BAYVIEW LOAN SERVICING, LLC *v.* REAL M. GALLANT ET AL. (AC 43835)

Alexander, Clark and Pellegrino, Js.

Syllabus

The substitute plaintiff, U Co., sought to foreclose a mortgage on certain real property of the defendant G. B Co., which commenced the foreclosure action, had assigned the note and mortgage to U Co., which thereafter was substituted as the plaintiff. During the foreclosure proceeding, U Co. presented the trial court with a lost note affidavit from B Co., in which B Co. stated that the original mortgage note was lost and could not be found. The trial court rendered judgment of foreclosure by sale, at which U Co. was the successful bidder. G filed a motion to dismiss the foreclosure action, alleging, inter alia, that there was no evidence that anyone had physical possession of the original note at the time the foreclosure action was commenced or at any time during the action. The trial court denied G's motion to dismiss, concluding that B Co. had standing to prosecute the foreclosure action at the time of its commencement. The court was presented with evidence pertaining to the original note, including the lost note affidavit, and credited the testimony of an employee of B Co. who was responsible for reviewing its business records. The court determined that B Co. was the holder of the note and the mortgage, and had possessed the original note with endorsements at the time the note was lost. The court thereafter rendered judgment for U Co., and G appealed to this court. *Held* that the trial court properly denied G's motion to dismiss the foreclosure action, B Co. having had standing to bring the foreclosure action at the time it was commenced: B Co. possessed and was the holder of the original note at the time it commenced the foreclosure action, the note, which was endorsed in blank and thus payable to bearer, was not lost prior to the commencement of the foreclosure action, G offered no credible evidence to rebut the presumption that B Co. owned the debt, and, the trial court having made those findings on the basis of its determination that B Co.'s employee was a competent and credible witness, this court would not second-guess the trial court's credibility determination;

moreover, although G's motion to dismiss was unclear as to whether his claim of lack of standing related to B Co. or to U Co., it nevertheless failed, as U Co.'s failure to produce the original note in court was not fatal to its foreclosure of the mortgage, the court having had before it the lost note affidavit and having found that credible evidence demonstrated that B Co. was the last entity to possess the original note with endorsements before commencing the litigation, and, although the note was lost while it was in B Co.'s possession, that did not affect U Co.'s ability to foreclose the mortgage, as U Co. was able to prove its ownership of the debt through the assignment of the note and mortgage that secured the debt.

Argued September 23—officially released December 14, 2021

Procedural History

Action to foreclose a mortgage on certain real property of the named defendant, and for other relief, brought to the Superior Court in the judicial district of Windham at Putnam, where U.S. Bank Trust, N.A., as trustee for LSF9 Master Participation Trust, was substituted as the plaintiff; thereafter, the court, *Cole-Chu*, *J.*, rendered judgment of foreclosure by sale; subsequently, the court, *Auger*, *J.*, denied the named defendant's motion to dismiss, and the named defendant appealed to this court. *Affirmed.*

John L. Giulietti, for the appellant (named defendant).

Christopher J. Picard, for the appellee (plaintiff).

Opinion

PER CURIAM. The defendant Real M. Gallant[1] appeals from the judgment of foreclosure by sale[2] rendered by

[1] The complaint also names as defendants Capital One Bank (USA), N.A., Fidelis Holdings, Ltd., and the Department of Treasury of the United States of America. Because those defendants are not involved in this appeal, our references in this opinion to the defendant are to Gallant.

[2] Although the defendant's appeal form lists the judgment of foreclosure by sale as one of the decisions that he is challenging on appeal, his appellate brief focuses primarily on his assertion that the substitute plaintiff, U.S. Bank Trust, N.A., as trustee for LSF9 Master Participation Trust, lacks standing to maintain this action because the original note was never produced in court, which was the basis for his motion to dismiss. We address the defendant's jurisdictional claim in our review of whether the trial court

the trial court and from the court's denial of his motion to dismiss this foreclosure action, which had been commenced by the original plaintiff, Bayview Loan Servicing, LLC (Bayview), the assignee of a note and mortgage that had been executed by the defendant with respect to certain real property located in Brooklyn. The defendant claims that (1) the trial court, after holding an evidentiary hearing on the motion to dismiss, improperly determined that the substitute plaintiff, U.S. Bank Trust, N.A., as trustee for LSF9 Master Participation Trust (U.S. Bank), has standing to maintain this action, even though the original note was not produced in court, and that the requirements of General Statutes § 42a-3-309, which governs lost instruments, had been satisfied because "all reasonable attempts" had been made to locate the lost note before a lost note affidavit was created,[3] and (2) a fraud was perpetrated on the trial court, which necessitates a reversal of the foreclosure judgment. We disagree and affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of the claims on appeal. On February 2, 2006, the defendant executed a note in the amount of $322,800 in favor of VirtualBank, a division of Lydian Private Bank. The note was secured by an open-end mortgage in favor of Mortgage Electronic Registration Systems, Inc., as nominee for VirtualBank, which encumbered certain real property located in Brooklyn. Subsequently, the note and mortgage were assigned to JPMortgage Chase Bank, National Association, which, in turn, assigned the note and mortgage to Bayview on Septem-

properly denied his motion to dismiss and conclude that his jurisdictional challenge fails. Because the defendant's brief is devoid of any argument or analysis concerning the underlying foreclosure judgment, we deem any claim related thereto abandoned. See *Belevich* v. *Renaissance I, LLC*, 207 Conn. App. 119, 120 n.1, 261 A.3d 1 (2021).

[3] See footnote 6 of this opinion.

ber 6, 2014. After the defendant defaulted on his obligations under the loan, Bayview commenced this foreclosure action on May 14, 2015. On September 29, 2015, the defendant was defaulted for failure to appear,[4] after which the defendant filed for bankruptcy protection. Thereafter, on January 12, 2017, Bayview assigned the note and mortgage to U.S. Bank. Relief from the bankruptcy stay was granted in November, 2017, and U.S. Bank was substituted as the plaintiff in this action on December 11, 2017.

On February 26, 2018, the trial court rendered judgment of foreclosure by sale, and a sale date was set for June 2, 2018. At the time it rendered the foreclosure judgment, the court had before it a lost note affidavit that had been executed by an employee of Bayview on January 5, 2016, stating that the original note had been lost and that Bayview had made a diligent search to locate the note but was unable to find it. The foreclosure sale proceeded, with U.S. Bank being the successful bidder. On June 5, 2018, U.S. Bank filed a motion to confirm the committee sale, but before the sale could be confirmed, the defendant, again, sought bankruptcy protection. The bankruptcy proceeding, however, was dismissed on October 31, 2018, and, on November 30, 2018, the defendant filed a motion to dismiss, which is the subject of this appeal. In his motion, he alleged, inter alia, that there was "no evidence in the record of anyone having physical possession of the *original* note at the time of the commencement of this foreclosure action," or at any time during this action, and that the

[4] Although both U.S. Bank and the defendant acknowledge in their briefs that the defendant had been defaulted for failure to appear, U.S. Bank has not raised any claim on appeal related to the failure of that default to be set aside. Accordingly, we deem this issue waived and do not address it. See *O & G Industries, Inc.* v. *American Home Assurance Co.*, 204 Conn. App. 614, 642, 254 A.3d 955 (2021). We do note, however, that an appearance was filed on behalf of the defendant on June 29, 2018, prior to the date when the defendant filed his motion to dismiss.

lost note affidavit did not satisfy the requirements of § 42a-3-309. (Emphasis in original.)

A hearing was held on the defendant's motion to dismiss on August 27, 2019. At the hearing, U.S. Bank represented that the original note had been lost and could not be found, and that Bayview had possessed the original note at the time it commenced this action and when the note was lost. Thereafter, the court proceeded to review the evidence and testimony presented by U.S. Bank in support of its claim and concluded that "Bayview . . . had standing to prosecute this foreclosure action" at the time of its commencement.

In its memorandum of decision denying the defendant's motion to dismiss, the court stated: "To support [its] claim, U.S. Bank called James D'Orlando as its only witness. The defendant called no witnesses. U.S. Bank also offered, and the court admitted, six exhibits [which included a copy of the note with endorsements, a computer screenshot of loan information for the defendant, a mortgage deed, assignments of the mortgage, and the complaint]. . . . The defendant introduced without objection [his] exhibit A, the lost note affidavit sworn to by Alejandro Diaz, a Bayview employee.

"The court found . . . D'Orlando . . . to be a competent and credible witness. . . . D'Orlando has been a Bayview litigation manager for about six years. During that period, he has testified in about two to three hundred cases. His responsibilities include review of business records and working with local counsel. His total service with Bayview spans about sixteen years. . . . D'Orlando was familiar with the loan Bayview serviced that is the subject of this litigation. Bayview serviced the defendant's loan for a few years. Bayview maintained business records relating to the defendant's loan. . . . D'Orlando reviewed said business records.

"Relying on a screenshot of the computer file documenting the defendant's loan . . . D'Orlando testified that Bayview received the subject loan and collateral file on September 16, 2014, when Bayview boarded said loan onto Bayview's computer system. . . . If the note with endorsements were not included in the collateral file, Bayview would not board the subject loan onto its computer system, unless the collateral file included a lost note affidavit authored by the prior servicer. Bayview would not have serviced the loan without possessing the original note with endorsements or lost note affidavit. In this instance, Bayview possessed the original note with endorsements on September 16, 2014, and thereafter. . . . D'Orlando's review of the business records relating to this loan allowed him to conclude [that] the note with endorsements was not lost before Bayview commenced this action."

Accordingly, the court concluded, on the basis of D'Orlando's testimony, which it found credible, that "Bayview possessed the original note with endorsements at the time [the] note was lost," that "Bayview was the 'holder' of [the] note, as it was the entity in possession of a note payable to bearer," and that the defendant "offered no credible evidence to rebut" the presumption that Bayview, as the holder of the note at the time this action was commenced, was the owner of the debt. The court concluded that, because "Bayview was also the holder of the mortgage via proper assignments . . . at the time it commenced this litigation . . . [it] had standing to prosecute this foreclosure action . . . ." (Citation omitted.) Therefore, the court rendered judgment denying the defendant's motion to dismiss on January 3, 2020, and this appeal followed. Thereafter, on January 7, 2020, U.S. Bank again filed a motion for approval of the committee sale, which was marked off by the court due to the defendant's filing of this appeal.

