence-2, which the psychologist found significant when coupled with the plaintiff's verbal score of eighty on the 2002 WISC-III test. Id., 613. The court determined that the commissioner's decision to examine the scores separately was supported by the Diagnostic and Statistical Manual of Mental Disorders, which provided: "When there is significant scatter in the subtest scores, the

profile of strengths and weaknesses, rather than the mathematically derived full-scale IQ, will more accurately reflect the person's learning abilities. When there is a marked discrepancy across verbal and performance scores, averaging to obtain a full-scale IQ score can be misleading." (Internal quotation marks omitted.) Id., 614, quoting American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (4th Ed. 1994) p. 40. The court noted that the clinical neuropsychologist "who had administered the plaintiff's 1997 WISC-III test, found the broad disparity between the plaintiff's verbal and performance scores to be clinically significant." *Christopher R.* v. *Commissioner of Mental Retardation*, supra, 277 Conn. 614.

Moreover, the court explained that the record reflected several psychological, social and medical evaluations performed over the years that had diagnosed the plaintiff as having a learning disability, pervasive developmental disorder, and obsessive compulsive disorder. Id. The psychologist that performed the 2002 assessment and the neuropsychologist who performed the 1997 assessment both opined that certain of the plaintiff's disorders may have impacted his scores. Id. The court concluded that the commissioner properly could have relied on such evidence. Id., 614–15. Lastly, the court stated that the commissioner "was entitled to consider the absence of any reference to mental retardation" in the numerous assessments performed. Id., 615. Ultimately, the court concluded that the commissioner's decision "was supported by substantial evidence in the record." Id., 616.

With that background in mind, we turn to the plaintiffs' claim that, under the amended statute, the department "no longer has the discretion to consider more than one intelligence test where, as here, the applicant presents one full-scale IQ score below 70."

The following additional procedural history is relevant to this claim. The Superior Court addressed the plaintiffs' claim as follows: "The plaintiffs claim that with the amendment of 2012 to § 1-1g, deleting the phrase 'one or more,' the [department] may not review more than one score in determining eligibility. Here there are two test scores that meet the 'one-score' definition. The plaintiffs claim that under [General Statutes § 1-1 (f)], the use of a plural may also mean the singular. On the other hand, as the [department] points out, the amended § 1-1g (b) does retain the word 'tests' in two places. The use of the plural indicates that the legislature did not intend to allow one test to be determinative. According to the [department], [General Statutes] § 1-1a requires the court to give a common meaning to the amended statute. Therefore, *Christopher R.* continues to be a valid precedent that the [department] was required to rely on." (Footnote omitted.) Although the Superior Court found the statute to be plain and unambiguous, it stated that, even if it used legislative history, "it is clear that the intent of the legislature was to abolish a pejorative definition in § 1-1g (b), and not to alter *Christopher R.*"

On appeal, the plaintiffs first argue that *Christopher R.* is no longer good law in light of the 2012 amendments to § 1-1g. Specifically, they emphasize that the "legislature is always presumed to be aware of all existing statutes and the effect that its action or nonaction will have on any of them . . . and it also is presumed to be aware of existing judicial interpretations of those statutes." (Citation omitted; internal quotation marks omitted.) *AvalonBay Communities, Inc.* v. *Zoning Commission*, 87 Conn. App. 537, 559, 867 A.2d 37 (2005), aff'd, 280 Conn. 405, 908 A.2d 1033 (2006). The plaintiffs maintain that the legislature was "aware of the significance ascribed to the phrase 'one or more' in the text of § 1-1g by the Supreme Court in *Christopher*

R.," and the Supreme Court's express reliance on that phrase in stating that, "to adopt a construction under which an applicant must be deemed mentally retarded upon submitting one test with a full scale score below seventy, irrespective of other test scores—we would have to read [the] words 'or more' out of the statute." *Christopher R.* v. *Commissioner of Mental Retardation*, supra, 277 Conn. 608. Thus, according to the plaintiffs, the removal of the words "one or more" must be interpreted to mean that an applicant who presents one test with a full-scale score below seventy must be deemed to have an intellectual disability.

We disagree with the plaintiffs' contention that the 2012 amendments to § 1-1g, which replaced the words "one or more" with the word "tests," renders *Christopher R.* no longer good law. Notably, our Supreme Court did not rely solely on the legislature's use of the term "one or more" but also relied on common sense and logic, considering a hypothetical situation in which three recent tests reflected full-scale scores of ninety and the earliest test reflected a full-scale score of sixty-nine. See *Christopher R.* v. *Commissioner of Mental Retardation*, supra, 277 Conn. 609. The court stated that "[i]t would be illogical to require that the department deem an applicant eligible for services . . . simply because of one anomalous test score." Id. The court also relied on the commissioner's special qualification to make determinations of eligibility, noting that "[n]othing in the statutes or regulations limits the [commissioner's] discretion in this regard . . . ." Id., 611. Moreover, as discussed further subsequently in this opinion, we do not read the substitution of "tests" for "one or more" to evidence an intention to eliminate the plural nature of the phrase. Accordingly, we conclude that *Christopher R.* remains good law and continues to control the meaning of § 1-1g.

Second, the plaintiffs argue that the Superior Court's "assumption that the legislature's use of a plural noun is significant in statutory interpretation is incorrect," citing § 1-1 (f), which provides: "Words importing the singular number may extend and be applied to several persons or things, and words importing the plural number may include the singular." The plaintiffs further challenge the Superior Court's reference to "tests" as appearing twice in the statute, arguing that the use of the plural is of significance *only* when the legislature uses both the plural and singular terms within the statute. See *Covenant Insurance Co.* v. *Coon*, 220 Conn. 30, 36 n.6, 594 A.2d 977 (1991) ("the fact that the legislature used both plural and singular terms in the statute is a strong indication that the use of the singular was deliberate").[3]

We are not persuaded by the plaintiffs' argument that the use of the plural term "tests" is insignificant. "[A]lthough . . . § 1-1 (f) provides that [w]ords importing the singular number may extend and be applied to several persons or things, and words importing the plural number may include the singular, we have held that because § 1-1 (f) uses the word may it is clearly directory and not mandatory. . . . [S]uch statutory expressions are legislative statements of a general principle of interpretation. . . . The principle

[3] The plaintiffs additionally argue that the statutory phrase, "tests of general intellectual functioning," refers to the full-scale intelligence test results, as opposed to the subtest scores, which measure particular aspects of the applicant's IQ, such as verbal comprehension, perceptual reasoning, working memory, and processing speed. On the basis of the plaintiffs' proposed construction of the statute, they maintain that the commissioner is not permitted to evaluate subtest scores separately when the applicant has presented a full-scale score below seventy. We disagree with the plaintiffs' construction of the statute. Rather, we find persuasive the defendants' response that the term "general" refers to the type of tests administered, specifically, those that measure general intellectual functioning. The inclusion of the word "general" in the statute does not prohibit the use of the subtest scores.

does not require that singular and plural word forms have interchangeable effect, and discrete applications are favored except where the contrary intent or reasonable understanding is affirmatively indicated." (Internal quotation marks omitted.) *State* v. *Brown*, 310 Conn. 693, 704, 80 A.3d 878 (2013). There is no such contrary intent or reasonable understanding affirmatively indicated in § 1-1g. Rather, the plain meaning of the word "tests" in its plural form refers to more than one test.[4]

Accordingly, we conclude that the 2012 amendment to § 1-1g does not preclude the commissioner from considering more than one intelligence test.

II

Having determined that § 1-1g, as amended, continues to permit the commissioner to consider more than one test score, we turn to the plaintiffs' second, and

[4] The plaintiffs assert, in passing, two additional arguments. First, they assert in the alternative that, even if this court determines that the use of the plural term "tests" is significant, we should conclude that such term is used to indicate only that there are several different types of intelligence tests that can be used to measure "intellectual functioning." We disagree with the plaintiffs' interpretation, which, as the defendants emphasize, "presumes that only one test would ever be administered to an individual or presented to [the department] in support of an application for services." As the defendants state, there is nothing in the statute, as amended, that limits the number of tests that can be administered to an applicant and, indeed, the plaintiffs submitted the results of multiple tests, which were administered over a period of years, in support of their application. See *Christopher R.* v. *Commissioner of Mental Retardation*, supra, 277 Conn. 609 n.15 (noting that "it is not uncommon for persons seeking the department's services to have taken several intelligence tests").

Second, the plaintiffs point to the Superior Court's citation to § 1-1a, which addresses statutory interpretation of terms relating to security in personal property, and argue that it "has nothing to do with this case." The Superior Court stated: "According to the [department], § 1-1a requires the court to give a common meaning to the amended statute." It is clear that the Superior Court's reference to § 1-1a is a scrivener's error and the court intended to cite to General Statutes § 1-1 (a), which provides in relevant part that "words and phrases shall be construed according to the commonly approved usage of the language . . . ."

alternative, claim that "the statute requires the defendants to analyze all of the applicant's full-scale IQ scores as part of [their] final decision." Specifically, the plaintiffs claim that the commissioner's failure to consider Benjamin's January, 2016 full-scale IQ score violates § 1-1g. The defendants respond that "[t]he evidence both in the record and the final decision itself shows that [the department] did indeed consider these results but interpreted them differently than the plaintiff." We agree with the defendants.

The following additional procedural history is relevant to this claim. As noted previously, the proposed decision stated, with respect to the Abildgaard report that contained the 2016 score, that Benjamin's "full-scale IQ score was 65 on the WAIS-IV, his VCI score was 74 (which falls in the borderline range), his PRI score was 73 (which falls in the borderline range), his WMI score was 74 (which falls in the borderline range), and his PSI score was 59 (which fell in the extremely low range and is effected by his seizure disorder)."

Although the final decision deleted this paragraph, it added other findings related to the Abildgaard report. Specifically, the commissioner found: "In the cognitive assessment that Dr. Chris Abildgaard completed towards the end of the developmental period when [Benjamin] was seventeen years, eleven months [old], the doctor found that [his] '[full-scale IQ] falls within the borderline range and is consistent with his current adaptive functioning.' . . . Significantly, in the assessment, Dr. Abildgaard advised: 'For a more complete developmental history, the reader is encouraged to reference the psychoeducational evaluation conducted by Dr. Erik Mayville in 2013.' . . . The assessment noted that all but one of the WAIS-IV index scores, the [PSI], fell in the borderline range and that '[d]ifficulties in scanning large amounts of visual stimuli and visual motor coordination may have impacted . . . [the PSI]

results.' . . . The assessment indicated, 'By parent report in the last six months, [Benjamin] has experienced twenty-six seizures. Several required immediate medical support.' . . . Dr. Abildgaard recommended that [Benjamin] 'benefits from longer amounts of processing time . . . when presented with tasks or directives . . . [he] also benefits from being allowed to get verbal information out at a slower pace . . . [and] often knows what he wants to say, however it will take him slightly longer to get all those thoughts out.' . . . He also recommended that [Benjamin's] 'program at the Benhaven Academy is appropriate at this time and day-to-day programming *should not change based on these results*.' . . . Accordingly, [Benjamin's] primary disability of autism and his programming subsequently did not change." (Citations omitted; emphasis in original.)

In its memorandum of decision, the Superior Court, applying the substantial evidence test, determined that it "cannot set aside the . . . commissioner's conclusion that Benjamin's test scores from 2016 were not properly evaluated. The commissioner concluded that Dr. Abildgaard's report showed that Benjamin's scores were in the borderline range, except for processing speed. The commissioner used properly the full IQ score, but took into account subtests."

We first set forth our standard of review of this claim. The plaintiffs claim that their contention that the statute requires the department to consider all scores is subject to plenary review. The plaintiffs' statutory interpretation claim, which would compel plenary review, is only relevant, however, to the extent that the commissioner failed to consider the 2016 score, which the defendants dispute. We first address that threshold question, which, as the defendants suggest, is subject to review for substantial evidence. See *Costello* v. *Commissioner of Developmental Services*, 128 Conn. App. 286, 290, 16

A.3d 811 (2011) (claim that commissioner ignored substantial evidence in record was subject to review for substantial evidence in record to support agency's factual findings).

"According to our well established standards, [r]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither this court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . [A]n agency's factual and discretionary determinations are to be accorded considerable weight by the courts." (Internal quotation marks omitted.) Id.

We disagree with the plaintiffs' argument that the commissioner failed to consider Benjamin's full-scale IQ score as reported in the Abildgaard report. Although the commissioner deleted the finding pertaining to the full-scale score from his final decision, he did so in conjunction with his addition of detailed findings regarding that assessment, which findings were supported by substantial evidence in the record. Specifically, the commissioner considered that Abildgaard's report indicated that Benjamin's full-scale IQ score fell " 'within the borderline range and [was] consistent with his current adaptive functioning.' " The commissioner noted that all but one of the WAIS-IV index scores—the PSI—fell within the borderline range. The commissioner further noted that Abildgaard stated in his report that " '[d]ifficulties in scanning large amounts of visual stimuli and visual motor coordination may have

impacted' " the PSI results. Lastly, the commissioner referenced Abildgaard's notation that Benjamin's mother had reported that he had experienced twenty-six seizures in the preceding six months. The separate examination of the subtest scores and consideration of other factors impacting such scores is within the authority of the commissioner.[5] See *Christopher R.* v. *Commissioner of Mental Retardation*, supra, 277 Conn. 614–15. Accordingly, we reject the plaintiffs' argument that the commissioner failed to consider the 2016 full-scale IQ score.

III

The plaintiffs' third claim on appeal is that the Superior Court erred in refusing to take judicial notice of certain Probate Court documents "for the purpose of establishing that [the department] took the position in the Probate Court that Benjamin has an intellectual disability pursuant to § 1-1g, and the Probate Court adopted [the department's] position." We disagree.

The following additional procedural history is relevant. In their administrative appeal to the Superior Court, the plaintiffs represented that Denise had been appointed plenary guardian of Benjamin, following a guardianship hearing in the Probate Court. The plaintiffs attached to their administrative appeal the Probate Court order. The plaintiffs also alleged in their appeal that, prior to the Probate Court hearing, two assessment team members from the department had filed with the Probate Court an evaluation in which they represented that Benjamin is " 'a person with intellectual disability as defined in . . . § 1-1g.' " The plaintiffs attached to their administrative appeal a copy of the evaluation. The plaintiffs alleged that the Probate Court's order

[5] In part V of this opinion, we examine the plaintiffs' related claim regarding whether the commissioner's decision to examine separately the subtest scores was supported by evidence in the record.

found that Benjamin " 'is by reason of the severity of his intellectual disability, totally unable to meet essential requirements for his physical health or safety, and totally unable to make informed decisions about matters related to his care.' " On the basis of the representations of the assessment team members made to the Probate Court, the plaintiffs alleged in their administrative appeal that the department was barred by the doctrine of judicial estoppel from representing to the Superior Court that Benjamin did not have an intellectual disability pursuant to § 1-1g.

The Superior Court's scheduling order included a date by which the plaintiffs could file a motion to present additional evidence to supplement the record pursuant to § 4-183 (h). The plaintiffs did not file any such motion. In their brief to the Superior Court, the plaintiffs again referenced and attached as exhibits the Probate Court order and evaluation (Probate Court documents) in support of their claim of judicial estoppel and maintained that the court could take judicial notice of such records. The parties thereafter filed additional briefing on the issue and discussed it at oral argument.

In its memorandum of decision, the Superior Court explained that Denise did not introduce into the administrative record the Probate Court documents and noted that she was self-represented at the hearing before the hearing officer and during the commissioner's review of the proposed decision. The court explained that the plaintiffs, who had retained counsel to represent them in their administrative appeal, now requested that the court take judicial notice of the Probate Court documents in support of their claim of judicial estoppel. The court rejected their request. First, the court stated that judicial notice to supplement a record in an administrative appeal was rejected in *Blinkoff* v. *Commission on Human Rights & Opportunities*, 129 Conn. App. 714, 722, 20 A.3d 1272, cert. denied, 302 Conn. 922, 28 A.3d

341 (2011). The court found significant that the plaintiffs chose to rely only on the doctrine of judicial notice rather than filing a motion to supplement the record pursuant to § 4-183 (h).

The court then stated that, "even if [it] were to take judicial notice of the [department's] declarations in the Probate Court, the court would have to weigh these averments against the findings in the final decision." The court noted that, pursuant to § 4-183 (j), it is prohibited from substituting its judgment for that of the agency as to the weight of the evidence on questions of fact. The court next determined that the Probate Court documents were not conclusive. Having reviewed the two documents, the court stated that, although "the Probate Court believed Benjamin was in need of a guardian, because of his developmental challenges, it did not state that he was . . . eligible [for the department's services]." The court noted that "a panel of the [department] found Benjamin to qualify for § 1-1g services, but not on the basis of psychological tests."

On appeal, the plaintiffs reiterate their argument that the Superior Court was permitted to take judicial notice of the Probate Court documents and that it erred in refusing to do so.

We first set forth our standard of review. Whether the court properly applied § 4-183 (h) and (j) in denying the plaintiffs' request that it take judicial notice of certain documents presents a question of law subject to plenary review. See *Estela* v. *Bristol Hospital, Inc.*, 179 Conn. App. 196, 207, 180 A.3d 595 (2018).

We begin our analysis with *Blinkoff* v. *Commission on Human Rights & Opportunities*, supra, 129 Conn. App. 715, in which the plaintiff appealed from the judgment of the trial court dismissing her administrative appeal from the decision of the Commission on Human Rights and Opportunities. She argued, inter alia, that

the Superior Court improperly had failed to consider certain statements and documents in its review. Id. That is, the plaintiff had filed with the Superior Court several "motion[s] to take judicial notice of public documents," attaching exhibits that were not in evidence at the agency hearing. (Internal quotation marks omitted.) Id., 722. The Superior Court denied the motions, stating that its review of the referee's decision was limited to the administrative record. Id. On appeal to this court, the plaintiff argued that the Superior Court should have considered the documents under the doctrines of judicial admissions and judicial estoppel. Id., 723. This court concluded that the Superior Court "properly did not consider the newly offered statements and documents." Id.

In *Blinkoff*, this court supported its decision by citing § 4-183 (i); id.; which provides in relevant part that the administrative appeal "shall be confined to the record. . . ." General Statutes § 4-183 (i). Our statutes, however, do provide a procedure by which a party to an administrative appeal may file a motion with the Superior Court seeking a remand to the agency to present additional evidence. Section 4-183 (h) provides: "If, before the date set for hearing on the merits of an appeal, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court."

Pursuant to § 4-183 (h), "a trial court has discretion regarding whether to grant or deny a motion brought

pursuant to the statute." *Salmon* v. *Dept. of Public Health & Addiction Services*, 259 Conn. 288, 315, 788 A.2d 1199 (2002). In order for a party to obtain a remand to the agency for the taking of additional evidence, the party must demonstrate that "(1) the proffered evidence was material; and (2) there were good reasons for [the] failure to present it at the [agency] hearing." Id., 315–16. "[A] court order granting such [an application] does not vitiate the department's original decision, but instead permits [it] to consider new evidence and to modify its decision as necessary. Thus, a remand under § 4-183 (h) does not offer the parties an opportunity to relitigate the case ab initio, but rather represents a continuation of the original agency proceeding." (Internal quotation marks omitted.) *Clark* v. *Commissioner of Motor Vehicles*, 183 Conn. App. 426, 442, 193 A.3d 79 (2018).

Under the separate doctrine of judicial notice, "[c]ourt records may be judicially noticed for their existence, content and legal effect. . . . Care should be taken [however] to avoid noticing judicial records in one case as evidence upon which to find facts in another case. For example, one can judicially notice that certain testimony was given in a case, but not that it was true." (Internal quotation marks omitted.) *O'Connor* v. *Larocque*, 302 Conn. 562, 568 n.6, 31 A.3d 1 (2011). The plaintiffs maintain that "[t]he doctrine of judicial notice also applies to administrative agencies." *West Hartford* v. *Freedom of Information Commission*, 218 Conn. 256, 264, 588 A.2d 1368 (1991); id. (*agency* reasonably could have taken judicial notice of fact that addresses are available in public directories). Specifically, the plaintiffs rely on General Statutes § 4-178, which governs evidence in contested cases in agency proceedings and provides in relevant part that "notice may be taken of judicially cognizable facts . . . ."[6] It is the agency though that

[6] The cases cited by the plaintiffs are distinguishable. See *Berka* v. *Middletown*, 181 Conn. App. 159, 162 and n.3, 185 A.3d 596 (Appellate Court took judicial notice of summons in Superior Court in action underlying appeal

can take judicial notice as part of its fact-finding process, not the Superior Court, which is reviewing the decision of the agency on the basis of the record before it. Consequently, § 4-178 is inapplicable in the present case because the plaintiffs did not request *the agency*, the department in this case, to take judicial notice of the Probate Court documents.

Significantly, the plaintiffs failed to file with the Superior Court an application for leave to present additional evidence, despite there being a deadline explicitly provided in the scheduling order for such motions. Had they done so, and had they met the statutory requirements, the Superior Court would have considered the request and could have ordered that the Probate Court documents be taken before the department, which would then have the opportunity to modify its findings and decision by reason of that evidence. Rather than avail themselves of the statutory procedure, the plaintiffs' counsel expressed his opinion, during oral argument before the Superior Court, that "judicial notice is an option to get this done . . . quick." Indeed, the plaintiffs' counsel requested that the trial court *itself* consider such documents pursuant to the doctrine of judicial notice, rather than utilize the statutory process available for remand to the *department* to consider the evidence in the first place.

As noted previously, the plaintiffs sought to introduce the Probate Court documents in order to assert a claim

in resolving appeal from Superior Court's granting of motion to dismiss where service was not made on department), cert. denied, 328 Conn. 939, 184 A.3d 268 (2018), cert. denied, U.S. , 140 S. Ct. 479, 205 L. Ed. 2d 268 (2019); *Pierce* v. *Lantz*, 113 Conn. App. 98, 103 and n.1, 965 A.2d 576 (taking judicial notice of state regulations), cert. denied, 293 Conn. 915, 979 A.2d 490 (2009); *Lucarelli* v. *Freedom of Information Commission*, 29 Conn. App. 547, 550 and n.4, 616 A.2d 816 (1992) (taking judicial notice of other administrative appeals and civil action filed by same plaintiff in concluding that plaintiff's claim was moot), cert. denied, 225 Conn. 901, 621 A.2d 284 (1993).

of judicial estoppel. The Superior Court concluded, and we agree, that even if it had taken judicial notice of the documents, it would have resulted in the Superior Court weighing the evidence, which is inappropriate in light of its restrictive standard of review. See General Statutes § 4-183 (j) ("[t]he court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact"). On the basis of the plaintiffs' failure to take advantage of the statutory process by which they could seek to have additional evidence taken before the agency, and the violation of § 4-183 that would have necessarily resulted from the Superior Court taking judicial notice of the Probate Court documents, we conclude that the court properly declined to take judicial notice of the documents.

IV

The plaintiffs' next claim on appeal is that the Superior Court erred in refusing to apply the doctrine of judicial estoppel.[7] Specifically, the plaintiffs claim that the defendants are estopped from taking the position that Benjamin does not have an intellectual disability as defined by § 1-1g on the basis of earlier representations, made by representatives of the department to the Probate Court that Benjamin is " 'a person with intellectual disability as defined in . . . § 1-1g.' " The plaintiffs' judicial estoppel argument is premised on representations made in the Probate Court documents that were not part of the administrative record. Because, as we

[7] "Typically, judicial estoppel will apply if: [1] a party's later position is clearly inconsistent with its earlier position; [2] the party's former position has been adopted in some way by the court in the earlier proceeding; and [3] the party asserting the two positions would derive an unfair advantage against the party seeking estoppel. . . . We further limit judicial estoppel to situations where the risk of inconsistent results with its impact on judicial integrity is certain. . . . Thus, courts generally will not apply the doctrine if the first statement or omission was the result of a good faith mistake . . . or an unintentional error." (Citation omitted; internal quotation marks omitted.) *Assn. Resources, Inc.* v. *Wall*, 298 Conn. 145, 170, 2 A.3d 873 (2010).

concluded in part III of this opinion, the Superior Court properly denied the plaintiffs' request to take judicial notice of the Probate Court documents, the court properly declined to invoke the doctrine of judicial estoppel on the basis of the representations made therein.

V

The plaintiffs' final claim on appeal is that the Superior Court "erred in ruling that the final decision is supported by substantial record evidence." The plaintiffs initially argue that the commissioner's reliance on intelligence test scores from 2010 and 2013, rather than the 2016 Abildgaard report and the 2018 Apex report, was arbitrary and capricious. Next, the plaintiffs argue that the final decision "made several invalid and insufficient findings, and therefore, the [Superior Court] erred in failing to remand the case for further proceedings." We conclude that the decision denying the plaintiffs' application was supported by substantial evidence.

As previously stated in part II of this opinion, addressing the plaintiffs' related claim, "[r]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable." (Internal quotation marks omitted.) *Costello* v. *Commissioner of Developmental Services*, supra, 128 Conn. App. 290. "This so-called substantial evidence rule is similar to the sufficiency of the evidence standard applied in judicial review of jury verdicts, and evidence is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . The reviewing court must take into account [that there is] contradictory evidence in the record . . . but the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative

agency's finding from being supported by substantial evidence . . . .'' (Internal quotation marks omitted.) *Christopher R.* v. *Commissioner of Mental Retardation*, supra, 277 Conn. 611–12.

We first address the plaintiffs' challenge to the commissioner's reliance on earlier intelligence test scores rather than more recent test scores. The plaintiffs' point to Benjamin's full-scale scores on his two most recent evaluations in 2016 and 2018, which were 65 and 66, respectively, as demonstrating ''the absence of substantial evidence to support the defendants' final decision to deny services to Benjamin.'' We already have discussed the commissioner's use of the 2016 score in this opinion; see part II of this opinion; and we focus on the 2018 score here.

We disagree with the plaintiffs' contention that the final decision fails to acknowledge the 2018 score. The hearing officer's proposed findings stated that the Apex report was prepared in 2018, when Benjamin was twenty years and four months old. Thus, the report was prepared outside of the developmental period. See General Statutes § 1-1g (a) (defining '' 'intellectual disability' '' as ''a significant limitation in intellectual functioning existing concurrently with deficits in adaptive behavior that originated during the developmental period *before eighteen years of age*'' (emphasis added)). Although the final decision deleted the hearing officer's proposed finding related to the Apex report, the commissioner in his final decision stated that the department has the authority ''to determine whether [Benjamin's] scores during the developmental period, *and the testing conducted after*,'' meet the eligibility criteria. (Emphasis added.) Immediately following this statement, the commissioner reported that the department had reviewed ''*all testing* and determined that the test scores do not meet the requisite criteria.'' (Emphasis

added.) Accordingly, we are not persuaded that the commissioner failed to acknowledge the 2018 test.

With respect to the plaintiffs' challenges to the factual findings as invalid and insufficient, we first examine the commissioner's finding related to the 2010 WISC-IV test results. The finding at issue states: "In 2011, [Benjamin] was denied eligibility for [department] services because, on a May, 2010 WISC-IV [test], he obtained a full-scale IQ of 87 and he was functioning in the average range of intelligence. Moreover, there was 'cognitive testing indicating he [was] functioning within at least the high borderline to average range of measured intelligence.' " The plaintiffs reference a March 30, 2011 letter, authored by H. Steven Zuckerman, a department psychologist, which was entered into evidence before the agency proceedings and which states that the full-scale IQ score from the May, 2010 WISC-IV test "is not interpretable." Specifically, the letter provided: "According to the [b]ook, Essentials of the WISC-IV Assessment by Alan S. Kaufman and Dawn P. Flanagan published in 2004, and [t]echnical [n]otes from the [p]ublishers, you cannot [utilize] or interpret a [full-scale] IQ if the difference between any [two] of the indexes are greater than 23 points (i.e., 1 1/2 Standard Deviations). As one can see from the above Standard Scores, this is the case in more than one of the Standard Scores. The [PSI] is 44 points below the [PRI], and the [WMI] is 24 points below the [PRI]. Thus the [full-scale] IQ is not interpretable.

"One therefore must examine all the indexes separately, and if possible, one compute[s] a General Ability Index (GAI) Standard [Score]. The GAI serves as a measure of the individual['s] true cognitive abilities. The examiner did not compute the GAI, however the [d]epartment did, and it was 99. A GAI Standard Score of 99, attained during the developmental period, is 30 IQ points above what is considered to be the mentally

retarded range of measured intelligence (i.e., a score of 69 or below), and is within the [a]verage [r]ange of [m]easured [i]ntelligence. Therefore, as there are not concurrent deficits in both adaptive and cognitive abilities, as . . . § 1-1g requires, this individual is not eligible for the services of the [d]epartment."[8]

We agree with the plaintiffs that the commissioner's finding misstates the basis for the 2011 denial of eligibility. The defendants argue that the misstatement does not require a remand because, as Zuckerman explained later in the letter, there was an alternate method of scoring the test by calculating a GAI. As the defendants recognize, however, there is no indication from the final decision that the commissioner relied on the alternate method of scoring. To the contrary, the commissioner specifically cited the full-scale score of 87.

Pursuant to § 4-183 (j), "[t]he court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings . . . are . . . clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record . . . ." We cannot conclude that the commissioner's misstatement of the basis for the 2011 denial of eligibility has prejudiced the plaintiffs. Although the commissioner indicated that Benjamin was denied eligibility in 2011, on the basis of the 2010 test results, the commissioner's other findings addressed Benjamin's 2015 denial of eligibility and, more comprehensively, the 2016 Abildgaard report. See part II of this opinion. Thus, the commissioner's determination of ineligibility remains supported by

[8] At the hearing before the hearing officer, Murphy testified with respect to Zuckerman's analysis that "Dr. Zuckerman felt that because of the extreme variability between the verbal index score, the verbal IQ score of 65 and the performance IQ score, he shouldn't rely on the full-scale IQ score. Instead he should calculate an alternate overall measure of intelligence, which is called a [GAI], and the [GAI] came out in the borderline range. It was the same as the full-scale IQ score."

substantial evidence in the record, even excluding the 2010 results from consideration.

