IN RE YASSELL B.*
(AC 44478)

Prescott, Alexander and DiPentima, Js.

Syllabus

The petitioner, the Commissioner of Children and Families, filed a neglect petition and a motion for an order of temporary custody, alleging that the respondent mother had abused her minor child. The respondent father, B, who was divorced from the mother, was named as the father on the child's birth certificate, and the child was identified in the dissolution judgment rendered in New York as a child of the respondents' marriage. C claimed to be the child's father, and the commissioner filed a motion

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

to adjudicate the paternity of the child. Although a previous paternity test had indicated a 99.99 percent probability that C was the child's father, the New York family court, which was not presented with the results of that test, dismissed an action C brought to establish his paternity of the child, thereby leaving in place the dissolution court's adjudication that the child was a child of the respondents' marriage. The court here issued a ruling on the commissioner's motion to adjudicate paternity, concluding that the paternity determinations by the state of New York should be afforded full faith and credit and declining to disturb the New York findings that B was the child's father. The court also determined that C was not the child's legal father and dismissed C as a party to the neglect proceeding, after which the court adjudicated the child as abused and ordered a period of protective supervision. C thereafter appealed to this court. During the pendency of C's appeal, the underlying neglect proceeding was resolved, the child was returned to the mother and the period of protective supervision expired. *Held* that C's appeal was dismissed as moot, as there was no actual controversy from which the adjudication of the child's paternity would afford C any practical relief: the trial court addressed the issue of paternity only to determine which parties had cognizable interests at stake in the neglect proceeding, and, in light of the termination of that proceeding, no orders would be issued that could affect C's alleged interest in or relationship to the child; moreover, vacatur of the paternity judgment was appropriate, as C did not cause the appeal to become moot through any voluntary action, he was not permitted to participate in the neglect proceeding after the court ruled on the motion to adjudicate the child's paternity, and it would be unfair to bind him to a judgment that he challenged but, through no fault of his own, could not contest; furthermore, vacatur was appropriate to prevent legal consequences from spawning as a result of the court's determination to afford the New York paternity adjudications full faith and credit as well as the court's conclusion that C is not the legal father of the child.

Argued September 9—officially released November 22, 2021**

Procedural History

Petition by the Commissioner of Children and Families to adjudicate the respondents' minor child abused, brought to the Superior Court in the judicial district of New Britain, Juvenile Matters, where the court, *Huddleston, J.*, denied the motion of Carlos G. to intervene; thereafter, the court issued a ruling on the petitioner's

** November 22, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

motion to adjudicate the paternity of the minor child; subsequently, the respondent mother was presented to the court on a plea of nolo contendere to the charge of abuse; thereafter, the court adjudicated the minor child as abused and issued an order of protective supervision, and Carlos G. appealed to this court. *Appeal dismissed*; *judgment vacated*.

James P. Sexton, assigned counsel, with whom was *John R. Weikart*, assigned counsel, for the appellant (Carlos G.).

Joshua D. Michtom, assistant public defender, for the appellee (respondent father Daniel B.).

John E. Tucker, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, *Clare E. Kindall*, solicitor general, and *Evan M. O'Roark*, assistant attorney general, for the appellee (petitioner).

Opinion

PER CURIAM. In this neglect proceeding, Carlos G. appeals from the judgment of the trial court on the motion to adjudicate the paternity of Yassell B. filed by the petitioner, the Commissioner of Children and Families (commissioner), in which the court determined that he was not the legal father of Yassell and dismissed him as a party to the neglect proceeding.[1]

[1] At the outset, we note that the court's paternity determination constitutes an appealable final judgment. "The right of appeal is purely statutory. It is accorded only if the conditions fixed by statute and the rules of court for taking and prosecuting the appeal are met. . . . Because our jurisdiction over appeals, both criminal and civil, is prescribed by statute, we must always determine the threshold question of whether the appeal is taken from a final judgment before considering the merits of the claim." (Citation omitted; internal quotation marks omitted.) *In re Marcquan C.*, 202 Conn. App. 520, 528, 246 A.3d 41, cert. denied, 336 Conn. 924, 246 A.3d 492 (2021). In *State* v. *Curcio*, 191 Conn. 27, 463 A.2d 566 (1983), our Supreme Court articulated the standard for determining when an otherwise interlocutory order is immediately appealable. It permits appeals from such orders "in two circumstances: (1) where the order or action terminates a separate and distinct proceeding, or (2) where the order or action so concludes the rights of the parties that further proceedings cannot affect them." Id., 31.

On appeal, Carlos G. claims that the trial court improperly (1) afforded full faith and credit to the prior judgments regarding paternity rendered in New York (New York judgments), (2) applied the doctrines of res judicata and collateral estoppel to give the New York judgments preclusive effect, and (3) concluded that it was in the best interest of Yassell that the respondent Daniel B. remain the legal father of Yassell. Before this court, Daniel B. argued that the appeal has become moot due to the resolution of the underlying child protection action, which included a motion for an order of temporary custody and a neglect petition alleging that Yassell had been abused by the respondent Matilde F. We ordered the parties to submit supplemental briefs specifically addressing whether (1) Carlos G.'s claim was moot due to the resolution of the underlying child protection action and (2) vacatur of the paternity determination would be an appropriate remedy. After considering the parties' supplemental briefs and the record in this case, we conclude that Carlos G.'s claim is moot and vacatur is appropriate.

The following facts, as found by the trial court, and procedural history are relevant. The respondents, Matilde F. and Daniel B., "were married for a number of years and resided in New York. They have a daughter, Shairi, who was born in 2005. Yassell was born in 2011,

Applying the second *Curcio* prong in *Madigan* v. *Madigan*, 224 Conn. 749, 620 A.2d 1276 (1993), our Supreme Court held that "a temporary order of custody is a final judgment for the purpose of an immediate appeal because a parent's custodial rights during the course of dissolution proceedings cannot otherwise be vindicated at any time, in any forum." Id., 754–55. In the present case, upon the court's paternity determination, Carlos G. was dismissed from the neglect proceeding. Following the court's order, he was unable to assert rights that would have been afforded him had he remained a party to that action and those rights were concluded so that further proceedings could not affect them. Thus, an immediate appeal was the only reasonable method of ensuring that the important rights surrounding his parent-child relationship were adequately protected. See id., 757.

while [Matilde F.] and [Daniel B.] were married. [Daniel B.] is named as father on Yassell's birth certificate. . . . On October 12, 2012, [Matilde F.] and [Daniel B.] were divorced. The judgment of divorce issued by the New York Supreme Court . . . identified Shairi and Yassell as the 'children of the marriage' and awarded sole custody to [Matilde F.]. [Daniel B.] was awarded reasonable rights of visitation and ordered to pay child support for the two children . . . .

"In June, 2015, a DNA [paternity] test was conducted by [Laboratory Corporation of America] in Hempstead, N.Y. . . . The report states that [Carlos G.] and Yassell were tested on June 2, 2015, and the results rendered on June 10, 2015, indicate a 99.99 percent probability that [Carlos G.] is Yassell's father.

"On April 4, 2016, [Carlos G.] commenced a paternity action in New York Family Court, seeking to establish his paternity of Yassell. According to the 'Decision and Order after Fact Finding' rendered in that proceeding . . . a hearing was conducted on [Carlos G.'s] petition . . . ." In that proceeding, DNA evidence of paternity was not presented to the court for its consideration. "At the conclusion of the hearing, based on the application of New York statutes and the court's findings as to the credibility of witnesses, the court found that [Carlos G.] had failed to meet his burden of proof because he failed to present clear and convincing evidence to rebut the presumption of legitimacy. The court dismissed [Carlos G.'s] paternity petition, leaving in effect the adjudication of the New York Supreme Court that Yassell was a 'child of the marriage' of [the respondents]."

In 2017, Matilde F., Shairi and Yassell moved to Connecticut where they lived with Carlos G. On September 18, 2020, the commissioner instituted the underlying

neglect action by filing a motion for an order of temporary custody and a petition alleging that Matilde F. had abused Yassell. The court, *C. Taylor*, *J.*, granted the commissioner's motion and vested temporary custody of Yassell in the commissioner. On September 25, 2020, the trial court, *Huddleston*, *J.*, held a preliminary hearing on the order of temporary custody, at which both Carlos G. and Daniel B. appeared and claimed to be the father of Yassell. On September 29, 2020, the commissioner filed a motion to adjudicate paternity of Yassell. The commissioner argued that paternity should be determined prior to addressing the merits of the contested order of temporary custody to determine who should participate in that proceeding. During the pendency of the neglect proceeding, both the respondents, Matilde F. and Daniel B., and Carlos G. had weekly supervised visits with Yassell.

The court held a hearing on the commissioner's motion to adjudicate paternity on September 30 and November 9 and 23, 2020. On November 25, 2020, the court issued its ruling on the motion to adjudicate paternity. The court concluded that the "paternity determinations by the state of New York should be afforded full faith and credit[2] and that the New York findings that [Daniel B.] is Yassell's father should not be disturbed." (Footnote added.) The court also concluded, in the alternative, that, even if it did not give the New York paternity adjudication full faith and credit, "the court finds that it is in Yassell's best interest to preserve the parent-child relationship with [Daniel B.] that has existed since his birth. . . . [Carlos G.] is hereby dismissed as a party to the proceeding." This appeal followed.

[2] The full faith and credit clause of the constitution of the United States, article four, § 1, requires that the judicial proceedings of a state be given full faith and credit in every other state. "The judgment rendered in one state is entitled to full faith and credit only if it is a final judgment . . . ." (Internal quotation marks omitted.) *Krueger* v. *Krueger*, 179 Conn. 488, 490, 427 A.2d 400 (1980).

Additionally, on November 25, 2020, the trial court accepted the plea of nolo contendere entered by Matilde F. to the allegations of abuse and adjudicated Yassell as abused and ordered a period of protective supervision, which terminated on March 25, 2021. Hence, during the pendency of this appeal, the underlying neglect proceeding was resolved and Yassell was returned to the custody of Matilde F. Having considered the entirety of the record, including the supplemental briefs of the parties, we conclude that Carlos G.'s claim is moot.

"Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [a] court's subject matter jurisdiction. . . . [A]n actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot." (Internal quotation marks omitted.) *In re Naomi W.*, 206 Conn. App. 138, 143, 258 A.3d 1263, cert. denied, 338 Conn. 906, 258 A.3d 676 (2021). "It is a [well settled] general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow." (Internal quotation marks omitted.) *In re Forrest B.*, 109 Conn. App. 772, 775, 953 A.2d 887 (2008).

We conclude that the appeal before us is moot because there is no actual controversy from which this court can grant any practical relief to Carlos G. Carlos G.'s appeal of the trial court's determination of paternity arose out of a neglect proceeding. The court addressed the issue of paternity only in order to determine which parties had cognizable interests at stake in that proceeding. During the pendency of this appeal, however, the

underlying neglect proceeding was resolved. Yassell has been returned to the custody of his mother, Matilde F., and the period of protective supervision has expired. As a result, adjudicating the paternity of Yassell *in the context of this case* will afford Carlos G. no practical relief because, in light of the termination of this neglect proceeding, no orders will be issued that could affect Carlos G.'s alleged interest in or relationship to Yassell. Thus, there is no actual controversy from which this court can grant practical relief. See *In re Alba P.-V.*, 135 Conn. App. 744, 746–47, 42 A.3d 393 (dismissing appeal as moot when, during pendency of appeal from trial court's judgment adjudicating children neglected and ordering period of protective supervision, period of protective supervision expired), cert. denied, 305 Conn. 917, 46 A.3d 170 (2012).

Having concluded that this appeal is moot, we next must determine whether vacatur of the underlying Connecticut paternity judgment is appropriate. "Vacatur is commonly utilized . . . to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences. . . . In determining whether to vacate a judgment that is unreviewable because of mootness, the principal issue is whether the party seeking relief from [that] judgment . . . caused the mootness by voluntary action. . . . A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment. . . . The same is true when mootness results from unilateral action of the party who prevailed below. . . . Nevertheless, our law of vacatur, though scanty . . . recognizes that [j]udicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would

be served by a vacatur. . . . Thus, [i]t is the [appellant's] burden, as the party seeking relief from the status quo of the [trial court] judgment, to demonstrate . . . equitable entitlement to the extraordinary remedy of vacatur." (Internal quotation marks omitted.) *Thornton* v. *Jacobs*, 339 Conn. 495, 502, A.3d (2021); see also *In re Emma F.*, 315 Conn. 414, 430–31, 107 A.3d 947 (2015).

It is clear that Carlos G. did not cause this appeal to become moot through any voluntary action. After the court issued its ruling on the commissioner's motion to adjudicate the paternity of Yassell, Carlos G. was not permitted to participate in the underlying neglect action and took no further part in those proceedings. Vacatur is appropriate to prevent legal consequences from spawning as a result of the trial court's determination that the New York judgment should be afforded full faith and credit and its ultimate conclusion that Carlos G. is not the legal father of Yassell.[3] In this appeal,

[3] We recognize that there are instances in which both our Supreme Court and this court have declined to use the remedy of vacatur to vacate the judgment of a trial court, stating that a trial court's decision is not binding precedent. See *In re Emma F.*, supra, 315 Conn. 433; *In re Angela V.*, 204 Conn. App. 746, 760–62, 254 A.3d 1042, cert. denied, 337 Conn. 907, 252 A.3d 365 (2021). However, on the basis of these facts and circumstances, vacatur of the trial court's judgment will ensure Carlos G. is not precluded from relitigating the issues raised in this appeal should he want to do so in the future. See *State* v. *Charlotte Hungerford Hospital*, 308 Conn. 140, 146 and n.8, 60 A.3d 946 (2013) (vacating decisions of appellate and trial courts and stating that "[v]acatur of the trial court judgment will further aid in the antipreclusionary aspect of the vacatur remedy"); *Private Healthcare Systems, Inc.* v. *Torres*, 278 Conn. 291, 304, 898 A.2d 768 (2006) ("Once we pass from the issue of mootness to the issue of remedy, we still may encounter some lingering though remote possibility of residual collateral harm . . . . Recourse to the equitable tradition of vacatur may be warranted, then, partly because it eliminates that possibility altogether. . . . [Thus] [i]t may . . . be speculative whether leaving the [judgment] standing could cause some residual harm, but vacating the [judgment] puts the speculation to rest." (Internal quotation marks omitted.)), quoting *American Family Life Assurance Co. of Columbus* v. *Federal Communications Commission*, 129 F.3d 625, 631 (D.C. Cir. 1997).