We first set forth our standard of review and the general principles of law that govern our resolution of this appeal. "The issue of standing implicates the trial court's subject matter jurisdiction and therefore presents a threshold issue for our determination. . . . Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary." (Internal quotation marks omitted.) *U.S. Bank, National Assn.* v. *Fitzpatrick*, 190 Conn. App. 773, 783, 212 A.3d 732, cert. denied, 333 Conn. 916, 217 A.3d 1 (2019). "The proper procedural vehicle for disputing a party's standing is a motion to dismiss. . . . A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . [O]ur review of the trial court's ultimate legal conclusion and resulting [denial] of the motion to dismiss will be de novo." (Citations omitted; internal quotation marks omitted.) *Heinonen* v. *Gupton*, 173 Conn. App. 54, 58, 162 A.3d 70, cert. denied, 327 Conn. 902, 169 A.3d 794 (2017).

Under our law governing standing in foreclosure matters, "[t]he ability to enforce a note in Connecticut is governed by the adopted provisions of the Uniform Commercial Code. Pursuant to General Statutes § 42a-3-301, a [p]erson entitled to enforce an instrument means . . . the holder of the instrument . . . . When a note is endorsed in blank . . . the note becomes payable to the bearer of the note. . . . When a person or entity has possession of a note endorsed in blank, it

becomes the valid holder of the note. . . . Therefore, a party in possession of a note, endorsed in blank and thereby made payable to its bearer, is the valid holder of the note, and is entitled to enforce the note. . . . [A] holder of a note is presumed to be the rightful owner of the underlying debt, and . . . unless the party defending against the foreclosure action rebuts that presumption, the holder has standing to foreclose." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *U.S. Bank, National Assn.* v. *Schaeffer*, 160 Conn. App. 138, 146–47, 125 A.3d 262 (2015). To establish that presumption, the holder must produce the note. See *U.S. Bank, National Assn.* v. *Fitzpatrick*, supra, 190 Conn. App. 785. However, pursuant to § 42a-3-309 (a), "[a] person not in possession of an instrument is entitled to enforce the instrument if (i) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred . . . ."[5] Thus, "[i]n order to enforce a lost note, the person seeking to enforce it must have had possession of it when it was lost." *Castle* v. *DiMugno*, 199 Conn. App. 734, 752, 237 A.3d 731 (2020).

Moreover, "[i]t is well established that [i]t is within the province of the trial court, when sitting as the fact finder, to weigh the evidence presented and determine the credibility and effect to be given the evidence. . . . Credibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude. . . . An appellate court must defer to the trier of fact's assessment

[5] General Statutes § 42a-3-309 (a) provides: "A person not in possession of an instrument is entitled to enforce the instrument if (i) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred, (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, and (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process."

of credibility because [i]t is the [fact finder] . . . [who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom." (Internal quotation marks omitted.) *Rutka* v. *Meriden*, 145 Conn. App. 202, 211–12, 75 A.3d 722 (2013); see also *Giordano* v. *Giordano*, 203 Conn. App. 652, 662, 249 A.3d 363 (2021) ("[w]e will not second-guess the court's credibility determination or retry the facts on appeal"); *Fishbein* v. *Menchetti*, 165 Conn. App. 131, 136, 138 A.3d 1061 (2016) (it is sole province of trial court, as trier of fact, to determine credibility of witnesses, and court's determination of credibility of witnesses is beyond "scope of this court's review").

In the present case, a hearing was held on the defendant's motion to dismiss, at which the defendant presented no witnesses. U.S. Bank presented testimony from one witness, D'Orlando, an employee of Bayview who was responsible for reviewing Bayview's business records, and offered into evidence a copy of the note with endorsements, a document containing information related to the defendant's loan, the mortgage deed, and copies of assignments of the mortgage. Following the hearing, the court found that Bayview possessed the original note, which was endorsed in blank and thus payable to bearer, at the time the note was lost, that the note was not lost prior to the commencement of this action, that Bayview was the holder of the note payable to bearer at the time it commenced this action, and that the defendant "offered no credible evidence to rebut" the presumption that Bayview, as the holder of the note at the time this action was commenced, was the owner of the debt. Because the court made those findings on the basis of D'Orlando's testimony and its determination that D'Orlando was a "competent and credible witness," we must defer to the court's

findings and will not second-guess the court's credibility determination.[6] Accordingly, in light of those findings and the defendant's failure to offer any credible evidence or testimony at the hearing to rebut or challenge them, the court properly determined that Bayview had standing to bring this foreclosure action at the time it was commenced.

We note that the defendant's motion to dismiss is unclear as to whether his lack of standing claim relates to Bayview or U.S. Bank, or both. For example, in his motion to dismiss, the defendant, after initially referring to Bayview as the original plaintiff and to U.S. Bank as the substitute plaintiff, repeatedly refers to the "plaintiff" in the singular, stating, as his first ground for dismissal, that the action should be dismissed because the "plaintiff" did not "demonstrate [that] it had the original note at the commencement of the action," which suggests that the reference to the "plaintiff" is to Bayview as the party that commenced this foreclosure action. In his second ground for dismissal, however, the defendant argues that the action should be dismissed because the "plaintiff has failed to submit any evidence that it presented the original note to the court . . . [at] any time during the course of this action, contrary to [the] allegation . . . of its amended complaint," which suggests that this reference to the "plaintiff" is to U.S. Bank as the party that filed the amended complaint. We conclude that, regardless of whether the defendant's challenge relates to Bayview or U.S. Bank, it fails.

[6] The court also concluded, in the alternative, that, "even if Bayview had lost the note before commencing this litigation, it provided [the] court with credible evidence demonstrating full compliance with . . . § 42a-3-309," and that "credible evidence allows the court to conclude that Bayview exercised due diligence in attempting to locate the lost note." Again, because the court's findings were based on its assessment of the credibility of the evidence and testimony, it is not for this court to second-guess those findings. See *Fishbein* v. *Menchetti*, supra, 165 Conn. App. 136.

With respect to Bayview, all that was necessary to show that Bayview had standing to commence the action was that Bayview had possession of the note when it commenced the action and that the court, in rendering the judgment of foreclosure by sale, had before it the lost note affidavit of Bayview. The transcript of the proceeding at which the court rendered the foreclosure judgment demonstrates that the court had the lost note affidavit. Moreover, as we have stated in this opinion, the trial court's finding that Bayview was the holder of the note when it commenced this action was based on a credibility determination that this court will not disturb.

With respect to U.S. Bank, the defendant's primary contention is that the original note was never produced in court. Under the circumstances here, where the note was lost and the court had before it a lost note affidavit and found that credible evidence demonstrated that Bayview was the last entity to possess the original note with endorsements before commencing this litigation, which gave it standing to bring this foreclosure action, the failure to produce the original note was not fatal to the foreclosure of the mortgage. Moreover, the fact that the note was lost while it was in the possession of Bayview did not affect the ability of U.S. Bank, as a valid assignee of the note and mortgage, to foreclose on the mortgage, as it was able to prove its ownership of the debt through secondary evidence, namely, the assignment of the note and mortgage that secured the debt. See *New England Savings Bank* v. *Bedford Realty Corp.*, 238 Conn. 745, 760, 680 A.2d 301 (1996) (explaining that fact that assignee of note and mortgage never possessed original note that was lost did not prohibit it from pursuing foreclosure action to enforce terms of mortgage); *Castle* v. *DiMugno*, supra, 199 Conn. App. 754 ("[p]ossession of the original note underlying the mortgage is not a necessary prerequisite for [seeking

foreclosure of the mortgage] because [t]he mortgage secures the indebtedness itself, not the written evidence of it" (internal quotation marks omitted)); *Seven Oaks Enterprises, L.P.* v. *DeVito*, 185 Conn. App. 534, 547–48, 198 A.3d 88 ("[B]ecause the plaintiff had chosen to pursue the equitable action of foreclosure of the mortgage, rather than a legal action on the note, the fact that [the plaintiff] never possessed the lost promissory note [was] not fatal to its foreclosure of the mortgage. . . . [W]hatever restrictions . . . [§] 42a-3-309 might put upon the enforcement of personal liability based solely upon a lost note, they [did] not prohibit [the plaintiff] from pursuing an action of foreclosure to enforce the terms of the mortgage." (Internal quotation marks omitted.)), cert. denied, 330 Conn. 953, 197 A.3d 893 (2018).

Accordingly, we conclude that the trial court properly denied the defendant's motion to dismiss this foreclosure action.[7]

[7] In his appellate brief, the defendant also raises a claim, for the first time on appeal, that a fraud was perpetrated on the trial court, and he seeks plain error review of this claim. Although the defendant includes a lengthy quote regarding the standard of review for claims of plain error, his analysis regarding claims of fraud on the court is sparse and refers to one Superior Court case, without any explanation as to how the facts of the present case relate to the cited case. Because the defendant has failed to brief this claim adequately, we decline to review it. "Both this court and our Supreme Court repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited. . . . *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016); see also *Parnoff* v. *Mooney*, 132 Conn. App. 512, 518, 35 A.3d 283 (2011) ([i]t is not the role of this court to undertake the legal research and analyze the facts in support of a claim or argument when it has not been briefed adequately . . .)." (Internal quotation marks omitted.) *Seaport Capital Partners, LLC* v. *Speer*, 202 Conn. App. 487, 489–90, 246 A.3d 77, cert. denied, 336 Conn. 942, 250 A.3d 40 (2021).

The judgment is affirmed and the case is remanded with direction to act on the motion for approval of the committee sale.

STATE OF CONNECTICUT *v.* EVAN JARON HOLMES (AC 43632)

Moll, Alexander and Flynn, Js.