Second, the plaintiffs argue that the commissioner improperly relied on the testimony of Kathleen Murphy, the director of eligibility for the department, as to her subjective opinion regarding Abildgaard's finding that Benjamin's full-scale IQ score "falls within the borderline range . . . ." Specifically, they point to Murphy's testimony that "Abildgaard . . . felt . . . that there was so much variability, there was so much going on with [Benjamin's] seizure disorder, attentional issues, that he didn't seem to be functioning in the intellectually disabled range but rather in the borderline range." The plaintiffs contend that Abildgaard's reference to Benjamin's score as falling within the borderline range is a scrivener's error. They point to a notation on a different page of Abildgaard's report indicating that his full-scale score fell within the classification "extremely low." Moreover, they argue that Abildgaard stated that Benjamin's full-scale IQ score is " 'consistent with his current adaptive functioning,' " which he had found to be within the " 'low range.' "

We reject the plaintiffs' argument regarding Murphy's testimony. In his final decision, the commissioner directly quoted Abildgaard's statement, from the "Impressions" section of the report, that Benjamin's full-scale IQ score "falls within the borderline range . . . ." The final decision further references and discusses Abildgaard's finding and recommendations made in his report, rather than Murphy's testimony regarding that report. To the extent that the plaintiffs seek to challenge the commissioner's findings with respect to Abildgaard's statement on the basis of other statements included within the same report, we cannot conclude that the commissioner's findings were improper. "Neither [the appellate] court nor the trial court may retry the case or substitute its own judgment

for that of the administrative agency on the weight of the evidence or questions of fact." (Internal quotation marks omitted.) *Christopher R.* v. *Commissioner of Mental Retardation*, supra, 277 Conn. 603.

Third, the plaintiffs challenge the commissioner's reliance on the subtest scores from the Abildgaard report, arguing that there was no record evidence to support the decision to analyze the subtest scores separate from the full-scale score. The plaintiffs distinguish our Supreme Court's approval, in *Christopher R.*, of separate examination of the subtest scores on two bases. First, they note that in *Christopher R.*, the department's decision to examine the subtest scores separately was supported by the Diagnostic and Statistical Manual of Mental Disorders, which provided that " '[w]hen there is significant scatter in the subtest scores, the profile of strengths and weaknesses, rather than the mathematically derived full-scale IQ, will more accurately reflect the person's learning abilities. When there is a marked discrepancy across verbal and performance scores, averaging to obtain a full-scale IQ score can be misleading.' " Id., 614. Second, they note that, in *Christopher R.*, "the clinical neuropsychologist at the Yale University School of Medicine who had administered the plaintiff's 1997 WISC-III test, found the broad disparity between the plaintiff's verbal and performance scores to be clinically significant." Id. The plaintiffs assert that, in contrast with *Christopher R.*, the department in the present case did not introduce any expert evidence to support its decision to examine separately Benjamin's subtest scores from his full-scale IQ score as set forth in the Abildgaard report.

The defendants respond, inter alia, that "[t]he plaintiffs misinterpret the holding in *Christopher R.* . . . ." They maintain that the court in *Christopher R.* "did not limit the circumstances upon which [the department] could look to and rely upon subtest scores to those

articulated by the plaintiff[s]." We agree with the defendants that the commissioner's consideration of additional evidence beyond Benjamin's full-scale IQ scores was supported by substantial evidence and did not run afoul of *Christopher R.* In noting that all but one of Benjamin's index scores on the WAIS-IV were in the borderline range, the commissioner expressly quoted from Abildgaard's discussion of the one score that fell below the borderline range, the PSI. With respect to that score, Abildgaard had explained that "[d]ifficulties in scanning large amount of visual stimuli and visual motor coordination may have impacted . . . [the PSI] results." This is akin to the evidence considered by the court in *Christopher R.* See *Christopher R.* v. *Commissioner of Mental Retardation*, supra, 277 Conn. 612 (discussing conclusions of psychologist who administered test regarding factors that had affected plaintiff's score).

Fourth, the plaintiffs argue in passing that the commissioner improperly treated as significant Abildgaard's reference to a 2013 psychoeducational evaluation. They point to the commissioner's finding: "Significantly, in the assessment, Dr. Abildgaard advised: 'For a more complete developmental history, the reader is encouraged to reference the psychoeducational evaluation conducted by Dr. Erik Mayville in 2013.' " The plaintiffs argue that Abildgaard's statement "merely recognizes that the Mayville assessment from 2013, already summarizes Benjamin's lengthy 'developmental history,' and there is no need for Abildgaard to repeat it in [his report]." Thus, they argue that "it is difficult to understand why this rather ordinary statement is 'significant.' " We fail to see how the commissioner's identification of this statement as significant is improper. To the extent that the plaintiffs are challenging the commissioner's judgment on the weight of that evidence, we are unable to substitute our own judgment for that of

the commissioner on the weight of the evidence. See *Costello* v. *Commissioner of Developmental Services*, supra, 128 Conn. App. 290.

Accordingly, we conclude that the commissioner's decision was reasonably supported by substantial evidence in the record taken as a whole.

The judgment is affirmed.

In this opinion the other judges concurred.

LUIS A. SANTANA, JR. *v.* COMMISSIONER OF CORRECTION (AC 43687)

Alvord, Alexander and Clark, Js.

Syllabus

The petitioner, who had been convicted of the crimes of murder, conspiracy to commit murder, and carrying a pistol without a permit, sought a writ of habeas corpus, claiming, inter alia, that his trial counsel, H, provided ineffective assistance by failing to investigate and present a third-party culpability defense. Specifically, the petitioner alleged that H failed, inter alia, to question D, a detective involved in the case, regarding his investigation of certain other suspects, to present out-of-court statements of certain witnesses that D had interviewed, and to offer into evidence a statement made by a witness, M, to the police in which he identified individuals other than the petitioner as suspects. Following an evidentiary hearing, the habeas court rendered judgment denying the habeas petition. The habeas court denied the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court did not abuse its discretion in denying the petition for certification to appeal because the petitioner failed to demonstrate that the issues raised were debatable among jurists of reason, that the court could have resolved the issues in a different manner, or that the questions raised were adequate to deserve encouragement to proceed further: although, contrary to the claim of the respondent Commissioner of Correction, the petitioner's stated grounds for appeal in his application for waiver of fees, costs and expenses and appointment of counsel sufficiently put the habeas court on notice that the petitioner sought to appeal his claim of ineffective assistance of counsel for failing to investigate and present a third-party culpability defense, the petitioner did not provide any affirmative evidence that would support such a defense, as he failed to

produce D as a witness at the habeas trial, to identify the particular witnesses whose out-of-court statements he claimed would support his defense, or to introduce into evidence a statement or photographic array signed by M that identified individuals other than the petitioner as suspects, and the witnesses that the petitioner did produce were unable to identify the individuals they had seen following the incident; moreover, the petitioner failed to establish that he was prejudiced by H's decision to forgo a third-party culpability defense because he did not demonstrate that there was a reasonable probability that the outcome of his criminal trial would have been different if H had presented such a defense; accordingly, the appeal was dismissed.

Argued April 7—officially released November 2, 2021

Procedural History

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

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

Thadius L. Bochain, deputy assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Rebecca A. Barry*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

ALEXANDER, J. The petitioner, Luis A. Santana, Jr., 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 (1) abused its discretion in denying his petition for certification to appeal from the denial of his habeas petition and (2) improperly concluded that he had not received ineffective assistance from his criminal trial counsel. We disagree that the court abused its discretion in denying the petition for certification to appeal and, accordingly, dismiss the appeal.

At the petitioner's criminal trial, the jury reasonably could have found that on September 17, 2006, the petitioner and Geraldo Rosado shot the victim, Aaron McCrea, in an area between Portsea Street and Loop Road in New Haven. *State* v. *Santana*, 313 Conn. 461, 463–64, 97 A.3d 963 (2014). The victim died from multiple gunshot wounds. Id., 464. The petitioner was convicted of murder in violation of General Statutes § 53a-54a, conspiracy to commit murder in violation of General Statutes §§ 53a-48 and 53a-54a, and carrying a pistol without a permit in violation of General Statutes § 29-35. Id., 463, 466. Our Supreme Court affirmed his conviction on direct appeal. Id., 464.

The petitioner initiated this habeas action and, on January 24, 2018, he filed an amended petition alleging three claims. Only the first claim, in which the petitioner alleged ineffective assistance of his criminal trial counsel, Lawrence Hopkins, for, inter alia, failing to investigate and to present a third-party culpability defense, is relevant to this appeal. With respect to this claim, the petitioner alleged that Hopkins was ineffective because, inter alia, he failed (1) to question Detective Michael Hunter regarding an investigation of two other suspects, Jose Montero and Juan Nunez, (2) to present out-of-court statements of witnesses interviewed by Hunter "to show what was in [Hunter's] mind at the time of his investigation of [Montero] and [Nunez]," and (3) to offer a statement made by Joseph Mungo to the police in which he identified Montero and Nunez as the individuals he saw after the shooting.

A trial on the habeas petition was held on December 11 and 12, 2018, and May 8, 2019. The petitioner did not present Hunter as a witness but presented multiple other witnesses and exhibits.[1] Jose Velazquez testified

[1] The petitioner introduced multiple documents into evidence, including an arrest warrant application, a search warrant application, an incident report, and a transcript of an interview with Mungo.

that, at the time of the murder, he lived on Liberty Street in New Haven, heard "three or four shots" and "saw somebody running, but I didn't see no faces." He further testified that, when shown photographic arrays, he was unable to identify the individual he saw running. Aixa Cruz testified that, at the time of the murder, she lived on Portsea Street in New Haven and that she had "seen two guys running in mask[s] and I didn't see nobody. I mean, I couldn't tell the person, who it was. They [were] covered." She recalled looking at photographic arrays and being unable to identify anyone.

Hopkins testified that he did not recall any specific discussions with the petitioner regarding a third-party culpability defense and added that he does not "like the defense generally. It's difficult to proffer because there's got to be a direct connection between the third party and the crime and that's fairly rarely the case." Hopkins explained that his defense "consisted largely of attacking the credibility of the witnesses . . . ." He testified that he was aware there were "two possible third parties, [Nunez] and [Montero]" but that he "didn't see . . . any articulable reason to proffer that as third-party evidence" because he "didn't have any evidence that would amount to anything that [he] deemed would be admissible." In addition, Hopkins testified that he had not wanted to "put Montero into the mix" because "[i]t would have opened a Pandora's box of evidence that [he] felt would have been fatal rather than helpful." Hopkins explained that he wanted to keep out a statement made by the petitioner's codefendant, Rosado, that implicated the petitioner in the crime, in which Rosado "claims that [Montero] was present when a guy by the name of Primo ordered the hit of the deceased in this case in return for a $15,000 payment" and indicated that the petitioner "accepted the offer of the moneys and the guns with which to commit the homicide."

On October 17, 2019, the court issued a memorandum of decision denying the petition for a writ of habeas corpus. The court concluded that the petitioner's claim of ineffective assistance of counsel "fails because of a complete lack of evidence." The court stated that the petitioner's claim that Hopkins was ineffective when he did not question Hunter about his investigation into Nunez and Montero failed as a matter of law because the petitioner did not present Hunter as a witness. The claim that Hopkins was deficient for not presenting out-of-court statements of witnesses interviewed by Hunter failed because the petitioner did not identify particular witnesses or "support this claim with any affirmative evidence." The court indicated that "the supposed out-of-court statements made [by] whatever witnesses he interviewed were not produced." Further, the court stated that the petitioner did not establish "how . . . Hunter's state of mind would have been relevant or admissible on the issue of . . . Hopkins establishing a defense of third-party culpability."

On October 24, 2019, the petitioner filed a petition for certification to appeal, which the court denied. This appeal followed. On appeal, the petitioner argues that the habeas court (1) abused its discretion in denying his petition for certification to appeal because the issues are debatable among jurists of reason, a court could resolve the issues in a different manner, or the questions raised are adequate to deserve encouragement to proceed further, and (2) improperly concluded that he had not received ineffective assistance as a result of Hopkins' failure to investigate and present a third-party culpability defense.

The respondent, the Commissioner of Correction, first argues that the petitioner's claims are unreviewable because he did not state his claim of ineffective assistance of counsel for failing to present a third-party culpability defense in his petition for certification to

appeal. We are not persuaded by this argument. The petitioner stated his grounds for appeal in his application for waiver of fees, costs and expenses and appointment of counsel on appeal.[2] He filed the application in a self-represented capacity.

"It is the established policy of the Connecticut courts to be solicitous of [self-represented] litigants and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the [self-represented] party. . . . The modern trend . . . is to construe pleadings broadly and realistically, rather than narrowly and technically." (Internal quotation marks omitted.) *Henderson* v. *Commissioner of Correction*, 181 Conn. App. 778, 793, 189 A.3d 135, cert. denied, 329 Conn. 911, 186 A.3d 707 (2018). In stating his grounds for appeal, the petitioner specifically referred to "testimony of witnesses . . . in regards to a third-party culpability defense as these witnesses originally identified other perpetrators and could not identify the petitioner." Further, the issues raised at the habeas trial included multiple claims of ineffective assistance, with one of those being that Hopkins failed to investigate and present a third-party culpability defense. On the basis of these specific facts and circumstances, we conclude that the petitioner's stated grounds for appeal sufficiently put the habeas court on notice that the petitioner sought to appeal his claim of ineffective assistance of counsel for failing to investigate and present a third-party culpability defense.

[2] The petitioner stated his grounds for appeal as follows: "Abuse of discretion in credibility findings. No consideration was given to petitioner's testimony regarding plea deal, judge only discusses testimony of [Attorneys] Hopkins and O'Brien. No consideration was given to testimony of witnesses Axia Cruz, Jose Velazquez or the statements of Joseph Mungo who was deceased before these proceedings in regards *to a third-party culpability defense* as these witnesses originally identified other perpetrators and could not identify the petitioner." (Emphasis added.)

Next, the respondent argues that the habeas court did not abuse its discretion in denying the petitioner's petition for certification to appeal and that it properly concluded that the petitioner failed to prove that he was prejudiced by the alleged deficient performance of his counsel. We agree and, for the following reasons, dismiss the petitioner's appeal.

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

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

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more

of the three criteria . . . adopted by [our Supreme Court] for determining the propriety of the habeas court's denial of the petition for certification." (Internal quotation marks omitted.) *Whistnant* v. *Commissioner of Correction*, 199 Conn. App. 406, 414–15, 236 A.3d 276, cert. denied, 335 Conn. 969, 240 A.3d 286 (2020).

"Our standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary. . . .

"In *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], the United States Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he must show that counsel's assistance was so defective as to require reversal of [the] conviction . . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong. . . .

"To satisfy the performance prong [of the *Strickland* test] the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . [A] court must indulge a strong presumption that counsel's

conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . 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. . . . A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . . In its analysis, a reviewing court may look to the performance prong or to the prejudice prong, and the petitioner's failure to prove either is fatal to a habeas petition." (Citations omitted; internal quotation marks omitted.) *Anderson* v. *Commissioner of Correction*, 201 Conn. App. 1, 11–13, 242 A.3d 107, cert. denied, 335 Conn. 983, 242 A.3d 105 (2020).

The legal principles applicable to a claim of third-party culpability are well known. "It is well established that a defendant has a right to introduce evidence that indicates that someone other than the [petitioner] committed the crime with which the [petitioner] has been charged. . . . The [petitioner] must, however, present evidence that directly connects a third party to the crime. . . . It is not enough to show that another had the motive to commit the crime . . . nor is it enough to raise a bare suspicion that some other person may have committed the crime of which the [petitioner] is accused." (Internal quotation marks omitted.) *McClain* v. *Commissioner of Correction*, 188 Conn. App. 70, 77–78, 204 A.3d 82, cert. denied, 331 Conn. 914, 204 A.3d 702 (2019).

In the present case, the petitioner identified Montero and Nunez as potentially culpable third parties. As the habeas court stated, however, the petitioner failed to provide "any affirmative evidence" that would support his third-party culpability defense. The petitioner failed

to produce Hunter as a witness at the habeas trial. He also failed to "identify the particular witnesses" whose out-of-court statements would support his third-party culpability defense identifying Montero and Nunez as the perpetrators of the crime. As the habeas court noted, the petitioner submitted into evidence a transcript of an interview of Mungo conducted by Hunter and Detective Clarence Willoughby in which they discuss a prior identification made by Mungo after looking at photographic arrays. Neither a statement signed by Mungo nor signed photographic arrays, however, were introduced into evidence. Additionally, neither Velazquez nor Cruz identified Montero or Nunez, as they were both unable to identify whom they had seen after the shooting. Further, Hopkins testified that, at the time of the petitioner's trial, he was aware that there were "two possible third parties, [Nunez] and [Montero]" but that "I didn't see . . . any articulable reason to proffer that as third-party evidence" because "I didn't have any evidence that would amount to anything that I deemed would be admissible." It is not enough for the petitioner to raise a "bare suspicion" that someone else, namely, Montero and Nunez, may have committed the crime. *McClain* v. *Commissioner of Correction*, supra, 188 Conn. App. 77–78. Further, without evidence directly connecting Montero or Nunez to the murder, the petitioner cannot demonstrate that if Hopkins had presented a third-party culpability defense, there is a reasonable probability that the outcome of his criminal trial would have been different. See *Anderson* v. *Commissioner of Correction*, supra, 201 Conn. App. 12–13. Because he did not present any affirmative evidence supporting his third-party culpability claim, we conclude that the petitioner has failed to demonstrate that he was prejudiced by Hopkins' decision to forgo a third-party culpability defense.

For the foregoing reasons, we conclude that the petitioner has failed to demonstrate that the issues raised

are debatable among jurists of reason, that the court could resolve the issues in a different manner, or that the questions are adequate to deserve encouragement to proceed further. Therefore, the petitioner failed to establish that the court abused its discretion in denying his petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

JAMAAL COLTHERST *v.* COMMISSIONER OF CORRECTION (AC 43864)

Elgo, Cradle and Pellegrino, Js.

Syllabus

The petitioner, who had been convicted of multiple crimes, including murder, sought a writ of habeas corpus, claiming that he received ineffective assistance of counsel in the two criminal matters underlying his petition and that his conviction of kidnapping in the first degree with a firearm violated his right to due process. The first incident occurred in Hartford, and the second incident occurred four days later, and was tried in New Britain. Specifically, he claimed that the jury in the New Britain case was not instructed to determine whether the victim was restrained to an extent exceeding that which was necessary to complete the other crimes, as required by *State* v. *Salamon* (287 Conn. 509). Thereafter, the habeas court rendered judgment denying the habeas petition, and the petitioner, on the granting of certification, appealed to this court. *Held*:

1. The petitioner could not prevail on his claims that counsel in his underlying criminal matters rendered ineffective assistance.

a. The habeas court correctly determined that the petitioner's trial counsel, O, in the Hartford case did not provide ineffective assistance by failing to advise him adequately regarding his decision to testify: the petitioner failed to meet his burden of demonstrating that O's conduct fell below an objective standard of reasonableness and failed to overcome the presumption that his counsel acted competently; the court's finding that O met with the petitioner to discuss his case eighteen times was supported by the petitioner's own testimony, and, although O could not recall how he advised the petitioner regarding whether he should testify, O testified regarding what he would normally do with respect to advising a criminal defendant about whether to testify, and the court found O's testimony to be credible; moreover, O could not have foreseen that the

petitioner would not testify truthfully, which resulted in the petitioner opening the door to the introduction of evidence concerning the New Britain case.

b. The habeas court correctly determined that the petitioner's trial counsel in the New Britain case, C, did not provide ineffective assistance by failing to adequately advise him about a plea offer to resolve that case: the record supported the habeas court's conclusion that the petitioner failed to meet his burden of demonstrating that the trial court would have accepted the plea agreement, as the petitioner presented no evidence to that effect, and, even if this court assumed the existence of such an agreement, the petitioner's equivocal testimony that he "possibly" would have accepted the plea offer was insufficient to meet his burden of demonstrating a reasonable probability that, if not for C's defective performance, he would have accepted the plea offer.

2. The petitioner's claim that his kidnapping conviction in the New Britain case violated his right to due process because the jury was not instructed to determine whether the victim was restrained to an extent exceeding that which was necessary to complete the other crimes was unavailing: the court correctly determined that the absence of a *Salamon* instruction at the petitioner's criminal trial constituted harmless error; the court thoroughly addressed each of the *Salamon* factors as applied to the facts of the present case and made factual findings in connection therewith, which were not clearly erroneous, as the restraint and movement of the victim were done to facilitate the petitioner's escape from the robbery scene, not to accomplish the robbery itself, and, as such, they had independent criminal significance, the court's determination that those factors did not favor the petitioner was supported by the record, and, thus, the absence of a *Salamon* instruction could not have substantially affected or influenced the jury's verdict.

Argued September 9—officially released November 2, 2021

Procedural History

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

Michael W. Brown, for the appellant (petitioner).

Laurie N. Feldman, deputy assistant state's attorney, with whom, on the brief, were *Sharmese L. Wolcott* and *Brian W. Preleski*, state's attorneys, and *Tamara*

Grasso, former senior assistant state's attorney, for the appellee (respondent).

Opinion

PELLEGRINO, J. The petitioner, Jamaal Coltherst, appeals following the granting of his petition for certification to appeal from the judgment of the habeas court denying his petition for a writ of habeas corpus. He claims that (1) he received ineffective assistance of trial counsel in both of the underlying criminal matters that formed the basis for his habeas petition and (2) because the jury in one of his underlying criminal matters was not instructed to determine whether the victim in that case was restrained to an extent exceeding that which was necessary to complete other crimes, as required by *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008), his conviction of kidnapping in the first degree with a firearm in that case violated his constitutional right to due process. We disagree and affirm the judgment of the habeas court.

The following facts and procedural history are relevant to our disposition of the petitioner's claims on appeal. The petitioner's habeas petition concerns his convictions of various crimes in two underlying criminal matters. The first matter occurred in Hartford in 1999 (Hartford case), and the second matter occurred in Wethersfield four days after the incident in Harford, and was tried in New Britain (New Britain case). In the Hartford case, the petitioner was convicted of nine different offenses related to a carjacking incident,[1] and,

[1] Specifically, the petitioner was convicted of capital felony in violation of General Statutes (Rev. to 1999) §§ 53a-54b (5) and 53a-8 (a), murder in violation of General Statutes (Rev. to 1999) §§ 53a-54a (a) and 53a-8 (a), felony murder in violation of General Statutes § 53a-54c, kidnapping in the first degree in violation of General Statutes §§ 53a-92 (a) (2) (B) and 53a-8 (a), robbery in the first degree in violation of General Statutes § 53a-134 (a) (2), robbery in the second degree in violation of General Statutes § 53a-135 (a) (1), larceny in the first degree in violation of General Statutes (Rev. to 1999) §§ 53a-122 (a) (3) and 53a-8 (a), conspiracy to commit kidnapping in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-92 (a)

following resentencing, he was sentenced to a total effective sentence of eighty years of incarceration, which was to run consecutive to the sentence imposed in the New Britain case.

The petitioner filed a direct appeal from his conviction in the Hartford case to our Supreme Court, which set forth the following relevant facts. On the evening of October 15, 1999, the petitioner and a friend, Carl Johnson, who was armed with a gun, rode mountain bikes "to an exotic dance club known as Kahoots, located on Main Street in East Hartford, arriving at approximately 7:30 p.m. They parked the bicycles in the bushes behind the club and then walked around the parking lot to identify cars that they might want to carjack. . . .

"The [petitioner] and Johnson [left the Kahoots parking lot briefly to look elsewhere for cars to carjack but] returned to Kahoots . . . at approximately 9 p.m. They hid their bicycles behind the Rent-A-Wreck building located next to the club. They saw a 1999 Toyota 4Runner parked in the Rent-A-Wreck parking lot and waited there for the driver to return so that they could carjack the car. While they were waiting, a black Honda Accord pulled up behind Rent-A-Wreck. The driver, later identified as Kyle Holden (victim), exited the car and went into Kahoots. Some time later, when the victim came out of Kahoots and headed toward his car, the [petitioner] and Johnson ran up to him. Johnson pointed his gun at the victim's head and demanded the keys to the car. The [petitioner] took them. Johnson then gave the gun to the [petitioner] and took the keys himself. Johnson and the [petitioner] forced the victim into the backseat of the car, where the [petitioner] joined him. They then drove to an automatic teller machine (ATM)

(2) (B), and larceny in the fourth degree in violation of General Statutes (Rev. to 1999) § 53a-125 (a).

located next to the Triple A Diner. The [petitioner] took the victim's wallet, removed his ATM card and demanded the victim's personal identification number. The [petitioner then] gave the card to Johnson, who used it to withdraw money from the ATM.

"Johnson then drove to a nearby entrance ramp for Interstate 84, where he pulled over to the side of the road. The [petitioner] and Johnson got out of the car, and the [petitioner] gave the gun to Johnson. Johnson then ordered the victim to get out of the car. The victim went to the far side of the guardrail, where he sat down. The [petitioner] removed the victim's belongings from the car and then got back into the car's passenger side seat. At that point, the [petitioner] saw Johnson shoot the victim at point blank range in the back of the head. The victim died within seconds. Johnson then got back into the car. The [petitioner] asked him why he had shot the victim, and Johnson said that he did not want any witnesses." (Footnote omitted.) *State* v. *Coltherst*, 263 Conn. 478, 484–86, 820 A.2d 1024 (2003). Our Supreme Court affirmed the petitioner's judgment of conviction in the Hartford case. See id., 483.

In the New Britain case, the petitioner was convicted of fifteen different offenses, including kidnapping in the first degree with a firearm in violation of General Statutes § 53a-92a and two counts of robbery in the first degree in violation of General Statutes § 53a-134 (a) (1) and (2).[2] The petitioner was sentenced in the

[2] In addition to the kidnapping and robbery offenses, the petitioner also was convicted of burglary in the first degree in violation of General Statutes § 53a-101 (a) (1) and (2), attempt to commit murder in violation of General Statutes (Rev. to 1999) §§ 53a-54a and 53a-49, assault in the first degree in violation of General Statutes § 53a-59 (a) (1) and (2), conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 and 53a-134 (a) (1) and (2), conspiracy to commit kidnapping in the first degree with a firearm in violation of §§ 53a-48 and 53a-92a, conspiracy to commit burglary in the first degree in violation of General Statutes §§ 53a-48 and 53a-101, conspiracy to commit assault in the first degree in violation of §§ 53a-48 and 53a-59 (a) (1), larceny in the first degree in violation of General Statutes (Rev. to 1999) § 53a-122 (a) (3), and conspiracy to commit larceny

New Britain case to eighty-five years of incarceration, to run consecutive to the sentence imposed in the Hartford case.

The petitioner appealed his conviction in the New Britain case to this court, which set forth the following relevant facts: "On October 19, 1999, the [petitioner] . . . Johnson and Rashad Smith were sitting in a stolen black Honda Accord near 85 Wolcott Hill Road in Wethersfield. The trio had smoked marijuana. Sometime after darkness fell, the victim, Michael Clarke, returned to Camilleri and Clarke Associates, Inc., the insurance brokerage firm located there, of which he was an owner. He had left his motor vehicle, a black Lincoln Mark VIII valued at approximately $28,000, in the firm's parking lot. After [Clarke] had been in the building for some time, his dog began to bark, and so [Clarke] went outside. After [Clarke] left the building, he was accosted by the [petitioner] and Johnson. The [petitioner] wore a red sweatshirt or parka. [Clarke] was instructed to turn over the keys to his vehicle. One of the men pointed a gun at [Clarke], and told him to go back into the building and to his office.

"In the office, while one of the men continued to point the gun at [Clarke], the other held [Clarke]. The [petitioner] and Johnson took [Clarke's] laptop computer and credit card. They threatened [Clarke] and ordered him to provide the access code for the card so that they could use it to obtain cash. Johnson took the computer while the [petitioner] took the credit card. The [petitioner] and Johnson stated that they were going to take [Clarke] to the car, and after he protested and resisted, he was struck twice in the face with the gun. [Clarke] was pushed outside, continued to struggle with the two men and broke away from them before

in the first degree in violation of General Statutes (Rev. to 1999) §§ 53a-122 (a) (3) and 53a-48.

being forced into the car. [Clarke] started to flee and called out for help, but was soon tackled by Johnson. [Clarke] then struggled with the [petitioner], who took out a .22 caliber Beretta and shot [Clarke] in the head. The [petitioner] and Johnson fled the scene in [Clarke's] Lincoln while Smith drove the Honda Accord.

"Oscar Rivera, a Wethersfield police officer, arrived at the scene after being notified of the assault. He found [Clarke] lying on the ground in the parking lot, which was otherwise empty. At that time, [Clarke] was responsive, but had suffered visible injuries. Medical personnel subsequently transferred [Clarke] to Hartford Hospital for treatment. [Clarke] was hospitalized for nine to ten days and then was transferred to a rehabilitation facility for an additional seven weeks of therapy." (Footnotes omitted.) *State* v. *Coltherst*, 87 Conn. App. 93, 96–98, 864 A.2d 869, cert. denied, 273 Conn. 919, 871 A.2d 371 (2005). This court affirmed in part[3] the petitioner's conviction in the New Britain case. See id., 96.

Following the resolution of his direct appeals in the Harford and New Britain cases, the petitioner filed a petition for a writ of habeas corpus, which is the subject of this appeal. He first filed a petition on June 10, 2015, in a self-represented capacity but later filed an amended petition, through counsel, on August 27, 2018. In his amended habeas petition, the petitioner alleged nine separate grounds for reversal of his convictions, all but three of which were withdrawn prior to the habeas trial. The three remaining counts alleged (1) ineffective assistance by trial counsel in the Hartford case, (2) ineffective assistance by trial counsel in the New Britain

[3] This court agreed with a double jeopardy claim raised by the petitioner that the trial court improperly had sentenced him on his conviction of six counts of conspiracy offenses, and we remanded the case with direction to merge the petitioner's conviction of the six conspiracy offenses and to vacate the sentences for five of them. *State* v. *Coltherst*, supra, 87 Conn. App. 96, 113.

case, and (3) that the petitioner's kidnapping conviction in the New Britain case violated the petitioner's right to due process. The habeas court rendered judgment denying the habeas petition, from which the petitioner, on the granting of certification, appealed to this court. Additional facts will be set forth as necessary.