Carlos G. has argued that the court's conclusions regarding these issues were improper. Therefore, because we substantively will not address a moot issue, we conclude that it would be unfair to Carlos G. to bind him to a judgment that he has challenged but, through no fault of his own, cannot contest. See *Private Healthcare Systems, Inc.* v. *Torres*, 278 Conn. 291, 304, 898 A.2d 768 (2006). Accordingly, we conclude that vacatur of the court's paternity decision is appropriate in this circumstance.

The appeal is dismissed and the judgment of the trial court regarding the paternity of Yassell B. is vacated.

STATE OF CONNECTICUT *v.* ANDRES C.*
(AC 43081)

Moll, Alexander and DiPentima, Js.**

Syllabus

Convicted of the crimes of sexual assault in the third degree and risk of injury to a child, the defendant appealed to this court. The defendant's conviction stemmed from his sexual abuse of the minor victim, his niece. Before trial, the court granted the state's motion to allow the introduction of uncharged misconduct evidence, specifically, evidence regarding the defendant's sexual abuse of the victim's cousin, D. At trial, the victim testified, inter alia, that she maintained certain journals, which related to her abuse, and the court declined to allow the defendant access to the journals. The prosecutors assigned the task of reviewing the journals for exculpatory material, which were handwritten in Spanish, to a bilingual investigator in their office. The court indicated that it would conduct

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

** This case originally was argued before a panel of this court consisting of Judges Moll, Alexander, and Devlin. Thereafter, Judge Devlin retired from this court and did not participate in the consideration of this decision. Judge DiPentima was added to the panel, and she has read the briefs and appendices and has listened to a recording of the oral argument prior to participating in this decision.

an in camera review of any materials that might be exculpatory, and defense counsel did not challenge this procedure. *Held*:

1. The defendant could not prevail on his claim that the trial court improperly admitted uncharged misconduct evidence.

a. This court declined to review the defendant's claim that the trial court erred in permitting the state to present uncharged misconduct evidence regarding the sexual abuse of D to show his propensity for such acts, because the court ultimately admitted this evidence for a limited purpose, namely, as an explanation for the victim's delayed disclosure of the abuse, and not to establish the defendant's propensity to commit such acts.

b. The trial court properly denied the defendant's motion to strike the testimony regarding the uncharged misconduct evidence after the prosecutors declined to call D as a witness: the evidence was admitted only for the purpose of explaining the victim's delay in disclosing her own sexual abuse by the defendant, the evidence did not have only minimal probative value as the victim testified that she delayed disclosing her abuse after she learned of the defendant's abuse of D and observed the subsequent shunning of D and D's mother by her family, and her testimony was not cumulative of expert testimony presented on delayed disclosure; moreover, contrary to the defendant's claim, the trial judge, as the finder of fact, was not prejudiced after hearing of the defendant's sexual abuse of D and was not unable to limit consideration of this evidence to the sole purpose for which it had been admitted, the defendant having failed to point to anything in the record to overcome the presumption that the court, as the trier of fact, considered only properly admitted evidence when it rendered its decision.

2. The defendant's claim that his right to a fair trial was violated by prosecutorial impropriety was unavailing: although the prosecutor erred in her consideration of what was necessary for uncharged misconduct to be admitted into evidence, the defendant neither demonstrated the lack of a good faith basis by the prosecutor nor showed that his right to a fair trial was violated, the defendant failed to establish a lack of a good faith basis with respect to the prosecutor's attempt to admit the defendant's guilty plea relating to the case involving D.C. pursuant to *North Carolina* v. *Alford* (400 U.S. 25), and the prosecutor's efforts to admit constancy testimony did not raise to the level of impropriety.

3. The trial court properly denied the defendant access to the victim's journals.

a. The defendant's claim that he was entitled to review the victim's journals because she had reviewed them prior to her testimony was unavailing: the court considered the private nature of the journals, that the victim reviewed only a few pages of the journals before testifying, and that the state had been reviewing the journals for exculpatory material, and, thus, its decision was neither so arbitrary as to vitiate logic nor based on improper or irrelevant factors.

b. The defendant waived the claim that he was entitled to the contents of the victim's journals because they constituted a statement pursuant to the rules of practice (§§ 40-13A and 40-15 (1)): defense counsel agreed to the procedure to be used in the review of, and the potential disclosure of, the contents of the journals, specifically, the prosecutors' review of the journals for exculpatory material and to the court's in camera review of any exculpatory material, and, having agreed to this procedure before the trial court, the defense cannot now challenge that procedure.

4. The defendant could not prevail on his unpreserved claim that his rights under *Brady* v. *Maryland* (373 U.S. 83) were violated, which was based on his claim that the prosecutors were required to personally review the victim's journals for exculpatory information and that this task could not have been delegated to a nonlawyer member of their office: although, ultimately, the obligation for complying with *Brady* rests with the prosecutor, it does not follow that the personal review of items such as the victim's journals by a prosecutor is constitutionally required.

Argued March 1—officially released November 30, 2021

Procedural History

Substitute information charging the defendant with the crimes of sexual assault in the third degree, sexual assault in the fourth degree, and risk of injury to a child, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Alander*, *J.*; judgment of guilty of sexual assault in the third degree and risk of injury to a child, from which the defendant appealed to this court. *Affirmed.*

Richard Emanuel, for the appellant (defendant).

Matthew A. Weiner, assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Mary A. SanAngelo* and *Brian K. Sibley*, *Sr.*, senior assistant state's attorneys, for the appellee (state).

Opinion

ALEXANDER, J. The defendant, Andres C., appeals from the judgment of conviction, rendered after a court trial, of sexual assault in the third degree in violation of General Statutes § 53a-72a (a) (1) and risk of injury to a child in violation of General Statutes § 53-21 (a)

(2). On appeal, the defendant claims that (1) the court improperly admitted uncharged misconduct evidence, (2) his right to a fair trial was violated by prosecutorial impropriety, (3) the court improperly denied him access to the victim's journals, and (4) his rights under *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1983), were violated.[1] We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, as the court reasonably could have found, and procedural history are relevant to the resolution of this appeal. When she was ten years old, the victim, along with her mother and siblings, moved into her grandmother's home. Shortly thereafter, the defendant, the victim's uncle, moved in. At some point, during the time that the victim and the defendant were living at the grandmother's house, the defendant came out of the shower dressed only in a towel and took the victim into his bedroom. The defendant removed his towel, lay upright on the bed, and had the victim apply lotion to his penis and masturbate him. After the defendant ejaculated, he directed the victim to wash her hands. This type of abuse occurred more than ten times over the next two years while the victim lived at her grandmother's house and continued after she had moved to another house.

[1] The defendant also claims that his waiver of a jury trial was not made knowingly, intelligently, and voluntarily, and, therefore, that he was denied his federal and state constitutional rights to a jury trial. Specifically, he contends that the trial court failed to inform him that, at a jury trial, he would have the opportunity to participate in the jury selection process. The defendant concedes, however, that our Supreme Court previously has rejected such a claim. See *State* v. *Ouellette*, 271 Conn. 740, 747–58, 859 A.2d 907 (2004); *State* v. *Cobb*, 251 Conn. 285, 374, 743 A.2d 1 (1999), cert. denied, 531 U.S. 841, 121 S. Ct. 106, 148 L. Ed. 2d 64 (2000). He further recognizes that, as an intermediate appellate court, we are bound by those decisions. See, e.g., *State* v. *Corver*, 182 Conn. App. 622, 638 n.9, 190 A.3d 941, cert. denied, 330 Conn. 916, 193 A.3d 1211 (2018). The defendant, therefore, has briefed this claim only to preserve it for further review before our Supreme Court or the United States Supreme Court. We, therefore, need not address it.

The victim described other instances of inappropriate behavior by the defendant. On one occasion, the defendant, while dressed only in boxer shorts, went into the victim's bedroom, got under the covers with her, and rubbed the victim's stomach and legs under her shirt and pajama bottoms. After the victim had moved to another house, she would, on occasion, sleep over at her grandmother's home. During several of these occasions, the defendant got into bed with the victim and rubbed himself against her so that she felt his penis against her back.

A few years later, the then sixteen year old victim began speaking with a therapist, and she disclosed the sexual abuse during her first session. At a therapy session attended by her mother and brother, the victim disclosed the sexual abuse by the defendant. Thereafter, on October 28, 2015, the victim reported the defendant's conduct to the police. The defendant was arrested in March, 2016.

In an information filed on February 7, 2019, the state charged the defendant with sexual assault in the third degree, sexual assault in the fourth degree, and risk of injury to a child. After trial, the court, *Alander, J.*, found the defendant guilty of sexual assault in the third degree and risk of injury to a child and not guilty of sexual assault in the fourth degree. The court imposed a total effective sentence of twenty years of incarceration, execution suspended after twelve years, and fifteen years of probation. This appeal followed.

I

The defendant first claims that the court improperly admitted uncharged misconduct evidence that he also had sexually abused the victim's cousin, D. The defendant has presented two distinct arguments with respect to this claim. First, he argues that the court erred in its preliminary decision to permit the state to present

evidence regarding D to show the defendant's propensity for such acts. Second, he contends that the court improperly denied his motion to strike all of the testimony regarding this uncharged misconduct after the prosecutors did not call D as a witness. We are not persuaded.

The following additional facts are necessary for our discussion. Approximately one week before the trial was to begin, the state filed a motion to allow the introduction of uncharged misconduct evidence pursuant to § 4-5 (b) of the Connecticut Code of Evidence.[2] In this motion, the state indicated that this uncharged misconduct evidence consisted of the victim's testimony that, in 2009, she learned that the defendant had sexually abused D over a period of time. The state represented that the victim would testify as to the reactions of her family with respect to D's disclosure and how that impacted her decision to report her own abuse. The state also indicated that D would testify as to the details of the sexual abuse. According to the state's motion, "[s]aid evidence will be offered to prove intent, identity, absence of mistake or accident, a system of criminal activity or to corroborate crucial prosecution testimony." On the first day of the trial, the defendant filed an objection to the state's motion to present uncharged misconduct evidence.

Prior to the start of evidence, the court heard argument regarding the uncharged misconduct evidence.

[2] Section 4-5 (b) of the Connecticut Code of Evidence provides: "Evidence of other sexual misconduct is admissible in a criminal case to establish that the defendant had a tendency or a propensity to engage in aberrant and compulsive sexual misconduct if: (1) the case involves aberrant and compulsive sexual misconduct; (2) the trial court finds that the evidence is relevant to a charged offense in that the other sexual misconduct is not too remote in time, was allegedly committed upon a person similar to the alleged victim, and was otherwise similar in nature and circumstances to the aberrant and compulsive sexual misconduct at issue in the case; and (3) the trial court finds that the probative value of the evidence outweighs its prejudicial effect."

The prosecutor represented that the victim was between the ages of eleven and fourteen years old during the alleged sexual abuse, and that D had been between the ages of ten and thirteen years old when the defendant had sexually abused her. The prosecutor indicated that the victim and D are related to each other and to the defendant, and that the sexual abuse occurred in a similar time frame, and, in part, at the same residence. The prosecutor acknowledged that, contrary to the facts of the present case, the sexual abuse of D involved digital and penile penetration. After hearing from defense counsel, the court granted the state's motion to present the uncharged misconduct evidence regarding the defendant's sexual abuse of D.

The victim testified that, at some point, she had learned that the defendant had sexually abused D. The court indicated that, during a conversation in chambers, the prosecutor had indicated that this aspect of the victim's testimony was not being offered for the truth of the matter asserted, namely, that the defendant had sexually abused D, but, rather, "just to show the effect on [the victim] about her receiving information concerning those incidents to then show why she acted as she did." After hearing from defense counsel, the court stated: "So, I will allow [the victim] to discuss what she heard about those incidents and relate what effect it had on her. It is my understanding it is the state's position that that led to her reluctance to disclose and that is why it is relevant."

The victim testified that she learned that D had made an allegation of abuse against the defendant to the police. The victim's mother, the victim's grandmother, and the rest of the family "sided" with the defendant and ostracized D and her mother, N. When asked how the family's reaction made her feel while her own abuse by the defendant was ongoing, the victim responded: "It made me feel like I was surrounded by adults who

did not want to believe [D], who didn't believe a kid, who did not want—who would prefer to cover up and side with [the defendant], and I saw them bash her and criticize, and it felt in that moment safer for me to stay quiet and it felt safer to be with everyone else on his side and pretend like nothing happened and cover up my abuse, cover up her abuse.'' The victim subsequently stated that she did not disclose her own sexual abuse because no one in her family believed her cousin.

The next day, the victim's mother testified. The prosecutor asked her if, in 2011, she had learned that the defendant had sexually abused D. After an objection based on hearsay, the prosecutor indicated that this evidence was not being offered for its truth. The court ruled that the evidence was admissible for its effect on the victim's mother and her subsequent reaction. The victim's mother stated that, following the allegations of sexual abuse made by D against the defendant, the rest of the family ''shunned'' D and N.

The state subsequently sought to have a certified copy of the defendant's conviction for sexually abusing D admitted into evidence. The state noted that this document was not offered to establish the facts regarding the sexual abuse of D, or any admission by the defendant, but rather to ''help show the time frame of the arrest and conviction on [D's] matter because it corroborates crucial state's testimony as far as what was happening with the family and why [the victim] in [this] case delayed in disclosing her sexual abuse by this defendant.'' Defense counsel objected and noted that, because the defendant had pleaded guilty pursuant to the *Alford* doctrine,[3] this evidence was inadmissible. The court cited to § 4-8A of the Connecticut Code of

[3] See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

Evidence[4] and sustained defense counsel's objection. At this point, the state rested.

Defense counsel immediately moved to strike all references to the uncharged misconduct evidence on the basis that D did not testify during the state's presentation of evidence. Defense counsel argued that the defendant's fundamental right to challenge and cross-examine D had been violated and that the appropriate remedy was to strike all references to the defendant's sexual abuse of D. After hearing from the prosecutor, the court noted that its initial ruling permitting the state to present evidence regarding the defendant's sexual abuse of D to show propensity was based on the expectation that D would testify.

After hearing further argument, including the state's request to open the evidence, the court ruled that the evidence regarding the defendant's abuse of D was not admissible to show that those acts had occurred, or that the defendant had a propensity to engage in such behavior, but was admissible "to show that [the victim] was aware of those claims and that impacted her decision to not disclose her own sexual—alleged sexual abuse because of the reaction within the family." The court declined to strike the testimony regarding the defendant's abuse of D but limited its purpose to show why the victim had delayed disclosing her own sexual abuse. The court further noted that the probative value of this evidence outweighed any prejudicial effect.