Syllabus

The defendant, who had previously been convicted of, inter alia, the crimes of manslaughter in the first degree with a firearm and felony murder, appealed to this court from the judgment of the trial court dismissing in part and denying in part his motion to correct an illegal sentence. The defendant claimed that the protection of the federal constitution against double jeopardy was violated when the state subjected and prosecuted him for multiple, mutually exclusive homicide offenses for a single act and also when the trial court vacated his conviction of manslaughter instead of his conviction of felony murder. The court determined that it did not have subject matter jurisdiction over the defendant's first claim, reasoning that it attacked the charging document itself rather than the sentencing proceeding. As to the defendant's second claim, the court reasoned that the sentencing court properly vacated his manslaughter conviction and sentenced him on his felony murder conviction. *Held*:

1. The trial court properly dismissed for lack of subject matter jurisdiction the defendant's claim that the charging document listed multiple homicide offenses in violation of his constitutional right against double jeopardy; although the claim purportedly pertained to double jeopardy, which can be raised in a motion to correct, it actually attacked the proceedings leading up to the conviction, namely, the charging document itself, and not the sentence or sentencing proceeding, and our case law is clear that motions to correct an illegal sentence that attack the conviction

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Moreover, the claim was never presented to or addressed by the trial court, and to review such a claim on appeal would be contrary to our long-standing precedent. See *Tompkins* v. *Freedom of Information Commission*, 136 Conn. App. 496, 511, 46 A.3d 291 (2012) ("It is fundamental that claims of error must be distinctly raised and decided in the trial court before they are reviewed on appeal. As a result, Connecticut appellate courts will not address issues not decided by the trial court." (Internal quotation marks omitted.)). Accordingly, we decline to review the defendant's fraud on the court claim.

or the proceedings leading up to the conviction are not within the trial court's jurisdiction on a motion to correct an illegal sentence.

2. The trial court properly denied the defendant's claim that his sentence for his felony murder conviction was illegal because the sentencing court improperly vacated his conviction of manslaughter in the first degree with a firearm and instead sentenced him on the felony murder conviction, the sentencing court not having imposed multiple punishments for the single act of causing the death of the victim: this court, having conducted a double jeopardy analysis under a two step process, determined, first, that it was undisputed that the charges of manslaughter in the first degree with a firearm and felony murder arose out of the same act or transaction, and, second, under the rule of statutory construction pursuant to *Blockburger* v. *United States* (284 U.S. 299), that the crimes were separate because both required proof of elements that the other did not, but further determined, as our Supreme Court explained in *State* v. *John* (210 Conn. 652), that the legislature intended that felony murder and manslaughter in the first degree, which are alternative means of committing the same offense, be treated as a single crime for double jeopardy purposes, such that it did not intend that a defendant could be sentenced for both; moreover, the sentencing court's decision to vacate the less serious felony of manslaughter was proper despite the erroneous statements of both counsel that manslaughter was a lesser included offense of felony murder because vacatur of the less serious homicide offense was proper under *John*, and the defendant failed to demonstrate that the sentencing court abused its discretion in determining that the felony murder conviction controlled and in vacating the manslaughter conviction.

Argued September 20—officially released December 14, 2021

Procedural History

Substitute information charging the defendant with the crimes of murder, felony murder, home invasion, conspiracy to commit home invasion, burglary in the first degree and criminal possession of a pistol or revolver, brought to the Superior Court in the judicial district of New London, where the first five counts were tried to the jury before *Jongbloed, J.*; verdict of guilty of the lesser included offense of manslaughter in the first degree with a firearm, felony murder, home invasion, conspiracy to commit home invasion and burglary in the first degree; thereafter, the charge of criminal possession of a pistol or revolver was tried to the court; judgment of guilty; subsequently, the court vacated the

verdict as to the lesser included offense of manslaughter in the first degree with a firearm and burglary in the first degree, and rendered judgment of guilty of felony murder, home invasion, conspiracy to commit home invasion and criminal possession of a pistol or revolver; thereafter, the court, *Strackbein, J.*, dismissed in part and denied in part the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Affirmed.*

Evan J. Holmes, self-represented, the appellant (defendant).

Kathryn W. Bare, senior assistant state's attorney, with whom, on the brief, was *Paul J. Narducci*, state's attorney, for the appellee (state).

Opinion

FLYNN, J. The defendant,[1] Evan Jaron Holmes, appeals from the judgment of the trial court dismissing in part and denying in part his motion to correct an illegal sentence. On appeal, the defendant claims that the court improperly determined (1) that it lacked subject matter jurisdiction over his claim that the charging document listed multiple homicide offenses in violation of his federal constitutional right against double jeopardy and (2) that the sentencing court properly vacated the manslaughter conviction and sentenced him on the felony murder conviction. We conclude that the court properly dismissed in part and denied in part the defendant's motion to correct an illegal sentence and affirm its judgment.

The following factual scenario, which the jury reasonably could have found, is gleaned from the opinion of this court in the defendant's direct appeal affirming the judgment of conviction. See *State* v. *Holmes*, 176 Conn.

[1] The defendant was self-represented before the motion court and in this appeal.

App. 156, 169 A.3d 264 (2017), aff'd, 334 Conn. 202, 221 A.3d 407 (2019). At 4 a.m. on November 12, 2011, the defendant and another man forced entry into an apartment occupied by Todd Silva, with whom the defendant had a fight previously, and the victim, Jorge Rosa. Id., 159–60. The defendant fired ten shots into the victim's body, who died within a few minutes due to his wounds. Id., 160.

The jury found the defendant not guilty of murder in violation of General Statutes § 53a-54a (a), and guilty of the lesser included offense of manslaughter in the first degree with a firearm in violation of General Statutes §§ 53a-55 (a) (1) and 53a-55a. The jury also found the defendant guilty of felony murder in violation of General Statutes § 53a-54c, home invasion in violation of General Statutes § 53a-100aa (a) (2), conspiracy to commit home invasion in violation of General Statutes §§ 53a-48 (a) and 53a-100aa, and burglary in the first degree in violation of General Statutes § 53a-101 (a) (1). The defendant elected to be tried by the court, *Jongbloed, J.*, on a separate charge of criminal possession of a pistol or revolver in violation of General Statutes § 53a-217 and was found guilty. At the defendant's December 3, 2013 sentencing hearing, the court vacated the defendant's convictions for manslaughter and burglary on double jeopardy grounds and sentenced him to a total effective sentence of seventy years of incarceration.[2]

On August 26, 2019, the self-represented defendant filed his third motion to correct an illegal sentence pursuant to Practice Book § 43-22,[3] which is the subject

[2] The court sentenced the defendant to fifty-eight years of incarceration for felony murder, twelve years for home invasion to be served consecutively to the felony murder conviction, and concurrent sentences on conspiracy to commit home invasion and criminal possession of a firearm.

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

of this appeal.[4] In his memorandum of law in support of the motion, the defendant argued that the trial court violated the protection of the federal constitution against double jeopardy when it (1) "simultaneously subjected and prosecuted the [defendant] for a slew of 'mutually exclusive' homicide offenses, that inevitably prejudiced the [defendant] in a plethora of ways" and (2) convicted and sentenced him "for the conduct of 'murder' " despite that he was acquitted of murder. The state filed an objection to the defendant's motion. After an October 9, 2019 hearing at which the defendant and the state presented arguments, the motion court, *Strackbein, J.*, dismissed in part and denied in part the defendant's motion to correct in an October 11, 2019 memorandum of decision. The court determined that it did not have subject matter jurisdiction over the defendant's first claim, in which he alleged double jeopardy violations as a result of the trial court's improperly having permitted him to be charged with multiple homicide offenses when there had only been one death resulting from a "single alleged act." In dismissing the claim, the court reasoned that it attacked the charging document itself rather than the sentencing proceeding, which is impermissible in a motion to correct an illegal sentence. With respect to the defendant's second claim, the court reasoned that the sentencing court properly vacated his manslaughter conviction and sentenced him on his felony murder conviction, and denied that claim. The court further determined that the defendant's argument that his right to be free of double jeopardy was violated when he was acquitted of murder and found guilty of felony murder, although incorrect, was not a claim over which the court had subject matter jurisdiction because it attacked the underlying conviction and not the sentence itself. This appeal followed.

[4] The defendant's two prior motions to correct an illegal sentence were denied.

I

The defendant first challenges the decision of the motion court that it lacked subject matter jurisdiction to review his first claim in his motion to correct that the charging document listed multiple homicide offenses in violation of his federal constitutional right against double jeopardy. He argues that "[r]ather than commit to a single theory as to the commission of an alleged offense—to ensure that they are given their one and only, full and fair, opportunity to convict—prosecutors can now circumvent the double jeopardy clause and subject defendants to literally all of the different statutes pertaining to an alleged offense; only to later have to 'remedy' the violation by vacating all of the 'unlawful' convictions with the foresight that should the defendant prevail on a postconviction challenge to the seated conviction, the state can simply 'resurrect' one of its violative convictions." The state counters that the court properly dismissed this claim for lack of subject matter jurisdiction. We agree with the state.

We begin with our standard of review and relevant legal principles. "[J]urisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it." (Internal quotation marks omitted.) *State* v. *Alexander*, 269 Conn. 107, 112, 847 A.2d 970 (2004). "[B]ecause [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary." (Internal quotation marks omitted.) Id.

"[I]t is axiomatic that [t]he judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner . . . ." (Internal quotation marks omitted.) *State* v. *Francis*, 322 Conn. 247, 259, 140 A.3d 927 (2016); see Practice Book § 43-22. "A motion to correct

an illegal sentence under Practice Book § 43-22 constitutes a narrow exception to the general rule that, once a defendant's sentence has begun, the authority of the sentencing court to modify that sentence terminates." *State* v. *Casiano*, 282 Conn. 614, 624, 922 A.2d 1065 (2007). "In order for the court to have jurisdiction over a motion to correct an illegal sentence after the sentence has been executed, the sentencing proceeding, and not the trial leading to the conviction, must be the subject of the attack." *State* v. *Lawrence*, 281 Conn. 147, 158, 913 A.2d 428 (2007).