I

In this appeal, the petitioner raises two claims related to the habeas court's denial of his ineffective assistance of counsel claims—one related to the Hartford case and the other to the New Britain case. We address each in turn. First, we set forth our well settled standard of review and legal principles applicable to claims of ineffective assistance of counsel in habeas matters.

"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.) *Charles* v. *Commissioner of Correction*, 206 Conn. App. 341, 346, A.3d (2021).

"The sixth amendment to the United States constitution guarantees a criminal defendant the assistance of counsel for his defense. . . . It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . . To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy a two-pronged test articulated in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Strickland* requires that a petitioner satisfy both a performance and a prejudice prong. To satisfy

the performance prong, a [petitioner] 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 [petitioner] 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. . . .

"We . . . are mindful that [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. . . . [C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. . . . Similarly, the United States Supreme Court has emphasized that a reviewing court is required not simply to give [counsel] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as [he or she] did. . . .

"In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. . . . Instead, *Strickland* asks whether it is reasonably likely the result would have been different. . . . The likelihood of a

different result must be substantial, not just conceivable." (Internal quotation marks omitted.) *Harris* v. *Commissioner of Correction*, 205 Conn. App. 837, 857–58, 257 A.3d 343 (2021).

A

The petitioner claims that the habeas court improperly determined that his trial counsel in the Hartford case did not provide ineffective assistance by failing to advise the petitioner adequately regarding his decision to testify at the underlying criminal trial in the Hartford case. We disagree.

With respect to the claim of ineffective assistance of counsel in the Hartford case, the habeas court found the following relevant facts: "In the Hartford case, the petitioner was represented at all relevant times by Attorney Donald O'Brien. He met with the petitioner approximately eighteen times during which he discussed the evidence. The defense theory at trial was that the petitioner was not involved and, instead, it was the codefendant . . . Johnson who was responsible for the crimes. The gun was connected to . . . Johnson and the defense sought to put the blame on Johnson's shoulders. The petitioner, seventeen at the time of the offenses, had given various statements to the police. Defense counsel attempted to discredit the statements by questioning the way in which police obtained the statements from the petitioner and argued to the jury that [it] should not believe the contents of the statements. Since almost twenty years have passed since the petitioner's underlying trial, Attorney O'Brien did not remember many details of the trial or his communications with the petitioner. He testified credibly, however, that he would have discussed with the petitioner his right to testify and, in doing so, would have laid out the evidence the state presented up to that point during the trial. If he believed the state had not proven its case

beyond a reasonable doubt, he would have encouraged the petitioner to not testify because doing so would give the prosecution an opportunity to vigorously cross-examine the petitioner and potentially fill in the gaps in the state's case. He insisted that the decision to testify belongs to the petitioner.

"The petitioner did testify in the Harford case and, according to Attorney O'Brien, did well on direct examination. He denied making many of the statements contained in his written statements given to the police. 'One of those statements indicated that the [petitioner] had stated to the police that, on the night of the crime, he and Johnson parked [their] bikes in the bushes behind Kahoots and walked around the parking lot looking for cars that [they] might want to jack.' . . . *State* v. *Coltherst*, supra, 263 Conn. 508. During cross-examination, he was asked what it meant to jack a car. The petitioner replied that he did not know because he did not jack cars. As a result of this, the state sought to question the petitioner about [the] carjacking that occurred in Wethersfield four days after the Hartford incident or, in the alternative, [to] admit a redacted version of his statement to the police admitting to the Wethersfield crime. After some back and forth, the state and defense counsel agreed that the state would conduct a limited inquiry into this area, and the court subsequently gave a limiting instruction to the jury.

"According to the petitioner, Attorney O'Brien talked to him about testifying at the trial a few days before his testimony and they discussed it for only a few minutes. The petitioner testified that had Attorney O'Brien told him that he could be cross-examined about the Wethersfield carjacking incident, he would . . . not have testified the way he did. At the very least, according to the petitioner, he would have been better prepared to testify." (Footnote omitted.)

In rejecting the petitioner's claim that Attorney O'Brien provided ineffective assistance, the habeas court stated: "The only surviving claim against Attorney O'Brien is that he did not adequately advise the petitioner about testifying, nor did he adequately prepare him to testify. The petitioner has not met his burden of proof with regard to this claim. The petitioner's claim appears to be that, had Attorney O'Brien told the petitioner that he could be questioned about the Wethersfield carjacking, the petitioner would not have misled the jury by saying that he didn't jack cars.

"The court struggles to understand how Attorney O'Brien can be faulted for the petitioner's decision, sua sponte, to testify in a manner that he knew not to be true. There is no deficient performance. Further, the state's evidence against the petitioner was significant. Even assuming any deficient performance, the petitioner has not proven prejudice. Thus, this claim must be denied."

The following relevant legal principles guide our analysis of this claim. "[I]t is the right of every criminal defendant to testify on his own behalf . . . and to make that decision after full consultation with trial counsel." (Internal quotation marks omitted.) *Henderson* v. *Commissioner of Correction*, 129 Conn. App. 188, 195, 19 A.3d 705, cert. denied, 303 Conn. 901, 31 A.3d 1177 (2011). "It is the responsibility of trial counsel to advise a defendant of the defendant's right to testify and to ensure that the right is protected. [T]he if and when of whether the accused will testify is primarily a matter of trial strategy to be decided by the defendant and his attorney. . . . The decision of whether to testify on one's own behalf, however, ultimately is to be made by the criminal defendant." (Citation omitted; internal quotation marks omitted.) *Victor C.* v. *Commissioner of Correction*, 179 Conn. App. 706, 715, 180 A.3d 969 (2018). "A defendant is entitled to decide whether to

testify in his or her own case and is further entitled to have advice from counsel concerning that decision. . . . Counsel's duty to advise includes the duty to keep the defendant informed of all developments in the case material to the defendant's decision to testify. . . . Deciding whether to testify on one's own behalf is often among the most difficult choices a criminal defendant must make during trial. Testifying can present a risky and difficult ordeal for a defendant. Defense counsel therefore must keep the defendant apprised of all material information known to counsel in order to help the defendant in making that decision." (Internal quotation marks omitted.) *Houghtaling* v. *Commissioner of Correction*, 203 Conn. App. 246, 260–61, 248 A.3d 4 (2021). "[T]he habeas court must presume that counsel acted competently and the burden lies with the petitioner, as the party asserting ineffectiveness, to overcome this presumption . . . ." *Budziszewski* v. *Commissioner of Correction*, 322 Conn. 504, 517 n.2, 142 A.3d 243 (2016).

The petitioner claims that Attorney O'Brien provided ineffective assistance because he "failed to advise [the petitioner] about general principles surrounding the admissibility of evidence related to the New Britain [case] and how his answers to certain questions might result in opening the door to more damaging evidence being offered against him." According to the petitioner, "[i]f [Attorney O'Brien] had informed the petitioner that his testimony could expose him to the risk of having the jury hear about the New Britain [case], it could have changed his decision to testify completely."

Given that twenty years had passed between the petitioner's criminal trial in the Hartford case and the habeas trial, Attorney O'Brien had trouble recalling exactly what advice he had given to the petitioner. The habeas court, however, found that Attorney O'Brien "testified credibly . . . that he would have discussed

with the petitioner his right to testify and . . . the evidence the state presented up to that point during the trial," that, if he believed the state had not met its burden of proof beyond a reasonable doubt, "he would have encouraged the petitioner to not testify," and that, ultimately, "the decision to testify belong[ed] to the petitioner." As this court previously has explained, "[t]ime inevitably fogs the memory of busy attorneys. That inevitability does not reverse the *Strickland* presumption of effective performance. Without evidence establishing that counsel's strategy arose from the vagaries of ignorance, inattention or ineptitude . . . *Strickland*'s strong presumption must stand." (Internal quotation marks omitted.) *Williams* v. *Commissioner of Correction*, 177 Conn. App. 321, 333, 175 A.3d 565, cert. denied, 327 Conn. 990, 175 A.3d 563 (2017); see also *Rodriquez* v. *Commissioner of Correction*, 35 Conn. App. 527, 536–37, 646 A.2d 919 (fact that attorney could not recall specifically informing petitioner of right to testify did not establish that he never told petitioner of his right to testify and was not sufficient, by itself, to demonstrate deficient performance), cert. denied, 231 Conn. 935, 650 A.2d 172 (1994).

Our review of the record supports the habeas court's conclusion that the petitioner failed to meet his burden of demonstrating deficient performance by Attorney O'Brien. The habeas court's finding that Attorney O'Brien had met with the petitioner to discuss his case eighteen times was supported by the petitioner's own testimony. Although Attorney O'Brien could not recall what advice he may have given to the petitioner regarding whether the petitioner should testify, he did testify regarding what he would normally do with respect to advising a criminal defendant about whether to testify, and the habeas court found his testimony to be credible. "We will not disturb a habeas court's factual finding

that turns on its evaluation of the credibility of witnesses. See *Flomo* v. *Commissioner of Correction*, 169 Conn. App. 266, 279, 149 A.3d 185 (2016) ('[a] reviewing court ordinarily will afford deference to those credibility determinations made by the habeas court on the basis of [the] firsthand observation of [a witness'] conduct, demeanor and attitude' . . .), cert. denied, 324 Conn. 906, 152 A.3d 544 (2017)." *Houghtaling* v. *Commissioner of Correction*, supra, 203 Conn. App. 263. Moreover, we agree with the habeas court that Attorney O'Brien could not have foreseen that the petitioner would not testify truthfully, which resulted in his opening the door to the introduction of evidence concerning the New Britain case. The petitioner, therefore, has not met his burden of demonstrating that Attorney O'Brien's conduct fell below an objective standard of reasonableness, nor has he overcome the presumption that his counsel acted competently. See *Budziszewski* v. *Commissioner of Correction*, supra, 322 Conn. 517 n.2; *Johnson* v. *Commissioner of Correction*, 285 Conn. 556, 576–77, 941 A.2d 248 (2008). Accordingly, the habeas court properly denied the habeas petition with respect to the petitioner's claim of ineffective assistance by Attorney O'Brien in the Hartford case.[4]

B

The petitioner next claims that the habeas court improperly determined that trial counsel in the New Britain case did not provide ineffective assistance by failing to advise the petitioner adequately about a seventy year plea offer to resolve the New Britain case. We disagree.

[4] In light of our conclusion that the petitioner has failed to establish deficient performance by Attorney O'Brien, we need not address the prejudice prong of the *Strickland* test. See *Fair* v. *Commissioner of Correction*, 205 Conn. App. 282, 294, 256 A.3d 163 (2021) ("[i]n its analysis, a reviewing court may look to the performance prong or to the prejudice prong [of the *Strickland* test], and the petitioner's failure to prove either is fatal to a habeas petition" (internal quotation marks omitted)).

With respect to the claim of ineffective assistance of counsel in the New Britain case, the habeas court found the following relevant facts: "The petitioner was represented in the New Britain case by Attorney Thomas Conroy. At the time of the New Britain trial, the petitioner was already sentenced in connection with the Hartford case. There may have been a plea offer pursuant to which the petitioner would have been sentenced to a term of imprisonment of seventy [years of] incarceration, concurrent to his Hartford sentence, but Attorney Conroy could not recall any of the details of the plea negotiations. The petitioner could not recall if Attorney Conroy discussed the plea offer with him.

"During the New Britain trial, the state sought to introduce a letter written by the petitioner to his codefendant . . . Johnson in which the petitioner offered Johnson money to tell the police that the petitioner had not been involved. This letter had been introduced at the Hartford trial as consciousness of guilt. In the New Britain trial, the letter was not introduced, but the petitioner's testimony on this subject from the Hartford trial was read to the jury. The petitioner now claims that Attorney Conroy did not tell him that this testimony would be admitted at the New Britain trial and, had he done so, the petitioner would have possibly considered pleading guilty instead of going to trial."

In rejecting the petitioner's claim that Attorney Conroy provided ineffective assistance, the habeas court stated: "Even though the court has granted the petitioner's motion to amend the pleadings to allege a claim that Attorney Conroy failed to adequately advise the petitioner regarding the plea, there is simply no evidence that this is the case. For starters, the petitioner has presented no evidence from which this court can conclude that there was a firm offer of seventy [years of] incarceration. Attorney Conroy testified that he thought the offer might have been for seventy years. There was

no testimony about the charges to which the petitioner would have to plead guilty to receive that sentence. Further, there was no evidence whatsoever from which this court could conclude that, even if such an offer were made, the trial court would have accepted the offer, a necessary requirement under our case law. Finally, the petitioner's testimony in this regard is also unpersuasive. He testified that he possibly would have considered pleading guilty to the offer if he had known that his testimony from the Hartford trial would have been admitted. The court does not find this credible. Thus, the claim is denied."

As we have stated previously, "[i]n order to prevail on a claim of ineffective assistance of counsel, the petitioner must establish both prongs of the *Strickland* test. . . . [A] habeas court may dismiss the petitioner's claim if he fails to satisfy either prong. . . . Accordingly, a court need not determine the deficiency of counsel's performance if consideration of the prejudice prong will be dispositive of the ineffectiveness claim." (Internal quotation marks omitted.) *Carrasquillo* v. *Commissioner of Correction*, 206 Conn. App. 195, 205, A.3d (2021). To establish prejudice when a petitioner has rejected an alleged plea offer due to ineffective assistance of counsel, the petitioner must establish "that (1) it is reasonably probable that, if not for counsel's deficient performance, the petitioner would have accepted the plea offer, and (2) the trial judge would have conditionally accepted the plea agreement if it had been presented to the court." *Ebron* v. *Commissioner of Correction*, 307 Conn. 342, 357, 53 A.3d 983 (2012), cert. denied sub nom. *Arnone* v. *Ebron*, 569 U.S. 913, 133 S. Ct. 1726, 185 L. Ed. 2d 802 (2013). "A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . . In a habeas corpus proceeding, the petitioner's burden of proving that a fundamental unfairness had been done is not met by

speculation . . . but by demonstrable realities. . . . If the habeas court determined that . . . it is not reasonably probable that the trial court would have imposed the sentence embodied in the plea agreement, the prejudice prong has not been satisfied." (Citation omitted; internal quotation marks omitted.) *Sanders* v. *Commissioner of Correction*, 169 Conn. App. 813, 834–35, 153 A.3d 8 (2016), cert. denied, 325 Conn. 904, 156 A.3d 536 (2017).

Our review of the record in the present case supports the habeas court's conclusion that the petitioner failed to meet his burden of demonstrating that the trial court would have accepted the plea agreement. The petitioner presented no evidence to that effect, despite having offered eleven exhibits into evidence at the habeas trial. In fact, the record is bereft of any evidence that a firm plea agreement for seventy years of incarceration even existed,[5] let alone that the court would have accepted the agreement. Even if we assume the existence of such an agreement, the petitioner's equivocal testimony that he "[p]ossibly" would have accepted the plea offer was not sufficient to meet his burden of demonstrating a reasonable probability that, if not for Attorney Conroy's deficient performance, he *would have accepted* the plea offer. Because the petitioner has failed to establish that he was prejudiced by Attorney Conroy's allegedly deficient performance in the plea bargain context, the habeas court properly denied the habeas petition with respect to this claim.[6]

II

The petitioner next claims that his kidnapping conviction in the New Britain case violated his right to due

[5] At oral argument before this court, the petitioner's counsel acknowledged the difficulty in pursuing this claim on appeal given the sparse record. He also recognized the petitioner's ambivalence regarding whether he would have accepted the plea agreement.

[6] See footnote 4 of this opinion.

process because the jury in that case was not instructed to determine whether Clarke was restrained to an extent exceeding that which was necessary to complete the other crimes, as required by *State* v. *Salamon*, supra, 287 Conn. 509. We are not persuaded.

The habeas court found the following relevant facts related to the petitioner's conviction in the New Britain case and his encounter with Clarke on October 19, 1999. After the petitioner and Johnson accosted Clarke, forced him into the building where he worked, took his laptop and credit card, and made him disclose the personal identification number for the credit card, they "then ordered him to get into his vehicle. He refused to do so, at which point one of them struck him with the gun and they both assaulted [Clarke]. This occurred while they were still inside the building. Clarke continued to fight with both of them but they opened the door to the building and pulled him outside by his arms and down the stairs leading out of the building into the parking lot. The petitioner and Johnson went to [Clarke's] car and opened the car door. They ordered Clarke to get into the backseat and pushed him into the car. Clarke was pushed close enough to the interior of the car that he was able to touch the seats and the center console. He was in the area between the door and the inside of the car for approximately twenty seconds. He was almost inside the car but not in the backseat. He used the seats and console as leverage to push himself backward and break free, which he did, and then ran back in the direction that they had come from but was tackled again. He screamed for help in the direction of a passerby. He was then pushed up against a wall by the petitioner, where they both struggled for thirty to forty seconds. The last thing he remembered was being pushed to the ground until police officers arrived.

"In his statement to police, which was admitted as substantive evidence for the jury, the petitioner admitted that their plan was to steal [Clarke's car] and force [Clarke] to come with them in the stolen vehicle so [Clarke] would be unable to call the police. According to the petitioner, Clarke did not want to go with them, but they were pulling him by his arms trying to force him outside the building and into the car. Both the petitioner and Johnson repeatedly tried to get Clarke inside the vehicle but were ultimately unsuccessful."

We first set forth our standard of review applicable to the petitioner's claim that his right to due process was violated as a result of the absence of a *Salamon* instruction to the jury. "In reviewing this issue, we are mindful that the facts found by the habeas court are subject to the clearly erroneous standard of review. *Farmer* v. *Commissioner of Correction*, 165 Conn. App. 455, 458, 139 A.3d 767, cert. denied, 323 Conn. 905, 150 A.3d 685 (2016). The applicability of *Salamon* and whether the court's failure to give a *Salamon* instruction was harmless error are issues of law over which our review is plenary." (Internal quotation marks omitted.) *Pereira* v. *Commissioner of Correction*, 176 Conn. App. 762, 767–68, 171 A.3d 105, cert. denied, 327 Conn. 984, 175 A.3d 43 (2017).

To resolve the petitioner's *Salamon* claim on appeal, we must also provide some background concerning that case and certain changes in the law concerning how courts interpret our kidnapping statutes. In 2008, our Supreme Court decided *State* v. *Salamon*, supra, 287 Conn. 509, in which it "overruled [its] long-standing interpretation of the state's kidnapping statutes . . . ." *Banks* v. *Commissioner of Correction*, 339 Conn. 1, 4, A.3d (2021). Specifically, in *Salamon*, our Supreme Court, after conducting an "examination of the common law of kidnapping, the history and circumstances surrounding the promulgation of our current

kidnapping statutes and the policy objectives animating those statutes . . . conclude[d] the following: Our legislature, in replacing a single, broadly worded kidnapping provision with a gradated scheme that distinguishes kidnappings from unlawful restraints by the presence of an intent to prevent a victim's liberation, intended to exclude from the scope of the more serious crime of kidnapping and its accompanying severe penalties those confinements or movements of a victim that are merely incidental to and necessary for the commission of another crime against that victim. Stated otherwise, to commit a kidnapping in conjunction with another crime, a defendant must intend to prevent the victim's liberation for a longer period of time or to a greater degree than that which is necessary to commit the other crime." *State* v. *Salamon*, supra, 542. The court in *Salamon* also held that "when the evidence reasonably supports a finding that the restraint was not merely incidental to the commission of some other, separate crime, the ultimate factual determination [of whether the movement of the victim has independent criminal significance or is merely incidental to an underlying crime] must be made by the jury"; (emphasis omitted) id., 547–48; which should be instructed to consider various factors, "including the nature and duration of the victim's movement or confinement by the defendant, whether that movement or confinement occurred during the commission of a separate offense, whether the restraint was inherent in the nature of the separate offense, whether the restraint prevented the victim from summoning assistance, whether the restraint reduced the defendant's risk of detection and whether the restraint created a significant danger or increased the victim's risk of harm independent of that posed by the separate offense." Id., 548.

In *Luurtsema* v. *Commissioner of Correction*, 299 Conn. 740, 748, 12 A.3d 817 (2011), our Supreme Court

addressed the issue of "[w]hether individuals whose kidnapping convictions became final prior to [the court's] reconsideration [of the kidnapping statutes] in *Salamon* may challenge the legality of their convictions based on the interpretation . . . adopted in [*Salamon*]," and determined that *Salamon* applies retroactively in habeas cases. Id., 751. Thus, even though the petitioner's conviction in the New Britain case became final before *Salamon* was decided, his claim that the jury was not properly instructed in accordance with *Salamon* was properly raised in his habeas petition. See *Banks* v. *Commissioner of Correction*, supra, 339 Conn. 15–17.

In the present case, the habeas court determined that the fact that the jury had not been instructed in accordance with *Salamon* was harmless beyond a reasonable doubt, as "there [was] no 'reasonable possibility that a properly instructed jury would [have] reach[ed] a different result.' " In support of its conclusion, the habeas court examined the factors set forth in *Salamon* and made a number of findings, including that the instances of restraint of Clarke's liberty, which occurred when he was dragged by his arms out of the office building and was forced into his own vehicle, "were independent of, and exceeded, any restraint necessary to commit either a robbery, burglary, assault or larceny," and, thus, were not incidental to the commission of any of the charged offenses; although the duration of the restraint was not lengthy, its nature was significant; the confinement did not occur during the commission of a separate offense, as "the facts [did] not support the conclusion that the robbery was still underway at the time of the restraint on [Clarke's] movement"; the petitioner's restraint of Clarke was not inherent to the robbery, as "no jury could reasonably determine that the petitioner's acts of pulling [Clarke] by his arms out of the building and into the parking lot, and,

further, the act of pushing [Clarke] into the vehicle, coupled with the petitioner's statements that they could not leave [Clarke] behind for fear of being identified, were inherent to the robbery of [Clarke], or even the burglary or larceny of his motor vehicle"; Clarke shouted for help from a passerby and, thereby, was able to summon assistance; Clarke was restrained for the purpose of reducing the petitioner's risk of identification; and, because the petitioner and Johnson had completed the robbery and the burglary, there was no need to further restrain Clarke, but by forcing Clarke into the parking lot and his vehicle, they significantly increased Clarke's risk of harm. In summary, the habeas court concluded that "the restraint and abduction of [Clarke] was in excess of any restraint needed to complete the commission of another crime. . . . [The] court has no doubt that the jury, even if properly instructed on incidental restraint, would have returned the same verdict."

The petitioner agrees with the habeas court that the dispositive "question in this case [is] whether the lack of a *Salamon* instruction was harmless error . . . ." He claims that he was harmed by the lack of such an instruction. In support of that claim, the petitioner asserts that, even though Clarke had relinquished the items that he and Johnson demanded, "the continuing efforts to subdue [Clarke] for purposes of evading detection were part of the robbery itself . . . ." He further claims that "[i]t is undisputed that any alleged confinement occurred solely while [Clarke was being attacked]. There is nothing in the record to suggest that there was anything that could be characterized as confinement that occurred apart from the robbery of [Clarke] and the force incidental to attempting to gain control of [Clarke] to complete the robbery." In making that argument, the petitioner relies on this court's decision in *Banks* v. *Commissioner of Correction*, 184

Conn. App. 101, 194 A.3d 780 (2018), which, during the pendency of this appeal, was reversed by our Supreme Court. See *Banks* v. *Commissioner of Correction*, supra, 339 Conn. 4–5.[7]

We must briefly set forth the factual background of *Banks*. In 1995, the petitioner in that case "was arrested and charged in connection with the armed robberies of two Bedding Barn stores, the first in Newington and the second in Southington." Id., 5. With respect to the Newington robbery, the petitioner pointed a gun at a store employee, and took money from the cash register and from the wallet of a second store employee, after which he moved both employees down a hallway and locked them in a bathroom. Id., 5–6. After the employees heard a bell indicating that the front door of the store had been opened, they kicked down the door and called 911. Id., 7. With respect to the Southington robbery, the petitioner, armed with a gun, demanded money from the cash register, and, once he obtained that money, he led the store employee and her roommate, who had been in the store, to a bathroom at gunpoint and told them to lock themselves inside. Id., 7–8. Again, after a buzzer went off indicating that the door to the store had been opened, the employee and her roommate left the bathroom and called 911. Id.

After the petitioner's convictions in *Banks* were upheld on direct appeal; *State* v. *Banks*, 59 Conn. App. 112, 113–14, 755 A.2d 951, cert. denied, 254 Conn. 950,

[7] On May 17, 2021, the state filed a notice of supplemental authority, pursuant to Practice Book § 67-10, advising this court of the release of our Supreme Court's decision in *Banks* on May 12, 2021, and its applicability to the present case.

At oral argument before this court, the petitioner's counsel argued that our Supreme Court's decision in *Banks* was not dispositive of this claim on appeal, and he attempted to distinguish *Banks* on the ground that the facts of the present case were not as conclusive as those in *Banks*, in which store employees were locked in a bathroom.

762 A.2d 904 (2000); our Supreme Court decided *Salamon* in 2008. Subsequently, in 2014, the petitioner in *Banks* filed a petition for a writ of habeas corpus, claiming that his convictions of four counts of kidnapping violated his right to due process because the jury had not been instructed in accordance with *Salamon*. *Banks* v. *Commissioner of Correction*, supra, 339 Conn. 13. The habeas court denied the habeas petition, and the petitioner, on the granting of certification, appealed to this court, which, in a divided panel, concluded that the absence of a jury instruction required by *Salamon* was not harmless beyond a reasonable doubt. *Banks* v. *Commissioner of Correction*, supra, 184 Conn. App. 104. We concluded that the petitioner was entitled to a new trial because a jury provided with a *Salamon* instruction reasonably could have found that the petitioner's movement and confinement of his victims was done in furtherance of the robberies. Id., 131. Following our decision, our Supreme Court granted the petition for certification to appeal filed by the respondent in *Banks*. *Banks* v. *Commissioner of Correction*, 330 Conn. 950, 197 A.3d 391 (2018).

On appeal, our Supreme Court decided two issues in *Banks* that impact our decision in the present case. First, the court established the standard of harmless error review applicable to habeas cases involving a *Salamon* error. *Banks* v. *Commissioner of Correction*, supra, 339 Conn. 15. The court adopted the standard articulated in *Brecht* v. *Abrahamson*, 507 U.S. 619, 623, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993), pursuant to which a new trial is necessary if the instructional error "had [a] substantial and injurious effect or influence in determining the jury's verdict . . . ." (Internal quotation marks omitted.) *Banks* v. *Commissioner of Correction*, supra, 15.

Next, the court addressed the issue of whether "a properly instructed jury would have found the petitioner guilty of kidnapping beyond a reasonable doubt

notwithstanding the *Salamon* error." Id., 34. In rejecting this court's conclusion that a jury reasonably might have found that the restraint and movement of the victims were undertaken as part of the ongoing robberies, the court stated: "This case is categorically distinct from all of our prior *Salamon* cases insofar as the petitioner indisputably had accomplished the criminal objective of his underlying crimes prior to the commencement of the alleged kidnapping. Under such circumstances, there simply is no concern that the intent of the legislature will be frustrated by prosecuting a defendant for kidnapping solely on the basis of the restraint inherent in or necessary to accomplish the underlying crime. Many if not most robbers choose to leave the scene immediately upon obtaining the fruits of their crime. Numerous sister state courts have concluded, as a matter of law, that a perpetrator's choice to remain at the crime scene and further restrict a victim's liberty after having robbed him or her manifests independent, criminal significance. . . . There is nothing specific to—let alone inherent in—the crime of robbery about forcing someone at gunpoint to the back of a store and restraining them in a bathroom or cooler. That conduct could just as well follow, and facilitate the offender's escape from, a physical or sexual assault, or other crime. The purpose is to escape unhindered from a crime scene—which, presumably, is a goal of most criminals—and the specific nature of the underlying crime is simply irrelevant." (Citations omitted.) Id., 39–41.

Moreover, the court in *Banks*, in addressing the factors set forth in *Salamon* for determining whether conduct has independent criminal significance, stated "that, in cases such as this, in which it is undisputed that the perpetrator unlawfully restrained his victims following, and to facilitate his escape from the location of, a robbery, the *Salamon* factors typically will tip against the petitioner's claim." Id., 42. After examining

those factors in detail as applied to the facts of the case, the court in *Banks* concluded "that, when a perpetrator, having taken his victims' valuables, then leads them at gunpoint away from a highly visible commercial storefront and confines them in an isolated area of the store while he makes his escape, thereby exposing them to new and different risks, such conduct is not inherent in the nature of the robbery but, rather, indisputably has independent criminal significance." Id., 55–56.

Our decision in the present case is guided by our Supreme Court's decision in *Banks*. Here, the petitioner and Johnson already had taken the keys to Clarke's vehicle,

his laptop and credit card, and had made him disclose the personal identification number for the credit card, when they ordered him to get into his vehicle. Their conduct in pulling Clarke out of the building by his arms and pushing him into his car had nothing whatsoever to do with their robbery of his valuables, nor was it necessary for them to take Clarke's vehicle. As our Supreme Court in *Banks* explained: "The goal of a robbery is to take possession of another's property. Once that property has been taken by force, the purpose of leading the victims to a different, more isolated location and requiring that they remain there for some period of time is, undoubtedly, to facilitate the offender's escape from the premises, undetected and unobstructed." Id., 44. The petitioner's statement to the police regarding the New Britain case, which was dated October 25, 1999, and which had been admitted into evidence at the habeas trial, demonstrated that the petitioner's plan was to steal Clarke's car and to force him to come along so that Clarke could not call the police and identify the perpetrators. The restraint and movement of Clarke, therefore, were done to facilitate the petitioner's escape from the scene of the robbery, not to accomplish the robbery itself. As such, this conduct had independent

criminal significance. Moreover, even though the facts of the present case differ slightly from those in *Banks*, both cases involve a situation in which a "perpetrator removes [a victim] from the scene of [a] robbery and restrains [the victim] after having forcibly taken [the victim's] property . . . ." Id. We therefore are not persuaded by the petitioner's attempt to distinguish *Banks* from the present case.