A

The defendant first argues that the court erred in its preliminary decision permitting the state to present

[4] Section 4-8A (a) of the Connecticut Code of Evidence provides in relevant part: "Evidence of the following shall not be admissible in a civil or criminal case against a person who has entered a plea of guilty or nolo contendere in a criminal case . . . (2) a plea of nolo contendere or a guilty plea entered under the *Alford* doctrine . . . ."

evidence pertaining to the sexual abuse of D to show his propensity for such actions. The defendant contends that the court abused its discretion in admitting this evidence because the state failed to establish that this uncharged misconduct was similar to the offense charged or otherwise similar in nature to the circumstances of the aberrant and compulsive sexual misconduct at issue in the present case. See, e.g., Conn. Code Evid. § 4-5 (b); *State* v. *DeJesus*, 288 Conn. 418, 476–77, 935 A.2d 45 (2008). The state counters, inter alia, that we should not address this argument because the court superseded its ruling admitting the uncharged misconduct evidence for the purpose of propensity, and, therefore, the defendant cannot demonstrate prejudice. We agree with the state.

As we noted, following the state's offer of proof, the court initially admitted the uncharged misconduct evidence at issue for the purpose of demonstrating the defendant's propensity to engage in such conduct. The state failed, however, to introduce into evidence sufficient proof of the defendant's prior misconduct as to D. See, e.g., *State* v. *Holly*, 106 Conn. App. 227, 235–36, 941 A.2d 372, cert. denied, 287 Conn. 903, 947 A.2d 334 (2008). As a result, the court admitted this uncharged misconduct evidence for a limited purpose, namely, as an explanation for the victim's delayed disclosure, and not for the purpose of establishing that D actually had been sexually abused by the defendant or to establish his propensity to commit such acts of sexual abuse.

In support of its argument that we should not review this claim, the state directs us to *State* v. *Sanders*, 86 Conn. App. 757, 862 A.2d 857 (2005). In that case, the state filed motions in limine to restrict the cross-examination of a witness. Id., 763. "[T]he court granted the motions, precluding any reference to prior convictions or pending criminal charges and prohibiting any reference to [the witness'] involvement in drug trafficking

and gang related activity." Id. The trial court subsequently granted the defendant's motion for reconsideration and permitted questions regarding past felony convictions and pending charges against the witness. Id. On appeal, the defendant claimed that the court improperly had restricted his cross-examination of this witness. Id., 762. We declined to review this claim because the defendant was not prevented from questioning the witness about his past and pending charges and, therefore, was not aggrieved by the court's ruling. Id., 764. Likewise, in the present case, we need not review the defendant's claim that the court abused its discretion in its initial ruling permitting the state to present propensity evidence because the court ultimately ruled that it was inadmissible for that purpose.

B

The defendant additionally argues that the court improperly denied his motion to strike all of the testimony regarding this uncharged misconduct after the state did not call D as a witness. Specifically, he contends that the prejudicial effect of this evidence outweighed its "minimal" probative value and that this inadmissible evidence affected the court's factual findings. The state counters, inter alia, that the court properly (1) admitted the evidence pertaining to D's abuse for a limited purpose and (2) denied the defendant's motion to strike. We agree with the state.

We begin with the relevant legal principles. "[T]he trial court has broad discretion in ruling on the admissibility . . . of evidence. . . . The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion." (Internal quotation marks omitted.) *State* v. *Sampson*, 174 Conn. App. 624,

636, 166 A.3d 1, cert. denied, 327 Conn. 920, 171 A.3d 57 (2017); see also *State* v. *Courtney G.*, 339 Conn. 328, 337, A.3d (2021) (trial court given broad discretion in determining relevancy of evidence and balancing probative value against prejudicial effect).

The evidence regarding the defendant's sexual abuse of D was properly admitted for the sole purpose of explaining the victim's delay in disclosing her own sexual abuse by the defendant. The defendant does not dispute that the evidence was relevant for this purpose. Thus, we must determine whether the prejudicial impact of this otherwise admissible evidence outweighed its probative value. See Conn. Code Evid. § 4-3. "Although relevant, evidence may be excluded by the trial court if the court determines that the prejudicial effect of the evidence outweighs its probative value. . . . 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 [fact finder]. . . . 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. *Holmgren*, 197 Conn. App. 203, 211–12, 231 A.3d 379 (2020); *State*

v. *Rosa*, 104 Conn. App. 374, 378, 933 A.2d 731 (2007), cert. denied, 286 Conn. 906, 944 A.2d 980 (2008).

"Our Supreme Court has identified four factors relevant to determining whether the admission of otherwise probative evidence is unduly prejudicial. These are: (1) where the facts offered may unduly arouse the [fact finder's] emotions, hostility or sympathy, (2) where the proof and answering evidence it provokes may create a side issue that will unduly distract the [fact finder] from the main issues, (3) where the evidence offered and the counterproof will consume an undue amount of time, and (4) where the defendant, having no reasonable ground to anticipate the evidence, is unfairly surprised and unprepared to meet it." (Internal quotation marks omitted.) *State* v. *Joseph V.*, 196 Conn. App. 712, 761, 230 A.3d 644, cert. granted, 335 Conn. 945, 238 A.3d 17 (2020).

The defendant first contends that the uncharged misconduct evidence pertaining to D had only minimal probative value, given that the state had presented testimony from an expert[5] on the topic of delayed disclosure. The expert, however, had no knowledge of the facts of this case. It was the victim herself who testified that she had delayed disclosing her abuse after she learned of the defendant's abuse of D and observed the subsequent "shunning" of D and N by the rest of her family. The evidence of D's abuse by the defendant was not cumulative of the expert testimony, and, therefore, we disagree that it had only "minimal" probative value.

The defendant's second contention is that the trial judge, as the finder of fact, was prejudiced after hearing of the defendant's sexual abuse of D. The defendant

[5] Janet Murphy, a pediatric nurse practitioner, testified as an expert in the field of behavioral characteristics of child sexual abuse victims. Murphy testified that, in general, a delayed disclosure is very common for child victims of sexual abuse.

postulates that the court was unable to limit its consideration of this evidence to the sole purpose for which it had been admitted. Absent from the defendant's brief, however, is any reference to evidence from the proceedings to support this assertion.

Our Supreme Court recently has stated that, "[o]n appeal from a bench trial, there is a presumption that the court, acting as the trier of fact, considered only properly admitted evidence when it rendered its decision." (Internal quotation marks omitted.) *State* v. *Roy D. L.*, Conn. , , A.3d (2021); see also *State* v. *Ouellette*, 190 Conn. 84, 92, 459 A.2d 1005 (1983) ("[i]n trials to the court, where admissible evidence encompasses an improper as well as a proper purpose, it is presumed that the court used it only for an admissible purpose"). The defendant has failed to point us to anything in the record that would overcome this presumption.[6] We conclude, therefore, that this argument must fail.

II

The defendant next claims that his right to a fair trial was violated by prosecutorial impropriety. The defendant argues that the prosecutors[7] committed impropriety by their efforts (1) to introduce evidence of the sexual abuse of D to show his propensity to engage in such behavior and then failing to call D as a witness, (2) to introduce evidence of his *Alford* plea from the sexual abuse case involving D, and (3) to introduce constancy of accusation evidence that did not meet

[6] We also note that the court, albeit in a different context, stated: "I feel comfortable reviewing it because, as a judge, I am trained to only concentrate on admissible evidence and not inadmissible evidence . . . ." The court further noted: "Having done this for a long period of time I have a fair amount of confidence in my ability to separate what is admissible and what is inadmissible evidence . . . ."

[7] Two assistant state's attorneys conducted the prosecution of the defendant.

the standard for admission and to comment on this evidence during closing argument. The state counters that there was no prosecutorial impropriety and that the defendant failed to establish a due process violation, if any prosecutorial impropriety did exist. We conclude that the defendant has not demonstrated any impropriety in this case.

We begin with the relevant legal principles. "In analyzing claims of prosecutorial impropriety, we engage in a two step process. . . . First, we must determine whether any impropriety in fact occurred; second, we must examine whether that impropriety, or the cumulative effect of multiple improprieties, deprived the defendant of his due process right to a fair trial. . . . To determine whether the defendant was deprived of his due process right to a fair trial, we must determine whether the sum total of [the prosecutor's] improprieties rendered the defendant's [trial] fundamentally unfair . . . . The question of whether the defendant has been prejudiced by prosecutorial [impropriety], therefore, depends on whether there is a reasonable likelihood that the . . . verdict would have been different absent the sum total of the improprieties. . . . Accordingly, it is not the prosecutorial improprieties themselves but, rather, the nature and extent of the prejudice resulting therefrom that determines whether a defendant is entitled to a new trial. . . .

"To determine whether any improper conduct by the [prosecutor] violated the defendant's fair trial rights is predicated on the factors set forth in *State* v. *Williams* [204 Conn. 523, 540, 529 A.2d 653 (1987)] . . . ." (Internal quotation marks omitted.) *State* v. *Franklin*, 175 Conn. App. 22, 46–47, 166 A.3d 24, cert. denied, 327 Conn. 961, 172 A.3d 801 (2017); see also *State* v. *Albert D.*, 196 Conn. App. 155, 162–63, 229 A.3d 1176, cert. denied, 335 Conn. 913, 229 A.3d 118 (2020).

The defendant's claims of prosecutorial impropriety originate with the prosecutors' efforts to have certain testimony or documents admitted into evidence. First, the prosecutors sought to have testimony regarding uncharged misconduct, namely, the defendant's sexual abuse of D, admitted as propensity evidence, but did not call D as a witness. The defendant argues that, whether intentional or not, the prosecutors essentially made a misleading representation to the court.

Second, the prosecutors attempted to admit a copy of the defendant's *Alford* plea from the case involving D to corroborate portions of the testimony regarding the defendant's sexual abuse of D, the family's reaction, and the time frame of those events. The defendant argues that the prosecutors knew, or reasonably should have known, that § 4-8A (a) (2) of the Connecticut Code of Evidence prohibits the admission of such evidence and that "[t]he only conceivable purpose for offering such irrelevant evidence—at a court trial where the judge sees and hears the inadmissible evidence before 'excluding' it—was to try to prejudice the fact finder . . . ."

Third, the prosecutors presented numerous instances of constancy of accusation testimony from the victim's friends, brother, and mother, and commented on this evidence during the prosecutors' rebuttal argument. The defendant argues that there was no "reciprocity" between the victim's testimony and that of the constancy witnesses. (Internal quotation marks omitted.) Therefore, the defendant argues that the constancy testimony from the friends, brother, and mother of the victim did not meet the standard for admissibility of constancy testimony, and, thus, should not have been admitted into evidence or commented on during closing argument by the prosecutors.

Impropriety may result from a prosecutor's efforts to introduce certain evidence. For example, in *State* v.

Angel T., 292 Conn. 262, 264, 973 A.2d 1207 (2009), our Supreme Court considered whether the prosecutor had committed an impropriety by introducing evidence of, and commenting on, the fact that the defendant, while represented by counsel, had failed to meet with the police during their investigation. "We agree with those jurisdictions that have concluded that a prosecutor violates the due process clause of the fourteenth amendment when he or she elicits, and argues about, evidence tending to suggest a criminal defendant's contact with an attorney prior to his arrest. In our view, this prohibition necessarily is founded in the fourteenth amendment due process assurances of a fair trial under which proscriptions on prosecutorial impropriety are rooted generally." Id., 281–82; see also *State* v. *Salamon*, 287 Conn. 509, 559–60, 949 A.2d 1092 (2007) (rejecting claim of prosecutorial impropriety due to excessive leading questions because majority of such questions fell within exceptions to general rule prohibiting them on direct or redirect examination and defendant failed to provide any reason why remainder of questions were themselves so prejudicial or harmful as to render trial unfair).

Our decision in *State* v. *Marrero*, 198 Conn. App. 90, 234 A.3d 1, cert. granted, 335 Conn. 961, 239 A.3d 1214 (2020), is particularly instructive. In that case, the defendant claimed, inter alia, that the prosecutor committed an impropriety by asking an excessive amount of leading questions during his direct examination of the victim. Id., 97–98. In addressing this issue, we looked to our Supreme Court's decision in *State* v. *Salamon*, supra, 287 Conn. 509. *State* v. *Marrero*, supra, 99–100. "The upshot of *Salamon* is that to establish the impropriety prong of a claim of prosecutorial impropriety based on a prosecutor's allegedly excessive use of leading questions on direct examination of the state's witnesses, the defendant must prove not only that such questioning was improper in the evidentiary sense but

that it was improper in the constitutional sense as well because it threatened his due process right to a fair trial." Id., 101.

In considering whether the use of excessive leading questions threatened to violate the defendant's constitutional right to a fair trial, we set forth the following guidance: "Our case law, however, and that of our sister jurisdictions, furnish several useful examples of such circumstances, including, but not limited to, repeatedly asking improper leading questions after defense objections to those questions have been sustained, *asking questions stating facts that the prosecutor has no good faith basis to believe are true*, *asking questions referencing prejudicial material that the prosecutor has no good faith basis to believe is relevant and otherwise admissible at trial* . . . ." (Emphasis added; footnotes omitted.) Id., 101–102.

In the present case, the defendant does not contend that the prosecutors asked an excessive amount of leading questions but, rather, maintains that their efforts regarding the introduction of uncharged misconduct evidence and the defendant's *Alford* plea amounted to prosecutorial impropriety. He further asserts that the prosecutors misrepresented information to the court with respect to the former and lacked any basis to offer the latter and that, therefore, the prosecutors lacked a good faith basis with respect to these evidentiary matters. We disagree.

With respect to the uncharged misconduct evidence, in response to the defendant's motion to strike such evidence after the state rested without calling D as a witness, the prosecutor argued that the evidence of the defendant's sexual abuse of D was admissible for the purpose of demonstrating the defendant's propensity for such unlawful conduct and was established through the testimony of the victim, her brother, and her mother.

The prosecutor further indicated that, with the permission of the court, she could have D testify without delay, despite having rested. Although the prosecutor erred in her consideration of what was necessary for uncharged misconduct to be admitted into evidence, the defendant has neither demonstrated the lack of a good faith basis by the prosecutor, nor shown that his right to a fair trial was threatened.

With respect to the prosecutor's attempt to have the defendant's *Alford* plea admitted into evidence, we again note that the prosecutor presented a good faith basis for admitting the plea offer. The prosecutor argued that, despite § 4-8A of the Connecticut Code of Evidence, the defendant's *Alford* plea was admissible to corroborate the testimony of the state's witnesses. The court sustained the objection of defense counsel and did not admit this evidence, and the defendant on appeal has failed to establish a lack of a good faith basis on the part of the prosecutor or to show that his right to a fair trial was threatened.