"[A]n illegal sentence is essentially one [that] . . . exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory. . . . In accordance with this summary, Connecticut courts have considered four categories of claims pursuant to [Practice Book] § 43-22. The first category has addressed whether the sentence was within the permissible range for the crimes charged. . . . The second category has considered violations of the prohibition against double jeopardy. . . . The third category has involved claims pertaining to the computation of the length of the sentence and the question of consecutive or concurrent prison time. . . . The fourth category has involved questions as to which sentencing statute was applicable." (Internal quotation marks omitted.) *State* v. *Smith*, 338 Conn. 54, 60, 256 A.3d 615 (2021).

It is useful to state what the defendant's first claim is not about. He did not claim in his motion to correct that the fifty-eight years to which he was sentenced for felony murder exceeds the statutory maximum limit for felony murder of sixty years, that his total effective sentence was computed improperly, that the sentence was ambiguous or internally contradictory or imposed in any way in an illegal manner, or that he was deprived

of his right to due process during the sentencing hearing, but rather he argued that his right against double jeopardy was violated because the state *charged* him with felony murder despite that he was also charged with both murder and manslaughter with a firearm. In his own words, the defendant argued in his motion to correct that his right to not be subject to double jeopardy was violated when the state charged him with "a slew of 'mutually exclusive' homicide offenses . . . ." Although this claim purportedly pertains to double jeopardy, which can be raised in a motion to correct, the claim actually attacks the proceedings leading up to the conviction, namely, the charging document itself, and not the sentence or sentencing proceeding. Simply put, our law is clear that motions to correct an illegal sentence that attack the conviction or the proceedings leading up to the conviction are not within the trial court's jurisdiction on a motion to correct an illegal sentence. See, e.g., *State* v. *Lawrence*, supra, 281 Conn. 158. Because the defendant's claim does exactly that—it attacks the proceeding leading up to the underlying conviction and not the sentence or the sentencing proceeding—it does not fall within the purview of the categories of claims permitted to be raised in a motion to correct an illegal sentence pursuant to Practice Book § 43-22. See id., 150. We conclude that the court properly determined that it lacked subject matter jurisdiction over the defendant's first claim in his motion to correct. The court properly dismissed the claim because where a court lacks jurisdiction over the motion to correct, dismissal is proper. See *State* v. *Saunders* 132 Conn. App. 268, 271–72, 50 A.3d 321 (2011), cert. denied, 303 Conn. 924, 34 A.3d 394 (2012).

II

We next turn to the defendant's second claim, as clarified at the hearing on his motion to correct, that his sentence for his felony murder conviction was illegal

in that the sentencing court improperly vacated the manslaughter in the first degree with a firearm conviction and sentenced him instead to fifty-eight years on the felony murder conviction. This claim rests on his argument that "felony murder is murder" and that, because he was acquitted of murder in violation of § 53a-54a (a), he could not be convicted of felony murder in violation of § 53a-54c. He clarified at the hearing on his motion to correct that "[m]y argument is not that you can't be punished for the same crime" but that the "second conviction for the same offense" was in error and gave him "more time" than if he had been sentenced on the manslaughter with a firearm charge instead. In other words, the defendant challenges on double jeopardy grounds the action of the sentencing court in vacating his conviction for manslaughter in the first degree with a firearm and sentencing him on the felony murder conviction.

We first observe that the jury reasonably could have acquitted the defendant of murder in violation of § 53a-54a because it did not find it proved that he brought about the death of the victim with the intent to kill him, but that it could have convicted the defendant of felony murder because it found he had the intent to commit the underlying felony, and, in the course of and in furtherance of such crime, caused the victim's death.

To the extent that the defendant's claim rests on the notion it somehow violated his right against double jeopardy for the jury to acquit him of murder and find him guilty of felony murder, we already have concluded that the motion court properly determined that it lacked jurisdiction over this claim.[5] This argument attacks the

[5] We note, however, that the defendant's argument that, because felony murder is classified as a murder pursuant to *State* v. *Adams*, 308 Conn. 263, 273–74, 63 A.3d 934 (2013), he cannot be punished for felony murder after having been acquitted of murder wrenches out of context the holding of *Adams*. *Adams* held that because felony murder is a felony classified as murder, it is punishable as a class A felony. Id., 273.

underlying conviction rather than the sentence or the sentencing proceeding and, accordingly, is not a claim that falls within the purview of Practice Book § 43-22. See *State* v. *Lawrence*, supra, 281 Conn. 158.

We next turn to the portion of the defendant's claim in which he contends that the sentencing court improperly vacated his conviction for manslaughter instead of vacating his conviction for felony murder. We note the following relevant procedural history. Both the prosecutor in this case and the defense counsel told the court that the charge of manslaughter with a firearm was a lesser included offense of felony murder. The sentencing court vacated the conviction of manslaughter in the first degree with a firearm and sentenced the defendant on the felony murder conviction. The state has later correctly conceded that manslaughter in the first degree with a firearm is not a lesser included offense of felony murder. In its appellate brief, the state cites *State* v. *John*, 210 Conn. 652, 695, 557 A.2d 93, cert. denied, 493 U.S. 824, 110 S. Ct. 84, 107 L. Ed. 2d 50 (1989), and cert. denied sub nom. *Seebeck* v. *Connecticut*, 493 U.S. 824, 110 S. Ct. 84, 107 L. Ed. 2d 50 (1989) (*John*), as authority for that proposition. The defendant also argues that the sentencing court erroneously vacated his conviction of manslaughter because it was a lesser included offense of felony murder. We do not conclude that this error in counsels' representation to the court affects the outcome of this appeal because we conclude that the court properly vacated the manslaughter conviction for reasons that follow.

We begin with our standard of review and relevant legal principles. "Ordinarily, a claim that the trial court improperly denied a defendant's motion to correct an illegal sentence is reviewed pursuant to the abuse of discretion standard." (Internal quotation marks omitted.) *State* v. *Bennett*, 187 Conn. App. 847, 851, 204 A.3d 49, cert. denied, 331 Conn. 924, 206 A.3d 765 (2019).

However, a double jeopardy claim presents an issue of law over which our review is plenary. *State* v. *Bozelko*, 119 Conn. App. 483, 507, 987 A.2d 1102, cert. denied, 295 Conn. 916, 990 A.2d 867 (2010), cert. denied, 571 U.S. 1215, 134 S. Ct. 1314, 188 L. Ed. 2d 331 (2014).

The double jeopardy clause of the fifth amendment to the United States constitution, which is applicable to the states through the due process clause of the fourteenth amendment, provides in relevant part: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." The double jeopardy clause prohibits not only multiple trials for the same offense but also multiple punishments for the same offense. *John*, supra, 210 Conn. 693. "Double jeopardy analysis in the context of a single trial is a [two step] process. First, the charges must arise out of the same act or transaction. Second, it must be determined whether the charged crimes are the same offense. Multiple punishments are forbidden only if both conditions are met." (Internal quotation marks omitted.) Id.

In the present case, the first step is satisfied. It is undisputed that the charges of manslaughter in the first degree with a firearm and felony murder arose out of the same act or transaction. We next determine whether these crimes are separate or the same offenses for purposes of double jeopardy. In so determining, we apply the rule of statutory construction pursuant to *Blockburger* v. *United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932), to determine whether two statutes criminalize the same offense, thereby placing a defendant who is prosecuted under both statutes in double jeopardy. See *State* v. *Tinsley*, Conn. , , A.3d (2021). "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses

or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger* v. *United States*, supra, 304. "Our case law has been consistent and unequivocal that the second step of *Blockburger* is a technical one and examines only the statutes, charging instruments, and bill of particulars as opposed to the evidence presented at trial." (Internal quotation marks omitted.) *State* v. *Tinsley*, supra, .

The crimes of felony murder and manslaughter in the first degree with a firearm are separate crimes because both require proof of elements that the other does not. See *John*, supra, 210 Conn. 693–97. Felony murder requires proof beyond a reasonable doubt of all the elements of the predicate offense, which in the present case is burglary,[6] and that the victim's death was caused in the furtherance of that felony offense. See *State* v. *Castro*, 196 Conn. 421, 428–29, 493 A.2d 223 (1985); see also General Statutes § 53a-54c.[7] "Our felony murder

[6] With respect to the defendant's second motion to correct, this court in *State* v. *Holmes*, 182 Conn. App. 124, 134–35, 189 A.3d 151, cert. denied, 330 Conn. 913, 193 A.3d 1210 (2018), rejected his claim that the trial court erroneously denied his motion to correct by finding that his sentence for felony murder had been based on the predicate offense of burglary, which had been vacated so as to avoid double jeopardy. This court determined that, "[b]ecause the court could have reinstated the defendant's burglary conviction, had it later reversed the defendant's conviction of home invasion . . . it follows that the court could rely on the vacated burglary conviction when sentencing the defendant for felony murder." (Citations omitted.) Id.

[7] General Statutes § 53a-54c provides: "A person is guilty of murder when, acting either alone or with one or more persons, such person commits or attempts to commit robbery, home invasion, burglary, kidnapping, sexual assault in the first degree, aggravated sexual assault in the first degree, sexual assault in the third degree, sexual assault in the third degree with a firearm, escape in the first degree, or escape in the second degree and, in the course of and in furtherance of such crime or of flight therefrom, such person, or another participant, if any, causes the death of a person other than one of the participants, except that in any prosecution under this section, in which the defendant was not the only participant in the underlying crime, it shall be an affirmative defense that the defendant: (1) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and (2) was not armed with a deadly weapon, or any dangerous instrument; and (3) had no reasonable

statute, § 53a-54c, contains no mens rea requirement beyond that of an intention to commit the underlying felony upon which the felony murder charge is predicated." (Internal quotation marks omitted.) *State* v. *Amado*, 42 Conn. App. 348, 358, 680 A.2d 974 (1996).

Unlike felony murder, manslaughter in the first degree with a firearm does not require proof of a predicate offense, but requires a mens rea element to the act of causing the death of the victim. Manslaughter in the first degree with a firearm requires proof beyond a reasonable doubt that the defendant, with the specific intent to cause serious physical injury to another, causes the death of such person or another person, and that the defendant used or threatened to use a firearm in the commission of that crime. See General Statutes §§ 53a-55a and 53a-55.[8]

ground to believe that any other participant was armed with such a weapon or instrument; and (4) had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury."