Accordingly, we conclude, on the basis of the reasoning in *Banks*, that the habeas court properly determined that the absence of a *Salamon* instruction at the petitioner's criminal trial in the New Britain case constituted harmless error. The habeas court, after thoroughly addressing each of the *Salamon* factors as applied to the facts of the present case, made factual findings in connection therewith, which were not clearly erroneous, and its determination that those factors did not favor the petitioner was supported by the record. The absence of a *Salamon* instruction, thus, could not have substantially affected or influenced the jury's verdict.

The judgment is affirmed.

In this opinion the other judges concurred.

L. W. *v.* M. W.*
(AC 44101)
(AC 44184)

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

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgment of the trial court denying her postjudgment motion for contempt. The judgment of dissolution incorporated the parties' separation agreement, which required

* In accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018); we decline to identify any party protected or sought to be protected under a protective order or a restraining order that was issued or applied for, or others through whom that party's identity may be ascertained.

the defendant to pay the plaintiff a minimum of $3000 per month in unallocated alimony, with an additional amount owed based on the annual earnings of the defendant. In her contempt motion, the plaintiff alleged that the defendant failed and refused to comply with the court's order to pay her additional unallocated alimony based on his earned income in 2018. The defendant's 1099 form for 2018 showed his income was $159,079; the court, however, found that the defendant's income for 2018 was $135,569, from which the court deducted certain self-employment expenses, for a net income of $102,363. On this basis, the court held that the defendant did not owe the plaintiff additional alimony and was not in contempt. On appeal, the plaintiff claimed that the court incorrectly calculated the defendant's earned income for 2018. The trial court granted two other of the plaintiff's postjudgment motions for contempt, and the defendant filed a separate appeal. *Held*:

1. The trial court erred when it found that the defendant's earned income for 2018 was $135,569: it was evident that the parties intended the defendant's earned income to be the amount shown on his 1099 form, as the separation agreement provided that, upon written request from the plaintiff, the defendant was required to produce his paychecks and W-2 and/or 1099 forms reflecting earned income, and that amount for 2018 was $159,079; moreover, the court erred when it reduced the defendant's 2018 income to $102,363 by deducting the defendant's self-employment expenses, as the separation agreement contained no reference to and, thus, did not provide for, business deductions for tax purposes when calculating the defendant's earned income, and, as the language of the separation agreement was plain and unambiguous, there was no need to consider the definition of earned income in the federal statute (26 U.S.C. § 32 (c) (2) (A) (2018)) when interpreting the separation agreement.
2. The defendant could not prevail on his claim that the trial court erred in granting the plaintiff's motions for contempt:

a. This court declined to review the defendant's claim that the court abused its discretion when it granted the plaintiff's contempt motions on the basis that the record was inadequate for review; the defendant filed a Judicial Branch form pursuant to the rules of practice (§§ 63-4 (a) and 63-8 (a)) on which he wrote that he had decided not to order transcripts from the hearings on the plaintiff's motions for contempt and, in the absence of the transcripts, this court could not evaluate the defendant's arguments in support of his appellate claim without impermissibly resorting to speculation.

b. This court declined to review the defendant's claim that the court abused its discretion in ordering him to pay attorney's fees in connection with the plaintiff's motions for contempt on the basis that the record was inadequate for review; due to the defendant's failure to request transcripts, this court could not evaluate the trial court's reasoning for awarding attorney's fees to the plaintiff, and, contrary to the defendant's

claim, neither an affidavit of attorney's fees nor knowledge of the plaintiff's exact legal expenses was required to provide sufficient evidence of the reasonableness of the award.

Argued September 21—officially released November 2, 2021

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Malone, J.*; judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *M. Moore, J.*, granted in part the plaintiff's motions for contempt, and the plaintiff appealed to this court; subsequently, the court, *M. Moore, J.*, denied the defendant's motions to reargue, and the defendant appealed to this court; thereafter, this court consolidated the appeals. *Affirmed in part; reversed in part; further proceedings.*

Alexander Copp, with whom, on the brief, were *Rachel A. Pencu* and *Jenna T. Cutler*, for the appellant in Docket No. AC 44101 (plaintiff).

M. W., self-represented, the appellant in Docket No. AC 44184 (defendant).

Alexander Copp, with whom, on the brief, was *Rachel A. Pencu*, for the appellee in Docket No. AC 44184 (plaintiff).

Opinion

BRIGHT, C. J. These two appeals arise out of three separate postjudgment motions for contempt filed by the plaintiff, L. W. In Docket No. AC 44101, the plaintiff appeals from the judgment of the trial court denying her motion for contempt dated November 25, 2019, and filed on November 27, 2019 (November, 2019 motion), alleging that the trial court abused its discretion by failing to find the defendant, M. W., in contempt. In Docket No. AC 44184, the defendant appeals from the

judgments of the trial court granting the plaintiff's two motions for contempt dated October 24, 2019, and filed on October 25, 2019 (October, 2019 motions), alleging that the trial court abused its discretion by finding him in contempt.[1] We agree with the plaintiff in AC 44101 and decline to review the defendant's claims in AC 44184 because the defendant has failed to provide us with an adequate record. Accordingly, we reverse the judgment of the trial court denying the plaintiff's November, 2019 motion for contempt and remand the case for further proceedings on that motion, and we affirm the judgments of the trial court granting the plaintiff's October, 2019 motions for contempt.

The following facts and procedural history are relevant to both appeals. "The parties were married on November 27, 1996, and their marriage was dissolved on February 9, 2012. The judgment of dissolution incorporated the parties' [separation] agreement, which provides, in relevant part, that the defendant is to pay the plaintiff unallocated alimony until September 11, 2019, or until the plaintiff's death, remarriage, or cohabitation for more than three months, whichever event shall occur first. Pursuant to article 3.2 of the agreement, the defendant is required to pay the plaintiff a minimum of $3000 per month, with an additional amount owed based on the annual earnings of the defendant.[2] . . . The agreement also states in article 3.4 that in any year

[1] We note that the "JDNO notice" of the order granting the second October, 2019 motion and the "JDNO notice" of the order denying the November, 2019 motion each listed an incorrect entry number for the motion at issue. It is clear from the language of the court's orders that the court granted the second October, 2019 motion and denied the November, 2019 motion.

[2] "Specifically, the agreement provides that the defendant is to pay additional alimony as follows: 30 percent of his earned income in excess of $102,000 and less than $150,000; 20 percent of his earned income in excess of $150,000 and less than $200,000; and 0 percent of his earned income in excess of $200,000." *Winthrop* v. *Winthrop*, 189 Conn. App. 576, 579, 207 A.3d 1109 (2019).

in which the defendant does not pay the maximum annual alimony amount, he shall provide the plaintiff, upon written request, with copies of his quarterly paychecks and his year-end W-2 or 1099 forms reflecting earned income." (Footnote added; internal quotation marks omitted.) *Winthrop* v. *Winthrop*, 189 Conn. App. 576, 579–80, 207 A.3d 1109 (2019).

The agreement also addresses the possible eventuality of the parties' obligation to pay college expenses for the couple's two children, providing that "[t]he [c]ourt shall reserve jurisdiction to enter [an] order concerning post majority education support, as set forth under Connecticut General Statute[s] § 46-[5]6c." On March 27, 2019, the trial court entered an order for the parties' payment of postsecondary education support in which it required "the defendant to pay 60 percent of the maximum amount of the educational expenses for each minor child and the plaintiff to pay 40 percent."

In October, 2019, the plaintiff filed two postjudgment motions for contempt. In the first motion, the plaintiff alleged that "the defendant failed and refused to provide the plaintiff, or her counsel, with any documentation to establish his 2018 earned income."[3] In the second motion, the plaintiff alleged that the defendant had "failed and refused" to pay his share of their child's University of Rhode Island tuition, which forced the plaintiff to take out a loan to cover those expenses. Thereafter, in November, 2019, the plaintiff filed a third motion for contempt, alleging that the "defendant has failed and refused to comply with the court's order to pay the plaintiff any additional unallocated alimony

[3] According to the plaintiff, in 2018, the defendant did not pay the maximum amount of annual support. Thus, pursuant to the parties' separation agreement, the defendant was required to provide, upon written request from the plaintiff, "copies of his quarterly paychecks and his year-end W-2 or 1099 forms reflecting his earned income." The plaintiff requested this documentation on October 2, 2019.

based on the amount of his earned income for the year 2018 as required by the separation agreement . . . ."

In two separate orders dated April 21, 2020, the trial court granted both of the plaintiff's October, 2019 motions. The trial court further ordered the defendant "to pay counsel fees to the plaintiff in the amount of $2500 within 30 days" for each contempt finding. In a third order, also dated April 21, 2020, the trial court denied the plaintiff's November, 2019 motion for contempt. According to the court's order, "[t]he defendant was to pay the plaintiff 30 percent of earned income in excess of $102,000 and less than $150,000. . . . The motion for contempt filed by the plaintiff claims the defendant failed to pay the plaintiff additional alimony in 2018 based on this earned income. Pursuant to the defendant's tax return for 2018, the defendant had business income of $135,569. After [deducting] self-employment tax and self-employed health insurance, the defendant's income was $102,363." The court consequently concluded that, based on the total amount of the defendant's net income, as reflected in his tax return, the plaintiff was not entitled to any additional alimony and the defendant was not in contempt. The plaintiff thereafter appealed to this court from the judgment denying her November, 2019 motion for contempt.

On May 13, 2020, in response to the trial court's orders concerning the October, 2019 motions, the defendant filed two motions to reargue, alleging several factual and legal errors with the court's contempt findings. The trial court denied both motions, and the defendant appealed.

On May 22, 2020, in response to the trial court's order on her November, 2019 motion, the plaintiff filed a motion for articulation, seeking an explanation for how the court reached its conclusion that the defendant's earned income was $102,363, when the defendant's 1099

form for the year showed that his income was $159,079. The trial court denied the motion.

I

AC 44101

The plaintiff contends that the trial court erred when it denied her November, 2019 motion for contempt because the court incorrectly calculated the defendant's earned income for the year 2018. We agree.

We begin by setting forth the applicable standard of review and principles of law that guide our analysis. "It is well established that a separation agreement that has been incorporated into a dissolution decree and its resulting judgment must be regarded as a contract and construed in accordance with the general principles governing contracts." (Internal quotation marks omitted.) *McTiernan* v. *McTiernan*, 164 Conn. App. 805, 821, 138 A.3d 935 (2016). "A contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . If a contract is unambiguous within its four corners, the determination of what the parties intended by their contractual commitments is a question of law. . . . When the language of a contract is ambiguous, [however] the determination of the parties' intent is a question of fact, and the trial court's interpretation is subject to reversal on appeal only if it is clearly erroneous. . . . In interpreting contract items, we have repeatedly stated that the intent of the parties is to be ascertained by a fair and reasonable construction of the written words and that the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract." (Internal quotation marks omitted.) *Hirschfeld* v. *Machinist*, 181 Conn. App. 309, 322–23, 186 A.3d 771, cert. denied, 329 Conn.

913, 186 A.3d 1170 (2018). "The court will not torture words to impart ambiguity where ordinary meaning leaves no room for ambiguity. . . . Moreover, the mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous." (Internal quotation marks omitted.) *Parisi* v. *Parisi*, 315 Conn. 370, 383, 107 A.3d 920 (2015). Because resolution of the plaintiff's claim requires us to interpret the unambiguous applicable provisions of the agreement, our standard of review is plenary.

In *Winthrop* v. *Winthrop*, supra, 189 Conn. App. 582–83, an earlier appeal concerning the application of articles 3.2 and 3.4 of the parties' agreement, this court had an opportunity to interpret the term " 'earned income,' " as used in the agreement. In that case, as in the present case, the plaintiff had filed a motion for contempt claiming that the defendant had failed to pay additional alimony based on his earned income. Id., 580. The plaintiff's motion in that case related to the defendant's 2016 income, which was reported on a W-2 form from the defendant's employer. Id. Although there was no provision in the agreement that authorized the deduction of business expenses from his stated W-2 form income to determine his 2016 earned income, the defendant argued that he owed no additional alimony because, as a commissioned salesperson, he had certain business expenses that needed to be deducted from his W-2 income to accurately state his true earned income. Id., 583–84. The trial court denied the plaintiff's motion for contempt but rejected the defendant's argument that he was entitled to deduct certain business expenses when determining earned income. Id., 580–81. The court concluded that earned income was defined in the separation agreement as the figure set forth on his W-2 form and ordered the defendant to pay additional alimony based on that figure. Id.

On appeal, this court agreed with the trial court and concluded "that the term 'earned income' as used in the parties' agreement is unambiguous." Id., 582. More specifically, the term "earned income" meant the amount shown on the defendant's W-2 form because "the agreement provides that, upon written request from the plaintiff, the defendant is required to produce his paychecks and W-2 and/or 1099's reflecting *earned income*. . . . The inclusion of this provision evinces a clear intent by the parties that the income provided on the defendant's W-2 [form] is his earned income for the purpose of ascertaining his additional alimony obligations." (Emphasis in original; internal quotation marks omitted.) Id., 582–83.

In the same opinion, this court also considered the defendant's argument that, because it was necessary for him to incur significant expenses in order to do his job, he should be allowed to deduct those expenses from his earned income. Id., 583–84. We disagreed and held that, "[a]lthough [the defendant] may be permitted for the purposes of calculating his income tax liability . . . to deduct the expenses that he incurs in connection with his employment, these deductions are nonetheless inconsequential in calculating his earned income . . . ." Id., 584.

Our analysis in *Winthrop* compels the same result in the present case. Although in 2018 the defendant was not an employee who received a W-2 form, his earned income for 2018 was reported on a 1099 form. As we noted in *Winthrop*, the separation agreement provides that, "upon written request from the plaintiff, the defendant is required to produce his paychecks and W-2 *and/or 1099's* reflecting earned income." (Emphasis altered; internal quotation marks omitted.) Id., 582. Just as we concluded in *Winthrop* that this language unambiguously evinces a clear intent by the parties that the defendant's " 'earned income,' " as used for purpose of calculating additional alimony, is the amount listed on the

defendant's W-2 form; id., 582–83; it similarly evinces the same intent if the defendant receives a 1099 form instead of or in addition to a W-2 form.

Furthermore, as this court held in *Winthrop*, any business or self-employment deductions that the defendant might make for tax purposes are irrelevant when calculating his earned income under the separation agreement. Id., 584. According to the parties' agreement, the defendant's "earned income" is the amount reflected on his W-2 and/or 1099 form. "Earned income," as unambiguously set forth in the agreement, contains no reference to, and, thus, does not include, business deductions for tax purposes. Therefore, under the terms of the agreement, any deductions made by the defendant for tax reasons are "inconsequential in calculating his earned income . . . ." Id.

We also are not persuaded by the defendant's argument[4] that, because in 2018 he was a self-employed independent contractor and not a W-2 employee, he was entitled to deduct certain business expenses from his gross income to arrive at his net income. It appears that in making this argument the defendant is relying on this court's reference in *Winthrop* to the Internal Revenue Code's definition of " 'earned income.' " See 26 U.S.C. § 32 (c) (2) (A) (2018).[5] After quoting this

[4] The defendant did not file an appellee's brief in AC 44101. As a result, this court ordered that the appeal would "be considered on the basis of the plaintiff-appellant's brief and the record as defined by Practice Book § 60-4 and, pursuant to Practice Book § 70-4, the defendant-appellee will not be permitted to argue." Despite this order, the defendant, at the time that AC 44101 was called for argument, objected to the court's order that he was not permitted to argue in that appeal. The court overruled his objection. Nonetheless, during his oral argument in AC 44184, the defendant argued in opposition to the plaintiff's claim in AC 44101. Although such argument was inconsistent with this court's order in AC 44101, we, in the exercise of our discretion, have considered the defendant's oral argument in analyzing the plaintiff's claim.

[5] "The term 'earned income' means—(i) wages, salaries, tips, and other employee compensation, but only if such amounts are includible in gross income for the taxable year, plus (ii) the amount of the taxpayer's net

definition, the court stated: "Pursuant to this definition, earned income is the gross earnings received as compensation from employment and the net earnings received from self-employment." *Winthrop* v. *Winthrop*, supra, 189 Conn. App. 583. Given the defendant's oral argument before us in the present appeal, it might be that, although there is no language in the agreement referring to the Internal Revenue Code's definition of earned income, the defendant relied on this language in switching his status from a W-2 employee in 2016 to a 1099 contractor in 2018.

The defendant's reliance on this court's general reference in *Winthrop* to the Internal Revenue Code's definition of earned income is misplaced. The court's reference, even assuming arguendo that it was somehow relevant to the specific terms of the agreement, was, at most, purely dicta. See id., 583 n.2. Indeed, this court mentioned that provision to distinguish *Winthrop* from a different case wherein a trial court found that the parties' agreement was ambiguous as to the definition of earned income and thus relied on the Internal Revenue Code's definition of " 'gross earned income' " to resolve that ambiguity. Id.; see also *Lagasse* v. *Lagasse*, Superior Court, judicial district of Stamford-Norwalk, Docket No. FA-08-4013511-S (January 16, 2018). Because the provision of the agreement at issue in *Winthrop* was not ambiguous, there was no need to consider the Internal Revenue Code when interpreting the agreement. *Winthrop* v. *Winthrop*, supra, 538 n.2. The same is true in the present appeal, where the same unambiguous earned income language in the agreement is at issue. Thus, there is no need to resort to the Internal Revenue Code to determine what that term means. See

earnings from self-employment for the taxable year (within the meaning of section 1402 (a)), but such net earnings shall be determined with regard to the deduction allowed to the taxpayer by section 164 (f)." 26 U.S.C. § 32 (c) (2) (A) (2018).

Schimenti v. *Schimenti*, 181 Conn. App. 385, 397, 186 A.3d 739 (2018) ("[w]hen only one interpretation of a contract is possible, the court need not look outside the four corners of the contract" (internal quotation marks omitted)).

Applying the plain and unambiguous language of the parties' agreement, we conclude that the trial court erred when it found, based on the defendant's tax return, that the defendant's earned income for 2018 was $135,569, instead of the $159,079 that was listed on the defendant's 1099 form. We further conclude that the trial court erred when it reduced the defendant's earned income to $102,363 by deducting the defendant's self-employment expenses from the amount of the defendant's 1099 form earned income.

Given the unambiguous language of the separation agreement, we conclude that the defendant's 2018 earned income was the amount listed on his 1099 form for that tax year: $159,079. Given that amount, pursuant to the parties' agreement it is clear that the defendant owes the plaintiff additional alimony from 2018.[6] Nevertheless, whether the defendant's failure to pay the required amount was wilful is a question of fact for the trial court. We therefore reverse the trial court's judgment denying the plaintiff's November, 2019 motion for contempt and remand the matter to the trial court with direction to hold a new contempt hearing on that motion to determine whether the defendant's failure to comply with the separation agreement was wilful, and, in any event, to determine the amount of additional alimony owed to the plaintiff.

II

AC 44184

A

The defendant contends that the trial court abused its discretion when it granted both of the plaintiff's

[6] See footnote 2 of this opinion.

October, 2019 motions for contempt. With respect to the first motion, the defendant argues that the court erred because it (1) never informed him of his right to counsel or that incarceration was not a possibility, and (2) found him in contempt even though he eventually provided the plaintiff with the requested tax documents. As for the second motion, the defendant asserts that the court erred because it (1) never informed him of his right to counsel or that incarceration was not a possibility, and (2) found him in contempt even though he had a payment plan in place with the University of Rhode Island and was current with that plan. We decline to review the defendant's claims due to an inadequate record.

Practice Book § 61-10 (a) provides: "It is the responsibility of the appellant to provide an adequate record for review. The appellant shall determine whether the entire record is complete, correct and otherwise perfected for presentation on appeal." Further, "[t]his court does not presume error on the part of the trial court; error must be demonstrated by an appellant on the basis of an adequate record." (Internal quotation marks omitted.) *Lucarelli* v. *Freedom of Information Commission*, 136 Conn. App. 405, 410, 46 A.3d 937, cert. denied, 307 Conn. 907, 53 A.3d 222 (2012). "[A]n appellate tribunal cannot render a decision without first fully understanding the disposition being appealed. . . . Our role is not to guess at possibilities, but to review claims based on a complete factual record . . . . Without the necessary factual and legal conclusions . . . any decision made by us respecting [the claims raised on appeal] would be entirely speculative." (Internal quotation marks omitted.) *Cianbro Corp.* v. *National Eastern Corp.*, 102 Conn. App. 61, 72, 924 A.2d 160 (2007). "If an appellant fails to provide an adequate record, this court may decline to review the appellant's claim." *Federal National Mortgage Assn.* v. *Buhl*, 186 Conn.

App. 743, 753, 201 A.3d 485 (2018), cert. denied, 331 Conn. 906, 202 A.3d 1022 (2019). "[A]lthough we afford self-represented parties some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law." (Internal quotation marks omitted.) *Lucarelli* v. *Freedom of Information Commission*, supra, 410.

Our analysis of these claims begins and ends with our consideration of the adequacy of the record provided by the defendant. After examining the record provided to us, we conclude that the defendant has failed to provide an adequate record that would enable our review of his claims on appeal. In the present case, the trial court held multiple hearings on the plaintiff's two October, 2019 motions for contempt.[7] In his brief, the defendant contends that the trial court (1) failed to inform him of certain legal rights on the record, and (2) made several erroneous factual findings. On September 8, 2020, however, he submitted a JD-ES-38 form pursuant to Practice Book §§ 63-4 (a) and 63-8 (a), on which he wrote, "I have decided to not order the transcript[s] for this case." In the absence of these transcripts, we cannot evaluate the defendant's arguments in support of his appellate claims without impermissibly resorting to speculation. See *Berger* v. *Deutermann*, 197 Conn. App. 421, 425–26, 231 A.3d 1281 (declining to consider plaintiff's claims on appeal when plaintiff failed to order transcripts from trial), cert. denied, 335 Conn. 956, 239 A.3d 318 (2020). Accordingly, we decline to review these claims.

B

Last, the defendant contends that the court improperly ordered him to pay attorney's fees in connection

[7] The parties first appeared in court on the plaintiff's October, 2019 motions on December 16, 2019. That hearing was continued, allegedly so that the defendant could secure legal counsel. The parties later appeared in court on February 24, 2020, to argue the motions.

with the plaintiff's two October, 2019 motions for contempt. We again decline to review this claim due to an inadequate record.

General Statutes § 46b-87 provides in relevant part that, "[w]hen any person is found in contempt of an order of the Superior Court . . . the court may award to the petitioner a reasonable attorney's fee . . . such sums to be paid by the person found in contempt . . . ." We review a trial court's ruling on attorney's fees for an abuse of discretion. *Gil* v. *Gil*, 110 Conn. App. 798, 802, 956 A.2d 593 (2008). Under the abuse of discretion standard, "[w]e will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did." (Internal quotation marks omitted.) *Landry* v. *Spitz*, 102 Conn. App. 34, 59, 925 A.2d 334 (2007).

In the present case, we cannot review whether the attorney's fees awarded were proper because, due to the defendant's failure to request the transcripts, we are unable to ascertain the court's reasoning for the award. As noted in part II A of this opinion, "[i]t is a well established principle of appellate procedure that the appellant has the duty of providing this court with a record adequate to afford review." (Internal quotation marks omitted.) *Berglass* v. *Berglass*, 71 Conn. App. 771, 789, 804 A.2d 889 (2002). "If an appellant fails to provide an adequate record, this court may decline to review the appellant's claim." *Federal National Mortgage Assn.* v. *Buhl*, supra, 186 Conn. App. 753. Accordingly, we decline to address the defendant's claim that the court's award of attorney's fees was an abuse of discretion. See id.

We also note, contrary to the defendant's argument on appeal, that an affidavit of attorney's fees is not required to provide sufficient evidence of the reasonableness of an award. See *Smith* v. *Snyder*, 267 Conn. 456, 480, 839 A.2d 589 (2004). Trial courts may, instead, award such fees on any number of factors including "general knowledge of the case, sworn affidavits or other testimony, itemized bills, and the like." Id.; see also *Gil* v. *Gil*, supra, 110 Conn. App. 807 (in making attorney's fees determination, court is allowed to rely on familiarity with complexity of legal issues involved, as well as court's experience and legal expertise). Moreover, because an award of attorney's fees in a contempt proceeding is punitive, not compensatory, knowledge of the prevailing party's exact legal expenses is not required for the trial court to properly determine the amount of an award. See *Gil* v. *Gil*, supra, 807; see also *Pace* v. *Pace*, 134 Conn. App. 212, 218, 39 A.3d 756 (2012) ("[m]oreover, because the award of attorney's fees pursuant to § 46b-87 is punitive, rather than compensatory, the court properly may consider the defendant's behavior as an additional factor in determining both the necessity of awarding attorney's fees and the proper amount of any award").

The judgment in Docket No. 44101 denying the plaintiff's November, 2019 motion for contempt is reversed, and the case is remanded with direction to conduct a hearing on that motion; the judgments in Docket No. 44184 granting the plaintiff's October, 2019 motions for contempt are affirmed.

In this opinion the other judges concurred.

SAVIN GASOLINE PROPERTIES, LLC *v.* COMMISSION ON THE CITY PLAN OF THE CITY OF NORWICH ET AL. (AC 44090)

Prescott, Suarez and Clark, Js.

Syllabus

The defendant commission granted various permits and approvals to the applicant, C Co., to construct and operate a gasoline station on property it leased. The plaintiff, S Co., the owner of a gasoline station near the property C Co. leased, appealed the commission's decision to the trial court. The trial court affirmed the decision of the commission after rejecting the merits of S Co.'s claim and dismissed the appeal, from which S Co. appealed to this court. Thereafter, during the pendency of the appeal, C Co. notified this court that it had terminated its lease and was no longer interested in pursuing the project. *Held* that S Co.'s appeal from the trial court was moot because this court could no longer grant S Co. any practical relief; accordingly, because the appeal became moot through no fault of S Co., this court granted S Co.'s motion for vacatur and vacated the judgment of the trial court and the commission.

Argued September 7—officially released November 2, 2021

Procedural History

Appeal from the decision of the named defendant granting, inter alia, a special permit application, brought to the Superior Court in the judicial district of New London, where Upcountry II, LLC, was cited in as an additional party defendant; thereafter, the matter was withdrawn as to the defendant Upcountry, LLC; subsequently, the matter was tried to the court, *Knox, J.*; judgment dismissing the appeal, from which the plaintiff, on the granting of certification, appealed to this court. *Appeal dismissed*; *judgment and decision vacated.*

Harry B. Heller, with whom was *Andrew J. McCoy*, for the appellant (plaintiff).

Michael E. Driscoll, with whom, on the brief, was *Cassie N. Jameson*, for the appellee (named defendant).

Opinion

PER CURIAM. The plaintiff, Savin Gasoline Properties, LLC (Savin), appeals from the judgment of the trial court dismissing its appeal of a decision of the defendant Commission on the City Plan of the City of Norwich (commission).[1] In this zoning action, the commission granted a special permit, site plan approval, and an approval of gasoline station location pursuant to General Statutes § 14-321 for a gasoline station and convenience store to be located in Norwich on property leased by the applicant, Cumberland Farms, Inc. (Cumberland).[2] Savin owns a gasoline station located at the same intersection at which Cumberland sought to construct and operate its gasoline station. The trial court upheld the decision of the commission after rejecting the merits of Savin's claim and dismissed Savin's appeal.

During the pendency of this appeal, Cumberland notified this court that it had terminated its lease and was no longer interested in pursuing the project. As a result, we instructed the parties to be prepared to address at oral argument whether, in light of Cumberland's intention not to proceed on its plan to develop the property at issue, the appeal should be dismissed as moot because this court could no longer grant Savin any practical relief. At oral argument, the court also indicated that it would entertain a motion for vacatur should one be filed by Savin. Savin subsequently filed a motion for vacatur arguing that, in the event this court determined that its appeal was moot, it should order the November 26, 2019 judgment of the trial court vacated with instruction that the trial court order the commission to vacate the special permit, corresponding site

[1] This court granted Savin's petition for certification to appeal filed in accordance with General Statutes §§ 8-8 and 8-9.

[2] The owners of the properties involved in the project at issue, Upcountry II, LLC, Franklin Development Funds II, LLC, and Agranovitch Real Estate Holding Company, LLC, were additional party defendants.

plan and § 14-321 approvals. The commission filed a response indicating that it believed that the appeal was moot and raising no objection to vacatur.[3]

Having considered the briefs and oral arguments of the parties, we conclude that the appeal is moot and, accordingly, dismiss the appeal. Furthermore, because we conclude that this appeal became moot through no fault of Savin; see *State* v. *Boyle*, 287 Conn. 478, 489, 949 A.2d 460 (2008); *In re Jessica M.*, 250 Conn. 747, 749, 738 A.2d 1087 (1999); we grant Savin's motion for vacatur and vacate the judgment of the trial court and remand with direction to the trial court to order the commission to vacate the special permit, corresponding site plan and § 14-321 approvals.

The appeal is dismissed and the judgment of the trial court and the decision of the commission are vacated.

RAMON LOPEZ *v.* COMMISSIONER OF CORRECTION (AC 43240)

Alvord, Clark and Norcott, Js.