Finally, regarding the claimed lack of reciprocity between the victim's testimony and that of the constancy witnesses, we conclude that this argument is without merit. The defendant failed to object to nearly all of the constancy testimony and, furthermore, he has not persuaded us that the prosecutor's efforts to have this testimony admitted into evidence rose to the level of impropriety. Moreover, as the state properly points out in its brief, once this constancy evidence was admitted into evidence, the prosecutors could comment on it during closing argument. "Our Supreme Court has held that "[a]rguing on the basis of evidence explicitly admitted . . . cannot constitute prosecutorial [impropriety]." (Internal quotation marks omitted.) *State* v. *Devito*, 159 Conn. App. 560, 575, 124 A.3d 14, cert. denied, 319 Conn. 947, 125 A.3d 1012 (2015). Accord-

ingly, we conclude that the defendant has failed to establish prosecutorial impropriety.

III

The defendant next claims that the court improperly denied him access to the journals of the victim. Specifically, he argues that he was entitled to the contents of these journals because the victim had reviewed them prior to her testimony and they constituted a statement pursuant to Practice Book §§ 40-13A[8] and 40-15 (1).[9] The state counters that (1) the court did not abuse its discretion in determining that the journals did not need to be produced for inspection following the victim's review prior to testifying pursuant to § 6-9 of the Connecticut Code of Evidence and (2) the defendant's claim pursuant to Practice Book §§ 40-13A and 40-15 (1) was waived. We agree with the state.

The following additional facts are necessary for the resolution of this claim. The victim testified on the first day of trial, February 13, 2019. During her testimony, the victim stated that the first person she had told about the sexual abuse was Milagros Vizueta, a therapist in North Branford.[10] During these sessions, Vizueta occasionally took notes and would write down things for

[8] Practice Book § 40-13A provides: "Upon written request by a defendant and without requiring any order of the judicial authority, the prosecuting authority shall, no later than forty-five days from receiving the request, provide photocopies of all statements, law enforcement reports and affidavits within the possession of the prosecuting authority and his or her agents, including state and local law enforcement officers, which statements, reports and affidavits were prepared concerning the offense charged, subject to the provisions of Sections 40-10 and 40-40 et seq."

[9] Practice Book § 40-15 provides in relevant part: "The term 'statement' as used in Sections 40-11, 40-13 and 40-26 means: (1) A written statement made by a person and signed or otherwise adopted or approved by such person . . . ."

[10] During cross-examination, the victim testified that Vizueta had studied psychology in Peru and that she subsequently was informed that Vizueta was not a licensed therapist in Connecticut.

the victim to "work on . . . ." During redirect examination, the prosecutor inquired whether the victim ever had seen her records from the therapy with Vizueta. The victim responded: "I have my journals. . . . I don't have—I don't know her records, but I have my journals."[11] Upon further inquiry, the victim stated: "For the journals, [Vizueta] would have me write a lot about either my relationship to [the defendant], with [the defendant], how the abuse happened, I would reflect a lot on how it made me feel, how I was missing, why I didn't want to talk. Sometimes in the journal we'd write about—like if I was having family fights, so my journals are the abuse that I lived with him, but also family fights with my siblings and my mom." The victim also stated that the journals were her "words through therapy."

On recross-examination, defense counsel inquired whether the victim had reviewed her journals prior to her testimony. The victim responded that she had looked at a "few pages" in one of her journals. The following colloquy between the victim and defense counsel then occurred:

"Q. Okay. Were those—and the—the journals that you have, are those your notes that [you] wrote at the time things were happening?

"A. No, it was while I was in therapy.

"Q. Okay. But it was part of the therapy process about what you spoke to the doctor about, what she told you and what happened to you, right?

"A. Yes.

"Q. And it would be much closer in time to the events that we're talking about; fair to say?

[11] On the basis of our review of the transcripts, it appears that neither the prosecutors nor defense counsel had been aware of these journals until the victim mentioned them during her testimony.

"A. When I was journaling, closer to the abuse, yes."

"Q. Would—would those be the best record you have of what happened? [The court overruled an objection by the state.]

"A. . . . Yes.

"Q. Okay. And you still have those journals?

"A. Yes."

At this point, defense counsel requested an in camera review of the victim's journals. The prosecutor objected, arguing that the journals did not constitute medical records, but rather were akin to a diary. The court inquired whether the journals were privileged documents, by statute or common law. The prosecutor then requested time to research the issue. Defense counsel suggested that the court should review the journals for exculpatory material. The court responded that the obligation to review the journals for exculpatory material rested with the prosecutors and that, if there was a claim of privilege, it would conduct an in camera review. Defense counsel responded: "I am asking for it as discovery; however, I was trying to be as respectful as I could be to the complainant." The court then suggested a further discussion of this issue in chambers and mentioned the possibility of recalling the victim as a witness, if necessary.

The next day, February 14, 2019, the court summarized the discussions that had occurred in chambers: "I have determined that [the victim's] journals should be reviewed by the state to determine, what, if anything in those journals [comprised of three notebooks totaling approximately 200 pages] concern—comprise statements by [the victim] concerning the incidents in questions here, and any exculpatory material. That upon that review they should disclose to defense counsel any such material, specifically statements made by [the

victim] in her journals concerning the sexual assault allegations here or any exculpatory material, and if there is anything the state is uncertain as to whether it is exculpatory [the prosecutors] can provide those portions of the journals to me and I will review them in camera to determine whether they should be disclosed to defense counsel.

"It is my understanding that the state has talked to [the victim]. She has agreed to provide the journals to them, they will be provided to the state sometime this afternoon, and the state—but apparently the journals are in Spanish so the state needs the assistance of someone on their staff to interpret those journals so that they can fulfill their obligation as I've outlined them." The prosecutors and defense counsel agreed with the court's summary, and neither side raised any objection.

The next day, the court placed the following on the record: "It is my order that the state review those journals to determine if there is any exculpatory information with respect to those journals that need to be disclosed to the defendant, and that includes any inconsistent statements and any statements regarding the therapy method used that may have fostered or—instructed her to use her imagination or speculate or embellish as to what happened but, basically, the . . . state needs to review those journals under its *Brady* obligations and—turn over to the defendant anything that is exculpatory."

The court then confirmed that defense counsel had argued that at least some portions of the journals were subject to disclosure because the victim had reviewed them prior to her testimony. The prosecutor countered that, aside from any *Brady* material, defense counsel was not entitled to review the victim's private journals.

The prosecutor further represented that her investigator had started the process of reviewing the 200 pages, which were handwritten in Spanish, and, after several hours of review, had not discovered any exculpatory material. The prosecutor also assured the court that she had given the investigator "very, very clear instructions on what is exculpatory and what is not. I sat in an office directly next to her, so if she had any questions at all she came to me, and there is nothing exculpatory or inconsistent so far at all . . . ."

The court then considered the defendant's claim that he was entitled to the journals because the victim had used them to refresh her memory prior to her testimony. After reading § 6-9 of the Connecticut Code of Evidence, the court stated: "In light of the fact that [the victim] testified that she only used a few pages of journals that consisted of hundred—at least, apparently, a couple hundred pages, and the fact that the state would be reviewing all the journals with the obligation to turn over any exculpatory evidence to the defendant, I am not going to order that the entire journals be turned over to the defense for examination. Also, in light of the private nature of those journals." The court indicated it would make the journals a court exhibit, and the parties noted their agreement that a translation was not necessary at that point.

On the next day of trial, February 25, 2019, the prosecutor indicated that the investigator had completed the review of the victim's journals.[12] Pursuant to General

[12] The prosecutor represented the following to the court: "These records . . . were reviewed by my office, specifically . . . [by] . . . an investigator for the state's attorney's office, she has been with the state's attorney's office for fifteen years, she has been an investigator in our office for five years, she is bilingual, she is a 2013 graduate of Albertus Magnus College with a major in Criminal Justice. She was instructed by [the prosecutors] as far as what she was looking for, we explained to her very carefully what the state's obligation is for exculpatory and *Brady* material.

"She indicated that she spent about ten hours reviewing these materials because they are in Spanish, and she took her time. These materials never

Statutes § 54-86c (b),[13] the prosecutors submitted, in a sealed envelope, four pages from the journals for review by a court for a determination of whether they contained exculpatory material. In their view, the contents of these four pages were protected by General Statutes § 54-86f,[14] but, "in the abundance [of] caution," sought a judicial determination as to whether these items should be disclosed to the defense.

Later that day, the court indicated that it had reviewed the four pages from the journals submitted by the prosecution and determined that one page should be disclosed to the defense. Specifically, the court stated: "One of the material issues in this case is the—is [the victim's] claim that she delayed disclosure of the alleged assaults by the defendant because, when [D] reported such assaults, the family rallied behind the defendant and she felt that there was no one she could report this

left the state's attorney's possession; they did not go to her home, they were done during business hours. She indicated that she spent about ten hours reviewing them and whenever she had any questions she would talk to [the prosecutors] . . . ."

[13] General Statutes § 54-86c (b) provides: "Any state's attorney, assistant state's attorney or deputy assistant state's attorney may request an ex parte in camera hearing before a judge, who shall not be the same judge who presides at the hearing of the criminal case if the case is tried to the court, to determine whether any material or information is exculpatory."

In the present case, the parties agreed that Judge Alander could review the four pages from the victim's journals to determine whether there was any exculpatory material contained therein.

[14] General Statutes § 54-86f (a) provides in relevant part: "In any prosecution for sexual assault under sections 53a-70, 53a-70a and 53a-71 to 53a-73a, inclusive, no evidence of the sexual conduct of the victim may be admissible unless such evidence is (1) offered by the defendant on the issue of whether the defendant was, with respect to the victim, the source of semen, disease, pregnancy or injury, or (2) offered by the defendant on the issue of credibility of the victim, provided the victim has testified on direct examination as to his or her sexual conduct, or (3) any evidence of sexual conduct with the defendant offered by the defendant on the issue of consent by the victim, when consent is raised as a defense by the defendant, or (4) otherwise so relevant and material to a critical issue in the case that excluding it would violate the defendant's constitutional rights. . . ."

assault to and be supported. . . . There is an incident [here] where she disclosed a claim of sexual abuse to her mother, which could be interpreted as the mother then supporting her claim. So, I think it is material and exculpatory so I will order it disclosed to the defendant."

On February 26, 2019, the court granted the defendant's motion to recall the victim as a witness. During redirect examination by the prosecutor, the victim explained that, following a prompt from Vizueta, she wrote a passage in her journal about what "an environment in which speaking about abuse should have looked like, instead of what I grew up in." Thus, the statements in her journal in which the victim wrote that she had disclosed a sexual assault by a different family member to her mother was hypothetical in nature and part of a therapy exercise, and not based on actual events.

A

The defendant first argues that he was entitled to review the contents of the journals because the victim had reviewed them prior to her testimony. Specifically, he contends that the court abused its discretion in not requiring the disclosure of the entirety of the journals on this basis. We disagree.

Our starting point is § 6-9 (b) of the Connecticut Code of Evidence, which provides in relevant part: "If a witness, before testifying, uses an object or writing to refresh the witness' memory for the purpose of testifying, the object or writing need not be produced for inspection unless the court, in its discretion, so orders. . . ." The official commentary to this subsection states that § 6-9 (b) "establishes a presumption against production of the object or writing for inspection in this situation . . . ." We review the trial court's decision on whether to order production of such an object or writing for an abuse of discretion. See *State* v. *Cosgrove*,

181 Conn. 562, 588–89, 436 A.2d 33 (1980); *State* v. *Watson*, 165 Conn. 577, 593, 345 A.2d 532 (1973), cert. denied, 416 U.S. 960, 94 S. Ct. 1977, 40 L. Ed. 2d 311 (1974). "In reviewing a claim of abuse of discretion, we have stated that [d]iscretion means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. . . . In general, abuse of discretion exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors. . . . Therefore, [i]n those cases in which an abuse of discretion is manifest or where injustice appears to have been done, reversal is required." (Internal quotation marks omitted.) *State* v. *Fortin*, 196 Conn. App. 805, 819, 230 A.3d 865, cert. denied, 335 Conn. 926, 234 A.3d 979 (2020); see also *State* v. *Maner*, 147 Conn. App. 761, 767, 83 A.3d 1182, cert. denied, 311 Conn. 935, 88 A.3d 550 (2014).

We conclude that the court did not abuse its discretion in not requiring the disclosure of the contents of the victim's journals to the defendant. As we previously noted, the court, in ruling on this request, considered the private nature of the journals, that the victim had reviewed only a few pages of the journals before testifying, and that the state was in the process of reviewing the entirety of the journals for exculpatory material. The court's consideration and its ultimate decision was neither so arbitrary as to vitiate logic nor based on improper or irrelevant factors. We cannot conclude, therefore, that the court abused its discretion.

B

The defendant next argues that he was entitled to the contents of the victim's journals because they constituted a statement pursuant to Practice Book §§ 40-13A and 40-15 (1). The state counters that the defendant

waived this claim before the trial court, and, therefore, we should not review it. We agree with the state.

On March 21, 2016, the defendant filed a motion for discovery, requesting that the state provide him with various materials. During the first day of the trial, both the prosecutors and defense counsel learned of the existence of the victim's journals. During the discussion regarding whether the court should review the contents of the journals, defense counsel indicated that he was requesting the journals as part of discovery, but in a manner respectful to the victim. The parties agreed to end the testimony of the victim, subject to her being recalled as a witness depending on the contents of the journals. The court then adjourned to discuss the issues regarding the journals with counsel in chambers.

The next morning, the court stated on the record that, following chambers discussions with the prosecutors and defense counsel, the state would review the journals for exculpatory material and any statements made by the victim regarding the incidents in question. If the journals contained such items, they would be disclosed to the defense. Additionally, the court stated that it would conduct an in camera review of any items that the state thought might be exculpatory. Defense counsel expressly agreed that the court's statements were consistent with what had been discussed previously in chambers, and raised no objection to that procedure. The next day, the court clarified its order as to the state's obligations in reviewing the journals. Again, defense counsel made no objection to this process. On the last two days of trial, when the parties discussed this issue with the court, defense counsel raised no objection and did not attempt to obtain the contents of the journals pursuant to Practice Book §§ 40-13A and 40-15 (1).

On the basis of this record, we conclude that the defendant waived the claim that he was entitled to the

contents of the victim's journals because they constituted a statement pursuant to the rules of practice. Defense counsel agreed to the procedure to be used in the review of, and potential disclosure of, the contents of the journals, and the defendant cannot now challenge said procedure. "When the defendant consented to the procedures, he waived his right to challenge them later on appeal. Our procedure does not allow a defendant to pursue one course of action at trial and later, on appeal, argue that the path he rejected should now be open to him. . . . For this court to rule otherwise would result in trial by ambuscade of the trial judge." (Internal quotation marks omitted.) *State* v. *Santaniello*, 96 Conn. App. 646, 669, 902 A.2d 1, cert. denied, 280 Conn. 920, 908 A.2d 545 (2006).