[8] General Statutes § 53a-55a provides in relevant part: "(a) A person is guilty of manslaughter in the first degree with a firearm when he commits manslaughter in the first degree as provided in section 53a-55, and in the commission of such offense he uses, or is armed with and threatens the use of or displays or represents by his words or conduct that he possesses a pistol, revolver, shotgun, machine gun, rifle or other firearm. No person shall be found guilty of manslaughter in the first degree and manslaughter in the first degree with a firearm upon the same transaction but such person may be charged and prosecuted for both such offenses upon the same information. . . ."

General Statutes § 53a-55 provides in relevant part: "(a) A person is guilty of manslaughter in the first degree when: (1) With intent to cause serious physical injury to another person, he causes the death of such person or of a third person; or (2) with intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he committed the proscribed act or acts under the influence of extreme emotional disturbance, as provided in subsection (a) of section 53a-54a, except that the fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subsection; or (3) under circumstances evincing an extreme indifference to

This does not end our inquiry because "*Blockburger* is merely a method for ascertaining the [legislative] intent to impose separate punishment for multiple offenses which arise during the course of a single act or transaction" and, therefore, "is best viewed as a rebuttable presumption of legislative intent that is overcome when a contrary [legislative] intent is manifest." (Internal quotation marks omitted.) *State* v. *Mitchell*, 195 Conn. App. 543, 553, 227 A.3d 522, cert. denied, 335 Conn. 912, 229 A.3d 118 (2020). The issue of what the legislature intended was settled by our Supreme Court in *John*, supra, 210 Conn. 695. The legislature intended that felony murder and manslaughter in the first degree, which are alternative means of committing the same offense, be treated as a single crime for double jeopardy purposes. Id. "[T]he legislature contemplated that only one punishment would be imposed for a single homicide, even if that homicide involved the violation of two separate statutory provisions. It follows from this discussion, therefore, that the imposition of sentences for both the manslaughter and the felony murder convictions, for a single homicide, was contrary to the intention of the legislature as expressed in the statutes and as ascertainable from the history of the adoption of § 53a-54c." Id., 696–97. In sum, felony murder and manslaughter with a firearm are separate crimes, but the legislature did not intend that a defendant could be sentenced for both.

We next turn to whether the court properly vacated the manslaughter conviction. In *State* v. *Johnson*, 137 Conn. App. 733, 752–58, 49 A.3d 1046 (2012), rev'd in part on other grounds, 316 Conn. 34, 111 A.3d 447 (2015), and aff'd, 316 Conn. 45, 111 A.3d 436 (2015), this court decided, on the basis of the United States

human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person. . . ."

Supreme Court's decision in *Rutledge* v. *United States*, 517 U.S. 292, 116 S. Ct. 1241, 134 L. Ed. 2d 419 (1996), that merging what would otherwise be two convictions is violative of double jeopardy and, therefore, was no longer permissible as a matter of federal constitutional law. Our Supreme Court in *State* v. *Polanco*, 308 Conn. 242, 245, 61 A.3d 1084 (2013), later ruled as a matter of state law and as part of its supervisory function that merging convictions of lesser included offenses was no longer permissible and that a proper remedy was to vacate one of the lesser included convictions that would otherwise constitute double jeopardy, so that sentence was imposed on only one conviction. Therefore, according to *Polanco*, the proper remedy is vacatur.[9] Id., 248. In the present case, the sentencing court vacated the manslaughter with a firearm conviction. The defendant argues, however, that the sentencing court acted improperly in

[9] The defendant also argues that his sentence for felony murder was impermissible in light of his conviction for manslaughter and contends that, according to *Ball* v. *United States*, 470 U.S. 856, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985), "the second conviction, even if it results in no greater sentence, is an impermissible punishment." Id., 865. In *Ball*, the Supreme Court, after conducting a *Blockburger* analysis, determined that Congress did not intend for the defendant to be punished for the conduct of both offenses of receiving and possessing a firearm where that conduct arose out of a single act, and, therefore, the proper remedy for a conviction of both counts was for the court "to exercise its discretion to vacate one of the underlying convictions." Id., 864. The Supreme Court concluded that "[t]he second conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence. The separate conviction, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. For example, the presence of two convictions on the record may delay the defendant's eligibility for parole or result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction may be used to impeach the defendant's credibility and certainly carries the societal stigma accompanying any criminal conviction. . . . Thus, the second conviction, even if it results in no greater sentence, is an impermissible punishment." (Citations omitted; emphasis omitted.) Id., 864–65. In the present case, the sentencing court did exactly that: it vacated one of two homicide convictions when both the felony murder and manslaughter convictions arose from a single act.

vacating the manslaughter conviction instead of the felony murder conviction.

According to *Polanco*, "when a defendant has been convicted of greater and lesser included offenses, the trial court must vacate the conviction for the lesser offense rather than merging the convictions . . . ." Id., 245. Manslaughter in the first degree with a firearm is a less serious felony offense than felony murder. Manslaughter in the first degree with a firearm is a class B felony; General Statutes § 53a-55a (b); which is punishable by a term of imprisonment of not less than five years and not more than forty years; General Statutes § 53a-35a (5); whereas felony murder is a class A felony punishable by a term of imprisonment of not less than twenty-five years nor more than life. See *State* v. *Adams*, 308 Conn. 263, 273–74, 63 A.3d 934 (2013); see also General Statutes § 53a-35a (2). However, manslaughter is not a lesser included offense of felony murder because each contains statutory elements that the other offense does not. In *State* v. *Miranda*, 145 Conn. App. 494, 508, 75 A.3d 742 (2013), aff'd, 317 Conn. 741, 120 A.3d 490 (2015), this court held that "[d]eciding which convictions must be vacated when the cumulative convictions reflect alternative means of committing the same crime, however, is generally in the discretion of the sentencing court." In *John*, our Supreme Court, after determining that subjecting the defendant to punishment for both his manslaughter and felony murder convictions violated double jeopardy, remanded the case to the trial court to vacate the conviction of manslaughter while at the same time affirming his conviction of felony murder. *State* v. *John*, supra, 210 Conn. 695–97. After affirming the conviction for felony murder, our Supreme Court in *John* specifically in its rescript directed the trial court to vacate the manslaughter conviction. Id., 697. We, therefore, agree with the state that there is authority for the imposition of a

sentence on the more serious felony murder charge while vacating the less serious felony of manslaughter. The sentencing court's decision to vacate the less serious felony of manslaughter was proper despite erroneous statements of both counsel that manslaughter is a lesser included offense of felony murder. The court properly vacated the manslaughter conviction because vacatur of the less serious homicide offense is proper. See id., 695.

In the present case, when sentencing the defendant, the court stated that "[t]o shoot a person sleeping in their bed in this way is just about as serious and as violent as it gets" and concluded that "a very lengthy sentence of incarceration is appropriate. This type of violence cannot be tolerated." The defendant has not demonstrated that the court abused its discretion in determining that the felony murder conviction controls and, accordingly, vacating the manslaughter conviction. Because the sentencing court did not impose multiple punishments for the single act of causing the death of the victim, but, rather, properly vacated the less serious felony of manslaughter in the first degree with a firearm and sentenced the defendant on the conviction of felony murder, we conclude that the court did not err in denying the defendant's second claim in his motion to correct an illegal sentence.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* GILBERTO PATRICIO CARRILLO (AC 43529)

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

Syllabus

The defendant, who had been convicted of the crimes of sexual assault and risk of injury to a child, appealed to this court from the judgment of the trial court, claiming that he was deprived of his right to a fair trial

as a result of certain improprieties the prosecutor committed during closing and rebuttal arguments to the jury. The defendant had engaged in various incidents of sexual behavior with his girlfriend's ten year old daughter who, thereafter, underwent a forensic interview by a single social worker. The defendant, who did not object at trial to any of the alleged improprieties, claimed that the prosecutor argued to the jury facts that were not in evidence, vouched for the credibility of the state's witnesses, appealed to the emotions of the jurors, and impugned the integrity and institutional role of defense counsel. *Held*:

1. The prosecutor made certain comments to the jury that were not supported by the record and were unconnected to the issues in the case:

a. Although it was not improper for the prosecutor to state to the jury that the procedure of having one social worker conduct a forensic interview of the minor child was designed to achieve the most unbiased and reliable interview of the child and that a child who talks with a medical provider will provide accurate information, the prosecutor improperly stated that the child could not have a point of reference as to certain sexual experiences due to her age, as that comment was not supported by the evidence and concerned issues that were for the jury to determine; moreover, the prosecutor's bald assertion that fathers do not sexually abuse their children amounted to improper, unsworn evidence that was unsupported by the record, as it did not ask the jurors to utilize their common sense to assess or draw reasonable inferences from the evidence, and his statement that the social worker testified that it was not unusual for a child to sleep in the same bed with her noncustodial parent during visitation also was improper, as it was unsupported by the record.

b. The defendant's assertion that the prosecutor improperly vouched for the minor child's credibility was unavailing: the prosecutor properly invited the jury to draw reasonable inferences from the evidence when he stated that any consistencies in the witnesses' testimony clearly fell under the category of an innocent lapse in memory rather than an intentional and malicious attempt to mislead, as his comment was not directed toward the child's testimony but to that of all the witnesses and was made in the context of reminding the jurors that it was their role to determine the credibility of the witnesses; moreover, the prosecutor's statement that a child, like an adult, would give medical personnel accurate information was based on a reasonable inference from the child's testimony about the effect of the defendant's conduct on the growth of her breasts.

c. Although the prosecutor improperly remarked that the minor child was bilingual and was trying to learn a language, as well as keeping her own culture, which had no connection to the issues in the case, the defendant's claims that the prosecutor improperly appealed to the jurors' emotions were unavailing: the prosecutor's invitation to the jurors to consider whether they would want their children or grandchildren to go through multiple rounds of interviews if they had been sexually abused

drew from the evidence and invited the jurors, who had heard the child's experience, to draw from their common sense and experience; moreover, although the prosecutor improperly invited the jurors to draw an inference that was based on facts that were not in evidence when he asked them to consider whether their children or grandchildren would have had any frame of reference for understanding that something sexual such as having their nipples sucked was improper, it did not suggest that the jurors should do so on the basis of emotion, and the prosecutor's comment that sexual abuse goes against the core of our being to protect, nurture and raise children appropriately was in response to defense counsel's statements to the jury that the case involved facts and crimes that were outside the bounds of morality.

d. The prosecutor's statement that defense counsel "bashed" the witnesses during cross-examination did not overstep the bounds of permissible argument, as the prosecutor's statement was based on the evidence and the state's burden to prove its case, and was not a suggestion that defense counsel acted improperly: although this court did not condone the use of the word bash, its use was not intended to mislead the jury but, rather, described what the prosecutor viewed as defense counsel's emphasis during closing argument on his assertion that the state failed to meet its burden of proof because its witnesses were unreliable; moreover, the prosecutor stated that defense counsel had a different read on the case, which was not unusual, because that was counsel's job, and the prosecutor argued that the jurors should rely on the witnesses, despite defense counsel's criticisms; furthermore, the prosecutor put his comments to the jury in context when he stated that, although the jury may not have liked how counsel tried the case, the bottom line was whether the elements of the crimes were proven beyond a reasonable doubt.