Syllabus

The petitioner, who had been convicted of murder, two counts of attempt to commit murder, and two counts of assault in the first degree, sought a writ of habeas corpus, claiming that the state failed to disclose certain information during his criminal case, that his first habeas counsel rendered ineffective assistance, and alleging a claim of actual innocence. The habeas court rendered judgment denying the habeas petition, and the petitioner, on the granting of certification, appealed to this court. *Held* that the judgment of the habeas court denying the petition for a writ of habeas corpus was affirmed; because the habeas court's memorandum of decision thoroughly addressed the petitioner's arguments raised in this appeal, this court adopted the habeas court's well reasoned

[3] Cumberland and the property owners; see footnote 2 of this opinion; have not filed any objection to the motion for vacatur.

decision as a proper statement of the relevant facts and applicable law on the issues.

Argued September 21—officially released November 2, 2021

Procedural History

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

Michael W. Brown, for the appellant (petitioner).

Timothy F. Costello, senior assistant state's attorney, with whom, on the brief, were *Joseph T. Corradino*, state's attorney, and *Emily Dewey Trudeau*, assistant state's attorney, for the appellee (respondent).

Opinion

PER CURIAM. The petitioner, Ramon Lopez, 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 rejected (1) his claim that the state, in violation of *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), failed to disclose certain information during the criminal case, (2) his claim that his first habeas counsel rendered ineffective assistance, and (3) his actual innocence claim. We affirm the judgment of the habeas court.

After a jury trial, the petitioner was convicted of murder in violation of General Statutes § 53a-54a (a), two counts of attempt to commit murder in violation of General Statutes §§ 53a-49 (a) and 53a-54a (a), and two counts of assault in the first degree in violation of General Statutes § 53a-59 (a) (5). He was sentenced to a total effective term of 100 years of incarceration. On

direct appeal, our Supreme Court affirmed the judgment of conviction. *State* v. *Lopez*, 280 Conn. 779, 782–83, 911 A.2d 1099 (2007). In 2005, the petitioner brought his first habeas action claiming ineffective assistance of his criminal trial counsel. The court denied habeas relief. *Lopez* v. *Commissioner of Correction*, Superior Court, judicial district of Tolland, Docket No. CV-05-4000857-S (January 4, 2012). This court affirmed the denial per curiam. *Lopez* v. *Commissioner of Correction*, 150 Conn. App. 905, 93 A.3d 181, cert. denied, 314 Conn. 922, 100 A.3d 853 (2014).

The petitioner filed this second petition for a writ of habeas corpus in July, 2012. The petitioner pursued claims of, inter alia, a *Brady* violation, ineffective assistance of his first habeas counsel, and actual innocence. Following a trial, the habeas court, *Sferrazza, J.*, issued a memorandum of decision denying the amended petition for a writ of habeas corpus. On May 31, 2019, the court granted the petition for certification to appeal.

On appeal, the petitioner claims that the court improperly rejected his claims of a *Brady* violation, ineffective assistance of his first habeas counsel, and actual innocence.[1] Specifically, the petitioner argues

[1] The petitioner also claims on appeal that the court abused its discretion in dismissing several related claims prior to the habeas trial. Prior to trial, a good cause hearing was held relating to several counts of the fourth amended petition. At the hearing, the petitioner sought to present evidence that would show that, at his criminal trial, a witness had falsely testified about an alleged cooperation agreement or similar understanding. However, the habeas court, *Oliver, J.*, dismissed the claims. The petitioner urges us to conclude that there was good cause to support these claims, and, therefore, the habeas court erred in dismissing them. Subsequently, the petitioner added claims involving the same alleged false testimony to his seventh amended petition. At the outset of trial, the habeas court, *Sferrazza, J.*, dismissed those claims. On appeal, the petitioner argues that the claims were improperly dismissed.

Additionally, the petitioner claims on appeal that the prosecutor at the petitioner's criminal trial was improperly exempted from the habeas court's order sequestering the witnesses. The petitioner argues that the habeas court abused its discretion "by allowing the prosecutor from the criminal trial, who was alleged in the amended petition to have violated the petition-

that "[t]he petition should have been granted on the *Brady* claim because the state's disclosure . . . was inadequate, and the authority the habeas court referenced to support its conclusion is too distinguishable to hold persuasive weight," the habeas court incorrectly concluded that the first habeas counsel was effective, and "the habeas court's conclusion that the petitioner had not proven his innocence was based upon several critical legal errors."

We have examined the record and considered the briefs and arguments of the parties, and conclude that the judgment of the habeas court should be affirmed. In denying the petition, the court issued a thorough and well reasoned memorandum of decision, which is a proper statement of the relevant facts and the applicable law on the issues. We therefore adopt the decision as our own. See *Lopez* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-12-4004836-S (May 1, 2019) (reprinted at 208 Conn. App. 519, A.3d). "It would serve no useful purpose for this court to repeat the discussion therein contained." *Norfolk & Dedham Mutual Fire Ins. Co.* v. *Wysocki*, 243 Conn. 239, 241, 702 A.2d 638 (1997); see also *Shaheer* v. *Commissioner of Correction*, 207 Conn. App. 519, 453, A.3d (2021).

The judgment is affirmed.

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er's constitutional rights, to participate closely in the habeas trial over the petitioner's objection" because exempting the prosecutor from the sequestration order "violated the petitioner's statutory and constitutional rights."

After a careful review of the record, as well as the parties' briefs and relevant law, we are convinced that these claims lack merit and that the habeas court acted properly when it dismissed the claims and excluded the prosecutor from the sequestration order.

APPENDIX

RAMON LOPEZ *v.* WARDEN*

Superior Court, Judicial District of Tolland
File No. CV-12-4004836-S

Memorandum filed May 1, 2019

Proceedings

Memorandum of decision on amended petition for writ of habeas corpus. *Petition denied.*

Michael W. Brown and Joshua Grubaugh, for the petitioner.

Emily D. Trudeau, assistant state's attorney, for the respondent.

Opinion

SFERRAZZA, J. The plaintiff, Ramon Lopez, seeks habeas corpus relief from a total, effective sentence of 100 years of imprisonment, imposed after a jury trial, for the crimes of murder, two counts of attempted murder, and two counts of assault in the first degree. Our Supreme Court affirmed the judgment of conviction on direct appeal. *State* v. *Lopez*, 280 Conn. 779, 911 A.2d 779 (2007).

The petitioner filed a previous habeas action attacking the effectiveness of his criminal defense counsel, Attorney Lawrence Hopkins. For sentencing, Attorney Robert Berke replaced Attorney Hopkins, and Attorney Berke's representation was not the subject of the first habeas case. On January 4, 2012, Judge Fuger denied habeas corpus relief. *Lopez* v. *Commissioner of Correction*, Superior Court, judicial district of Tolland, Docket No. CV-05-4000857-S (January 4, 2012). The

* Affirmed. *Lopez* v. *Commissioner of Correction*, 208 Conn. App. 515, A.3d (2021).

Appellate Court affirmed that decision, per curiam. *Lopez* v. *Commissioner of Correction*, 150 Conn. App. 905, 93 A.3d 181, cert. denied, 314 Conn. 922, 100 A.3d 853 (2014).

In the present case, the petitioner pursues claims of ineffective assistance of defense counsel and previous habeas counsel, Attorneys Thomas P. Mullany III and David Rozwaski; a *Brady* violation; see *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); and a claim of actual innocence. Other grounds for relief were previously dismissed or have not been pursued and are deemed abandoned.

Because of the unusually complicated factual circumstances and scenarios presented by the evidence and the complex legal issues propounded, the court has permitted oversized briefs and granted numerous extensions of time to file such briefs. The petitioner's counsel has described the potential factual and legal issues as "numerous, complicated, [and] wide-ranging." Counsel has also noted that the record is "fairly voluminous" and acknowledged that the petitioner's third-party culpability theory is "at first counterintuitive . . . ." These observations appear apposite.

The court has reviewed the evidence in this case in great detail, including transcripts of the criminal trial and the first habeas case and police investigation and interview reports pertaining to multiple incidents. In order to set the stage properly and promote a fuller understanding of the factual and legal questions to be resolved, the court adopts a somewhat peculiar format in this memorandum and hopes that these aspirations can be attained.

First, the court provides a nonexhaustive glossary of names, aliases, and sobriquets to facilitate a comprehensive explanation of the several relationships, locations, and events that are pertinent to the court's decision.

The petitioner: Ramon Lopez, a/k/a "Buttafuco."

The Pettway store: Located at the northwest corner of the intersection of Stratford Avenue and Fifth Street in Bridgeport. It is variously referred to as an all-night convenience store, a liquor store, and a grocery store.

Manual Rosado: a/k/a Kevin Anderson and "Cricket." One of the shooting victims in the Pettway store incident of February 2, 2002.

Shariff Hakeem-Abdul: a/k/a "Polo" and Lonnie Rosado. The deceased victim of the Pettway store shooting and brother of Manual Rosado.

Robert Payton (now deceased): "Rob." A friend of Manual Rosado, brother of Tony Payton, and cousin to Brad Rainey.

Tony Payton: "Tone" or "Tonny." Brother of Robert Payton and a purported witness to the Pettway store shooting of February 2, 2002. Walks with a pronounced limp.

Gary Burton: Another shooting victim of the Pettway store shooting and acquaintance of Robert Payton.

John Dawson: Purported witness to the February 2, 2002 shooting and/or aftermath.

Eddie Hilton: Purported witness to the February 2, 2002 shooting and/or aftermath.

Desiree Jones: Friend of Gary Burton and purported witness to his shooting and/or aftermath.

Keaga Johnson: Friend of Gary Burton and purported witness to his shooting and/or aftermath.

Francisco Soares: "Cisco." An acquaintance of Gary Burton and purported witness to his shooting and/or aftermath.

Kenny Soares: Brother of Francisco Soares and acquaintance of Gary Burton.

John Soares: "Jay"; "Big Jay." Acquaintance of Gary Burton and cousin to Francisco Soares and purported witness to his shooting.

John Santos: "Little Jay." Acquaintance of Gary Burton.

Michael Lockhart: a/k/a Michael Pettway; "Chef." Possibly one of the gunmen at the February 2, 2002 shooting.

Bernie Gethers: "Tank."

Lou Diamond: Possible a/k/a Troy Lopez. Alleged companion to Chef at Pettway store on February 2, 2002, and possible gunman.

Tajah McClain: "Kaiser"; "Kiser"; "Boo." Possible gunman at Pettway store shooting. Walks with a limp.

April Edwards: A close friend of Tony Payton and potential witness to the February 2, 2002 shooting, but never called to testify in criminal case or either habeas cases.

Michael Jackson: Purported witness to February 2, 2002 shooting and/or aftermath.

Bob Kapel (Capel): Purported witness to February 2, 2002 shooting and/or aftermath.

Jose Rivera: "Tweety." Possible associate of the petitioner.

"Pooh" or "Phoo": Possibly present at February 2, 2002 shooting.

Vincent Wilson: "Fato"; "Fatol." Brad Rainey's brother-in-law.

Brad Rainey: Possibly a/k/a Brad Payton. Cousin of Robert and Tony Payton.

Donna Jones: Purportedly heard February 2, 2002 shooting. Acquaintance of Manual Rosado.

"Weesa": Female acquaintance of Robert Payton and the petitioner.

Irell Pettway: "Country."

P.T. Barnum Apartments: Housing facility on Anthony Street, Bridgeport.

Jerry Kollock: Convicted of January 27, 2002 home invasion at Colbert apartment at P.T. Barnum complex. Companion to Randy Armstrong.

Keisha Bowles: Kollock's girlfriend.

Randy Armstrong: "Little Biscuit"; "L B." Friend of Kollock, "Fato," and Brad Rainey. Shot in the foot on January 24, 2002, at Greens housing complex. Allegedly shot accidently by the petitioner.

Nakina Goff: Randy Armstrong's girlfriend.

Barbie Colbert: Victim of P.T. Barnum home invasion of January 27, 2002.

Davis Brown: Another victim at Colbert apartment.

Latosha DelGiudice: "Natasha"; "Tosha"; Tasha." Brad Rainey's girlfriend and Shayla DelGiudice's sister.

Lakisha Banks: Friend of Kollock.

Kiva Scutter: "Aunt Kiva." Colbert's neighbor.

Shonda Upchurch: Sister of Vincent Wilson and go-between/mediator for disputants at P.T. Barnum housing complex.

Javen Eagles: "Rat." Drifter and friend of Colbert.

Cedelice Davis: Brad Rainey's friend.

Fifi: Brad Rainey's cousin.

Marcus Mahoney: Caucasian friend of "Polo." Like a brother to Polo and possible partner in illicit drug business with him.

The court now describes the potential evidence as to three incidents from which one can reasonably glean the following details. These putative facts are derived from police investigative notes and reports, hearsay statements contained therein, as well as evidence introduced at the petitioner's criminal trial and earlier habeas trial. Consideration of information included, or logically deducible, from these sources is necessary because the petitioner's *Brady* violation claims, as well as the ineffective assistance allegations, require scrutiny of the information reasonably available to any of the petitioner's counsel and/or imputable to the prosecuting authority.

RANDY ARMSTRONG SHOOTING

During the early hours of January 25, 2002, Armstrong was shot in the foot. His companion, Jerry Kollock, initially drove Armstrong for medical care, but they decided to stop at Armstrong's sister's home first. After she refused to join them on the trip to the hospital, Kollock and Armstrong drove to the home of Armstrong's girlfriend, Nakina Goff. Goff agreed to accompany them to the hospital.

When initially questioned by the police regarding how the injury occurred, Armstrong and Goff related a fictitious tale that the couple had just left Goff's residence on foot when unidentified gunmen emerged from a car and attempted to rob them. They stated the robbers forced Armstrong to lie on the ground. When the robbers ascertained that Armstrong had no money, they returned to their vehicle. Before departing, however,

the assailants fired a shot that struck Armstrong in the foot.

Armstrong and Goff fabricated this scenario because both Armstrong and Kollock were on parole and had traveled beyond the geographic limits specified by the parole conditions. Because Goff's apartment was closer to the area permitted by the terms of their parole, Armstrong and Kollock hoped that such a minor transgression would be overlooked.

Eventually, Goff told the police a different, and presumably truer, story. Armstrong and Kollock had visited the Greens housing complex, where Kollock and others drank and ingested drugs. While intoxicated, some members of the group exuberantly fired guns in the air. Armstrong told Goff that, as a consequence, the petitioner had accidently shot him.

Armstrong left the hospital during the afternoon of that same day, January 25, 2002. He used a cane to facilitate walking.

At around 2 o'clock that afternoon, Kollock's girlfriend, Keisha Bowles, drove Kollock and Armstrong to Goff's home. Later, Bowles and Kollock returned to pick up Armstrong so that Kollock and Armstrong could meet with their parole officers. After these appointments concluded, Bowles and Kollock dropped Armstrong off at his home.

The next day, January 26, 2002, at around 1 p.m., Armstrong and Goff argued, and Goff left from Armstrong's home to go to her own residence. Later that day, they reconciled, and she and Armstrong talked, by phone, through the night.

The following day, January 27, 2002, at around 8 a.m., Bowles arrived at Goff's home looking for Kollock. Bowles thought Armstrong might know of Kollock's whereabouts. Bowles told Goff that Kollock had taken

her car the night before, never returned, and that she received a phone call from Latosha DelGiudice, the girlfriend of Brad Rainey, that Bowles' car was stranded in the East End section of Bridgeport.

When Bowles went to retrieve her car, she found that it was unlocked, the keys were missing, and the tires had been flattened. She sought out Kollock and wanted Armstrong to assist her in that endeavor. Goff called Armstrong, but Armstrong's sister answered and told Goff that Armstrong was asleep and that she had not seen Kollock.

Goff asserted that she spent the evening of January 26 to 27, 2002, at Armstrong's residence and returned to her own home around 8 a.m. that morning.

P.T. BARNUM HOME INVASION

About two hours earlier, around 6 a.m. on January 27, 2002, Barbie Colbert was asleep in her residence, which was Apartment 108 of the P.T. Barnum Apartments. Sleeping in her bed with her were three of her children, ages seven, five, and four years. Colbert's thirteen year old son was asleep on a couch in the living room, and her seventeen year old stepdaughter slept in another bedroom. Another relative, Davis Brown, was watching television in the living room.

Earlier that morning, a neighbor, Kiva Scutter, visited Colbert's apartment and had awakened Brown. Scutter then left and announced that she expected to return shortly. When she exited Colbert's apartment, she left the front door to that apartment unlocked.

Suddenly, two armed men rushed into Colbert's apartment and demanded money. Brown recognized Jerry Kollock as one of the robbers. Brown knew Kollock's family. Brown believed that the second gunman was Randy Armstrong. Both gunmen had concealed their lower faces with masks or clothing, and Kollock

shoved a semiautomatic pistol into Brown's mouth while ordering Brown to take the gunmen into Colbert's bedroom to awaken her. Brown complied.

At first, Colbert assumes Brown was joking when he roused her with the news that armed men wanted to rob them. The gunmen forced Brown onto Colbert's bed. They compelled Brown and Colbert to refrain from looking at them. Kollock struck Brown in the head four or five times, causing Brown to bleed profusely. Colbert produced a pillowcase containing $180 and offered it to the robbers. Kollock told his accomplice to search the apartment, and his companion ransacked the residence. The robbers also inquired about the whereabouts of "Rat," Vincent Wilson.

When the gunmen first accosted Brown in the living room, Colbert's thirteen year old son awakened and arose. Kollock pointed his weapon at the boy and directed him to remain still. The boy froze, but he was in position to observe the entire episode.

One of the younger children in Colbert's bed warned, "Mommy don't move! They have guns!" As a result of the pistol-whipping of Brown and fear for their lives, Colbert screamed.

The scream and commotion brought Colbert's seventeen year old stepdaughter out of her bedroom and to the doorway of Colbert's bedroom. The girl tried to flee, and the gunmen pursued her. She tripped and fell, and Kollock's companion pushed his pistol into her mouth and then pressed it forcibly into her eye.

While so subjugated, Kollock reached underneath the teenager's underwear and probed her vagina, possibly searching for concealed drugs.

At that time, Colbert's five year old daughter ran from the bedroom toward the kitchen. She hid under

a kitchen table. Kollock demanded she come out, but she bravely refused.

A third accomplice, identified by Brown as Brad Rainey, entered the apartment and urged Kollock and the other gunman to leave. Kollock or his companion then fired a shot toward the kitchen table. The bullet struck a cabinet about three feet from the table. The three intruders then exited.

Brown and the thirteen year old ran to a window and saw two cars quickly drive out of parking spaces directly in front of Colbert's apartment. Brown recognized one vehicle as belonging to Kollock's girlfriend, Bowles.

Both Colbert and her thirteen year old son also recognized Kollock. Colbert occasionally braided customers' hair, and Kollock had sought such services just a few weeks before the incident.

Kollock learned that the police suspected him to be one of the gunmen. He disposed his pistol and went underground. The police eventually captured him.

PETTWAY STORE SHOOTING

Our Supreme Court described the evidentiary scaffold that supported the jury's guilty verdicts as follows:

"In the early morning hours of February 2, 2002, several people were gathered inside and outside of Pettway's Variety Store (Pettway's) at the northwest corner of the intersection of Stratford Avenue and Fifth Street in Bridgeport. Stratford Avenue runs in a generally east-west direction and has one-way traffic heading east. Fifth Street runs in a generally north-south direction and ends at Stratford Avenue. The three victims, Shariff Abdul-Hakeem, also known as "Polo," his brother, Manuel Rosado, and Gary Burton, were standing outside the store. Lou Diamond and a man known as "Chef"

came out of Pettway's, gave Abdul-Hakeem and Rosado a "grim" look and then walked north on Fifth Street. Shortly thereafter, Diamond and Chef, who had covered the lower parts of their faces with some type of cloths, turned around and walked back down Fifth Street toward Pettway's. At the same time, a third unidentified person carrying a gun ran from the east side of Fifth Street to the west side and joined Diamond and Chef.

Meanwhile, a white car had come down Fourth Street, the next street to the west of Fifth Street, turned east onto Stratford Avenue and stopped on the north side of that street. Two men got out of the rear driver's side door and the car then crossed Stratford Avenue and parked on the south side of the street. Although two men wore cloths over their lower faces, an eyewitness, Tony Payton, knew both men and was able to identify them as Boo McClain and the [petitioner]. McClain carried a handgun and the [petitioner] carried a shotgun. As McClain and the [petitioner] approached Pettway's, the [petitioner] said to the people gathered on the sidewalk, "All right freeze, nobody move," and he cocked the shotgun. The people on the sidewalk then rushed toward and started banging on the door to Pettway's, which had a "buzzer lock." The door opened and several people were able to get inside the store. Rosado, who was standing outside the store facing Fifth Street, turned toward Fourth Street to see the reason for the commotion. He saw the [petitioner], whom he had known for about one year before the shooting and with whom he had been incarcerated, aiming a gun at him. As Rosado dove for the door to Pettway's, McClain, the [petitioner] and the three men who were approaching Pettway's down Fifth Street opened fire on the crowd. After the shooting, the [petitioner] yelled, "I told you I was going to get you, Polo, I told you I was going to get you." McClain and the [petitioner] then ran back up Stratford Avenue and reentered the white car, which

turned around and sped back up Fourth Street. At the same time, Diamond and Chef ran back up Fifth Street. A later ballistics analysis revealed that two separate shotguns and four separate handguns had been used in the shooting.

"Abdul-Hakeem received bullet wounds in his left calf and left buttock. The bullet that hit his left buttock exited from the right side of his abdomen, and Abdul-Hakeem died several hours after the shooting as the result of uncontrollable bleeding from the wound. Rosado received shotgun wounds to his legs. Burton was wounded when a bullet hit him in the ribs and another bullet grazed his hip." *State* v. *Lopez*, supra, 280 Conn. 783–85.

BRADY VIOLATION CLAIMS

In his amended petition, dated July 28, 2017, the petitioner asserts that the prosecution failed to disclose to the defense or otherwise correct false or misleading testimony elicited from state's witnesses Tony Payton and Manual Rosado; failed to disclose that other suspects in the Pettway store shooting were never prosecuted; and failed to disclose the details acquired by the Bridgeport police regarding the P.T. Barnum home invasion case.

After a hearing, Judge Oliver previously dismissed the *Brady* violation claims premised on nondisclosure of possible consideration given to Manual Rosado with respect to federal charges he once faced in exchange for his cooperation with the state in the state's case against the petitioner.

Also, the petitioner's posttrial brief fails to discuss the same type of claim with respect to Tony Payton's cooperation. Therefore, the court regards that *Brady* violation allegation as abandoned.

There are three components needed to establish a valid *Brady* violation. *Lapointe* v. *Commissioner of Correction*, 316 Conn. 225, 262, 112 A.3d 1 (2015). The undisclosed evidence must be favorable to the accused; it must have been suppressed by the prosecution, wilfully or inadvertently; and "prejudice must have ensued." (Internal quotation marks omitted.) Id. "Prejudice" means that the favorable information withheld "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." (Internal quotation marks omitted.) Id., 262–63.

In determining whether evidence was suppressed, good faith or bad faith is irrelevant. *Demers* v. *State*, 209 Conn. 143, 149, 547 A.2d 28 (1988). The state has the duty to supply to the defense favorable material that is within its possession or control and which the state knew or should have known was exculpatory. Id., 150–51. No request for such evidence is necessary to trigger this duty. Id., 151. Evidence which is within the knowledge of state agencies, including local police departments, is constructively within the state's possession. See *Gonzalez* v. *State Elections Enforcement Commission*, 145 Conn. App. 458, 479, 77 A.3d 790, cert. denied, 310 Conn. 954, 81 A.3d 1181 (2013); see also *Giglio* v. *United States*, 405 U.S. 150, 154–55, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972).

1

The court declines to treat the prosecutorial decision not to file charges against persons, other than the petitioner, suspected of participating in the same criminal enterprise as an accomplice, accessory, or coconspirator, as exculpatory in this case. To be clear, the petitioner makes no claim that these other persons received favorable treatment in exchange for their cooperation in the investigation and/or prosecution of the Pettway

store shootings against the petitioner or anyone else. Nor does the petitioner allege that agents of the state engaged in conduct to render these other individuals unavailable to the defense in his case.

Instead, the petitioner argues that "other perpetrators named by the supposed eyewitnesses of the Pettway's shooting were never seriously investigated by the police." Petitioner's Posttrial Brief, p. 10. This argument appears more in the nature of a tacit recognition by the state that the police investigation of these persons was insufficient or that the prosecution lacked confidence in its eyewitnesses.

The court rejects this type of argument as describing a valid *Brady* violation. The prosecutors' subjective belief in the relative strength or weakness of their case is, standing alone, not exculpatory evidence. Specific information available to the state that prompts that belief may comprise exculpatory evidence, but the exercise of prosecutorial discretion is, in itself, a professional conclusion and not a potentially relevant fact. As such, the *Brady* rule requires no disclosure of that type of charging decision.

Also, it would disserve the ends of justice to employ a doctrine that induces law enforcement agents to arrest and charge persons of crime when the agents feel evidence to prove the crimes, beyond a reasonable doubt, may be lacking. The state ought to be free to decline to charge others of crimes just to avoid claims, such as the petitioner propounds, by one against whom the state did prefer charges.

The executive branch "has broad discretion as to whom to prosecute and what charges to file." *State* v. *Santiago*, 318 Conn. 1, 25, 122 A.3d 1 (2015). "Both the decision to criminally charge an individual and the choice of which crime should be charged lie within the discretion of the state and are not ordinarily subject to

judicial review." *Reynolds* v. *Commissioner of Correction*, 321 Conn. 750, 760–61, 140 A.3d 894 (2016), cert. denied sub nom. *Reynolds* v. *Semple*, U.S. , 137 S. Ct. 2170, 198 L. Ed. 2d 241 (2017). There is no legal principle "that the state commits misconduct if it chooses *not* to bring the most severe charges possible against a cooperating witness." (Emphasis added.) Id., 761.

Except for cases where nonprosecution rests on invidiously discriminatory motives, courts should avoid intruding on prosecutorial charging decisions. The petitioner has failed to prove a *Brady* violation based on the absence of charges lodged against other persons who might fall under suspicion based on the same or similar evidence as points to a defendant who was so charged.

2

The petitioner also contends that State's Attorney C. Robert Satti, Jr., failed to disclose exculpatory connections between the evidence gathered in the P.T. Barnum Apartments home invasion and the evidence obtained concerning the Pettway store shootings. The court determines that this evidence was not suppressed regardless of its purportedly exculpatory character. "[I]t is well established that 'evidence' is not considered to have been suppressed within the meaning of the *Brady doctrine if the defendant or his attorney either knew, or should have known, of the essential facts permitting him to take advantage of that* [*evidence*]." (Emphasis in original; internal quotation marks omitted.) *State* v. *Skakel*, 276 Conn. 633, 701, 888 A.2d 985, cert. denied, 549 U.S. 1030, 127 S. Ct. 578, 166 L. Ed. 2d 428 (2006).

The following evidence pertains to the issue of suppression. The police recovered several cartridge casings

from the fusillade of shots fired by the various perpetrators in the Pettway store incident of February 2, 2002. Among these were spent nine millimeter cartridges discharged from the same gun. Comparison testing disclosed that the same pistol that fired these shots was also used in five previous shootings in the Bridgeport area.

The written firearms comparison results were transmitted by the State's Attorney's office to Attorney Hopkins. This report contained the incident and case numbers for each earlier incident. In chronological order:

1. Incident number 010429-195 referencing shots fired on April 29, 2001, at or near the Marina Village area;

2. Incident number 010609-036, referencing shots fired on June 9, 2001, outside of the Pettway store;

3. Incident number 011012-294, referencing shots striking victim, Mark Mahoney, on Holley Street on October 12, 2001;

4. Incident number 011021-041, referencing shots fired on October 21, 2001, near the intersection of Roger and Stetson Streets; and

5. Incident number 020122-056, referencing the bullet fired by Jerry Kollock or accomplice into the kitchen cabinet during the P.T. Barnum Apartments home invasion of January 27, 2002, as discussed previously.

Attorney Satti testified that his office provided Attorney Hopkins with this report. A copy of this report was found in Attorney Hopkins' file, corroborating this disclosure by the state. The petitioner argues that it was a *Brady* violation for the state to fail to go beyond this disclosure and also provide, without a defense request, the entire investigation file materials generated by the police with respect to the earlier shootings.

In *State* v. *Skakel*, supra, 276 Conn. 633, a police report mentioned that a witness was asked to assist in creating a composite sketch of a person the witness recalled having seen near the crime scene during the relevant time frame. Id., 697–98. The sketch itself was never provided, only the written reference to its existence. This was the case despite the fact that the defense had made a discovery request for production of sketches in general. On appeal, the defendant argued that the drawing could have bolstered the defense's third-party culpability defense because the sketch somewhat resembled one of the putative third-party suspects.

Our Supreme Court held that revelation of the existence of the sketch alone satisfied the constitutional burden of disclosing exculpatory material under the *Brady* rule. Id., 706. "[T]he composite drawing will not be deemed to have been suppressed by the state . . . if the defendant or the defendant's trial counsel reasonably was on notice of the drawing's existence but nevertheless failed to take appropriate steps to obtain it." Id., 702.

In *State* v. *Skakel*, supra, 276 Conn. 633, appellate counsel had contended that mere knowledge that a sketch was done was "[in]adequate notice of the exculpatory nature of the composite drawing." Id., 704–705. That is, until the defense saw the actual drawing, the defense lacked knowledge of its beneficial utility, and that other evidence misled the defense into opining that the sketch depicted someone else at whom the defense wished to point an accusatory finger. Our Supreme Court responded that "[n]either of these assertions is reason to excuse the defense's failure to have requested the drawing [specifically]." Id., 705. "We . . . decline to endorse such an approach because there simply is no reason why a defendant who is aware of such evidence should not be required to seek it at a point in time when

any potential constitutional infirmity arising from the state's failure to provide the evidence can be avoided without the need for a new trial." Id., 706. "We conclude, therefore, that the facts fully support the trial court's determination that the defendant failed to establish that the state suppressed the composite drawing within the meaning of *Brady*." Id., 707.