Our decision in *State* v. *Tierinni*, 165 Conn. App. 839, 140 A.3d 377 (2016), aff'd, 329 Conn. 289, 185 A.3d 591 (2018), provides additional support for this conclusion. In that case, the trial court informed the parties of its practice to hear brief evidentiary arguments at sidebar to avoid excusing the jury each time. Id., 843–45. The substance of these discussions would be placed on the record at a later time. Id., 844. In the event that the matter needed to be addressed immediately, the court indicated its willingness to excuse the jury. Id., 845. When asked if the parties objected to this procedure, both the prosecutor and defense counsel responded in the negative. Id. On appeal, the defendant claimed that he had been excluded from critical stages of the proceedings in violation of his state and federal constitutional rights as a result of the court's procedure with respect to evidentiary objections. Id., 841. We concluded that, by agreeing to the proposed procedure, the defendant had waived this claim. Id., 843.

In *Tierinni*, we first set forth the definition of waiver. "[W]aiver is [t]he voluntary relinquishment or abandonment—express or implied—of a legal right or notice.

. . . In determining waiver, the conduct of the parties is of great importance. . . . [W]aiver may be effected by action of counsel. . . . When a party consents to or expresses satisfaction with an issue at trial, claims arising from that issue are deemed waived and may not be reviewed on appeal. . . . Thus, [w]aiver . . . involves the idea of assent, and assent is an act of understanding. . . .

"Put another way, [w]e do not look with favor on parties requesting, or agreeing to, an instruction or a procedure to be followed, and later claiming that that act was improper. . . . [S]ee . . . *State* v. *Thompson*, 146 Conn. App. 249, 259, 76 A.3d 273 (when party consents to or expresses satisfaction with issue at trial, claims arising from that issue deemed waived and not reviewable on appeal), cert. denied, 310 Conn. 956, 81 A.3d 1182 (2013); *State* v. *Crawley*, 138 Conn. App. 124, 134, 50 A.3d 349 (appellate court cannot permit defendant to elect one course at trial and then to insist on appeal that course which he rejected at trial be reopened), cert. denied, 307 Conn. 925, 55 A.3d 565 (2012)." (Citations omitted; internal quotation marks omitted.) *State* v. *Tierinni*, supra, 165 Conn. App. 847–48.

Next, we noted that the actions of counsel could effect a waiver, and that when a party consents to the use of a procedure at trial, a claim arising from that procedure was not reviewable on appeal. Id., 849. Consequently, by accepting and acquiescing to the court's procedure, the defendant waived his claim that he was denied the right to be present at the sidebar discussions. Id.

In the present case, the defendant, through his counsel, agreed to the prosecutors' review of the journals and to the court's in camera review of any materials that might be exculpatory. Having agreed to this procedure

before the trial court, the defendant cannot obtain appellate review of this claim.

IV

The defendant's final claim is that his rights under *Brady* v. *Maryland*, supra, 373 U.S. 83, were violated as a result of the procedures employed by the prosecutors with respect to the review of the victim's journals for exculpatory information. Specifically, he contends that, under these facts and circumstances, the prosecutors were required to personally review the contents of the journals and that this task could not have been delegated to an inspector working for the prosecutors. We disagree.

The defendant acknowledges that this claim was not raised before the trial court and, therefore, seeks review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). Pursuant to this 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 subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. . . . The first two *Golding* requirements involve whether the claim is reviewable, and the second two involve whether there was constitutional error requiring a new trial." (Citation omitted; emphasis in original, internal quotation marks omitted.) *State* v. *Castro*, 200 Conn. App. 450, 456–57, 238 A.3d 813, cert. denied, 335 Conn. 983, 242 A.3d 105 (2020); see generally *State* v.

Rosa, 196 Conn. App. 480, 496–97, 230 A.3d 677 (defendant's unpreserved *Brady* claim reviewable pursuant to *Golding* bypass doctrine), cert. denied, 335 Conn. 920, 231 A.3d 1169 (2020). The record is adequate and the defendant's claim is of constitutional magnitude, and, thus, the first two *Golding* prongs are satisfied. Our focus, therefore, is on whether the defendant demonstrated that a constitutional violation occurred. *State* v. *Rosa*, supra, 497.

"Our analysis of the defendant's claim begins with the pertinent standard, set forth in *Brady* and its progeny, by which we determine whether the state's failure to disclose evidence has violated a defendant's right to a fair trial. In *Brady*, the United States Supreme Court held that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. . . . In *Strickler* v. *Greene*, 527 U.S. 263, [281–82], 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999), the United States Supreme Court identified the three essential components of a *Brady* claim, all of which must be established to warrant a new trial: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the [s]tate, either [wilfully] or inadvertently; and prejudice must have ensued. . . . Under the last *Brady* prong, the prejudice that the defendant suffered as a result of the impropriety must have been material to the case, such that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. . . . If . . . [the defendant] . . . fail[s] to meet his burden as to [any] one of the three prongs of the *Brady* test, then [the court] must conclude that a *Brady* violation has not occurred." (Citations omitted; internal quotation marks omitted.) *State* v. *Rosa*, supra, 196 Conn.

App. 497–98; see also *State* v. *Bryan*, 193 Conn. App. 285, 315, 219 A.3d 477, cert. denied, 334 Conn. 906, 220 A.3d 37 (2019).

Our Supreme Court has summarized the obligations of the prosecutor with respect to *Brady* as follows. The state has a duty, pursuant to *Brady*, to disclose evidence that is favorable to the defense and material to the case. *State* v. *Guerrera*, 331 Conn. 628, 646–47, 206 A.3d 160 (2019). "As the state's representative, the prosecutor has a broad obligation to disclose *Brady* material because principles of fundamental fairness demand no less. . . . This obligation extends to evidence favorable to the defense that is not in the possession of the individual prosecutor responsible for trying the case; indeed, the obligation may encompass such evidence even if it is not known to the prosecutor. . . . More specifically, the prosecutor's duty of disclosure extends to *Brady* material that is known to the others acting on the government's behalf in [the case], including, but not limited to, the police. . . . In other words, the prosecutor is deemed to have constructive knowledge of *Brady* material possessed by those acting on the state's behalf. . . . Thus, the prosecutor has a duty to learn of exculpatory evidence in possession of any entity that is acting as an agent or arm of the state in connection with the particular investigation at issue." (Citations omitted; internal quotation marks omitted.) Id., 647; see also *Kyles* v. *Whitley*, 514 U.S. 419, 437–38, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) (individual prosecutor has duty to learn of any favorable evidence known to others acting on government's behalf, including police). Simply stated, the individual prosecutor or prosecutors trying a specific case bear the ultimate responsibility for compliance with the disclosure of evidence as required by *Brady* and its progeny. *United States* v. *Jennings*, 960 F.2d 1488, 1490 (9th Cir. 1992).

In the present case, the defendant has alleged a somewhat unusual *Brady* violation. He claims that the victim's journals needed to be reviewed personally by a prosecutor, rather than "a nonlawyer member" of the prosecutors' office. As we noted in part III of this opinion, the prosecutors assigned the task of reviewing the victim's journals, which were written in Spanish, to a bilingual, experienced investigator. They provided her with detailed instructions regarding this review, and a prosecutor remained available to answer any questions that arose during this process. The defendant contends, however, that in this case, the review of the victim's journals could not be delegated to a nonlawyer but, rather, required a personal review by the prosecutors in order to avoid violating his constitutional rights to due process.

In support of his argument, the defendant relies on language from cases stating that the prosecutor trying a particular case bears the ultimate responsibility for disclosing *Brady* materials independent from any conclusion reached by others acting as agents of the state in connection with the particular investigation. See, e.g., *Kyles* v. *Whitley*, supra, 514 U.S. 437; *State* v. *Guerrera*, supra, 331 Conn. 647, 656; see also, e.g., *McMillian* v. *Johnson*, 88 F.3d 1554, 1567 (11th Cir. 1996), cert. denied, 521 U.S. 1121, 117 S. Ct. 2514, 138 L. Ed. 2d 1016 (1997); *Walker* v. *New York*, 974 F.2d 293, 299 (2d Cir. 1992), cert. denied, 507 U.S. 961, 113 S. Ct. 1387, 122 L. Ed. 2d 762 (1993), cert. denied, 507 U.S. 972, 113 S. Ct. 1412, 122 L. Ed. 2d 784 (1993). These cases, however, do not support the claim advanced by the defendant in the present case. For example, the United States Court of Appeals for the Second Circuit has explained that the police satisfy their duty pursuant to *Brady* when they turn over exculpatory material to the prosecutor. *Walker* v. *New York*, supra, 298–99. The prosecutor, on the basis of his or her legal acumen, then

determines whether this material must be disclosed to the defense. Id., 299. The Second Circuit then explained: "A rule requiring the police to make separate, often difficult, and perhaps conflicting, disclosure decisions would create unnecessary confusion. It also would ignore the fact that the defendant's appropriate point of contact with the government during litigation is the prosecutor and not those who will be witnesses against him." Id. Thus, the Second Circuit clearly instructed, as a general rule, that the police are obligated to turn over material to the prosecutor's office for a determination of what is to be disclosed to the defense in order to comply with *Brady*. *Walker* does not, however, stand for the proposition that only the prosecutor in a case, and not a member of his or her staff acting under his or her supervision, may review materials for a determination of whether disclosure is required under *Brady*. See, e.g., *United States* v. *Claridy*, United States District Court, Docket No. 02:CR498 (LMM) (S.D.N.Y. March 20, 2003) (noting that *Kyles* v. *Whitley*, supra, 514 U.S. 419, did not require assigned prosecutor to personally review all relevant Securities and Exchange Commission personnel files in joint investigation).

Additionally, we note that the United States Court of Appeals for the Ninth Circuit twice has rejected the claim that an assistant United States attorney may be personally ordered to review for *Brady* material, before the trial, the personnel files of law enforcement officers expected to testify at trial. *United States* v. *Herring*, 83 F.3d 1120, 1122–23 (9th Cir. 1996); *United States* v. *Jennings*, supra, 960 F.2d 1488–89. In the latter case, the court noted that the assistant United States attorney prosecuting a case bore the responsibility for complying with *Brady* and its progeny. *United States* v. *Jennings*, supra, 1490. Cognizant of separation of powers concerns vis-à-vis a court interfering with prosecutorial independence, and relying on the lack of case law

requiring the personal efforts of an assistant United States attorney to review these personnel files and the absence of any indication that the prosecution would not adhere to its duties and obligations under *Brady*, the court determined that the United States District Court for the Southern District of California had improperly required personal review of the files by the assistant United States attorney. Id., 1490–92. In *United States* v. *Herring*, supra, 1121–23, the Ninth Circuit rejected the defendant's argument that *Jennings* had been overruled by the United States Supreme Court's decision in *Kyles* v. *Whitley*, supra, 514 U.S. 419. See also *United States* v. *Martin*, United States District Court, Docket No. 2:15-CR-0235 (TLN) (E.D. Cal. August 11, 2016). Additionally, the United States District Court for the Southern District of New York has noted that the Second Circuit does not have a requirement that prosecutors personally review the personnel files of anticipated government employee witnesses. *United States* v. *Principato*, United States District Court, Docket No. 01:CR588 (LMM) (S.D.N.Y. October 16, 2002).[15]

In the present case, the defendant has failed to demonstrate, through controlling or persuasive authority, that the prosecutors in the present case were required to personally review the contents of the victim's journals to satisfy *Brady*. We emphasize that, ultimately, the obligation for complying with *Brady* rests with the prosecutor, but it does not follow that the personal

[15] See also *United States* v. *Thomas*, United States District Court, Docket No. 1:18-CR-00458 (WJ) (D. N.M. October 23, 2018) (government satisfied its *Brady* duty by following current Department of Justice policy in which Drug Enforcement Agency attorneys and staff review personnel files and produce any exculpatory or impeachment materials to assistant United States attorney); *United States* v. *Burk*, United States District Court, Docket No. 3:15-CR-00088 (SLG-DMS) (D. Alaska September 8, 2016) (courts lack authority to order assistant United States attorney to personally review personnel files).

review of items such as the victim's journals by a prosecutor is constitutionally required. Accordingly, we conclude that, because the defendant has failed to establish a constitutional violation under the third *Golding* prong, his claim fails.

The judgment is affirmed.

In this opinion the other judges concurred.

CONNEX CREDIT UNION *v.* MICHELLE M. THIBODEAU (AC 43830)

Alvord, Cradle and DiPentima, Js.

Syllabus

The plaintiff, a secured party, sought to recover monetary damages from the defendant debtor, for breach of a retail installment sales contract, secured by an interest in the defendant's vehicle. After the defendant defaulted, the plaintiff took possession of the vehicle and sent the defendant a presale notice regarding her right to redeem and the notice of sale. The defendant took no steps to redeem the vehicle, and the plaintiff sold it in an arm's-length transaction. Following the sale, the plaintiff sent the defendant a postsale notice advising her of the sale and informing her that the sale price was less than the amount that she owed and that the plaintiff may seek a deficiency judgment. The defendant did not pay the amount allegedly due. Following a bench trial, the trial court rendered judgment for the plaintiff and awarded certain damages, and the defendant appealed to this court. *Held*:

1. The trial court did not err in determining that the plaintiff properly provided notice of the right to an accounting as required by article 9 of the Uniform Commercial Code (UCC), as the provision of an actual accounting in lieu of a statement of a right to an accounting was enough to satisfy the requirements set out by the applicable statute (§ 42a-9-613 (1) (D)): although the statute only requires a statement that the debtor is entitled to an accounting, additional information is permitted and exact language is not required, and providing an actual accounting in the notice is the type of additional information that the statute allows; moreover, providing the actual accounting, especially when provided free of charge, served as a consumer focused means of meeting the statutory purpose of notification to the debtor; accordingly, the plaintiff's presale notice, which provided detailed information, including details of the defendant's debt and the amount she owed to the plaintiff, and

actively invited questions, adhered to the requirements of the UCC and thus satisfied the accounting provision of the statute.

2. This court declined to reach the merits of the defendant's claim that the trial court erred in determining that the plaintiff properly provided a telephone number from which the defendant could learn the full amount she would need to pay in order to redeem her vehicle as required by article 9 of the UCC, the claim not having been properly preserved for appellate review; the defendant did not raise this issue until her posttrial brief, and this court's careful review of the record revealed the issue was not raised at trial and was not addressed in the court's memorandum of decision, of which no further articulation was sought, and, because the court did not consider the issue, the factual record was wholly inadequate for review.