2. The improprieties committed by the prosecutor were not so egregious that, in light of the entire trial, they denied the defendant his due process right to a fair trial: the improprieties, all of which were single, isolated statements, were not invited by defense counsel, whose failure to object to the alleged improprieties when they occurred, to challenge them during his closing argument to the jury or to request a curative instruction from the court highlighted that he presumably did not view the improprieties as so prejudicial as to jeopardize seriously the defendant's right to a fair trial; moreover, although two of the prosecutor's improper statements implicated the minor child's credibility, which was central to the case, the impact of their brief and isolated nature was minimal, and the prosecutor reminded the jurors on several occasions that it was their responsibility to assess the witnesses' credibility, which was the critical issue in the case; furthermore, the court's extremely thorough jury instructions were sufficiently curative; additionally, the state's case was not weak due to the lack of conclusive physical evidence, as the child's testimony provided very detailed descriptions of the defendant's

conduct and was consistent with the testimony of the other witnesses as well as with the video of her forensic interview.

Argued September 14—officially released December 14, 2021

Procedural History

Substitute information charging the defendant with two counts each of the crimes of sexual assault in the third degree, sexual assault in the fourth degree and risk of injury to a child, brought to the Superior Court in the judicial district of New Haven, geographical area number seven, and tried to the jury before *K. Murphy, J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

John R. Weikart, assigned counsel, with whom was *Emily Graner Sexton*, assigned counsel, for the appellant (defendant).

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

Opinion

EVELEIGH, J. The defendant, Gilberto Patricio Carrillo, appeals from the judgment of conviction, rendered after a jury trial, of two counts of sexual assault in the third degree in violation of General Statutes § 53a-72a (a) (1) (A),[1] two counts of sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (1) (A),[2] and two counts of risk of injury to a child in

[1] General Statutes § 53a-72a (a) provides in relevant part: "A person is guilty of sexual assault in the third degree when such person (1) compels another person to submit to sexual contact (A) by the use of force against such other person or a third person . . . ."

[2] General Statutes § 53a-73a (a) provides in relevant part: "A person is guilty of sexual assault in the fourth degree when: (1) Such person subjects another person to sexual contact who is (A) under thirteen years of age and the actor is more than two years older than such other person . . . ."

violation of General Statutes § 53-21 (a) (2).[3] On appeal, the defendant claims that he is entitled to a new trial on the grounds that the prosecutor, in his closing and rebuttal arguments to the jury, violated the defendant's right to a fair trial by improperly (1) referring to facts not in evidence, (2) vouching for the credibility of witnesses, (3) appealing to the passions, emotions, and prejudices of the jurors, and (4) impugning the integrity and institutional role of defense counsel. We conclude that, although some of the prosecutor's comments constituted improprieties, nevertheless, those improprieties did not deprive the defendant of his due process right to a fair trial. Accordingly, we affirm the judgment of conviction.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. The victim, M,[4] is the daughter of the defendant's girlfriend. In the spring and summer of 2017, when M was ten years old, she lived with her mother, the defendant, and her one year old sister, who is the daughter of the defendant and M's mother. M spent weekends with her biological father.

The defendant looked after M and her sister after M returned home from school because the children's mother was usually still at work. During the spring and

[3] General Statutes § 53-21 (a) provides in relevant part: "Any person who . . . (2) has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of . . . a class B felony for a violation of subdivision (2) of this subsection, except that, if the violation of subdivision (2) of this subsection and the victim of the offense is under thirteen years of age, such person shall be sentenced to a term of imprisonment of which five years of the sentence imposed may not be suspended or reduced by the court."

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

summer of 2017, while M's mother was working, the defendant touched M's breasts with his hands and mouth on several occasions. M testified at trial that, on one occasion, the defendant pushed her down onto her bed, held her hands over her head, pulled up her shirt and bra, and touched her breast, which M testified "hurt a little." On another occasion, M was lying on the living room sofa, and the defendant laid down next to her, pulled her hands over her head, raised her shirt and bra, and used his mouth to suck the nipples of her breasts. On a third occasion, the defendant again used his mouth to suck the nipples of her breasts as he held her hands above her head. The defendant told her that this would make her breasts grow.[5] M testified that the defendant touched her breasts "a lot" during the spring and summer of 2017. Specifically, that he sucked her nipples "a few times" but not as many times as he touched her breasts with his hands.

M told her mother about the defendant's behavior after M became angry at the defendant for ordering her around the house. Her mother told M that if he touched M's breasts again, they would report the defendant to the police. After this conversation, the defendant stopped touching M's breasts for some time but eventually began to do so again. M did not tell her mother when the incidents with the defendant resumed because she was afraid that (1) she would be unsafe, (2) she would not be able to see her little sister anymore, (3) her sister would grow up without a father if the defendant went to jail, and (4) her mother would not have the financial help she needed to pay bills. M's mother eventually disclosed the defendant's behavior to the pediatrician who treated M's sister, who, in turn, reported it to the

[5] In addition, Beth A. Moller, a nurse practitioner who had conducted a physical examination of M, testified that M was "very concerned that [the defendant] sucked her nipples, and because he had done that, that her— her breasts would not grow properly."

Department of Children and Families (department). Thereafter, the department notified the police, and Detective Gary Szlachetka was assigned to investigate.

The department scheduled a forensic interview and a physical examination of M at the Child Advocacy Center at Yale-New Haven Hospital. The forensic interview was conducted by a licensed clinical social worker, Maria Silva. Szlachetka, a department social worker, Alexandra Chisholm, and a nurse practitioner, Beth A. Moller, observed the forensic interview on a television monitor in a separate room. The interview was also recorded and later introduced at trial. During the interview, M told Silva that the defendant touched her breasts with his hands and sucked on her nipples with his mouth multiple times. M also demonstrated how the defendant touched her breasts by forming her hand into the letter "C." In addition, M used dolls to demonstrate to Silva how the defendant touched her.

Moller conducted a physical examination of M, but she did not find anything inconsistent with a normal, healthy child. At trial, Moller agreed that it was typical that there would not be any physical signs of abuse when the abuse alleged was touching and sucking on a child's breasts.[6]

[6] The following colloquy occurred between the prosecutor and Moller on direct examination:

"Q. Okay. And with regard to your physical examination of the intimate parts of the body . . . what were your findings, if any, with [M]?

"A. They were normal. . . .

"Q. Okay. Is there any significance to that . . . so to speak?

"A. No.

"Q. Is that what you would expect of a child that age?

"A. Yes.

"Q. And is that what you would expect based on the disclosure that you viewed during the forensic interview?

"A. Yes.

"Q. Okay. That's because [M] did not indicate there was any penetration . . . ?

"A. Exactly."

Silva testified regarding the procedure of the forensic interview. Specifically, Silva testified that she had undergone specialized training to interview children in a supportive, nonleading manner.[7] She further testified that it was very common for children to delay disclosing abuse and that it is common for children to disclose abuse when emotions are running high—such as when they are angry. With regard to reasons why children may not disclose or delay in disclosing abuse, Silva stated that "[t]here's a magnitude of [reasons] why children delay in disclosing . . . ."

After a three day jury trial, the defendant was convicted of all charges and sentenced to a total effective

[7] On direct examination, Silva testified: "So, we—here in the state of Connecticut, we utilize a one session interview, which we call a forensic interview. So, it's a single session interview that is video-recorded, and it is conducted in a way to elicit information from the child in a supportive, nonleading manner. So, that way the child does not have to repeat their story, does not have to talk to multiple professionals, and it'll decrease the trauma to the child."

On redirect examination, Silva further testified: "[I]t's supposed—it's a neutral, supportive, nonleading interview. And we don't want to go into it with a lot of preconceived notions or with a lot of information in order not to lead the child indirectly to anything. So, the child is there. We're there to listen to the story that they have to say, and we're not there to lead them in any way."

In addition, Silva testified about the protocol utilized in conducting the interview, which is "loosely based on Finding Words [a training protocol used by forensic interviewers]. . . . So, we start off with rapport building with the child. So, that's our protocol. So, rapport is, you ask lots of questions to build a rapport with the child. Normally, we ask about things they like to do or things they don't like, and so forth. . . . And then from rapport . . . we then transition to asking usually about family and who they live with and so forth. And then we go into why they—if they know why they're there, and we ask questions based on that. Again, all the questions are open-ended. . . . So, after we ask about that, depending on what the child says, if the child says they don't know why they're there or they say, I came because of this, we follow where the child leads us. And part of that, we also—we always do safety questions, we always do a closure piece. So, there's components of it that we always do. The questions within each component differ, based again, on the age of the child and what the child says."

term of thirty years of imprisonment, execution suspended after ten years, followed by fifteen years of probation. This appeal followed.

On appeal, the defendant claims that the prosecutor made several improper statements during closing and rebuttal arguments. Specifically, the defendant claims that the prosecutor improperly (1) referred to facts not in evidence, (2) vouched for the credibility of witnesses, (3) appealed to the passions, emotions, and prejudices of the jurors, and (4) impugned the integrity and institutional role of defense counsel. The defendant claims that the prosecutor's improper statements deprived him of his due process right to a fair trial. The state responds that only one of the alleged improprieties was improper and that none of the prosecutor's remarks, taken separately or in sum, violated the defendant's due process right to a fair trial. Although we agree with the defendant that some of the prosecutor's statements were improper, we nevertheless conclude that he was not deprived of his due process right to a fair trial.