In other words, the state must disclose the data which is potentially exculpatory but is not constitutionally obligated to connect the dots for the defense. The circumstances of the present case are more compelling that no *Brady* violation occurred than those presented in the *Skakel* case. This is because the essential fact that the same weapon that was used in the February 2, 2002 Pettway store shooting had previously been used in several other cases, including the P.T. Barnum Apartments home invasion, was disclosed along with information identifying the files pertinent to those earlier shootings. The potential for this information to help exonerate the [petitioner] speaks for itself.

The *Brady* doctrine does not "permit the defense to close its eyes to information likely to lead to the discovery of [exculpatory] evidence." *Skakel* v. *State*, 295 Conn. 447, 521, 991 A.2d 414 (2010). The court holds that the state satisfied its constitutional duties under *Brady* by providing to the defense the list of specific incidents/case numbers for which the firearms analyses showed that one of the weapons used on February 2, 2002, was also used in those shootings. Therefore, the petitioner has failed to meet his burden of proving his *Brady* claims.

INEFFECTIVE ASSISTANCE OF DEFENSE COUNSEL

In the fifth and sixth counts of the amended petition, the petitioner alleges various instances of ineffective assistance of trial counsel, Attorney Hopkins. These claims must be dismissed, pursuant to Practice Book

§ 23-29 (3), because they present the same grounds for relief denied in his earlier habeas case, namely, the ineffective assistance of defense counsel and which are not based on new facts or evidence "not reasonably available at the time of the prior petition . . . ." The addition of new specifications of ineffective assistance against Attorney Hopkins is insufficient to state new legal grounds different from that raised by the previous habeas petition. See, e.g., *McClendon* v. *Commissioner of Correction*, 93 Conn. App. 228, 230, 888 A.2d 183, cert. denied, 277 Conn. 917, 895 A.2d 789 (2006).

Of course, the failure by Attorneys Mullaney and Rozwaski to assert and prove these specifications of ineffective assistance can form the basis for a claim of ineffective assistance by previous habeas counsel, and the petitioner asserts just such a claim in the present case in the eighth count.

INEFFECTIVE ASSISTANCE OF HABEAS COUNSEL

Our Supreme Court has adopted the two-pronged *Strickland* test; *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); for evaluating ineffective assistance claims. *Johnson* v. *Commissioner of Correction*, 218 Conn. 403, 425, 589 A.2d 1214 (1991); *Ostolaza* v. *Warden*, 26 Conn. App. 758, 761, 603 A.2d 768, cert. denied, 222 Conn. 906, 608 A.2d 692 (1992). The *Strickland* criteria require that the petitioner demonstrate, by a preponderance of the evidence, that his attorney's performance was substandard and that there exists a reasonable likelihood that the outcome of the proceedings would have been different. *Ostolaza* v. *Warden*, supra, 761.

As to the performance prong of *Strickland*, the petitioner must establish that habeas counsel's representation fell below an objective standard of reasonableness. *Johnson* v. *Commissioner of Correction*, supra, 218 Conn. 425.

This standard of reasonableness is measured by prevailing, professional practices. Id. The habeas court must make every effort to eliminate the distorting effects of hindsight and to reconstruct the circumstances surrounding counsel's conduct from that attorney's perspective at the time of the representation. Id.

If it is easier to dispose of a claim of ineffective assistance on the ground of insufficient proof of prejudice, the habeas court may address that issue directly without reaching the question of counsel's competence. *Pelletier* v. *Warden*, 32 Conn. App. 38, 46, 627 A.2d 1363, cert. denied, 277 Conn. 920, 632 A.2d 694 (1993). In order to satisfy the prejudice prong of the *Strickland* test, the petitioner must prove that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Levine* v. *Manson*, 195 Conn. 636, 640, 490 A.2d 82 (1985). Reasonable probability means a probability sufficient to undermine confidence in the outcome; *Daeira* v. *Commissioner of Correction*, 107 Conn. App. 539, 542–43, 946 A.2d 249, cert. denied, 289 Conn. 911, 957 A.2d 877 (2008); that is, the petitioner must show that there is a reasonable probability that he remains burdened by an unreliable determination of guilt. Id. Thus, the failure of the petitioner to establish, by a preponderance of the evidence, either the allegations against trial counsel or habeas counsel, or the requisite prejudice as to both the first habeas case and the criminal trial, will defeat a claim for habeas corpus relief in the present action.

In *Lozada* v. *Warden*, 223 Conn. 834, 613 A.2d 818 (1992), our Supreme Court recognized a purely statutory right to raise, in a subsequent habeas action, a claim of ineffective assistance on the part of previous habeas counsel in presenting claims of ineffective assistance of trial counsel. Id., 835. However, the petitioner's

burden becomes a multitiered application of the *Strickland* standard by which allegations of ineffective assistance claims are gauged. Id., 842. To succeed in his bid for a writ of habeas corpus, the petitioner must prove *both* (1) that his habeas counsel were ineffective, and (2) that his trial counsel was ineffective. Id. Also, the petitioner must prove that, but for the derelictions of habeas counsel, he was prejudiced in the sense that the outcome of the first habeas case was suspect, and that burden demands proof of the existence of a reasonable likelihood that the outcome of the original, criminal trial would have been different. Id., 842–43. The Supreme Court described this double layered obligation as "a herculean task . . . ." Id., 843.

Although the amended petition recites sundry specifications of ineffective assistance of habeas counsel, in his posttrial brief the petitioner engages in more than a cursory discussion only as to the following alleged deficiencies of habeas counsel:

1. That habeas counsel failed to raise and litigate Attorney Hopkins' failure to pursue third-party culpability theories adequately;

2. That habeas counsel failed to raise and litigate the insufficiency of Attorney Hopkins' cross-examination of Manual Rosado;

3. That habeas counsel failed to raise and litigate Attorney Hopkins' failure to connect the Pettway store shooting of February 2, 2002, to the P.T. Barnum Apartments home invasion that occurred about one week earlier; and

4. That habeas counsel failed to litigate adequately Attorney Hopkins' failure to raise and pursue an alibi defense. (See Petitioner's Posttrial Brief, pp. 19–21, 45–50.)

At the previous habeas trial, Attorney Mullaney represented the petitioner and was joined, on the third day of the habeas trial, in that endeavor by Attorney Rozwaski. The operative, amended petition was dated December 15, 2009, and alleged that Attorney Hopkins represented the petitioner ineffectively by:

1. Failing to present favorable and available evidence as to

a. alibi witnesses;

b. the weaknesses regarding the state's identification witnesses;

2. Failing to impeach the testimony of Gary Burton, Manual Rosado, and Tony Payton, properly.

The evidence adduced at the first habeas trial can be summarized as follows. Vincent Wilson, an incarcerated felon, testified that he and the petitioner are good friends, having first met as children. Wilson recounted that soon after the Pettway store shooting on February 2, 2002, the police interrogated him about whether he drove the getaway vehicle and whether the petitioner participated in the shootings. Wilson denied being at the scene and disclaimed any knowledge concerning the incident. Wilson stated that the police told him that Manual Rosado suggested that Wilson might have driven the getaway car.

Wilson also noted that Attorney Hopkins' investigator had interviewed him, but that Attorney Hopkins had not spoken to him personally. Wilson further avowed that he was available to testify at the petitioner's criminal trial and would have willingly done so. However, Wilson acknowledged that he did witness a verbal confrontation between the petitioner and Manual Rosado at the Pettway store a few weeks before Rosado was shot there.

Attorney Mullaney also called upon Ralph Lewis to testify. He, too, is an incarcerated felon, and he related that he had met Manual Rosado in jail. Friction between Rosado and Lewis ensued. Lewis stated that Rosado told him that Rosado faced federal charges. He also indicated that Rosado stated he did not see who shot his brother, Polo, although the police urged him to report that he could identify his brother's killer in order to benefit himself in his federal case. However, Rosado also related that he resisted the police suggestion because he did not see who shot his brother.

Lewis first conveyed this information to an investigator in 2007, which was a few years after the petitioner's criminal trial. Lewis conceded that, despite knowing that charges were pending against his close friend, the petitioner, he never mentioned his jailhouse conversation with Rosado to anyone before 2007.

It should be noted that Rosado's statements to Lewis essentially conformed to Rosado's testimony at the petitioner's criminal trial and to his deposition testimony in the present habeas case. That is, Rosado consistently acknowledged his ignorance as to his brother's shooter, as opposed to his own assailant, who he identified as the petitioner. Rosado also maintained that he has always refused to lie to identify his brother's killer.

Attorney Mullaney also presented the testimony of the petitioner's sister, Rosa Lopez, at the previous habeas trial. She swore that during February 1, 2002, a Friday, she and the petitioner were together at their mother's residence and agreed to have a Super Bowl party that Sunday, February 3, 2002. A relative, Star Semedo, picked up Lopez and the petitioner and drove them to her home in Ansonia to plan the party. The party was to take place at Semedo's residence, and the expected attendees were Semedo, Lopez, the petitioner, their parents, and children. Lopez avowed that she and

the petitioner spent the entire evening of February 1 into February 2, 2002, at Semedo's residence and only returned to Bridgeport during the afternoon of February 2, 2002. In other words, Lopez testified that the petitioner was in Ansonia at the time of the Pettway store shootings in Bridgeport.

Lopez attended her brother's criminal trial and expected to testify at that trial regarding this alibi. Attorney Hopkins had spoken to her before trial. When she was not called as a witness, she asked Attorney Hopkins to explain his decision. Attorney Hopkins simply informed Lopez that her testimony was not needed.

Star Semedo, an emergency room technician nurse, also testified at the first habeas trial. She corroborated that she lived in Ansonia on February 1, 2002; that she drove Lopez and the petitioner from Bridgeport to Ansonia on February 1, 2002; that she, Lopez, and the petitioner planned the Super Bowl party details; and that Lopez and the petitioner stayed at her residence in Ansonia until Semedo drove them back to Bridgeport during the day of February 2, 2002.

Semedo indicated she was available to testify at the petitioner's criminal trial, but that no one called upon her to do so. Semedo acknowledged that she was aware that she possessed alibi testimony for the charges against the petitioner early on, but never conveyed that alibi evidence to the police or to defense counsel despite that awareness.

At the previous habeas trial, the petitioner testified consistently with this alibi scenario. He stated that he communicated these facts to Attorney Hopkins and the defense investigator, Justine Smith. He wanted and anticipated Attorney Hopkins to present Lopez and Semedo as alibi witnesses at his criminal trial. Attorney Hopkins declined to present the alibi defense.

The petitioner also wanted Attorney Hopkins to investigate whether Gary Burton described the shooters to the police as three black males. He urged Attorney Hopkins to probe this topic when Attorney Hopkins cross-examined Burton, but Hopkins rejected his suggestion.

On February 2, 2002, the petitioner was arrested by the police on an unrelated attempted murder charge. The police arrested the petitioner on charges arising from the Pettway store shootings about nine months later. At the time of his arrest on February 2, 2002, the petitioner resided with his mother in Bridgeport, but he pretended to live with an uncle in Stratford to avoid detection for violating a court order or condition of parole or probation prohibiting him from living in his mother's home.

Attorney Mullaney also offered the testimony of Bridgeport Police Sergeant Giselle Doszpoj. Sergeant Doszpoj indicated that she initiated the investigation of the Pettway store shooting on February 2, 2002. She noted that the investigation files for the case had been archived, and she lacked access to their contents. She recollected that, when she interviewed Gary Burton, he thought the three shooters were possibly African American.

Habeas counsel also utilized the testimony of Bridgeport Police Detective Warren DelMonte. Detective DelMonte went to the hospital on February 2, 2002, and interviewed Manual Rosado. The habeas judge disallowed Detective DelMonte from testifying about the substance of his conversation with Rosado.

A more productive witness was Kiaga Johnson. As noted previously, she was a friend of Gary Burton and saw the shootings. She indicated she observed three assailants and described them as including a black male, a Hispanic male, and a male with olive toned skin color.

At the 2010 habeas trial, she opined that the petitioner's skin color seemed different from any of the assailants. However, she acknowledged that the attackers' faces were partially concealed and that there may have been additional shooters besides the three she noticed.

As mentioned previously, Attorney Rozwaski appeared as habeas counsel on March 11, 2011, the third day of the previous habeas trial. On that day, Attorney Berke testified that he took over the petitioner's criminal case after the jury returned its verdict. Attorney Berke had his investigator, John McNichols, look into the petitioner's alibi claim and contact Rosa Lopez and Star Semedo in particular. Attorney Berke spoke to Semedo by phone. Semedo told Attorney Berke that the petitioner and his sister stayed overnight at her Ansonia residence but not on the evening and night of the Pettway store shootings on February 1 into February 2, 2002.

At the first habeas trial, Attorney Hopkins testified that he had experience handling many criminal defense cases, including serious felony allegations, before representing the petitioner. He related that he hired Justin Smith as his investigator. Attorney Hopkins employed his customary approach of meeting with his client, engaging in preliminary discussions with the prosecutor, obtaining discovery, and developing a sense of the strengths and weaknesses of both sides of the case.

The petitioner denied any involvement in the Pettway store shootings. Attorney Hopkins decided that the critical defense tactic would be to try to discredit the credibility and reliability of the two eyewitnesses that identified the petitioner as one of the assailants, namely, Manual Rosado and Tony Payton.

Attorney Hopkins opted to eschew an alibi defense based on reasons both general and particular. After discussing the alibi evidence with the petitioner, Attorney Hopkins concluded that such evidence would prove

more detrimental than beneficial. He regarded the alibi defense as generally a "bad idea" that seldom produced favorable results. Attorney Hopkins felt that unless the alibi evidence was "entirely solid," any deficiencies in that evidence create a very negative view of the defendant in the minds of jurors. That negative view may taint other, stronger defense arguments. Attorney Hopkins' "instinct" was to avoid using alibi evidence "like the plague."

This court's more than forty-five years of experience in the field of criminal law litigation finds Attorney Hopkins' general view of the ineffectiveness of an alibi defense as not lacking some experiential basis. Of course, each case presents unique circumstances, and the utility of presenting alibi evidence must be evaluated with those specific features in mind. But, any chink in the armor of the alibi defense arising at trial, exposes the defense to claims of contrivance and, inferentially, a consciousness of guilt. Also, strong alibi evidence often induces the prosecution to reevaluate the charges against an accused, so that "solid" alibi cases seldom reach the trial stage.

In particular, Attorney Hopkins was concerned that the petitioner was a convicted felon who had tried to use false alibi evidence in a previous criminal case. Also, Attorney Hopkins presumed, erroneously, that the petitioner's arrest on February 2, 2002, was for the Pettway store shootings. Instead, that arrest pertained to unrelated charges. This mistake led Attorney Hopkins to reckon that if the petitioner had a legitimate alibi, he and his family members would have immediately informed the police of his true whereabouts for the evening of February 1 into February 2, 2002. So while Attorney Hopkins' general apprehension about using the alibi as a defense may have been professionally understandable, his decision particularly and arrived at purposely to disregard such evidence in the

petitioner's particular case was based on a nonexistent factual foundation.

Because Attorney Hopkins harbored this negative opinion, he never pursued that line of defense at the petitioner's criminal trial, despite his client's imploring him to do so and his knowledge of the availability of the prospective testimony of Rosa Lopez and Star Semedo. That is not to say, of course, that such alibi evidence was reasonably likely to produce a different outcome had such evidence been presented, but it does establish that Attorney Mullaney, as habeas counsel, was warranted in alleging this deficiency in the earlier habeas case.

Attorney Mullaney also introduced evidence that Attorney Hopkins failed to challenge the reliability of Manual Rosado's identification of the petitioner, as having shot him, by calling Latosha DelGiudice as a defense witness. Ms. DelGiudice, also a convicted felon, testified at the first habeas trial that she visited Rosado at the hospital some hours after he was shot. At that time, Rosado accused her of setting him up and blamed her boyfriend, Brad Rainey, for the incident. She indicated that Rosado never mentioned the petitioner at that time.

Along a similar vein, Attorney Mullaney proffered the testimony of Lakesha Bowles, the girlfriend of Jerry Kollock, who disclosed that she received several phone calls from Manual Rosado on February 2, 2002, wherein Rosado also accused her of assisting in arranging the Pettway store attack. Bowles was under federal indictment at the time of her habeas testimony.

Attorney Mullaney called Attorney Norm Pattis as a criminal defense expert to demonstrate the substandard nature of Attorney Hopkins' representation. Attorney Pattis is a very experienced lawyer whose background includes expertise in the field of criminal defense work. Attorney Pattis opined that the putative alibi testimony

of Rosa Lopez and Star Semedo would have enhanced rather than detracted from Attorney Hopkins' attempt to discredit the identification testimony of Manual Rosado and Tony Payton. This was the case because evidence that an individual was elsewhere is completely compatible with misidentification.

Attorney Pattis stated that Attorney Hopkins' failure to interview the alibi witnesses departed from the minimum exercise of reasonable legal assistance ordinarily expected of competent defense counsel. This expert doubted whether any lawyer can accurately assess the usefulness of potential witnesses without ever interviewing those individuals.

At the previous habeas trial, the petitioner confirmed that his arrest, for the charges he stands convicted for the present case, came about nine months after the Pettway store shootings. He also stated that he never attempted to utilize a false alibi defense in any other case.

Judge Fuger denied habeas corpus relief; *Lopez* v. *Commissioner of Correction*, supra, Superior Court, Docket No. CV-05-4000857-S; and the Appellate Court affirmed his decision, per curiam. *Lopez* v. *Commissioner of Correction*, supra, 150 Conn. App. 905. Judge Fuger specifically found that the testimony of Rosa Lopez and Star Semedo lacked credibility. "This court . . . finds that the alibi evidence is not worthy of belief and that [Attorney Hopkins] cannot be held to be ineffective for failing to present a defective alibi defense." *Lopez* v. *Commissioner of Correction*, supra, Superior Court, Docket No. CV-05-4000857-S.

Consequently, the habeas court determined that the petitioner had failed to meet his burden of proving either prong of the *Strickland* standard with respect to Attorney Hopkins' refusal to offer alibi evidence at the petitioner's criminal trial. Id. "[D]efense counsel made

the correct strategic judgment in not pursuing this alibi and calling these missing witnesses in order to establish an alibi defense that may well have led a jury to conclude that the petitioner was lying to escape a finding of guilty." Id.

1

The petitioner now contends that habeas counsel rendered ineffective assistance by his strategic decision to press Attorney Hopkins' failure to present alibi evidence as the principal ground in the previous habeas case and that Attorney Mullaney's unsuccessful attempt to do so was, itself, constitutionally infirm. The court rejects this contention.

Attorney Mullaney had available to him the evidence that was available to Attorney Hopkins bearing on a third-party culpability defense. Attorney Mullaney also utilized the services of an investigator, Jacqueline Bainer, who thoroughly briefed him as to the results of her findings concerning evidence of third-party culpability. In particular, Bainer sought and obtained evidence concerning the possibility that the Pettway store shootings of February 2, 2002, were retaliation for the P.T. Barnum Apartments home invasion which occurred about one week earlier. The gist of this putative defense appears to be that Brad Rainey sought revenge against Manual Rosado and his brother, Polo, for having botched the home invasion of Colbert's apartment by firing a gun at a young child and groping the vagina of a teenage girl.

It should be recalled that three victims of that home invasion, namely, Colbert, her thirteen year old son, and Davis Brown, all positively identified Jerry Kollock as one of the perpetrators and possibly the person who fired the shot that lodged in the kitchen cabinet. A firearms expert determined that round was discharged from one of the handguns used in the Pettway store shootings.

Brown also identified the second gunman as Randy Armstrong, Kollock's frequent companion, and the person whom the petitioner had accidently shot in the foot two days before the home invasion. Brown also named Brad Rainey as the third accomplice who urged the gunmen to leave Colbert's apartment and make their getaway.

On the other hand, after Jerry Kollock's arrest, Kollock told Bainer that his cohorts were Polo and Manual Rosado, with Rosado being the lookout. To complicate matters further, Bridgeport Police Sergeant Larose received information that Robert Payton (deceased) was the second gunman.

Bainer also uncovered evidence that the petitioner and Robert Payton had a "beef" stemming from a dispute between the mother of the petitioner's child and Rosado's sister. Robert Payton, who was killed in a later incident, was one of the persons at the Pettway store on February 2, 2002, who managed to escape into the relative safety of the store unscathed.

Investigator Bainer urged Attorney Mullaney to raise an ineffective assistance claim in the first habeas case based on Attorney Hopkins' failure to obtain the information she uncovered and present a third-party culpability defense, in addition to the lack of an alibi defense which Attorney Mullaney did litigate. This third-party culpability claim is premised on speculation that Brad Rainey and Tank Gethers harbored great resentment against Polo, Manual Rosado, and Robert Payton for having botched the home invasion, coupled with Manual Rosado's initial failure to identify the petitioner as the person who shot him to the police and Latosha DelGiudice. Despite Bainer's earnest discussions with Attorney Mullaney on this point, Attorney Mullaney deliberately chose to confine the ineffective assistance

specifications to the allegations recited above, i.e., primarily the failure by Attorney Hopkins to present an alibi defense.

Attorney Mullaney testified at the present habeas trial, and he recounted that, in his judgment, the petitioner had a strong claim of ineffective assistance based on Attorney Hopkins' decision to forgo an alibi defense. Attorney Mullaney exercised that professional judgment and experience by opting to avoid muddying the habeas case with weaker claims such as the convoluted, third-party culpability argument. Attorney Mullaney's experience persuaded him that third-party culpability defenses often fail because the evidence relies on a good deal of conjecture and innuendo, as in the petitioner's case. The court agrees with Attorney Mullaney's assessment that Attorney Hopkins' failure to present an alibi defense, based on the known and available testimony of Rosa Lopez and Star Semedo, was a much stronger claim than the third-party culpability claim suggested by Bainer's investigation.

It must be observed that the petitioner, at the habeas on a habeas trial, never presented a legal expert who criticized habeas counsel's representation. The petitioner did proffer the testimony of Attorney Kenneth Simon, but that expert confined his opinions to an evaluation of Attorney Hopkins' performance in the criminal case.

Effective advocates bear no general constitutional obligation to raise or argue every conceivable issue. *Tillman* v. *Commissioner of Correction*, 54 Conn. App. 749, 757, 738 A.2d 208, cert. denied, 251 Conn. 913, 739 A.2d 1250 (1999). To the contrary, a scattershot approach "runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." (Internal quotation marks omitted.) Id. Habeas courts must be "highly deferential" to attorneys'

decisions to winnow out less persuasive claims in order to focus on the stronger ones. *Spearman* v. *Commissioner of Correction*, 164 Conn. App. 530, 539, 138 A.2d 378, cert. denied, 321 Conn. 923, 138 A.2d 284 (2016).

"[S]trategic choices made after thorough investigations of law and facts relevant to plausible options are virtually unchallengeable . . . ." (Internal quotation marks omitted.) *Arroyo* v. *Commissioner of Correction*, 172 Conn. App. 442, 467–68, 160 A.3d 425, cert. denied, 326 Conn. 921, 169 A.3d 235 (2017); see also *Bree* v. *Commissioner of Correction*, 189 Conn. App. 411, 207 A.3d 539 (2019).

In the present action, the credible evidence discloses that Attorney Mullaney retained the services of an investigator who diligently researched the shootings where the same handgun was used that predated the Pettway store incident of February 2, 2002. Bainer and Attorney Mullaney had frank discussions about the evidence Bainer's investigation produced. Attorney Mullaney made the tactical decision to restrict the earlier habeas claims to Attorney Hopkins' refusal to present available alibi evidence.

This court finds that Attorney Mullaney's tactical decision in this regard falls well within the realm of reasonable, professional advocacy for habeas counsel in his position. As described previously, Attorney Hopkins misunderstood the charges for which the petitioner was arrested on February 2, 2002, believing those charges to pertain to the Pettway store shootings of that date. He erroneously concluded that the lack of protest to the police by the petitioner's family based on an alibi for the evening of February 1 into February 2, 2002, cast doubt on the efficacy of an alibi defense and would jeopardize the petitioner's entire criminal case. Attorney Hopkins also feared that the petitioner had tried to employ a false alibi in a previous criminal

matter. Attorney Mullaney felt that the petitioner could have successfully refuted any assertion that the petitioner had previously attempted to use a fictitious alibi.

Previous habeas counsel also assessed that Attorney Hopkins had three alibi witnesses, including the petitioner, who could establish a viable alibi defense and were available to testify at the petitioner's criminal trial. Attorney Mullaney also stated that the alibi evidence would not have undermined the defense that Attorney Hopkins did pursue, namely, that Tony Payton and Manual Rosado had misidentified the petitioner as one of the shooters in the Pettway store attack.

On the other hand, the petitioner's present denigration of Attorney Mullaney's decision not to add a claim that Attorney Hopkins should have also pursued a third-party culpability defense appears counterintuitive and abstruse.

The petitioner submits that Attorney Hopkins, and derivatively, habeas counsel, ought to have attempted to demonstrate that the Pettway store shootings were prompted by the excesses engaged in during the P.T. Barnum Apartment home invasion of the week before. Specifically, that Polo, Manual Rosado, and, possibly, Robert Payton, were targeted by Tank Gethers and Brad Rainey, affiliates of Polo, Rosado, and Payton, in retribution for having fired a weapon, with a nexus to Rainey and Gethers, during the home invasion; and for molestation of the teenage stepdaughter of Colbert, an untoward act which would incite unwanted attention and notoriety to the home invasion. To be clear, the petitioner contends that the Pettway store shootings were not, as one might otherwise suppose, the actions of rival drug dealers or gang members, but rather one with internecine character.

Just who participated in the P.T. Barnum Apartments home invasion was in dispute, as mentioned earlier.

Davis Brown identified Kollock, Armstrong, and Rainey as the perpetrators. Kollock told Bainer that his accomplices were Polo and Manual Rosado. Brad Rainey, a/k/a Brad Payton, was the cousin of Tony and Robert Payton. The court also notes that Attorney Hopkins lacked the benefit of the information later revealed by Marcus Mahoney.

In addition to this scenario, the petitioner points to the testimony of the first habeas trial of Latosha DelGiudice. In her testimony, Latosha DelGiudice related that, when she visited Manual Rosado in the hospital, he accused her boyfriend, Brad Rainey, of using her to set him and his brother up for the attack. She further testified at the first habeas trial that Rosado never mentioned the petitioner at all.

The court finds this third-party culpability evidence and the inferences sought to be drawn from it to be tangled, tenuous, and conjectural. By comparison, the evidence regarding Attorney Hopkins' failure to present alibi evidence appears clear, concise, internally consistent, and not laden with suppositions and surmise. The court concludes that Attorney Mullaney's decision to pursue only the stronger ineffective assistance claim of lack of an alibi defense rather than the more nebulous third-party culpability claim was a reasonable exercise of professional judgment based on diligent investigation and competent understanding of the law.

Unsuccessful strategic decisions that are the result of the reasonable exercise of professional judgment comprise effective assistance despite an unfavorable outcome. *Stephen S.* v. *Commissioner of Correction*, 134 Conn. App. 801, 809–10, 40 A.3d 796, cert. denied, 304 Conn. 932, 43 A.3d 660 (2012). Therefore, the court determines that the petitioner has failed to prove the deficient performance component of the *Strickland* test regarding the representation at the first habeas trial by

Attorneys Mullaney and Rozwaski regarding the failure to raise Attorney Hopkins' failure to investigate and present a third-party culpability defense.

2

The petitioner also alleges that Attorneys Mullaney and Rozwaski rendered ineffective assistance by inadequately proffering evidence of Attorney Hopkins' failure to pursue the alibi defense. To reiterate, no legal expert testified in the present habeas case that previous habeas counsel were deficient in any manner.

Specifically, the petitioner complains that his habeas attorneys "inadequately" challenged Attorney Hopkins' testimony about his misunderstanding that an alibi defense is an affirmative defense; that habeas counsel should have "better developed" Attorney Hopkins' misinterpretation of the charges for which the petitioner was arrested on February 2, 2002; and that Attorney Norm Pattis was a poor choice of an expert witness to demonstrate Attorney Hopkins' deficiencies. The court rejects these claims because the petitioner has failed to prove the prejudice prong of the *Strickland* criteria, i.e., that there exists a reasonable likelihood that the outcome of the first habeas case would have been favorable but for these purported deficiencies.

As elaborated previously, Judge Fuger denied habeas corpus relief because he found the testimony of the alibi witnesses, Rosa Lopez and Star Semedo, lacked credibility. That dispositive finding, affirmed per curiam by the Appellate Court, bears no relation to the decision to call Attorney Pattis as an expert witness. Nor did Attorney Hopkins' erroneous view of the law or the basis for the petitioner's arrest on February 2, 2002, contribute to that finding. The adverse decision by Judge Fuger hinged on the witnesses' nonbelievability,

which determination cannot be attributed to the deficiencies alleged by the petitioner on the part of his former habeas counsel.

3

The final allegation of ineffective assistance by habeas counsel, as set forth in the petitioner's posttrial brief, is that previous habeas counsel ought to have attacked Attorney Hopkins' cross-examination of Manual Rosado more vigorously. Again, no legal expert decried habeas counsel's representation on this issue. The petitioner's posttrial brief contains little discussion as to this claim, and the court treats it as abandoned. In sum, the court denies the amended petition on the ground of ineffective assistance of habeas counsel.

ACTUAL INNOCENCE CLAIM

Habeas corpus relief in the form of a new trial based on actual innocence requires the petitioner to satisfy the criteria set forth in *Miller* v. *Commissioner of Correction*, 242 Conn. 745, 700 A.2d 1108 (1997).