3. The trial court did not err in determining that the plaintiff satisfied the requirements of the Retail Installment Sales Financing Act (RISFA) (§ 36a-770 et seq.) regarding the repossession and sale of a motor vehicle.

a. The defendant's claim that the postsale notice failed to provide a proper itemization as required by statute (§ 36a-785 (e)) was not properly preserved for appellate review, the defendant having failed to raise this issue until her posttrial brief, and the record was unclear how, if at all, the issue was raised at trial since the issue was not addressed in the court's memorandum of decision.

b. The plaintiff did not violate § 36a-785 (g) when it credited the defendant with the actual sale price of the vehicle, an amount lower than the statutory fair market value as determined by the formula in § 36a-785 (g); the purpose of § 36a-785 (g) is not to calculate an amount that a creditor must credit to a debtor's account but, rather, to provide the debtor with the tools to defend herself in a deficiency proceeding brought by a secured party, and, where a secured party seeks a deficiency judgment following a calculation pursuant to subsection (g) of the statute, the secured party may rebut the presumed value of the vehicle with direct in-court testimony, which the plaintiff did here, presenting testimony regarding how the sale price represented the actual fair market value of the vehicle due to damage sustained in an accident that prompted the defendant's surrender of the vehicle, and, additionally, the defendant did not offer any evidence as to the vehicle's value.

Argued September 16—officially released November 30, 2021

Procedural History

Action to recover damages for breach of contract, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the defendant filed a counterclaim; thereafter, the matter was tried to the court, *Aurigemma, J.*; subsequently, the defendant

withdrew the counterclaim; judgment for the plaintiff, from which the defendant appealed to this court. *Affirmed.*

Garrett A. Denniston, with whom, on the brief, was *Marisa A. Bellair*, for the appellant (defendant).

Robert C. Lubus, Jr., with whom were *Andrew S. Marcucci*, and, on the brief, *Stephanie Ann Palmer*, for the appellee (plaintiff).

Opinion

ALVORD, J. This appeal concerns the application of the statutory schemes that govern a secured party's repossession and subsequent sale of a motor vehicle in a consumer goods secured transaction. Connecticut has adopted article 9 of the Uniform Commercial Code (UCC), codified at General Statutes § 42a-9-101 et seq., which governs secured transactions. Specifically at issue here is the section that governs a secured party's notification to a debtor regarding the repossession and impending sale of collateral. Connecticut also has enacted the Retail Installment Sales Financing Act (RISFA), General Statutes § 36a-770 et seq., an act that governs installment sales contracts—a specific type of secured transaction. Specifically at issue here is the section that pertains to a secured party's notification to a debtor regarding the proceeds of the sale of a repossessed and sold motor vehicle. The underlying lawsuit arose from the defendant debtor's default on her car payments and the plaintiff secured party's subsequent repossession and sale of that vehicle. In essence, we are tasked with answering two questions: (1) what must a secured party tell a debtor *prior to* the sale of repossessed collateral and (2) what must a secured party do *after* the sale of a repossessed vehicle.

The defendant debtor, Michelle M. Thibodeau, appeals from the judgment of the trial court rendered in favor

of the plaintiff secured party, Connex Credit Union, in this breach of contract action. On appeal, the defendant claims that the trial court erred in determining that the plaintiff (1) provided notice of the right to an accounting as required by article 9 of the UCC, (2) provided a telephone number from which the defendant could learn the full amount she would need to pay in order to redeem her vehicle as required by article 9 of the UCC,[1] and (3) satisfied the requirements of RISFA regarding the repossession and sale of a motor vehicle. On the basis of these claims, the defendant argues that the plaintiff was precluded from recovering any deficiency upon resale due to its alleged failure to adhere to the statutory requirements.[2] We affirm the judgment of the trial court.

The following facts, as found by the trial court in its memorandum of decision, and procedural history are relevant to our discussion of the claims on appeal. "On April 7, 2014, the defendant . . . borrowed $19,993.12 [from the plaintiff] to be repaid with interest at 4.99 percent per annum over seventy-two months. The retail installment sales contract . . . signed by the defendant was secured by a security interest in the defendant's 2013 Kia Rio [vehicle] . . . . In the [c]ontract the defendant agreed to be responsible for repossession and sales costs as well as attorney's fees."

After her October 23, 2017 payment, the defendant made no further payments on the loan, and the trial court determined that, as a result, she had defaulted. The defendant "contacted the plaintiff on or about January 16, 2018, and advised it that her vehicle had been in an accident and she wished the plaintiff to come and take possession of the vehicle."

[1] Despite the phrasing of this claim, we note that the trial court made no such determination.

[2] Because we find that the plaintiff did not violate these statutes, we need not address the effects of such violations.

On January 17, 2018, the plaintiff sent a document titled "Right to Redeem and Notice of Sale" (presale notice) to the defendant via certified mail. This document noted the repossession date, advised the defendant of her right to redeem her vehicle, explained how to redeem the vehicle, and listed the details of the defendant's outstanding debt.[3] The defendant took no steps to redeem the vehicle.

On February 28, 2018, the plaintiff sold the vehicle in an arm's-length transaction for $4000. On March 20, 2018, the plaintiff sent the defendant a letter (postsale notice) advising her of the sale and informing her that the sale price was less than the amount that she owed. The postsale notice also informed the defendant that the plaintiff might seek a deficiency judgment against her. A named employee, identified as a collections specialist, signed the postsale notice which included the plaintiff's mailing address, website address, and phone number, and closed with the words "[i]f you have any questions, please call." The defendant did not contact the plaintiff with any questions.

In addition to the defendant's outstanding debt, the plaintiff incurred $760 in repossession and sales costs. Along with the sale proceeds, the plaintiff recovered a total of $1955.99 from the insurance it had on the vehicle. The plaintiff also applied $9 from a savings account that the defendant had with the plaintiff to the defendant's outstanding debt.

On August 30, 2018, the plaintiff commenced this action against the defendant for breach of contract. The

[3] "The document indicated that the repossession date was [January 16, 2018] and advised the defendant that she could 'still redeem (get back) [her] vehicle by curing [her] default.' It further advised that the defendant needed to pay $985.48 to the Credit Union for principal, interest and late fees and $200 to the Repossession agent 'on or before the REDEMPTION DATE,' which the document listed as [February 5, 2018]."

plaintiff sought principal damages of $4495.07, prejudgment interest in the amount of $263.22, and attorney's fees in the amount of $674. In response, the defendant asserted several special defenses, including assertions that the plaintiff had failed to inform her in its presale notice that she was entitled to an accounting and had not credited her with the correct value upon selling the vehicle.[4]

The case was tried to the court, *Aurigemma, J.*, on September 11, 2019. At trial, the plaintiff called J. R. Roy, the plaintiff's collection manager. Roy testified as to the vehicle's condition and value. The defendant did not present evidence on the value of the vehicle and presented no witnesses and no exhibits. The parties submitted simultaneous posttrial briefs.

On January 2, 2020, the court issued its memorandum of decision, in which it found that "the plaintiff [had] proved all the necessary elements of its cause of action." In addition, the court rejected each of the defendant's special defenses. The court rendered judgment for the plaintiff and awarded damages in the amount of $5432.29. This appeal followed. Additional facts will be set forward as necessary.

[4] In toto, the defendant asserted six special defenses. Specifically, she argued: (1) the plaintiff did not credit her with the fair market value of the vehicle, in violation of General Statutes § 36a-785 (g); (2) the plaintiff did not provide written notice explaining that she was responsible for retrieving personal property from the vehicle, in violation of § 36a-785 (c) (2); (3) the plaintiff failed to inform her that she was entitled to an accounting, in violation of General Statutes §§ 42a-9-613 (1) (D) and 42a-9-614; (4) the plaintiff failed to provide an accurate description of her liability for deficiency, in violation of § 42a-9-614 (1) (B); (5) the plaintiff's sale restricted her right to redeem under General Statutes § 42a-9-623 by requiring payment by cash or bank teller's check; and (6) the plaintiff misrepresented her right to redeem, in violation of § 42a-9-614 (5).

In addition, the defendant brought a counterclaim alleging violations of various consumer protection statutes. At trial, however, the defendant withdrew her counterclaim.

I

The defendant first claims that the court erred because "(1) it ignored the plain language of [General Statutes §§ 42a-9-614 (1) (A) and 42a-9-613 (1) (D)] by excusing [the plaintiff's] omission of language stating [that the defendant] had the right to request a written explanation of indebtedness and the cost for doing so (if any); and (2) what the court called an 'accounting' in the presale notice falls well short of what the [Connecticut] UCC requires." We disagree.

We first set forth the appropriate standard of review. Here, the financial amounts listed in the notices are not in dispute; in resolving the defendant's various claims, we are only tasked with determining what the relevant statutes require of secured parties. Thus, our consideration of this appeal requires only a review of the trial court's application of the law to the undisputed facts. "The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case, including the question of whether the language does so apply. . . . 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. . . . Furthermore, [t]he legislature is always presumed to have created a harmonious and consistent body of law . . . [so that] [i]n determining

the meaning of a statute . . . we look not only at the provision at issue, but also to the broader statutory scheme to ensure the coherency of our construction. . . . Because issues of statutory construction raise questions of law, they are subject to plenary review on appeal." (Internal quotation marks omitted.) *Robinson* v. *Tindill*, 208 Conn. App. 255, 264, A.3d (2021).

The first issue we address is the question of what information a secured party must include in a notice to a debtor *prior to* disposing of repossessed consumer goods collateral. In consumer goods secured transactions,[5] a notification of disposition of collateral requires a statement "that the debtor is entitled to an accounting of the unpaid indebtedness and [a statement of] the charge, if any, for an accounting . . . ." General Statutes § 42a-9-613 (1) (D); see also General Statutes § 42a-9-614 (1) (A). The parties agree that the notice in question did not include language expressly stating that the defendant was "entitled to an accounting . . . ." General Statutes § 42a-9-613 (1) (D). They disagree, however, as to whether the plaintiff's notification conforms to the statute's requirement despite the lack of the specific statement.

The defendant argues that a secured party cannot merely adhere to the "spirit" of §§ 42a-9-613 (1) (D) and 42a-9-614 (1) (A), but rather it must strictly comply with the requirements set out in the statute. The plaintiff responds that its notice "exceeded the minimum necessary contents to satisfy the statute by providing the actual accounting free of charge, rather than the right to request an accounting and the cost for the fulfillment of that request, if any." On the particular facts of this case, we conclude that the plaintiff did not violate the requirements of the statute.

[5] "'Consumer goods' means goods that are used or bought for use primarily for personal, family or household purposes." General Statutes § 42a-9-102 (23).

We begin by setting forth the relevant provisions of § 42a-9-614, which governs the contents and form of notification required before disposing of collateral in consumer goods transactions, and § 42a-9-613,[6] which, although it governs the contents and form of notification required before disposition of collateral in *nonconsumer goods transactions*, is incorporated in part into § 42a-9-614. Section 42a-9-614 provides that, "[i]n a consumer-goods transaction, the following rules apply . . . ."[7] Subsection (1) governs the information that must be provided in a notification of disposition. Specifically, a notification of disposition must provide four categories of information, only one of which is relevant to this discussion.[8] See General Statutes § 42a-9-614 (1). The relevant and first required category of information is "[t]he information specified in subdivision (1) of section 42a-9-613 . . . ." General Statutes § 42a-9-614 (1) (a). Section 42a-9-613 (1) (D) is the provision at issue and requires that a notification of disposition contain a statement that "the debtor is entitled to an accounting of the unpaid indebtedness" along with "the charge, if any, for an accounting . . . ." The other three catego-

[6] General Statutes § 42a-9-613 provides in relevant part: "Except in a consumer-goods transaction, the following rules apply: (1) The contents of a notification of disposition are sufficient if the notification: (A) Describes the debtor and the secured party; (B) Describes the collateral that is the subject of the intended disposition; (C) States the method of intended disposition; (D) States that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting; and (E) States the time and place of a public disposition or the time after which any other disposition is to be made. . . ."

[7] The requirements differ depending upon whether the transaction is a consumer goods transaction or not. See General Statutes §§ 42a-9-613 and 42a-9-614.

[8] General Statutes § 42a-9-614 (1) provides: "A notification of disposition must provide the following information: (A) The information specified in subdivision (1) of section 42a-9-613; (B) A description of any liability for a deficiency of the person to which the notification is sent; (C) A telephone number from which the amount that must be paid to the secured party to redeem the collateral under section 42a-9-623 is available; and (D) A telephone number or mailing address from which additional information concerning the disposition and the obligation secured is available."

ries of required information in disposing of consumer goods collateral, listed in § 42a-9-614 (1), are not relevant to this discussion.

Section 42a-9-614 (2) further provides that "[a] particular phrasing of the notification is not required." Lastly, although § 42a-9-614 (3) provides an example of a sufficient notification,[9] § 42a-9-614 (4) provides that "even

[9] General Statutes § 42a-9-614 (3) provides: "The following form of notification, when completed, provides sufficient information:

"(Name and address of secured party.)

"(Date)

NOTICE OF OUR PLAN TO SELL PROPERTY

" .... (Name and address of any obligor who is also a debtor.)

"Subject: .... (Identification of transaction)

"We have your .... (describe collateral), because you broke promises in our agreement.

"(For a public disposition:)

"We will sell .... (describe collateral) at public sale. A sale could include a lease or license. The sale will be held as follows:

"Date: ....

"Time: ....

"Place: ....

"You may attend the sale and bring bidders if you want.

"(For a private disposition:)

"We will sell .... (describe collateral) at private sale sometime after .... (date). A sale could include a lease or license.

"The money that we get from the sale (after paying our costs) will reduce the amount you owe. If we get less money than you owe, you (will or will not, as applicable) still owe us the difference. If we get more money than you owe, you will get the extra money, unless we must pay it to someone else.

"You can get the property back at any time before we sell it by paying us the full amount you owe (not just the past due payments), including our expenses. To learn the exact amount you must pay, call us at .... (telephone number).

"If you want us to explain to you in writing how we have figured the amount that you owe us, you may call us at .... (telephone number) or write us at .... (secured party's address) and request a written explanation. (We will charge you $.... for the explanation if we sent you another written explanation of the amount you owe us within the last six months.)

"If you need more information about the sale call us at .... (telephone number) or write us at .... (secured party's address).

"We are sending this notice to the following other people who have an interest in .... (describe collateral) or who owe money under your agreement:

".... (Names of all other debtors and obligors, if any.)"

if additional information appears at the end of the form," the notice remains sufficient.