Before we address the merits of the defendant's claims, we set forth the standard of review and the law governing claims of prosecutorial impropriety. "[I]n analyzing claims of prosecutorial [impropriety], we engage in a two step analytical process. The two steps are separate and distinct: (1) whether [an impropriety] occurred in the first instance; and (2) whether that [impropriety] deprived a defendant of his due process right to a fair trial. Put differently, [an impropriety is an impropriety], regardless of its ultimate effect on the fairness of the trial; whether that [impropriety] caused or contributed to a due process violation is a separate and distinct question that may only be resolved in the context of the entire trial . . . ." (Internal quotation marks omitted.) *State* v. *Ciullo*, 314 Conn. 28, 34–35, 100 A.3d 779 (2014).

Although the defendant did not object at trial to any of the prosecutor's alleged improprieties, his claims are nonetheless reviewable on appeal, pursuant to the factors set forth by our Supreme Court in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987).[8] See also *State* v. *Luster*, 279 Conn. 414, 426–28, 902 A.2d 636 (2006).

"[P]rosecutorial [impropriety] of a constitutional magnitude can occur in the course of closing arguments. . . . When making closing arguments to the jury, [however, counsel] must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument. . . . Thus, as the state's advocate, a prosecutor may argue the state's case forcefully, [provided the argument is] fair and based upon the facts in evidence and the reasonable inferences to be drawn therefrom. . . . Moreover, [i]t does not follow . . . that every use of rhetorical language or device [by the prosecutor] is improper. . . . The occasional use of rhetorical devices is simply fair argument. . . .

"Nevertheless, the prosecutor has a heightened duty to avoid argument that strays from the evidence or diverts the jury's attention from the facts of the case. [The prosecutor] is not only an officer of the court, like every attorney, but is also a high public officer, representing the people of the [s]tate, who seek impartial justice for the guilty as much as for the innocent." (Internal quotation marks omitted.) *State* v. *Ciullo*, supra, 314 Conn. 37–38.

I

PROSECUTORIAL IMPROPRIETY

We now turn to whether the prosecutor's remarks in the present case constituted prosecutorial impropriety.

[8] We discuss the *Williams* factors at length in part II of this opinion.

The defendant claims that he is entitled to a new trial because the prosecutor, in his closing and rebuttal arguments to the jury, violated his right to a fair trial by improperly (1) referring to facts not in evidence, (2) vouching for the credibility of witnesses, (3) appealing to the passions, emotions, and prejudices of the jurors, and (4) impugning the integrity and institutional role of defense counsel. We will address each of these issues in turn.

A

Facts not in Evidence

"A prosecutor, in fulfilling his duties, must confine himself to the evidence in the record. . . . [A] lawyer shall not . . . [a]ssert his personal knowledge of the facts in issue, except when testifying as a witness. . . . Statements as to facts that have not been proven amount to unsworn testimony, which is not the subject of proper closing argument." (Internal quotation marks omitted.) *State* v. *Singh*, 259 Conn. 693, 717, 793 A.2d 226 (2002). "While the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered, it must never be used as a license to state, or to comment upon, or to suggest an inference from, facts not in evidence, or to present matters which the jury ha[s] no right to consider." (Internal quotation marks omitted.) *State* v. *Martinez*, 319 Conn. 712, 727–28, 127 A.3d 164 (2015). "It is well established that [a] prosecutor may invite the jury to draw reasonable inferences from the evidence; however, he or she may not invite sheer speculation unconnected to evidence. . . . [W]hen a prosecutor suggests a fact not in evidence, there is a risk that the jury may conclude that he or she has independent knowledge of facts that could not be presented to the jury." (Internal quotation marks omitted.) Id., 733.

"[I]t is not improper for the prosecutor to comment upon the evidence presented at trial and to argue the inferences that the jurors might draw therefrom . . . . We must give the [jurors] the credit of being able to differentiate between argument on the evidence and attempts to persuade them to draw inferences in the state's favor, on [the] one hand, and improper unsworn testimony, with the suggestion of secret knowledge, on the other hand." (Internal quotation marks omitted.) *State* v. *Stevenson*, 269 Conn. 563, 583, 849 A.2d 626 (2004).

In the present case, the defendant challenges five separate statements the prosecutor made during closing and rebuttal arguments that he argues improperly state facts not in evidence and, thus, amount to improprieties. We address each statement in turn.

The defendant first challenges the prosecutor's statement during closing argument that the procedure of having one social worker conduct a forensic interview of a child who is a possible victim of sexual abuse is designed to achieve "the most unbiased and reliable interview of that child."[9] We are persuaded that this comment is supported by the evidence in the record and, thus, was not improper. This remark by the prosecutor directly relates to Silva's testimony regarding the forensic interview process.[10] The jury could draw a reasonable inference from the evidence that the procedure used by Silva in conducting the forensic interview of M was designed not only to reduce any potential trauma

[9] Specifically, the prosecutor stated: "Silva testified about . . . what is the best mechanism to follow, investigate, determine the medical, social, psychological needs of the child, which is paramount among everyone, but also to have the least trauma imposed on the child of tender years and also to have the most *unbiased and reliable interview of that child*." (Emphasis added.)

[10] See footnote 7 of this opinion.

for M but also to allow M to share her story in a "non-leading" way. Specifically, Silva testified about the protocol she follows, such as asking each child she interviews the same types of questions, learning as little as possible about the allegations prior to the interview, building rapport with the child, allowing the child's answers to lead the interview, and taking certain precautions to further the goal of the forensic interview, which is to have the child convey their own statement or story. The absence of the word "reliable" in Silva's testimony does not preclude the jury from drawing a reasonable inference that the procedure she used in conducting the forensic interview was designed to be unbiased and reliable. The prosecutor's comment directly related to Silva's description of the interview process. We agree with the state that the jury could view the prosecutor's comment as asking the jury to draw a "reasonable inference based on Silva's testimony that the interview process she follows was designed to reliably convey the child's account of the abuse," and, therefore, we do not find that this statement constitutes prosecutorial impropriety.

The defendant next challenges the prosecutor's statement that "[c]hildren feel the same way, I would propose. . . . [W]hen a child sits down and talks to a medical person, a doctor, an [advanced practice registered nurse], someone who's gonna do a physical examination, they're gonna give them information that is accurate . . . ."[11] The state argues that the prosecutor properly asked the jurors to "apply common sense and their

[11] Specifically, the prosecutor stated: "Just like when you sit down with your doctor, you tell your doctor things that concern you. Why? Because a doctor is going to help you. . . . Because you know, as an adult, that what you tell them they're gonna use to help you physically, mental health wise, counseling, whatever. Children feel the same way, *I would propose. And when a child sits down and talks to a medical person, a doctor, an* [*advanced practice registered nurse*], *someone who's gonna do a physical examination, they're gonna give them information that is accurate*, that is going to help them, help them as a person, help them get the assistance that they need." (Emphasis added.)

own life experience." We agree with the state that this comment does not amount to prosecutorial impropriety.

The prosecutor's statement is consistent with our Supreme Court's discussion in *State* v. *Fauci*, 282 Conn. 23, 36, 917 A.2d 978 (2007). In *Fauci*, the defendant argued that the prosecutor improperly introduced her personal opinion regarding the credibility of the witnesses when she stated during rebuttal argument, "I think that the most important thing for you to look at when you're trying to evaluate people's statements is that you should look at whether or not they had—when they made these statements, were they implicating themselves? . . . And maybe because I've been in this business for a long time, it's not hard for me to see that people tend to lie to get themselves out of trouble, not to get themselves into trouble. And maybe because I've been in this business for a long time, I feel that there seems to be something inherently reliable about statements that people make that implicate themselves [in] wrongdoing . . . . I think it's common sense." (Internal quotation marks omitted.) Id. Our Supreme Court concluded that the prosecutor's remarks "do not suggest that they were based on her knowledge of facts not in evidence. She merely was underscoring the commonsense inference that people do not tend to lie when they make statements against their penal interest." Id., 38.

The prosecutor's statement in the present case, likewise, merely asked the jurors to apply their common sense to the evidence presented. The remark does not suggest that the prosecutor was basing his comment on facts outside of the evidence, as he stated to the jury: "Children feel the same way, *I would propose*." (Emphasis added.) Furthermore, testimony adduced at trial from M and Moller regarding M's concern about the effect the defendant's conduct might have on the

growth of her breasts is plainly evidentiary support for this statement. As such, this statement does not amount to an impropriety.

The defendant next challenges the prosecutor's comment that a ten year old child does not have a point of reference as to sexual experiences such as someone sucking on her nipple.[12] We agree with the defendant that this comment is not supported by the evidence at trial.

The challenged statement is analogous to that addressed by our Supreme Court in *State* v. *Alexander*, 254 Conn. 290, 755 A.2d 868 (2000). In *Alexander*, the prosecutor did not confine herself to the record, stating to the jury, "[t]hat's how little kids think," and that children "can't make this up." (Emphasis omitted; internal quotation marks omitted.) Id., 301. In addition, the prosecutor suggested that an eight year old is not "sophisticated [enough to be able] to fabricate a story involving sexual abuse." (Emphasis omitted; internal quotation marks omitted.) Id. Our Supreme Court held that it was "wholly improper for the prosecutor to insinuate the truthfulness of certain claims, thereby inducing the jury to review the case by means of facts not in evidence." Id., 306. As in *Alexander*, the prosecutor in

[12] Specifically, the prosecutor stated: "The other thing she talked about is the, him sucking her nipple on more than one occasion. And I will suggest that the testimony from [M], both in the video and here, is very powerful, as far as the physical sensation. This is a ten year old on the video, and then here around twelve, saying how that felt. Number one, didn't like it; pressure. She felt pressure of some—someone sucking her nipple. That's rather descriptive. *And does a ten year old child have a point of reference on that sort of sexual thing? I would submit to you, no*. And I would ask you just to use your own common sense, your personal experiences, having children, having grandchildren who have gone through three, four, five, ten years old through puberty, maybe adults now. That's a rather descriptive way of explaining what happened, and she was consistent with that." (Emphasis added.) The prosecutor again made a statement regarding M's point of reference during rebuttal argument, stating to the jury: "Again, a ten year old has *no frame of reference* for that sort of stuff." (Emphasis added.)

the present case twice asked the jury to consider facts not in evidence when stating that M could not have a point of reference for the defendant's sexual behavior toward her due to her age. In his closing argument, the prosecutor stated to the jury: "This is a ten year old on the video, and then here around twelve, saying how that felt. Number one, didn't like it; pressure. She felt pressure of some—someone sucking her nipple. That's rather descriptive. And does a ten year old child have a point of reference on that sort of sexual thing? I would submit to you, no." In his rebuttal argument he again made this improper comment to the jury by stating: "Again, a ten year old has no frame of reference for that sort of stuff."