The *Miller* criteria comprise a two part test which requires a habeas petitioner asserting an actual innocence claim to prove, by clear and convincing evidence, that:

1. The petitioner is actually innocent of the crime for which he or she stands convicted; and

2. No reasonable fact finder would convict the petitioner of that crime after consideration of a combination of the evidence adduced at both the criminal trial and the habeas proceeding. *Miller* v. *Commissioner of Correction*, supra, 242 Conn. 746–47; see also *Gould* v. *Commissioner of Correction*, 301 Conn. 544, 557–58, 22 A.3d 1196 (2011).

The first component of the *Miller* criteria requires the petitioner to produce affirmative proof that he did

not purposefully participate in the charges for which he was convicted. "Affirmative proof of actual innocence is that which might tend to establish that the petitioner *could not* have committed the crime even though it is unknown who committed the crime, that a *third party* committed the crime or that *no* crime actually occurred." (Emphasis in original.) *Gould* v. *Commissioner of Correction*, supra, 301 Conn. 563. "Clear and convincing proof of actual innocence does not, however, require the petitioner to establish his or her guilt is a factual impossibility." Id., 564.

Before embarking on this analysis, the court must confront a preliminary question. In the *Gould* case, our Supreme Court recognized, in a footnote, that the court has never decided whether the affirmative evidence of innocence must be newly discovered. Id., 551 n.8. The Supreme Court acknowledged, however, that the Appellate Court has imposed such a requirement. Id.

Indeed, the Appellate Court has consistently and repeatedly demanded that affirmative proof of actual innocence be newly discovered. *McClain* v. *Commissioner of Correction*, 188 Conn. App. 70, 88, 204 A.3d 82, cert. denied, 331 Conn. 914, 204 A.3d 702 (2019), *Corbett* v. *Commissioner of Correction*, 133 Conn. App. 310, 315, 34 A.3d 1046 (2012); *Vasquez* v. *Commissioner of Correction*, 128 Conn. App. 425, 444, 17 A.3d 1089, cert. denied, 301 Conn. 926, 22 A.3d 1277 (2011); *Gaston* v. *Commissioner of Correction*, 125 Conn. App. 553, 558–59 (2010), cert. denied, 300 Conn. 908, 12 A.3d 1003 (2011); *Weinberg* v. *Commissioner of Correction*, 112 Conn. App. 100, 119, 962 A.2d 155, cert. denied, 291 Conn. 904, 967 A.2d 1221 (2009); *Grant* v. *Commissioner of Correction*, 103 Conn. App. 366, 369, 928 A.2d 1245, cert. denied, 284 Conn. 921, 933 A.2d 723 (2007); *Johnson* v. *Commissioner of Correction*, 101 Conn. App. 465, 469–70, 922 A.2d 221 (2007); *Batts* v. *Commissioner of Correction*, 85 Conn. App. 723, 726–27, 858

A.2d 856, cert. denied, 272 Conn. 907, 863 A.2d 697 (2004); *Clarke* v. *Commissioner of Correction*, 43 Conn. App. 374, 379, 682 A.2d 618 (1996), appeal dismissed, 249 Conn. 350, 732 A.2d 754 (1999); *Williams* v. *Commissioner of Correction*, 41 Conn. App. 515, 530, 677 A.2d 1 (1996), appeal dismissed, 240 Conn. 547, 692 A.2d 1231 (1997). This court is, of course, bound by these holdings of the Appellate Court.

The Appellate Court has stressed that habeas judges are bound by the requirement that the evidence of actual innocence be newly discovered. *Thompson* v. *Commissioner of Correction*, 172 Conn. App. 139, 158, 158 A.3d 814, cert. denied, 325 Conn. 927, 169 A.3d 232 (2017). "[E]ven though the final resolution of the newly discovered evidence standard has yet to be addressed by the Supreme Court, it is beyond argument that insofar as any Superior Court considering a [claim] of actual innocence in a habeas petition, the matter is *closed*." (Emphasis added.) Id.

Newly discovered evidence is "such that it could not have been discovered previously despite the exercise of due diligence . . . ." *Skakel* v. *State*, 295 Conn. 447, 466–67, 991 A.2d 414 (2010). Due diligence is reasonable diligence. Id., 506. The query to be answered is "what evidence would have been discovered by a reasonable [criminal defendant] by persevering application and untiring efforts in good earnest." (Internal quotation marks omitted.) Id., 507.

The petitioner avers that Manual Rosado's habeas deposition contained inconsistencies when compared to his criminal trial testimony; that evidence linked the P.T. Barnum Apartments home invasion incident to the Pettway store shootings; that Latosha DelGiudice's previous habeas trial testimony regarding Rosado's failure

to mention the petitioner as his assailant; and the present habeas trial testimony of Marcus Mahoney constitute clear and convincing evidence of the petitioner's actual innocence. The court disagrees.

1

First, the evidence connecting the weapon used at the P.T. Barnum Apartments home invasion with one also discharged during the Pettway store shootings cannot be fairly characterized as newly discovered.

The state provided Attorney Hopkins with a copy of the firearms analysis that ascertained that some rounds fired during the Pettway store shootings were discharged from the same pistol that either Kollock or Polo fired during the P.T. Barnum Apartments home invasion. Indeed, Attorney Mullaney's investigator used that report to investigate the five previous incidences in which that weapon was used. Therefore, potentially favorable, alternative explanations for the motivation for the Pettway store shootings, and by whom harbored, were available for production at the petitioner's criminal trial in the exercise of reasonable diligence. The petitioner has alleged just such a claim in his specifications of ineffective assistance by defense counsel and previous habeas counsel.

Consequently, the court cannot afford relief based on the claim that this was newly discovered evidence of the petitioner's actual innocence, standing alone.

2

Contrary to the petitioner's assessment, the court finds that Manual Rosado's criminal trial testimony and his later habeas deposition testimony were, as to essential details, significantly consistent and trustworthy; principally, as to who shot him. Any discrepancies go to credibility or the absence of it. It must be kept in mind that, under the *Miller* criteria, newly discovered

evidence that merely weakens the prosecution case, even that which severely weakens it, fails to comprise affirmative evidence of innocence.

In *Gould* v. *Commissioner of Correction*, supra, 301 Conn. 544, 546–47, our Supreme Court reversed a habeas court's determination of actual innocence based on the total recantation of the only witness who positively identified the defendants as the perpetrators of a murder of a shopkeeper. Her recantation stated that she was not at the scene when the shooting occurred, in direct contradiction to her trial testimony. The fact that the habeas court credited her recantation was irrelevant as to the claim of actual innocence. This was so because her revised story did not prove the defendants did not commit the murder but only that she was ignorant of who did. Such renunciation by a witness failed to constitute affirmative evidence of innocence. Id., 557–59.

In order to satisfy the affirmative evidence criterion of the *Miller* standard, the petitioner must prove, by clear and convincing evidence, that no crime occurred; that someone else committed the crime; or that the person convicted could not have committed the crime, even if the true perpetrator remains unknown. Id., 563. Actual innocence means factual innocence and is not equivalent to legal insufficiency of the evidence. Id., 560. The petitioner's burden is to prove he is actually innocent of the crime rather than merely that the state could no longer prove his guilt beyond a reasonable doubt. Id., 561. "Although the postconviction evidence [the petitioner] presents casts a vast shadow of doubt over the reliability of his conviction, nearly all of it serves only to undercut the evidence presented at trial, not affirmatively to prove [his] innocence." (Internal quotation marks omitted.) Id.

The petitioner's proof in the present case focuses on Rosado's initial failure to tell the police and others that

the petitioner shot him; the nature and substance of threats conveyed to him before the shooting, and that he accused Brad Rainey of being behind the Pettway store shooting. None of these inconsistencies demonstrates that no shootings occurred, that someone else shot Rosado instead of the petitioner, or that the petitioner could not have been his assailant.

Thus, the putative inconsistencies by Rosado when comparing his criminal trial testimony to his habeas deposition cannot form the foundation of the petitioner's actual innocence claim. That is not to say that such inconsistencies are irrelevant to that claim when considered in conjunction with newly discovered evidence that satisfies the *Miller* test, but such supposed discrepancies, standing alone, fail to meet that test.

3

Next, the petitioner relies on the testimony of Latosha DelGiudice presented during the first habeas trial. There, she avowed that, about five or six hours after Rosado was shot, she snuck into the hospital to visit him. She related that Rosado voiced his suspicions that Brad Rainey, the father of Latosha's child, enlisted her to set up Rosado to be shot at the Pettway store. This accusation by Rosado was predicated on phone conversations he had with Latosha DelGiudice shortly before the shooting. She swore that Rosado never mentioned the petitioner at all.

First, such evidence is not proof of the petitioner's innocence. Rosado may have been mistaken or correct in his conjecture that Brad Rainey lurked behind the Pettway store shootings. However, witnesses counted the number of gunmen ranging from two to five. Rainey could have been the moving force behind the attack without exonerating the petitioner; that is, the petitioner could have shot Rosado while acting in concert with Rainey. At least four handguns and two shotguns

were fired during the Pettway store shooting. Rosado's suspicions about Rainey do not exculpate the petitioner, although such evidence could be used to impeach Rosado's credibility.

Also, if Rosado suspected Latosha DelGiudice of complicity in the attack, Rosado would have good reason to withhold from her, and indirectly from Brad Rainey, and the petitioner, his complete knowledge of what happened. He was shot and his brother killed and vengeance was on his mind.

But more significantly, even if one assumes, arguendo, that Latosha DelGiudice's testimony that Rosado failed to remark to her that the petitioner was the person that shot him and that Rosado harbored a belief that Brad Rainey was also responsible for the attack, is evidence of the petitioner's actual innocence, her testimony was vulnerable to counterattack by the admission of testimony of other potential witnesses.

The petitioner offered and the court admitted exhibit 43, which consists of several documents prepared by the Bridgeport police during the investigation of the Pettway store shootings.

Shayla DelGiudice is Latosha's sister and gave the police a statement on February 8, 2002, that she visited Rosado at the hospital during his thirteen hour stay there. Latosha had also mentioned that she and her sister visited Rosado at the hospital during Latosha's second trip there. Shayla stated that Rosado told her that the petitioner shot him.

Also, Shayla DelGiudice's boyfriend, Daniel Vereen, also spoke to Rosado at the hospital. Vereen corroborated that Rosado named the petitioner as his shooter at that time.

While one never knows for certain whether a witness will later testify in accordance with the substance of

what the police recorded the witness as saying at an earlier time, the possibility that the benefit of Latosha DelGiudice's testimony would be devastatingly undermined by the testimony of her sister and Vereen looms large. Therefore, the court assigns diminished weight to the existence of Latosha DelGuidice's testimony, even if regarded as evidence of actual innocence.

4

The testimony of Marcus Mahoney, during the present case, is clearly newly discovered. Mahoney first revealed his knowledge about the P.T. Barnum Apartments home invasion and the Pettway store shootings, to anyone in an official or quasi-official capacity, years after the petitioner's conviction. This revelation occurred when Mahoney agreed to speak with the petitioner's habeas investigator while he was confined at Webster Correctional Institution.

Mahoney presently serves a prison term and has several felony convictions in his past. From early adolescence, he has regularly used street drugs, including blunts, heroin, and ecstasy. He, Polo, and Robert Payton engaged in the sale of illicit drugs together in the Pettway store area of Bridgeport. Mahoney and Polo were so close that Mahoney regarded Polo as his brother.

To recapitulate, Brad Rainey was Robert and Tony Payton's cousin and father of Latosha DelGiudice's child. Latosha DelGiudice and Manual Rosado also sold drugs, cooperatively.

Mahoney testified that Rainey had a long-standing feud with the Rosado brothers and their associates. In the fall of 2001, Rainey shot Mahoney, striking him five times. The gun used by Rainey was the very same weapon used in the P.T. Barnum Apartments home invasion and at the Pettway store shooting. Mahoney

has been shot two or three other times, including in the presence of Manual Rosado.

The gun in question appears well traveled. Besides the three incidents mentioned herein, it was also traced to at least two other shootings in 2001. Although Mahoney's testimony was sketchy on this point, it appears that the weapon belonged to Tank Gethers and/or Rainey, but kept in a garage to which Mahoney and Polo had access.

Mahoney stated that he knew the petitioner but had no significant dealings with him.

Mahoney, Polo, Manual Rosado, Tank Gethers, and Kollock believed that Barbie Colbert was a major drug dealer at the P.T. Barnum Apartments complex. They decided her apartment would make a lucrative target to rob. Mahoney and Polo surveilled her residence, and the group conceived a plan to conduct the robbery. That plan entailed Kollock and Polo entering Colbert's apartment with guns drawn to induce the occupants to relinquish money and/or drugs. The handguns were to be used as "props" and not to be fired. The guns were supplied by Gethers.

In the early hours of January 27, 2002, Kollock, Polo, and Rosado left to execute the robbery. They returned around 7 a.m. The loot garnered was divided among the conspirators. However, Polo revealed that the robbery got out of hand, resulting in a shot fired at a young child and a teenage girl sexually assaulted.

Gethers was outraged by these departures from the plan. The gun could now be linked to that shooting and possibly traced to him. The assault would also heighten scrutiny by the police and/or the victim's associates.

Mahoney avowed that he was at the Pettway store on February 2, 2002, when Polo was killed. He heard someone shout, "Oh, shit!" He saw three gunmen whose

faces were partially obscured by bandanas. Mahoney believed the three masked men to be Brad Rainey, Tank Gethers, and an individual he only knows as "K." Bullets began to whiz by, and Mahoney quickly ran across the street from the Pettway store, jumped a fence, and hid by or in his car. He recollected that Tank held a pump type shotgun.

Mahoney was uncertain as to what the result of the attack was. He phoned Polo, Manual Rosado, and Robert Payton, but no one returned his calls at first. Eventually, Robert Payton called Mahoney and informed him that Polo was dead and Manual Rosado wounded and in the hospital. Robert Payton cautioned Mahoney to stay away from the hospital and remain quiet about what had transpired.

About thirteen hours later, Rosado left the hospital and, along with Robert Payton went to Mahoney's residence. Tank Gethers drove up and an argument between Mahoney and Gethers ensued because Mahoney told him he knows who was responsible for the shooting. Gethers threatened Mahoney. Mahoney left the area, spending two or three months in Boston.

Mahoney testified that he did not see the petitioner, Tony Payton, or April Edwards at or near the Pettway store at the time of the shootings.

After he returned to Bridgeport, Mahoney learned that the police arrested the petitioner for his involvement in the Pettway store shootings. Despite believing the petitioner was innocent, Mahoney refrained from communicating his knowledge to the authorities. He attributed his silence to self-preservation, a reluctance to be labeled as a "rat," and a desire to avoid involvement in the case, generally.

When interviewed by the petitioner's habeas investigator years later, Mahoney decided to tell what he

believed he knew about the incident because he regretted that an innocent man was convicted of his close friend's murder when the real culprit was Brad Rainey.

The issue for the court to adjudicate, then, is whether Mahoney's exculpatory testimony, in combination with all the other evidence adduced, including the testimony of Latosha DelGiudice and the evidence connecting the P.T. Barnum Apartments home invasion with the Pettway store shootings, along with the original criminal trial evidence, establishes clear and convincing proof that no reasonable jury would convict the petitioner, if it received such evidence, and that the petitioner is factually innocent of the crimes. The petitioner faces a "heavy burden" to prevail under the *Miller* standard. (Internal quotation marks omitted.) *Gould* v. *Commissioner of Correction*, supra, 301 Conn. 567.

Contrary to the petitioner's position, the court finds the testimony of Manual Rosado identifying the petitioner as his assailant to be very credible. He has steadfastly maintained that identification.

Rosado's identification was corroborated by Tony Payton. Tony Payton observed the events unfold from a relatively safe vantage point and did not labor under the confusion, stress, and/or fear that the fusillade must have engendered in the minds and memories of those more exposed to its dangers. His supposed motives to lie appear very shallow.

The racial classifications and skin color testimony of the witnesses appears to the court to be particularly unuseful. Given the lack of reason for neutral witnesses to reflect upon and recollect the precise skin tones of persons firing bursts of bullets at targets unknown to them, at night, in a poorly lit area, it is entirely unsurprising that these witnesses' reports vary.

Gary Burton, a victim, thought the assailants were three black men, possibly. One of his female companions perceived the attackers to be composed of one black male, one Hispanic male, and one olive toned male. Of course, the shooters' lower faces were concealed. Therefore, the court attributes little significance to which of the witnesses' diverse descriptions of skin color comport with the petitioner's complexion or not.

Furthermore, through information received by the police as contained in exhibit 43, it is now the case that two individuals, Shayla DelGiudice and Daniel Vereen, said that they heard Rosado name the petitioner as his shooter very soon after the event while at the hospital.

Rosado has persistently denied knowing who killed his brother, Polo, and has refused to speculate on that question, nor has he stated he personally recognized any shooter besides the petitioner. If Rosado were of a mind to frame the petitioner, it seems incongruous that his mendacity would stop there and allow his brother's killer to remain unidentified.

Also, Rosado's identification of the petitioner as the person who shot him is not negated by his suspicion that Brad Rainey played some role in the event. As noted previously, evidence was adduced that the petitioner had engaged in menacing conduct toward Rosado and Robert Payton at the Pettway store before February 2, 2002. The petitioner's proof fails to dispel the possibility that Rosado's antagonists, Rainey and the petitioner, acted in concert.

It is clear that the same handgun fired at the P.T. Barnum Apartments home invasion was also used in the Pettway store shooting. But it is also apparent that weapon was well traveled. Gethers, and/or Rainey may have used the weapon, but it was also used to facilitate crimes by other persons.

Mahoney's testimony is fraught with circumstances that expose his credibility and/or reliability to derogation. His testimony conflicts with that of Tony Payton as to whether Payton and April Edwards were near the Pettway store during the shooting. No other eyewitness corroborated Mahoney's testimony as to the core issue of the identities of the shooters.

Mahoney bore a grudge against Brad Rainey. Mahoney testified that Rainey shot him five times because Rainey believed Mahoney had issued a threat to "get" Rainey previously. Mahoney acknowledged that the assailants wore bandanas concealing their lower faces and that, upon hearing bullets whiz by, he immediately fled the scene by running away from the locus of the gunfire. Mahoney claimed to regard Polo as his brother but allowed Polo's real killers to remain at large for years while the petitioner languished in prison for a shooting Mahoney knew he did not commit. These circumstances place great strain on the believability or accuracy of Mahoney's testimony, given years later.

Keeping in mind that the *Miller* level of proof goes beyond a mere preponderance to require a petitioner to bear the heavy burden of demonstrating his factual innocence by clear and convincing evidence, the petitioner has failed to carry that burden. Clear and convincing evidence is substantial and unequivocal evidence that produces a very high probability that the fact to be proven is true. *State* v. *Thompson*, 305 Conn. 412, 425, 45 A.3d 605 (2012), cert. denied, 568 U.S. 1146, 133 S. Ct. 988, 184 L. Ed. 2d 767 (2013); see *Gould* v. *Commissioner of Correction*, supra, 301 Conn. 560.

For these reasons, the amended petition for habeas corpus relief is denied.

STATE OF CONNECTICUT *v.* ROBERT KENNIBREW (AC 40970)

Alvord, Cradle and Palmer, Js.

Syllabus

Convicted of the crimes of murder, felony murder and robbery in the first degree in connection with the death of the victim, the defendant appealed to this court from the judgment of the trial court denying his motion to correct an illegal sentence. The sentencing court had imposed concurrent terms of forty-five years of imprisonment each on the murder and felony murder convictions but did not merge the convictions or vacate the felony murder conviction. In his motion to correct, the defendant claimed that the convictions of murder and felony murder violated the constitutional prohibition against double jeopardy and that the court should vacate the felony murder conviction under a retroactive application of *State* v. *Polanco* (308 Conn. 242), in which the Supreme Court held that, when a defendant has been convicted of a greater and a lesser included offense in violation of the prohibition of double jeopardy, the proper remedy is for the trial court to vacate the conviction of the lesser offense. The trial court incorrectly stated that the sentencing court had merged the defendant's convictions of murder and felony murder and determined that, because the rule adopted in *Polanco* was procedural, it did not apply retroactively to the defendant's convictions. *Held* that the trial court improperly denied the defendant's motion to correct an illegal sentence, as his conviction of murder and felony murder, which are a single crime for double jeopardy purposes, violated the prohibition against double jeopardy; contrary to the trial court's incorrect statement that the defendant's convictions of murder and felony murder had been merged, the defendant remained subject to two concurrent sentences for convictions that were cumulative, and, thus, at the time of the filing of his motion to correct an illegal sentence, he remained burdened by multiple punishments for the same offense; accordingly, the proper remedy, consistent with *Polanco*'s directive, was vacatur, and the judgment was reversed and the case was remanded with direction to vacate the felony murder conviction and to resentence the defendant.

Submitted on briefs October 5—officially released November 2, 2021

Procedural History

Substitute information charging the defendant with the crimes of murder, felony murder and robbery in the first degree, brought to the Superior Court in the judicial district of Middlesex, where the defendant was

presented to the court, *Higgins*, *J.*, on pleas of guilty; judgment of guilty; thereafter, the court, *Gold*, *J.*, denied the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Reversed*; *further proceedings*.

Bradford Buchta, senior assistant public defender, filed a brief for the appellant (defendant).

Michael A. Gailor, state's attorney, and *Linda F. Rubertone* and *Russell C. Zentner*, senior assistant state's attorneys, filed a brief for the appellee (state).

Opinion

ALVORD, J. The defendant, Robert Kennibrew, appeals from the judgment of the trial court denying his motion to correct an illegal sentence. On appeal, the defendant claims that his convictions and sentences for murder and felony murder, arising from the killing of a single victim, violate the double jeopardy clause of the fifth amendment to the United States constitution and the Connecticut constitution.[1] The state, in its appellate brief, concedes that the defendant "remains burdened by multiple punishments for the same offense" and agrees with the defendant that this court should remand the case to the trial court with direction to vacate the defendant's felony murder conviction and to resentence the defendant. We agree with the parties.

[1] "The fifth amendment to the United States constitution provides in relevant part: '[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . .' Although our state constitution does not contain an explicit prohibition on double jeopardy, it is well settled that 'the due process and personal liberty guarantees provided by article first, §§ 8 and 9, of the Connecticut constitution have been held to encompass the protection against double jeopardy.' . . . The protection that the state constitution provides against double jeopardy is 'coextensive with that provided by the constitution of the United States.' " (Citation omitted.) *State* v. *Drakes*, 321 Conn. 857, 865, 146 A.3d 21, cert. denied, U.S. , 137 S. Ct. 321, 196 L. Ed. 2d 234 (2016).

The record reflects the following procedural history that is relevant to this appeal. On April 7, 1998, the defendant pleaded guilty to murder in violation of General Statutes § 53a-54a,[2] felony murder in violation of General Statutes § 53a-54c, and robbery in the first degree in violation of General Statutes § 53a-134 (a) (2), in connection with the shooting death and robbery of the victim. The trial court, *Higgins*, *J*., sentenced the defendant to forty-five years of incarceration with respect to the murder conviction, forty-five years of incarceration with respect to the felony murder conviction, and twenty years of incarceration with respect to the robbery conviction. The court ordered the sentences to run concurrently, resulting in a total effective sentence of forty-five years of incarceration. The defendant's convictions of murder and felony murder were not merged, nor was the conviction of felony murder vacated, during the sentencing proceeding or at any time thereafter.

The defendant filed a motion to correct his sentence on May 27, 2016, and, following the appointment of counsel, a revised motion, dated February 28, 2017. The defendant argued that his convictions of murder and felony murder with respect to the death of one victim violated the constitutional prohibition against double jeopardy and that cumulative convictions lead to adverse collateral consequences. Relying on *State* v. *Miranda*, 317 Conn. 741, 755–56, 120 A.3d 490 (2015), the defendant argued that "[m]erger is no longer the

[2] The defendant pleaded guilty to murder under the *Alford* doctrine. "Under *North Carolina* v. *Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), a criminal defendant is not required to admit his guilt . . . but consents to being punished as if he were guilty to avoid the risk of proceeding to trial. . . . A guilty plea under the *Alford* doctrine is a judicial oxymoron in that the defendant does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea nevertheless." (Internal quotation marks omitted.) *State* v. *Tabone*, 292 Conn. 417, 421 n.7, 973 A.2d 74 (2009).

appropriate remedy" and requested that the court vacate the felony murder conviction.

The court, *Gold, J.*, heard argument on the motion on July 18, 2017. The state and the defendant agreed that "there should no longer be a sentence on the felony murder [conviction]." The question presented to the court was whether the convictions should be merged or the felony murder conviction vacated. The state argued that *State* v. *Chicano*, 216 Conn. 699, 725, 584 A.2d 425 (1990) (overruled in part by *State* v. *Polanco*, 308 Conn. 242, 61 A.3d 1084 (2013)), cert. denied, 501 U.S. 1254, 111 S. Ct. 2898, 115 L. Ed. 2d 1062 (1991), was the controlling authority at the time of the defendant's sentencing and, therefore, the court should merge the defendant's convictions. The state asserted that *State* v. *Polanco*, 308 Conn. 242, 245, 61 A.3d 1084 (2013), in which our Supreme Court terminated the use of the merger of convictions approach and readopted vacatur as a remedy for cumulative convictions that violate double jeopardy protections, was not given retroactive effect. The defendant reiterated his argument that merger is no longer the appropriate remedy and that the conviction of felony murder should be vacated. In support of that argument, the defendant maintained that "cumulative convictions for the single victim lead to an adverse collateral consequence" and directed the court to our Supreme Court's statement in *State* v. *Miranda*, supra, 317 Conn. 753, that it was "not convinced that the opaque remedy of merger can be implemented in a manner that consistently protects defendants from the potential collateral consequences . . . ."

The parties appeared before the court on August 21, 2017, on which date the court issued its oral ruling denying the defendant's motion to correct an illegal sentence. The court incorrectly stated that, with respect to the convictions of murder and felony murder, that

Judge Higgins had "merged those convictions, leaving the convictions intact, but merging them pursuant to the then existing law." Neither the state nor the defendant's counsel informed the court that the convictions never had been merged.

The court then stated that the defendant's motion "asks the court to apply, retroactively, to [his] 1998 conviction the new law in Connecticut first discussed in . . . *Polanco* that rejected the merger rule that had long been in place and had, instead, adopted a rule whereby defendants convicted of murder and felony murder would have the felony murder conviction actually vacated, and it was that relief that [the defendant] asked the court to award here." The court first determined that the motion to correct was an appropriate procedural vehicle for the defendant to seek his requested relief. The court then identified the question before it as "whether or not the rule adopted in *Polanco* is appropriately applied retroactively to [the defendant's] 1998 conviction." The court found the rule adopted in *Polanco* to be procedural, determined that it did not rise to the level of "a watershed procedural rule,"[3] and concluded that it did not apply retroactively

[3] "With two exceptions, a new rule will not apply retroactively to cases on collateral review. . . . First, if the new rule is substantive, that is, if the rule places certain kinds of primary, private conduct beyond the power of the criminal lawmaking authority to proscribe . . . it must apply retroactively. Such rules apply retroactively because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him. . . .

"Second, if the new rule is procedural, it applies retroactively if it is a watershed [rule] of criminal procedure . . . implicit in the concept of ordered liberty . . . meaning that it implicat[es] the fundamental fairness and accuracy of [a] criminal proceeding. . . . Watershed rules of criminal procedure include those that raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." (Citations omitted; internal quotation marks omitted.) *Casiano* v. *Commissioner of Correction*, 317 Conn. 52, 62–63, 115 A.3d 1031 (2015), cert. denied sub nom. *Semple* v. *Casiano*, 577 U.S. 1202, 136 S. Ct. 1364, 194 L. Ed. 2d 376 (2016).

to the defendant's 1998 conviction. Accordingly, the court denied the defendant's motion. This appeal followed.

On appeal, the defendant claims that the court erred in denying his motion to correct an illegal sentence. Specifically, he argues: "First, the trial court incorrectly found that Judge Higgins merged the defendant's convictions and sentences in 1998. That was incorrect, as the defendant's multiple convictions and sentences have never been remedied. Second, the trial court incorrectly concluded that remedying the double jeopardy violation by applying the rule of vacatur adopted by our Supreme Court in *State* v. *Polanco*, [supra] 308 Conn. 242 . . . would amount to an impermissible retroactive application of that decision. That was also incorrect because, as stated earlier, the defendant's multiple convictions and sentences were not merged in 1998. As such, upon the defendant's motion, the trial court was asked for the first time to remedy this clear double jeopardy violation." The state, abandoning the argument it made before the trial court that merger is the proper remedy in this case, responds that, "in light of the existing double jeopardy violation arising from the defendant's cumulative homicide convictions, the state agrees with the defendant that this court should reverse the judgment of the trial court and remand the matter for resentencing with direction to apply the *Polanco-Miranda* vacatur procedure, which presently is the applicable law in Connecticut." We agree with the parties.

We first set forth our standard of review and legal principles governing motions to correct an illegal sentence. "Practice Book § 43-22 provides in relevant part that [t]he judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner . . . . It is well established that under the common law a trial

court has the discretionary power to modify or vacate a criminal judgment [only] before the sentence has been executed. . . . This is so because the court loses jurisdiction over the case when the defendant is committed to the custody of the [C]ommissioner of [C]orrection and begins serving the sentence. . . . Without a legislative or constitutional grant of continuing jurisdiction . . . the trial court lacks jurisdiction to modify its judgment. . . .

"Because the judiciary cannot confer jurisdiction on itself through its own rule-making power, [Practice Book] § 43-22 is limited by the common-law rule that a trial court may not modify a sentence if the sentence was valid and its execution has begun. . . . Therefore, for the trial court to have jurisdiction to consider the defendant's claim of an illegal sentence, the claim must fall into one of the categories of claims that, under the common law, the court has jurisdiction to review. . . .

"[A]n illegal sentence is essentially one [that] . . . exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory. . . . In accordance with this summary, Connecticut courts have considered four categories of claims pursuant to [Practice Book] § 43-22. The first category has addressed whether the sentence was within the permissible range for the crimes charged. . . . The second category has considered violations of the prohibition against double jeopardy. . . . The third category has involved claims pertaining to the computation of the length of the sentence and the question of consecutive or concurrent prison time. . . . The fourth category has involved questions as to which sentencing statute was applicable. . . .