We begin our analysis by noting that the question of whether providing an actual accounting in lieu of a statement of a right to an accounting satisfies the requirements set out in § 42a-9-613 (1) (D) is a matter of first impression in Connecticut. Although the statute only requires a statement "that the debtor is entitled to an accounting"; General Statutes § 42a-9-613 (1) (D); including additional information is permitted; see General Statutes § 42a-9-614 (4); and exact language is not required. General Statutes § 42a-9-614 (2). Providing an actual accounting in the notice instead of a statement that such an accounting may be obtained on request is the type of additional information that the statute allows. Indeed, providing the actual accounting, especially when provided free of charge as was done here, instead of a notice of a right to an accounting serves as a consumer focused means of meeting the statutory purpose of notification to the debtor.

An accounting is defined, inter alia, as "the aggregate unpaid secured obligations" and identifies "the components of the obligations in reasonable detail." General Statutes § 42a-9-102 (4) (B) and (C). In the present case, the presale notice stated the principal ($9700.06), the interest ($114.05 with a $1.33 per diem accrual), late fees ($30), and cost of towing ($200), for a total outstanding balance of $10,044.11. The notice also closed with "[i]f you have any questions, please contact me," and provided a phone number and address. In addition, the notice provided a three page long description of the defendant's redemption rights and outstanding debt. The plaintiff provided an actual accounting in compliance with the statute, comprised of "the principal, interest, per diem, late fees, [and] repossession costs . . . ." See General Statutes § 42a-9-102 (4).

On these facts, we conclude that the plaintiff's presale notice, which provided detailed information, including details of the defendant's debt and the amount she owed to the plaintiff, and actively invited questions, adhered to the requirements of §§ 42a-9-614 (1) (A) and 42a-9-613 (1) (D) and thus satisfied the accounting provision of the statute.

II

The defendant's second claim is that the court erred in finding that the plaintiff provided a telephone number that she could call to determine the total amount that she would need to pay to redeem the vehicle as required by § 42a-9-614 (1) (C).[10] Because this claim is not properly preserved for appellate review, we decline to reach the merits of this argument.

The following facts are relevant to our resolution of this claim. The defendant asserted several special defenses relating to the sufficiency of the plaintiff's presale notice and postsale notice in her amended answer. Although the defendant raised other defenses based upon §§ 42a-9-613 and 42a-9-614, she did not assert the defense that the plaintiff failed to provide a number that she could call in order to learn the total amount she would need to pay to redeem her vehicle.[11] See footnote 4 of this opinion. The defendant did not raise this issue until her posttrial brief, which was filed

[10] General Statutes § 42a-9-614 (1) provides that "[a] notification of disposition must provide the following information . . . ." Subdivision (C) requires that such notice include "[a] telephone number from which the amount that must be paid to the secured party to redeem the collateral under section 42a-9-623 is available . . . ." General Statutes § 42a-9-614 (1) (C).

[11] The presale notice provides, beneath the list of money past due and repossession costs: "In addition to the charges listed above, you will incur storage fees. Please contact the [r]epossession agent to determine the amount of the charge." The defendant argues that because the presale notice only provided contact information for the credit union and not for the repossession agent, the defendant was not provided with a number with which she could learn the amount she needed to pay to redeem the vehicle.

simultaneously with the plaintiff's brief. Further, our careful review of the record reveals that this issue was not raised at trial and is not addressed in the trial court's memorandum of decision, of which no further articulation was sought.

Because the trial court did not consider this issue, the factual record is wholly inadequate for our review. The court did not make findings of fact relevant to this specific issue. Therefore, in asking us to review this claim, the defendant is essentially asking us to make factual findings—a request with which we cannot comply. See *Byrne* v. *Spurling*, 105 Conn. App. 99, 103, 937 A.2d 70 (2007). "[A]n examination of the plaintiff's belated arguments demonstrates the need for factual findings that the record does not contain." Id. For these reasons, we cannot address the merits of this claim.

"The court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. . . ." Practice Book § 60-5. "[T]he reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court *or the opposing party* to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party. . . . [T]o permit the appellant first to raise posttrial an issue that arose during the course of the trial would circumvent the policy underlying the requirement of timely preservation of issues." (Emphasis in original; internal quotation marks omitted.) *Carroll* v. *Yankwitt*, 203 Conn. App. 449, 479 n.23, 250 A.3d 696 (2021). This court previously has declined to review a claim raised for the first time in a posttrial brief because doing so would "contravene the purpose of the preservation requirement," noting that it was "not surprising that the trial court did not address the defendant's [claim] in any manner in its memorandum of decision." *AS Peleus, LLC* v. *Success, Inc.*, 162 Conn.

App. 750, 759–60, 133 A.3d 503 (2016). Thus, because the issue was only raised in the defendant's posttrial brief and because the record is inadequate for review, we do not reach the merits of this claim.

III

Finally, the defendant claims that the trial court erred by "implicitly" finding that the plaintiff complied with RISFA, specifically, General Statutes § 36a-785 (e), and provided the defendant with a " 'written statement itemizing the disposition of the proceeds' " from the vehicle's sale. In addressing this claim, we move away from the adequacy of the presale notice and examine the defendant's actions *after* the vehicle was sold. The defendant further argues that, even if the plaintiff had satisfied § 36a-785 (e), the court erred in finding that the plaintiff credited the defendant the proper amount from the sale of the vehicle. As to the claim that the plaintiff failed to provide an itemization in the postsale notice, the defendant's argument was not properly preserved, and, therefore, we do not reach the merits of the claim. As to the argument that the plaintiff failed to credit the defendant with the proper amount, we disagree.

A

Similar to the defendant's claim detailed in part II of this opinion, the defendant's claim that the postsale notice failed to provide a proper itemization as required by § 36a-785 (e)[12] is not properly preserved for appellate review.

Although the defendant raised other defenses based on § 36a-785 in her amended answer, she did not assert

[12] General Statutes § 36a-785 (e), titled "Proceeds of resale," provides in relevant part: "Not later than thirty days after the resale, the holder of the contract shall give the retail buyer a written statement itemizing the disposition of the proceeds. . . ."

the defense of failing to provide a statement itemizing the proceeds of the disposition. See footnote 4 of this opinion. The defendant did not raise the issue until her posttrial brief—filed simultaneously with the plaintiff's posttrial brief. Again, the record is unclear how, if at all, this issue was raised at trial since the issue is not addressed in the trial court's memorandum of decision.[13] The defendant herself acknowledges that "neither [the plaintiff] nor the trial court addressed the postsale RISFA argument . . . ." Perhaps neither addressed this argument because each was mindful of the precept that raising an issue only in a posttrial brief "circumvent[s] the policy underlying the requirement of timely preservation of issues." (Internal quotation marks omitted.) *Carroll* v. *Yankwitt*, supra, 203 Conn. App. 479 n.23.

Although each party briefed this issue on appeal, we decline to review the claim as it was neither properly raised nor considered at trial. Therefore, because permitting this claim " 'would encourage trial by ambuscade' " and would " 'contravene the purpose of the preservation requirement,' "; id.; we conclude that the defendant has failed to properly preserve the claim for appellate review. See *AS Peleus, LLC* v. *Success, Inc.*, supra, 162 Conn. App. 759–60.

B

In addition to the claim that the plaintiff provided no itemized statement of disposition, the defendant claims

[13] After filing the present appeal, the defendant filed a motion for articulation with the trial court on February 27, 2020. Specifically, the defendant requested articulation of the trial court's "basis for rejecting [the defendant's] contention '[that the plaintiff] didn't send [the defendant] a written statement itemizing the disposition of the vehicle's sales proceeds,' which violates § 36a-785 (e) of RISFA and bars recovery." This contention was not raised in the defendant's amended answer, but was argued in her posttrial brief. The trial court did not rule on the motion for articulation and the defendant did not file a motion to compel the court to issue a ruling.

that, even if there were such a statement, the plaintiff necessarily violated the statute's mandate by crediting her with the incorrect value of the vehicle.[14] Specifically, the defendant claims that § 36a-785 (g) requires a secured party to credit a debtor with the fair market value as determined by the formula set forth in the statute (statutory fair market value) at the time the collateral is disposed of and that the trial court erred in concluding that the postsale notice properly credited her with $4000 in actual sales proceeds rather than the statutory fair market value as required under § 36a-785 (g). We disagree.

For the same reasons set forth in part I of this opinion, this claim is subject to plenary review. See *Wells Fargo Bank, N.A.* v. *Fratarcangeli*, 192 Conn. App. 159, 165, 217 A.3d 649 (2019).

The following facts are relevant to our resolution of this claim. At trial, the plaintiff called its collection manager, Roy, as a witness. Roy testified that the statutory fair market value of the vehicle was $6225. He also testified, however, that, according to the vehicle condition report, the vehicle's driver side front door and rear quarter panel as well as the passenger side front quarter panel, rear door, and rear quarter panel all were scratched and dinged. According to Roy, the sale price of $4000—not the statutory fair market value of $6225—represented the vehicle's actual fair market value. The defendant did not present any evidence regarding the vehicle's value. The trial court found that the plaintiff rebutted the fair market value presumption of § 36a-785 (g), and found that the sale price ($4000) was the vehicle's actual fair market value.

Section 36a-785 (g), titled "Fair market value," provides in relevant part: "If the goods retaken consist of

[14] Although the defendant articulates this argument as part of her itemized statement claim, because this question was, in fact, properly preserved, we reach the merits of this claim.

a motor vehicle the aggregate cash price of which was more than four thousand dollars, the prima facie fair market value of such motor vehicle shall be calculated by adding together the average trade-in value for such motor vehicle and the highest-stated retail value for such motor vehicle and dividing the sum of such values by two. Such average trade-in value and highest-stated retail value shall be determined by the values as stated in the National Automobile Dealers Association Used Car Guide [(NADA)] . . . as of the date of repossession. . . . The prima facie evidence of fair market value of such motor vehicle . . . so determined may be rebutted only by direct in-court testimony. If such value of the motor vehicle . . . is less than the balance due under the contract . . . the holder of the contract may recover from the retail buyer . . . the amount by which such liability exceeds such fair market value . . . ." In essence, the statute creates a rebuttable presumption that the NADA value, the statutory fair market value, is the actual fair market value.

On appeal, the defendant claims that the plaintiff was required to credit her account with the statutory fair market value rather than the actual sale proceeds and was precluded from contesting the statutory fair market value until the matter was before a court. It is the defendant's position that the plaintiff is barred from recovering a deficiency judgment in this case because of its failure to credit her with the statutory fair market value when it sold the vehicle. The plaintiff essentially relies on the fact that the trial court found that Roy's testimony rebutted the presumption of fair market value in arguing that it complied with the statute.

We disagree with the defendant's interpretation of § 36a-785 (g). The purpose of subsection (g) is not to calculate an amount that a creditor/secured party *must* credit to a debtor's account, but rather to provide the debtor with the tools to defend herself in a deficiency

proceeding brought by a secured party. See General Statutes § 36a-785 (g). Where a secured party seeks a deficiency judgment, following a calculation pursuant to subsection (g), the secured party may rebut the presumed value of the vehicle with direct in-court testimony. See General Statutes § 36a-785 (g). In the present case, the plaintiff presented evidence of the statutory fair market value ($6225) and then rebutted the presumed value with Roy's testimony on the vehicle's sale price ($4000) and how that value represented the actual fair market value of the vehicle due to damage sustained in the accident that prompted the defendant's surrender of the vehicle. Finally, although the plaintiff presented ample evidence to rebut the statutory fair market value, the defendant did not offer any evidence as to the vehicle's value. We conclude that the plaintiff did not violate § 36a-785 (g).

The judgment is affirmed.

In this opinion the other judges concurred.

STEPHEN NELSON *v.* COMMISSIONER OF CORRECTION (AC 44294)

Elgo, Suarez and Clark, Js.

Syllabus

The petitioner, who had been convicted of several crimes after two trials, sought a writ of habeas corpus, claiming that he received ineffective assistance from counsel, F and R, who represented him in posttrial proceedings to reduce his sentences. The petitioner had been sentenced to eighteen years of incarceration after the first trial, in which a mistrial was declared as to certain charges on which the jury was unable to reach agreement. The Sentence Review Division of the Superior Court thereafter denied the petitioner's application for a sentence reduction. The petitioner was then retried and convicted of the charges on which the jury previously had failed to reach a verdict and was sentenced to fifty-five years of incarceration to run concurrently with the sentence in his first trial. At about the time of the second trial and after the

petitioner had cooperated with the state in conjunction with two murder trials, F represented him in discussions that led to an agreement with the state under which it would not oppose a sentence modification hearing as to the fifty-five year term of imprisonment. The modification hearing did not result in a sentence reduction. Thereafter, F discussed with the petitioner the possibility of applying for a review of the fifty-five year sentence, even though the deadline for such an application had expired. The petitioner then filed petitions for a writ of habeas corpus, which were consolidated before several counts were dismissed by the habeas court. R, the petitioner's habeas counsel, then negotiated an agreement with the respondent Commissioner of Correction to file a joint motion for a stipulated judgment under which the petitioner's right to apply with the Sentence Review Division for a reduction of the fifty-five year term of imprisonment was reinstated, and the petitioner would be foreclosed from filing any future civil actions challenging the judgments of conviction from his two trials and the remaining counts of his habeas petition would be stricken with prejudice. F represented the petitioner at the review proceeding after the petitioner's rights to sentence review were restored. The Sentence Review Division affirmed the petitioner's sentence, noting that it could not consider the petitioner's cooperation with the state because the sentencing court had not considered it when it sentenced the petitioner. In the present habeas petition, the petitioner alleged, inter alia, that F rendered ineffective assistance in advising him to pursue sentence review and failing to consult with R about the stipulation. The petitioner further claimed that R rendered ineffective assistance because he had not investigated and consulted with F to determine the basis for the stipulation before advising the petitioner to forgo his habeas corpus rights in exchange for sentence review. The habeas court denied the petition, concluding that neither F nor R rendered ineffective assistance, and that the petitioner's withdrawal with prejudice of the prior habeas petition was knowing and voluntary. Thereafter, the court granted the petitioner certification to appeal. *Held* that the habeas court properly denied the petition for a writ of habeas corpus: R informed the petitioner that the remaining claims in his consolidated habeas petition were weak and that sentence review might afford him relief from the fifty-five year sentence, F and R individually counseled the petitioner in separate and distinct capacities in the respective proceedings, and R believed that the petitioner comprehended the consequences of entering into the stipulated judgment, including his waiver of habeas corpus rights arising out of his convictions; moreover, the petitioner's claim that his withdrawal of his habeas corpus petition was not knowing or voluntary was unavailing, R having spent approximately one hour with him discussing the six page motion for the stipulated judgment and answering his questions before the petitioner signed the document; furthermore, the habeas court found R's testimony to be more credible than the petitioner's, and this court

was bound by those credibility determinations, as it is the habeas court that sits as the trier of fact.