"This court has recognized that a claim is cognizable in a motion to correct an illegal sentence if it is a challenge specifically directed to the punishment

imposed, even if relief for that illegal punishment requires the court to in some way modify the underlying convictions, such as for double jeopardy challenges." (Citations omitted; internal quotation marks omitted.) *State* v. *Smith*, 338 Conn. 54, 59–60, 256 A.3d 615 (2021). "[C]aims of double jeopardy involving multiple punishments present a question of law to which we afford plenary review." (Internal quotation marks omitted.) *State* v. *Coleman*, 204 Conn. App. 860, 868–69, 254 A.3d 938, cert. denied, 337 Conn. 907, 253 A.3d 45 (2021).

We next set forth our Supreme Court's jurisprudence with respect to the doctrines of merger and vacatur. In *State* v. *Chicano*, supra, 216 Conn. 725, our Supreme Court opined that when a defendant is convicted of and sentenced on both a greater and lesser included offense in violation of the double jeopardy clause, the proper remedy is for the court to merge the convictions, "vacating the sentence for the lesser included offense, but leaving the conviction for that offense intact and merging it with the conviction for the greater offense." *State* v. *Johnson*, 316 Conn. 34, 39, 111 A.3d 447 (2015), citing *State* v. *Chicano*, supra, 725. In *State* v. *Polanco*, supra, 308 Conn. 245, our Supreme Court "revisited the appropriate remedy to which a defendant should be entitled upon establishing that he had been convicted of and sentenced on both a greater and lesser included offense in violation of the double jeopardy clause." *State* v. *Johnson*, supra, 39. The defendant in *Polanco* argued that *Rutledge* v. *United States*, 517 U.S. 292, 307, 116 S. Ct. 1241, 134 L. Ed. 2d 419 (1996), required our Supreme Court to "eschew the merger of convictions approach, and, instead . . . to vacate the conviction for the lesser offense." *State* v. *Polanco*, supra, 248. Our Supreme Court declined to resolve the issue on constitutional grounds. Id. Instead, the court deemed it appropriate to exercise its inherent supervisory authority over the administration of justice to terminate the use of the

merger of convictions approach and hold that, "when a defendant has been convicted of greater and lesser included offenses, the trial court must vacate the conviction for the lesser offense rather than merging the convictions . . . ." Id., 245; see also id., 255. Subsequently, in *State* v. *Miranda*, supra, 317 Conn. 751–53, our Supreme Court extended the vacatur remedy prescribed in *Polanco* to double jeopardy violations arising out of cumulative convictions for the same offense.

On October 11, 2018, this court, sua sponte, ordered the briefing in this matter stayed pending the release of our Supreme Court's decision in *State* v. *Smith*, supra, 338 Conn. 54. In *Smith*, the defendant was convicted in 2005, following a jury trial, of felony murder and manslaughter in the first degree, among other crimes. Id., 55–56. The trial court merged the conviction of manslaughter with the felony murder conviction and sentenced the defendant to sixty years of imprisonment on the felony murder conviction. Id., 56. In 2015, the defendant, representing himself, "filed a motion to correct an illegal sentence in which he contended that the sentence was illegal under the *Polanco* supervisory rule because the court merged the convictions instead of vacating the conviction on the manslaughter charge." Id. The court denied the motion, accepting the state's argument that, because *Polanco* was decided pursuant to our Supreme Court's supervisory authority, it did not apply retroactively. Id. This court affirmed the judgment of the trial court. Id. Our Supreme Court granted the defendant's petition for certification to appeal, limited to the following issue: "Does this court's holding in . . . *Polanco* . . . readopting vacatur as a remedy for a cumulative conviction that violates double jeopardy protections, apply retroactively?" (Internal quotation marks omitted.) Id. In its brief to our Supreme Court, the state claimed, for the first time, that the trial court "lacked subject matter jurisdiction to entertain the

defendant's motion to correct an illegal sentence because the motion sought only to modify the defendant's conviction, not his sentence."[4] Id., 56. The Supreme Court agreed with the state. Id., 56–57. It explained that, "when cumulative convictions affect a *sentence* in any manner, the trial court has jurisdiction to entertain a motion to correct an illegal sentence." (Emphasis in original.) Id., 63. In *Smith*, however, "the defendant ha[d] not claimed that his *sentence* was affected *in any manner* by the allegedly cumulative convictions. No sentence was imposed on the defendant's merged manslaughter conviction, and it is undisputed that the only remedy sought by the defendant, namely, vacatur of that conviction, will have no effect on the length, computation or structure of his sentence." (Emphasis in original.) Id., 63–64. The court noted that it was not aware of any appellate authority holding that "trial courts have jurisdiction to correct an illegal sentence under Practice Book § 43-22 when the alleged double jeopardy violation had no impact whatsoever on the sentence imposed." Id., 64. Accordingly, our Supreme Court concluded that the trial court lacked jurisdiction to entertain the defendant's motion to correct an illegal sentence. Id.

We now turn to the present case, in which the defendant pleaded guilty to and was convicted of both murder

[4] After oral argument before our Supreme Court, that court ordered the parties to submit supplemental briefs on the following issue: "Is this court's holding pursuant to its supervisory authority in *State* v. *Polanco*, [supra, 308 Conn. 255], that vacatur is the proper remedy for a cumulative conviction that violates double jeopardy protections, as that holding was expanded and clarified by this court's decision in *State* v. *Miranda*, [supra, 317 Conn. 741], constitutionally mandated under the double jeopardy clause of the United States constitution or is merger of the cumulative convictions a constitutionally permissible remedy?" (Internal quotation marks omitted.) *State* v. *Smith*, supra, 338 Conn. 56 n.1. Because the court concluded that the trial court lacked jurisdiction over the defendant's motion to correct an illegal sentence, the court did not address the issue raised in its request for additional briefing. Id.

and felony murder, and received two concurrent sentences for those convictions. "Our Supreme Court has analyzed the legislative history of the felony murder statute and concluded that the legislature intended that intentional murder and felony murder are alternative means of committing the same offense and should be treated as a single crime for double jeopardy purposes." *State* v. *Benefield*, 153 Conn. App. 691, 709–10, 103 A.3d 990 (2014), cert. denied, 315 Conn. 913, 106 A.3d 305, cert. denied, 575 U.S. 1041, 135 S. Ct. 2386, 192 L. Ed. 2d 172 (2015); see also *State* v. *John*, 210 Conn. 652, 695, 557 A.2d 93, cert. denied, 493 U.S. 824, 110 S. Ct. 84, 107 L. Ed. 2d 50 (1989), and cert. denied sub nom. *Seebeck* v. *Connecticut*, 493 U.S. 824, 110 S. Ct. 84, 107 L. Ed. 2d 50 (1989). Because the defendant was convicted of both murder and felony murder, which are a single crime for double jeopardy purposes, the defendant's cumulative convictions violate the prohibition against double jeopardy.

State v. *Smith*, supra, 338 Conn. 63, in which the trial court at the time of sentencing had merged the defendant's manslaughter conviction with his felony murder conviction and "[n]o sentence was imposed on the defendant's merged manslaughter conviction," does not guide our consideration of the present case. Here, contrary to the court's statement at the time of the denial of the defendant's motion to correct his illegal sentence, the defendant's convictions of murder and felony murder had not been merged. Instead, the defendant remained subject to two concurrent sentences for convictions that were cumulative, in violation of double jeopardy principles. Thus, at the time of the filing of his motion to correct an illegal sentence, the defendant in the present case remained burdened by multiple punishments for the same offense. The court, therefore, improperly denied the defendant's motion to correct an illegal sentence.

As noted previously, the parties are in agreement that the proper remedy in the present case is to remand the matter to the trial court with direction to vacate the defendant's conviction of felony murder. In its appellate brief, the state expressly agrees with the defendant "that this court should reverse the judgment of the trial court and remand the matter for resentencing with direction to apply the *Polanco-Miranda* vacatur procedure, which presently is the applicable law in Connecticut." Under the circumstances of the present case, in which the defendant's cumulative convictions, imposed prior to our Supreme Court's decision in *Polanco*, were never merged and the defendant remains burdened by multiple punishments for the same offense in violation of double jeopardy principles, we agree with the parties that the proper remedy is vacatur, rather than merger.

We note that our conclusion as to the appropriate remedy in this case does not rest on a retroactive application of the *Polanco* supervisory rule. Rather, because the double jeopardy violation presently exists, the proper remedy, consistent with *Polanco*'s directive, is vacatur. Moreover, the policy concerns that led the court in *Polanco* to conclude that vacatur was the proper remedy apply with equal force in this case. As the court explained in *Polanco*, its decision to reject the merger of convictions approach was supported by the fact that the United States Court of Appeals for the Second Circuit no longer provided a jurisprudential foundation for continued use of the merger approach, and the court found no compelling reason to adhere to an approach that was not in conformity with the approach applied by other circuit courts of appeals. Additionally, the court in *Polanco* noted that "it is difficult to know whether collateral consequences would necessarily result from use of the merger approach. Still, although we do not rest our decision on constitutional grounds, we think it wise to adhere to an

approach that the federal courts seem to conclude is *less* likely to give rise to collateral consequences, which are oftentimes 'legion' . . . and may produce devastating results for a defendant." (Citation omitted; emphasis in original.) *State* v. *Polanco*, supra, 308 Conn. 255–56 n.5. Accordingly, we agree with the parties that the proper remedy in the present case is vacatur.

The judgment is reversed and the case is remanded with direction to vacate the conviction of felony murder and to resentence the defendant.

In this opinion the other judges concurred.

SHAYE MCCORMICK *v.* DAVID TERRELL
(AC 43946)

Alvord, Cradle and Lavine, Js.

Syllabus

The defendant, whose marriage to the plaintiff had previously been dissolved, appealed to this court from the decision of the trial court granting the plaintiff's postjudgment motion for attorney's fees. The defendant claimed that, in ordering him to pay the attorney's fees of the plaintiff, the trial court applied the incorrect legal standard in that it failed to determine that the plaintiff lacked ample liquid funds to pay her own attorney's fees. *Held* that the trial court did not abuse its broad discretion in its award of attorney's fees to the plaintiff: contrary to the defendant's contention, the court was not required to make a finding that the plaintiff lacked ample liquid funds to pay her own attorney's fees, as the court explicitly concluded that a denial of the plaintiff's motion for attorney's fees would undermine other financial orders of the court, one of two circumstances our Supreme Court has recognized that warrant an award of attorney's fees; accordingly, the lack of an explicit finding that the plaintiff lacked ample liquid assets to pay her own attorney's fees had no bearing on the basis for the trial court's award.

(*One judge dissenting*)

Argued September 14—officially released November 2, 2021

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Fairfield and tried to the court, *Winslow*, *J.*;

judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Egan, J.*, granted the plaintiff's motion for attorney's fees, and the defendant appealed to this court. *Affirmed.*

Sheila S. Charmoy, with whom, on the brief, was *Scott M. Charmoy*, for the appellant (defendant).

Shaye Anne McCormick, self-represented, the appellee (plaintiff).

Opinion

CRADLE, J. In this marital dissolution case, the defendant, David Terrell, appeals from the trial court's postjudgment award of attorney's fees in the amount of $7500 to the plaintiff, Shaye McCormick, for her defense of a motion to modify the dissolution judgment filed by the defendant. The defendant claims that, in ordering him to pay the plaintiff's attorney's fees, the trial court applied the incorrect legal standard in that it failed to determine that the plaintiff lacked ample liquid funds to pay her own attorney's fees.[1] We affirm the judgment of the trial court.[2]

[1] The defendant does not contest the reasonableness of the amount of attorney's fees awarded.

[2] The defendant also claims that the court erred in precluding him from introducing evidence of the plaintiff's expenses since the date of dissolution to demonstrate how the plaintiff spent the child support and alimony that he paid her. He argues that the court's ruling "that [the] plaintiff's expenses were not relevant is contradictory to the weight of controlling case law, inasmuch as the parties' expenses go to the parties' station and needs pursuant to the [General Statutes] § 46b-82 criteria that the court must consider." (Emphasis omitted.) At the hearing, however, the defendant did not seek to introduce evidence of the plaintiff's expenses for the purpose of demonstrating her needs or station. He sought to explore her expenses since the date of dissolution to demonstrate that she "dissipated" the money that she received from the defendant pursuant to the unallocated alimony and child support, and that she should have saved a portion of that money to pay for her attorney's fees instead of spending it on her "extravagant lifestyle." As explained herein, the trial court repeatedly rejected the defendant's argument that the plaintiff should have saved some of the money that he had paid to her as child support and alimony to pay for her attorney's fees. Indeed, the defendant cannot reasonably argue that the plaintiff should

The trial court set forth the following relevant factual and procedural history. "The parties appeared before the court on the plaintiff's motion for attorney's fees. She seeks $7500 for a retainer to be paid to counsel in connection with a hearing to be held on November 26, 2019, in regard to child support. The plaintiff has exhausted her initial retainer in the amount of $7500, and she owes additional attorney's fees.

"The court has had an opportunity to examine the parties' respective financial affidavits and exhibits submitted into evidence. Both parties testified.

"The court finds that the parties' marriage was dissolved on May 9, 2011. Pursuant to the separation agreement incorporated into the dissolution judgment, the defendant paid the plaintiff alimony in the amount of $1 per year for eight and one-half years,[3] and unallocated alimony and child support for the same period under the terms of the separation agreement.

"The plaintiff owns the former marital residence, and she pays the expenses related to it. She pays for various daily expenses related to the parties' minor children. The parties split other expenses such as music lessons, school events and trips on a pro rata basis under the

have saved the child support that she had received from the defendant to pay her attorney's fees. Similarly, the court's rejection of the defendant's argument is consistent with the well established purpose of alimony, to satisfy the obligor's continuing duty to support his or her former spouse.

Moreover, the defendant argues that it "is also common sense [that] these expenses relate directly to the amount of liquid funds available to a party to pay her attorney's fees, and the reasons she lacks funds." As explained herein, the court did not award the plaintiff attorney's fees on the ground that she lacked ample liquid funds to pay them. Accordingly, the defendant's argument in this regard is unavailing.

[3] In fact, the dissolution judgment required the plaintiff to pay the defendant $1 per year as alimony. The defendant notes this obvious scrivener's error to argue that the court was unaware of the amount of alimony and child support that he had paid to the plaintiff since the date of dissolution. As discussed in footnote 4 of this opinion, this argument is unfounded.

dissolution judgment. The plaintiff's share is 45 percent.[4] She has approximately $1000 combined in her two checking accounts. The plaintiff has available credit on her credit cards, but she does not wish to charge further on them, because she charged the first legal retainer and will be subject to paying interest on additional charges.

"The court finds that the plaintiff is presently employed part-time, working approximately twenty to twenty-five hours per week. She began working in May of 2018. Her hours worked per week fluctuate based upon her family's schedule and periods such as school vacations. Time off is unpaid.

"Until around the time she was hired in her present position, the plaintiff was unable to maintain any steady employment, or develop private yoga clients, because of her necessary extensive role in assisting the parties' son. Due to his special needs, she provided transportation to and from school, frequently responded to emergencies and issues that arose during the school day, and addressed his needs both after school and at night. The parties' younger daughter also required her presence at home. The plaintiff relied upon the alimony and child support to support the family, and for expenses such as to pay all costs associated with the residence, make home improvements, provide activities for the children and her return to school.

"The plaintiff recently earned her graduate degree. She is now actively seeking full-time employment. She sent out a number of resumes, but has not received any offers to date. She desires to return to work full-time

[4] The defendant contends that the court erroneously found that the plaintiff pays 45 percent of the children's extracurricular expenses. Although the dissolution judgment provided that the parties would pay their pro rata share of those expenses, the plaintiff testified at the hearing that she paid 45 percent of them. Because the court was entitled to credit that testimony, its determination was not clearly erroneous.

in the field of her graduate degree or as a paralegal in order to earn a higher income.

"The parties' son is now in high school. He has been able to transition well. The plaintiff continues to play an essential role in helping him manage several aspects of his personal life and academic issues. The plaintiff has not presently sought to work a second job because of her current work schedule, job search efforts and parenting obligations. The court finds that the plaintiff's current work schedule pending a new position is appropriate.

"The defendant is an executive at Blackstone, LLP. He is a certified public accountant and holds a graduate degree. His financial affidavit reflects that his net salary, with bonus, is $387,816, which he expects to receive in December, 2019. He is not looking to leave, and does not have any offers. The defendant funds his 401 (k) each pay period. He has over $60,000 in accounts including $3000 in a private equity account. He has made approximately three private equity investments amounting to roughly $10,000. The defendant contributes $96 on a weekly basis as a charitable contribution to a local youth rugby program.

"The defendant owns a home and leases an apartment in New York City for the convenience of not commuting during the work week. He has an outstanding loan of $220,000 to his parents for which he has made no payments until this year.

"The court finds that there is a significant discrepancy between the parties' financial resources, including liquid assets. The court finds that the attorney's fees and costs sought by the plaintiff are reasonable under the circumstances. . . . The court further finds that failure to award fees would substantially undermine other financial orders of the court." (Citation omitted; footnotes added.) The court thus granted the plaintiff's

motion and ordered the defendant to pay $7500 toward her attorney's fees. On January 23, 2020, the court denied the defendant's motion to reargue. This appeal followed.

"In dissolution and other family court proceedings, pursuant to [General Statutes] § 46b-62 (a), the court may order either parent to pay the reasonable attorney's fees of the other in accordance with their respective financial abilities and the equitable criteria set forth in [General Statutes] § 46b-82, the alimony statute. That statute provides that the court may consider 'the length of the marriage, the causes for the . . . dissolution of the marriage . . . the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section 46b-81' for the assignment of property. General Statutes § 46b-82. Section 46b-62 (a) applies to postdissolution proceedings because the jurisdiction of the court to enforce or to modify its decree is a continuing one and the court has the power, whether inherent or statutory, to make allowance for fees. . . . Whether to allow counsel fees, [under § 46b-62 (a)], and if so in what amount, calls for the exercise of judicial discretion. . . . An abuse of discretion in granting counsel fees will be found only if [an appellate court] determines that the trial court could not reasonably have concluded as it did." (Citation omitted; internal quotation marks omitted.) *Leonova* v. *Leonov*, 201 Conn. App. 285, 326–27, 242 A.3d 713 (2020), cert. denied, 336 Conn. 906, 244 A.3d 146 (2021).

Our Supreme Court has "stated three broad principles by which these statutory criteria are to be applied. First, such awards should not be made merely because the obligor has demonstrated an ability to pay. Second, where both parties are financially able to pay their own

fees and expenses, they should be permitted to do so. Third, where, because of other orders, the potential obligee has ample liquid funds, an allowance of [attorney's] fees is not justified." *Turgeon* v. *Turgeon*, 190 Conn. 269, 280, 460 A.2d 1260 (1983).

The self-stated "crux" of the defendant's appeal is that the trial court applied an incorrect legal standard in granting the plaintiff's motion for attorney's fees because it "failed to make the requisite predicate finding" that the plaintiff lacked ample liquid funds to pay her own attorney's fees. Contrary to the defendant's contention, this court has held that the trial court is not required to make such an express finding. See *Leonova* v. *Leonov*, supra, 201 Conn. App. 328–29. This court's holding in *Leonova* is consistent with the well established and related principle that, "[i]n making an award of attorney's fees [pursuant to §§ 46b-62 and 46b-82], [t]he court is not obligated to make express findings on each of these statutory criteria." (Internal quotation marks omitted.) *Grimm* v. *Grimm*, 276 Conn. 377, 397, 886 A.2d 391 (2005), cert. denied, 547 U.S. 1148, 126 S. Ct. 2296, 164 L. Ed. 2d 815 (2006).

Moreover, our Supreme Court has explained that the determination of whether a party has "ample liquid funds [is] not an absolute litmus test for an award of counsel fees. . . . [To] award counsel fees to a spouse who had sufficient liquid assets would be justified, if the failure to do so would substantially undermine the other financial awards." (Citation omitted; internal quotation marks omitted.) *Maguire* v. *Maguire*, 222 Conn. 32, 44, 608 A.2d 79 (1992). In other words, "an award of attorney's fees in a marital dissolution case is warranted only when at least one of two circumstances is present: (1) one party does not have ample liquid assets to pay for attorney's fees; *or* (2) the failure to award attorney's fees will undermine the court's other financial orders." (Emphasis added.) *Ramin* v. *Ramin*, 281 Conn. 324,

352, 915 A.2d 790 (2007). The trial court expressly relied on the latter justification in awarding the plaintiff attorney's fees in this case.[5] Although the court found that there was "a significant discrepancy between the parties' financial resources, including liquid assets," it made no finding as to whether or not the plaintiff had ample liquid assets to pay her own attorney's fees, nor, as discussed herein, was it required to do so.[6] The court explicitly concluded that a denial of the plaintiff's motion for attorney's fees would undermine the other financial orders—the unallocated alimony and child support order.[7] Accordingly, the lack of an explicit find-

[5] The defendant devotes a considerable portion of his brief to arguing that the court erred in precluding him from introducing evidence of prior court orders, specifically the unallocated alimony and child support order issued at the time of dissolution. The dissolution judgment was marked as an exhibit at the hearing, and the court further confirmed that it was part of the court file. The unallocated order was also referenced repeatedly throughout the hearing by both parties, by their attorneys, and by the court. The record reflects that the court was fully aware of the unallocated order and the amounts received by the plaintiff pursuant to that order. For example, at the hearing on the plaintiff's motion for attorney's fees, the defendant testified that he objected to that motion because "she's received over $400,000 in alimony in the last two years and has the ability to pay her own legal fees." The defendant further testified that, since the date of dissolution, he had paid the plaintiff approximately $1,570,000 in unallocated alimony, and that he paid her $320,000 in 2018. Thus, the defendant's contention that the court was unaware of the unallocated alimony and child support order is unfounded.

[6] The court did find that, at the time of the hearing, the plaintiff had $1000 in her two checking accounts. This finding is not supported by the record. Because, however, the court based its award of attorney's fees on the ground that the failure to award them would undermine the other financial orders, and not because the plaintiff lacked ample liquid funds to pay them herself, the court's erroneous determination of the amount the plaintiff had in her bank accounts is immaterial.

[7] In his objection to the plaintiff's motion for attorney's fees, the defendant argued that the plaintiff had ample liquid funds to pay her own attorney's fees "as a result of the trial court's judgment." The defendant contended that he had paid the plaintiff more than $900,000 in alimony and child support since January 1, 2015, and that she "cannot squander the income she received [from the defendant] and then be rewarded by this court for needless spending based on her claim of lack of funds. The plaintiff was well aware of the impending action to modify the child support order as same was clearly set

ing that the plaintiff lacked ample liquid assets to pay her own attorney's fees had no bearing on the basis for the trial court's award. On the basis of the foregoing, we conclude that the trial court did not abuse its broad discretion in its award of $7500 in attorney's fees to the plaintiff.

The judgment is affirmed.

In this opinion, LAVINE, J., concurred.

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forth in the agreement which specifically states that child support would be paid pursuant to the guidelines upon termination of alimony. She had an obligation to financially plan for same."

In response to the defendant's offer of evidence pertaining to the manner in which the plaintiff spent the unallocated alimony and child support that she received from the defendant, the court responded: "The court sees it as there was only an award of unallocated alimony and child support. And the plaintiff was charged with using those funds to, under the separation agreement, pay the mortgage on the house and other expenses for support of the children and support of the family. And to then bootstrap the argument into saying that some portion of that had to be saved for future litigation would be unreasonable.

"And to then compel an argument by the plaintiff that she was unreasonable with her—argued she was reasonable in her savings of that money already allocated after an analysis of the relative abilities to pay, now she should have saved some other portion of that for future litigation I think would be untenable.

"So there's already an allegation based on financial ability. Jobs, no jobs, assets, allocation, and one party got one amount, one party got the other amount. So I don't think it's appropriate now to start doing a dive into bank records on who bought coffee, who bought meals, and what the plaintiff did or didn't do with the money allocated to her for support of the family, savings or not, to now say she didn't save it for future proceedings. It's a matter of assets and income."

The court further noted that it would consider "earnings and whether she's working, could have worked, et cetera," "the estate and needs of the parties," and the factors enumerated in § 46b-82. The court reiterated, however, "[b]ut I don't think that turns into after having received an allocation of alimony and child support under a prior court order, whether the use of that allocation in the party's discretion . . . was appropriate." The court expounded: "[W]e have evidence on whether the plaintiff worked, if she could have worked, what her income is, what her income was, what her income may be. But you say what she—if she should have saved her child support, she should have saved part of the unallocated award of child support and alimony and whether she should have bought Starbucks coffee

ALVORD, J., dissenting. Because I believe that the trial court's clearly erroneous finding with respect to the assets of the plaintiff, Shaye McCormick, constituted harmful error, I respectfully dissent from the majority's conclusion that the court did not abuse its discretion in issuing its award of attorney's fees.

I briefly note the applicable standard of review. "In dissolution proceedings, the court may order either parent to pay the reasonable attorney's fees of the other in accordance with their respective financial abilities and the criteria set forth in General Statutes § 46b-82; see also General Statutes § 46b-62. . . . Whether to allow counsel fees, and if so, in what amount, calls for the exercise of judicial discretion. . . . An abuse of discretion in granting counsel fees will be found only if [an appellate court] determines that the trial court could not reasonably have concluded as it did. . . . The court's function in reviewing such discretionary decisions is to determine whether the decision of the trial court was clearly erroneous in view of the evidence and pleadings in the whole record." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *Pena* v. *Gladstone*, 168 Conn. App. 175, 185–86, 146 A.3d 51 (2016). "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 on this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence in the record to support it, the reviewing court on the entire evidence is left with

or a birthday present, which is what you were getting to, I'm not entertaining that."

the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Buehler* v. *Buehler*, 117 Conn. App. 304, 317–18, 978 A.2d 1141 (2009).

I agree with the facts as recited in the majority opinion.[1] Relevant to this dissent, I specifically agree with the majority that the court did not award attorney's fees on the basis that the plaintiff lacks ample liquid assets to pay for attorney's fees. Rather, the court awarded attorney's fees on the basis that a "failure to award fees would substantially undermine other financial orders of the court."

In awarding fees, however, the trial court erroneously found that the plaintiff "has approximately $1000 combined in her two checking accounts." As the majority recognizes, this finding is not supported by the record. Indeed, the plaintiff's October 17, 2019 financial affidavit disclosed a checking account containing $5939 and a savings account containing $10,129, for a total of $16,068. Moreover, the plaintiff testified during the hearing on her motion for attorney's fees that she had $16,000 in her bank account. Accordingly, the court's finding as to the plaintiff's assets is clearly erroneous.

I disagree with the majority that the court's clearly erroneous factual finding is immaterial. The court's finding as to the amount of the plaintiff's liquid assets was central to its decision granting the award of attorney's fees. Specifically, after narrating facts that could

[1] I note in passing the source of this motion to modify. The parties agreed, in their May 9, 2011 separation agreement, which was incorporated into the judgment of dissolution, that the defendant would pay unallocated alimony and child support for 102 months, and the parties further agreed that the defendant thereafter would pay child support. Coincident with its consideration of the defendant's motion for modification and to set a child support order in accordance with the child support guidelines, the court accepted the parties' agreement instituting a temporary child support order.

be tied to certain of the statutory criteria,[2] the court built on its clearly erroneous factual finding of the plaintiff's assets by determining that "there is a significant discrepancy between the parties' financial resources, *including liquid assets*." (Emphasis added.) The court made this finding in support of its conclusion that the failure to award attorney's fees would substantially undermine other financial orders of the court.[3] As in the present case, courts routinely consider the parties' assets in their determination of whether the failure to award attorney's fees would undermine other financial orders. See, e.g., *McMellon* v. *McMellon*, 116 Conn. App. 393, 400, 976 A.2d 1 (noting that court had articulated discrepancy between parties' net incomes as well as their assets), cert. denied, 293 Conn. 926, 980 A.2d 911 (2009). In the present case, the court's clearly erroneous determination of the plaintiff's assets, which the court expressly and centrally relied on in making its award of attorney's fees, cannot be deemed to be harmless error.[4]

[2] The statutory criteria encompass a range of considerations, many of which are most relevant to the judge's consideration of an award of attorney's fees related to the dissolution of the marriage.

[3] I note that the "enactment in 1973 [of § 46b-62] represented a departure from the common-law American rule followed in Connecticut, including in family matters cases, under which attorney's fees and ordinary expenses and burdens of litigation are not allowed to the successful party absent a contractual or statutory exception. . . . Thus, [our Supreme Court has stated that it is] mindful of other rules of statutory construction applicable when determining whether a statute has abrogated the common law. [W]hen a statute is in derogation of common law . . . it should receive a strict construction and is not to be extended, modified, repealed or enlarged in its scope by the mechanics of [statutory] construction. . . . In determining whether or not a statute abrogates or modifies a common law rule the construction must be strict, and the operation of a statute in derogation of the common law is to be limited to matters clearly brought within its scope." (Citations omitted; internal quotation marks omitted.) *Fennelly* v. *Norton*, 294 Conn. 484, 504–505, 985 A.2d 1026 (2010).

[4] "Where . . . some of the facts found [by the court] are clearly erroneous and others are supported by the evidence, we must examine the clearly erroneous findings to see whether they were harmless, not only in isolation, but also taken as a whole. . . . If, when taken as a whole, they undermine appellate confidence in the court's [fact-finding] process, a new hearing is

In light of the court's express reliance on its clearly erroneous factual finding, the trial court's judgment awarding attorney's fees should be reversed.

For the foregoing reasons, I respectfully dissent.

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required." (Internal quotation marks omitted.) *Zilkha* v. *Zilkha*, 180 Conn. App. 143, 179, 183 A.3d 64, cert. denied, 328 Conn. 937, 183 A.3d 1175 (2018).