Argued October 18—officially released November 30, 2021

Procedural History

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

Peter G. Billings, assigned counsel, with whom, on the brief, was *Stephanie K. Toronto*, assigned counsel, for the appellant (petitioner).

Samantha L. Oden, former deputy assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, and *Michael Proto*, senior assistant state's attorney, for the appellee (respondent).

Opinion

PER CURIAM. The petitioner, Stephen Nelson, has filed numerous direct and habeas corpus appeals arising from his convictions for crimes committed on January 22, 2005. He now appeals from the judgment of the habeas court, *Bhatt, J.*, denying his amended petition for a writ of habeas corpus. He claims that the habeas court erred by determining (1) that habeas counsel's performance was not deficient and (2) that his withdrawal with prejudice of a prior habeas corpus petition was knowing and voluntary. We affirm the judgment of the habeas court.

The following facts and lengthy procedural history are relevant to our resolution of the present appeal. The petitioner was arrested and charged with numerous crimes for an incident in which he was involved on January 22, 2005. *State* v. *Nelson*, 105 Conn. App. 393,

396–97, 937 A.2d 1249 (*Nelson I*), cert. denied, 286 Conn. 913, 944 A.2d 983 (2008). At trial, the petitioner was represented by Attorney Claud Chong. Following the presentation of evidence, the jury found the petitioner guilty of conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-134 (a), and not guilty of one of the other charges. Id. Members of the jury, however, were unable to reach a unanimous verdict on the remaining charges. The court, *Vitale, J.*, sentenced the petitioner to eighteen years of incarceration. The conviction was upheld on appeal to this court; id., 418; and our Supreme Court denied certification to appeal. See *State* v. *Nelson*, 286 Conn. 913, 944 A.2d 983 (2008).

The petitioner filed an application with the Sentence Review Division of the Superior Court, seeking to have his eighteen year sentence reduced. The Sentence Review Division denied the petitioner's request. See *State* v. *Nelson*, Superior Court, judicial district of New Britain, Docket No. CR-05-220383 (June 24, 2008).

In December, 2006, the state retried the petitioner on the charges on which the jury failed to reach a verdict in *Nelson I*: two counts of kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (A) and (B), two counts of burglary in the first degree in violation of General Statutes (Rev. to 2005) § 53a-101 (a) (1) and (2), and assault in the first degree in violation of General Statutes § 53a-59 (a) (1). *State* v. *Nelson*, 118 Conn. App. 831, 833, 986 A.2d 311 (*Nelson II*), cert. denied, 295 Conn. 911, 989 A.2d 1074 (2010). The petitioner elected to represent himself with Chong as standby counsel. Id., 837. The jury found the petitioner guilty of all counts, and the court, *D'Addabbo, J.*, sentenced the petitioner to a total effective term of fifty-five years of incarceration concurrent with the sentence he received in *Nelson I*. Id., 833 n.1.

At about the time of the trial in *Nelson II*, the petitioner cooperated with the state in conjunction with two murder trials. As a result of his cooperation and following his conviction in *Nelson II*, the petitioner engaged in discussions with the state about a possible modification of the sentence he received in *Nelson II*. Attorney Donald Freeman represented him during those discussions. As a result of those discussions, the state agreed to not oppose a sentence modification hearing for the petitioner but not to a specific sentence reduction. The modification hearing did not result in a reduction of the petitioner's sentence.

The petitioner subsequently filed an appeal from his *Nelson II* convictions. See id., 833. This court agreed with a double jeopardy claim the petitioner asserted and remanded the case to the trial court with direction to merge the two kidnapping convictions and to vacate the sentence imposed on one of them; id., 853–56; but affirmed the judgment in all other respects. Id., 862. On remand, the petitioner was resentenced to fifty-five years of incarceration. He did not seek a timely review of that sentence, thus waiving his right to sentence review.

The self-represented petitioner then filed two petitions for a writ of habeas corpus. *Nelson* v. *Commissioner of Correction*, 326 Conn. 772, 777, 167 A.3d 952 (2017). The petitions were consolidated, and Attorney David Rimmer filed an amended petition containing multiple counts. Id. The habeas court, *Schuman, J.*, dismissed four of those counts. Rimmer believed that the remaining habeas claims, although not frivolous, were weak. Meanwhile, Freeman had discussed with the petitioner the possibility of applying for a sentence review in *Nelson II* even though the deadline for making such an application had expired. Rimmer informed the petitioner of his assessment of his habeas claims and worked to accomplish a more favorable outcome

through negotiations with counsel for the respondent, the Commissioner of Correction. As a result of those negotiations, on December 1, 2011, the petitioner, Rimmer, and the respondent's counsel signed a motion for a stipulated judgment and filed it with the court clerk. "Under that stipulated judgment, the respondent agreed to the reinstatement of the petitioner's right to file an application with the Sentence Review Division for a reduction of the fifty-five year term of imprisonment that the petitioner received following [*Nelson II*]. For his part, the petitioner agreed to be foreclosed from filing any future civil actions challenging the judgments of conviction arising out of [*Nelson I* and *Nelson II*], and further, that the remaining counts of the then pending habeas petition were to be stricken with prejudice." Id., 777; see also id., 777 n.7. On December 6, 2011, the court, *Newson, J.*, took the papers on the motion for a stipulated judgment and issued an order granting it. See id., 777.

Freeman represented the petitioner at the review proceeding after the petitioner's rights to sentence review were restored pursuant to the stipulated judgment. At the sentence review hearing, Freeman and the petitioner argued for a reduction of the fifty-five year sentence. Although they principally argued that the victim of the petitioner's crimes was not murdered and did not suffer paralysis and, therefore, that the petitioner's sentence was disproportionately severe compared with sentences in other comparable cases, they also argued that the petitioner had cooperated with the state by testifying in two homicide trials. A member of the review panel asked whether the petitioner's cooperation occurred before or after the *Nelson II* trial and sentencing. Freeman informed the panel that the petitioner cooperated with the state prior to sentencing but that he did not testify until after he was sentenced. The Sentence Review Division affirmed the petitioner's

sentence, noting that it could not consider the petitioner's cooperation with the state because Judge D'Addabbo had not considered it when he sentenced the petitioner. See *State* v. *Nelson*, Superior Court, judicial district of New Britain, Docket No. CR-05-220383-A (November 2, 2012) (54 Conn. L. Rptr. 904, 905).

In 2013, the petitioner filed another petition for a writ of habeas corpus in which he alleged ineffective assistance of counsel at the *Nelson I* and *Nelson II* trials. The respondent moved to dismiss the petition pursuant to Practice Book § 23-29 (5)[1] on the basis of the stipulated judgment that barred the petitioner from filing any further civil actions pertaining to those trials. The habeas court, *Oliver*, *J.*, granted the motion to dismiss. The petitioner appealed, claiming that he did not knowingly and voluntarily enter into the stipulated judgment. *Nelson* v. *Commissioner of Correction*, supra, 326 Conn. 774. Our Supreme Court affirmed the judgment of dismissal, concluding that "the petitioner did not properly raise his challenge to the enforceability of the stipulated judgment in the habeas court and, further, that the stipulated judgment was a legally sufficient ground for dismissal of the present habeas action." Id., 775.

In 2015, the petitioner filed the present petition for a writ of habeas corpus. In his amended three count petition, he alleged in count one that Freeman, who represented him before the sentence review board, had provided ineffective assistance by advising the petitioner to pursue sentence review and failing to consult with Rimmer about the stipulation. In count two, the petitioner alleged that Rimmer, who was the petitioner's habeas counsel, had rendered ineffective assistance

[1] Practice Book § 23-29 provides in relevant part: "The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that . . . (5) any other legally sufficient ground for dismissal of the petition exists."

because he had not investigated and consulted with Freeman to determine the basis for the stipulation before advising the petitioner to forgo his habeas corpus rights in exchange for sentence review. In count three, the petitioner alleged that he was not fully and accurately apprised by Rimmer as to the full scope of the stipulation before withdrawing his habeas corpus petition.

The habeas trial was held on October 30, 2019. The petitioner, Freeman, and Rimmer testified. Following trial, Judge Bhatt denied the petition. As to the claim that Freeman's representation was ineffective, the court found that there was no evidence that "Freeman advised the petitioner that he should choose sentence review in lieu of the claims in his prior habeas petition." The court found that Rimmer had made the suggestion and concluded that Freeman's representation was not deficient.[2]

With respect to Rimmer's representation, the court credited Rimmer's testimony that the petitioner's habeas claims were not strong, given that he had represented himself in *Nelson II* and, therefore, was precluded from raising a claim of ineffective assistance of counsel. Even if the petitioner could prove that Chong provided ineffective assistance during *Nelson I*, the sentence imposed for that conviction was eighteen years, significantly shorter than the concurrent sentence he received in *Nelson II*. The petitioner presented no evidence that Rimmer failed to properly advise him that the sentence review board would not consider his cooperation with the state in the separate murder trials. Moreover, the court stated that the petitioner's simultaneous claims against Freeman and Rimmer would "require actions that each interfere with the other's representation of

[2] On appeal, the petitioner has not challenged the court's finding with respect to Freeman.

the same client. . . . [B]oth counsel strove to resolve the petitioner's matters by coordinating their respective efforts [to] get meaningful relief for the petitioner. The restoration of the petitioner's right to sentence review was meaningful relief."

The court credited Rimmer's testimony that he spent one hour explaining to the petitioner the motion for the stipulated judgment and believed the petitioner understood the motion. The petitioner, however, testified that he met with Rimmer for approximately ten minutes and that Rimmer gave him a single sheet of paper that he signed without reading. The motion for the stipulated judgment was placed into evidence, and the court found that it was six pages in length, including the signature page, and the petitioner's signature was on the last page.[3] The court concluded that Rimmer's representation was not deficient.

As to count three of the petition, which alleged that the petitioner's withdrawal of the prior habeas petition was not knowing and voluntary, the habeas court denied the claim because it was based on allegations that both Freeman and Rimmer provided ineffective assistance of counsel in connection with the stipulated judgment. The court already had determined that neither counsel had rendered ineffective assistance. In addition, the court found that the motion for a stipulated judgment was a proper basis for dismissal of the prior habeas petition, pursuant to our Supreme Court's decision in *Nelson* v. *Commissioner of Correction*, supra, 326 Conn. 774. The habeas court, therefore, denied the present petition for a writ of habeas corpus but granted the petitioner's petition for certification to appeal.

[3] Our review of the motion for stipulated judgment confirms the court's finding. Page 6 of the document contains the signatures and names of the petitioner, Rimmer, and counsel for the respondent.

On appeal, the petitioner claims that the court improperly determined that Rimmer did not render ineffective assistance and that the petitioner's withdrawal of the prior habeas petition with prejudice was knowing and voluntary. Factually, the claims are intertwined, as they both flow from the petitioner's allegations that Rimmer provided ineffective assistance by advising the petitioner to enter into the stipulated judgment.

In *Lozada* v. *Warden*, 223 Conn. 834, 613 A.2d 818 (1992), our Supreme Court "determined that the statutory right to habeas counsel for indigent petitioners provided in General Statutes § 51-296 (a) includes an implied requirement that such counsel be effective, and it held that the appropriate vehicle to challenge the effectiveness of habeas counsel is through a habeas petition." (Internal quotation marks omitted.) *Gerald W.* v. *Commissioner of Correction*, 169 Conn. App. 456, 463, 150 A.3d 729 (2016), cert. denied, 324 Conn. 908, 152 A.3d 1246 (2017). The question of whether the representation a petitioner received "was constitutionally inadequate is a mixed question of law and fact." (Internal quotation marks omitted.) *Sanders* v. *Commissioner of Correction*, 83 Conn. App. 543, 548, 851 A.2d 313, cert. denied, 271 Conn. 914, 859 A.2d 569 (2004).

"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." (Internal quotation marks omitted.) *Dwyer* v. *Commissioner of Correction*, 102 Conn. App. 838, 841, 927 A.2d 347, cert. denied, 284 Conn. 925, 933 A.2d 724 (2007). In a habeas trial, the court is the trier of fact and, thus, "is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony . . . ." *Bowens* v. *Commissioner of Correction*, 333 Conn. 502, 523, 217 A.3d 609 (2019). "It

is simply not the role of this court on appeal to second-guess credibility determinations made by the habeas court." *Noze* v. *Commissioner of Correction*, 177 Conn. App. 874, 887, 173 A.3d 525 (2017).

To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test of *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In *Strickland*, "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." (Internal quotation marks omitted.) *Sanders* v. *Commissioner of Correction*, supra, 83 Conn. App. 549. A petitioner can succeed only if he can satisfy both of the *Strickland* prongs. *Bowens* v. *Commissioner of Correction*, supra, 333 Conn. 538.

On the basis of our review of the record and having considered the briefs and arguments of the parties, we conclude that the court properly denied the petition for a writ of habeas corpus. Regarding the petitioner's claim that Rimmer provided ineffective assistance of counsel and, on the basis of the evidence presented at trial, the habeas court found that (1) Rimmer informed the petitioner that the remaining claims in his consolidated habeas petition were weak and that sentence review might afford him relief from the fifty-five year sentence in *Nelson II*; (2) Freeman and Rimmer individually counseled the petitioner in separate and distinct capacities in the respective proceedings; (3) Rimmer met with the petitioner for approximately one hour to review the

motion for the stipulated judgment, which was detailed and specific, and answered the petitioner's questions; and (4) Rimmer believed that the petitioner comprehended the consequences of entering into the stipulated judgment, including his waiver of habeas corpus rights arising out of his convictions.

With regard to the petitioner's claim that the withdrawal of his habeas corpus petition was not knowing or voluntary, the habeas court found that Rimmer spent approximately one hour with the petitioner discussing the six page motion for the stipulated judgment and answering the petitioner's questions before the petitioner signed the document. Importantly, the court found Rimmer's testimony to be more credible than the petitioner's. This court is bound by the credibility determinations of the habeas court, which sits as the trier of fact. See *Noze* v. *Commissioner of Correction*, supra, 177 Conn. App. 887.[4]

The judgment is affirmed.

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[4] In his habeas corpus petition, the petitioner did not allege that his waiver of his habeas rights were not voluntary and knowing because Judge Newson did not canvass him before granting the motion for the stipulated judgment. Judge Bhatt addressed the issue in his decision, and the petitioner made the argument in his appellate brief. The petitioner has not identified any authority in support of his argument other than Practice Book § 39-24 and *Almedina* v. *Commissioner of Correction*, 109 Conn. App. 1, 7, 950 A.2d 553, cert. denied, 289 Conn. 925, 958 A.2d 150 (2008). Those authorities are inapposite, as they both concern a guilty plea. Moreover, during oral argument before this court, counsel for the petitioner made clear that he was not claiming that the petitioner had a constitutional right to be canvassed.