As in *Alexander*, there was no testimony at trial in the present case supporting the prosecutor's general statement to the jury that a ten year old child does not have a frame of reference for the defendant's sexual conduct. The comment made by the prosecutor in this case concerned exactly those "principal issues set forth for the jury to determine on [its] own." *State* v. *Alexander*, supra, 254 Conn. 306. Therefore, the comment amounted to an impropriety.[13]

[13] Our Supreme Court recently discussed *Alexander* in *State* v. *Michael T.*, 338 Conn. 705, 259 A.3d 617 (2021). In *Michael T.*, the prosecutor asked the jury, "[d]oes [the victim] look like the type of child who would have been evil enough to make this up to get out of the house?" (Internal quotation marks omitted.) Id., 727. In holding this comment to be proper, the court distinguished this comment from the one in *Alexander* for two reasons: the remark was invited by defense counsel, and the prosecutor did not make a broad assertion that no child could make up an allegation of sexual abuse, but, rather, she "suggested only that the jury could infer from this child's appearance and demeanor on the [witness] stand that she was not lying in order to obtain something valuable, namely, getting out of the house." (Emphasis omitted.) Id., 729. In the present case, as in *Alexander*, the prosecutor made a broad statement as to whether *all ten year old children have* the capacity to fabricate a story of such a sexual nature, rather than specifically focusing on M's demeanor on the witness stand, as in *Michael T.* Thus, we conclude that the prosecutor's comments are analogous to those addressed by our Supreme Court in *Alexander* and are readily distinguishable from those in *Michael T.*

The defendant next challenges the prosecutor's statement that "[f]athers don't sexually abuse children."[14] The state argues that this comment was proper because "it is clear . . . from the context in which the prosecutor made the remark that he was talking about a typical situation that the jurors would have recognized from their life experience." We are not persuaded and, accordingly, agree with the defendant that this statement is unsupported by the record.

Our Supreme Court recently reaffirmed the principle that, although a prosecutor may "appeal to [the jurors'] common sense in closing remarks," that appeal must be "based on evidence presented at trial and reasonable inferences that jurors might draw therefrom." (Internal quotation marks omitted.) *State* v. *Courtney G.*, 339 Conn. 328, 347–48, A.3d (2021). In *Courtney G.*, the court concluded that it was proper for the prosecutor to ask the jurors to assess the defendant's credibility in light of his demeanor on the witness stand and "implicitly urged the jurors to infer, on the basis of their common sense and experience, that an innocent man falsely accused of sexually assaulting a child would have exhibited outrage while testifying. Because the prosecutor's argument was rooted in the evidence, we perceive no impropriety." Id., 348.

The prosecutor's comment in the present case is readily distinguishable from the one at issue in *Courtney G.* Here, the prosecutor did not ask the jurors to utilize their common sense and life experience *to assess the evidence*. Rather, the prosecutor made a bald assertion with no support from the record and asked the

[14] Specifically, the prosecutor stated: "He wants to be a father; well, he didn't do a very good job. Fathers don't do that. Fathers don't engage in corporal punishment, normally. *Fathers don't sexually abuse children.* That's a concept, or the argument is preposterous that, somehow, oh, this is just her confusing this roughhousing with the sexual assault." (Emphasis added.)

jurors to use their common sense to create facts, rather than to assess facts already in evidence. To assert to the jury that "[f]athers don't sexually abuse children" does not ask the jury to draw reasonable inferences from the evidence. This is particularly true because the defendant did not testify at trial, and there was no other evidence presented remotely related to such a statement. Rather, it is a statement of fact made by the prosecutor with no support in the evidence, which amounts to improper, unsworn testimony. Accordingly, this statement was improper.

The defendant next challenges the prosecutor's statement that Silva testified that it was not unusual for a child to sleep in the same bed with her noncustodial parent during visitation and that it may be more common in some cultures.[15] The state concedes that Silva never so testified and that there was no other evidence in support thereof. Upon our thorough review of the record, we agree that this statement is entirely unsupported by the record. Therefore, we conclude that this comment was improper.

B

Witness Credibility

The defendant next claims that the prosecutor improperly vouched for the credibility of the state's witnesses on three occasions. The state responds that the prosecutor's comments were properly based on reasonable inferences from trial testimony and permissibly asked the jury to draw from its common sense. We address each of the defendant's claims in turn.

[15] Specifically, the prosecutor stated: "Maria Silva said that's not unusual that, sometimes, a parent, a child, especially on a visitation when divorced, might sleep in the same bed for a variety of reasons. Also, [she commented] about, sometimes, it's maybe more common in certain cultures."

First, the defendant claims that the prosecutor vouched for M's credibility by stating that any inconsistencies in her testimony "clearly fall under the . . . category" of "innocent lapse in memory," rather than an "intentional and malicious attempt to mislead, a falsehood."[16] We are not persuaded.

"The prosecutor may not express his own opinion, directly or indirectly, as to the credibility of witnesses. . . . Nor should a prosecutor express his opinion, directly or indirectly, as to the guilt of the defendant. . . . Such expressions of personal opinion are a form of unsworn and unchecked testimony, and are particularly difficult for the jury to ignore because of the prosecutor's special position. . . . Moreover, because the jury is aware that the prosecutor has prepared and presented the case and consequently, may have access to matters not in evidence . . . it is likely to infer that such matters precipitated the personal opinions." (Internal quotation marks omitted.) *State* v. *Singh*, supra, 259 Conn. 713. "[Although a] prosecutor is permitted to comment [on] the evidence presented at trial and to argue the inferences that the jurors might draw therefrom, he is

[16] Specifically, the prosecutor argued: "We touched upon the credibility of witnesses. That is a key factor that the jury must decide. What is the credibility of a witness? Who to believe, who not to believe, et cetera. On the credibility issues, you have—I'll just go over some of the things. . . . What does a witness say, and how did they say it? What is their demeanor? What is their physical response? . . . And is their testimony reasonable and logical? No one has total recall. . . . [T]hat is not the bar, that you remember absolutely everything and that you recite absolutely everything in the exact same fashion that you did yesterday, a year ago, two years ago, five years ago, some experience that you may have. So, if there are inconsistencies in any of the witnesses' testimony, and there were four witnesses that testified during this case, you have to determine if that is [an] innocent lapse in memory or was it an intentional and malicious attempt to mislead, a falsehood. And, again, we're very satisfied that you folks are going to be able to make those determinations. *I submit to you that the evidence that you heard, if there are inconsistencies that you find in witness testimony, clearly fall under the first category*." (Emphasis added.)

not permitted to vouch personally for the truth or veracity of the state's witnesses." (Internal quotation marks omitted.) *State* v. *Albino*, 312 Conn. 763, 780, 97 A.3d 478 (2014). "[A] prosecutor may properly comment on the credibility of a witness where . . . the comment reflects reasonable inferences from the evidence adduced at trial." (Internal quotation marks omitted.) *State* v. *Luster*, supra, 279 Conn. 438.

Our Supreme Court's decision in *Luster* is particularly instructive. In *Luster*, the defendant argued that the prosecutor improperly expressed his own opinion about the credibility of two of the state's witnesses. Id. The prosecutor "referred to uncontested facts adduced at trial and [the witness'] demeanor on the witness stand before suggesting that he was honest and open with us." (Internal quotation marks omitted.) Id., 439. The court found that the remarks were not improper. Id. In its analysis, the court looked to *State* v. *Williams*, 41 Conn. App. 180, 184, 674 A.2d 1372, cert. denied, 237 Conn. 925, 677 A.2d 950 (1996). In that case, this court concluded that it was "improper for the prosecutor to make repeated bald assertions that the state's witnesses were honest. For example, the prosecutor in that case said: I would submit to you [the jury] that all of these officers are extremely honest; Detective [Nicholas] DeMatteis was very honest with you; and [the officers] all told you honestly what they saw." (Internal quotation marks omitted.) *State* v. *Luster*, supra, 279 Conn. 438–39. Our Supreme Court concluded in *Luster* that the prosecutor's statements were not bald assertions such as those in *State* v. *Williams*, supra, 41 Conn. App. 180, because the prosecutor referred to uncontested facts adduced at trial and the witnesses' demeanor on the witness stand. *State* v. *Luster*, supra, 439.

In the present case, the prosecutor's statement that any inconsistencies in the witnesses' testimony "clearly fall under the . . . category" of "innocent lapse in

memory," rather than an "intentional and malicious attempt to mislead, a falsehood," is more like the statement in *Luster* than the statement in *State* v. *Williams*, supra, 41 Conn. App. 180, and, accordingly, we conclude that this comment properly invited the jury to draw reasonable inferences from the evidence. First, contrary to the defendant's argument, the prosecutor's comment was not directed toward M's testimony but to the testimony of all of the witnesses. Second, the prosecutor's comment was made in the context of reminding the jurors that it was their role to determine the credibility of the witnesses in general. Just prior to suggesting to the jury that any inconsistencies in testimony of witnesses are the result of an innocent lapse in memory, the prosecutor reminded the jurors that it was their responsibility to consider the overall demeanor of the witnesses while testifying. In addition, the prosecutor reminded the jurors, on several occasions during closing and rebuttal argument, that it was their role, and not the role of counsel, to determine the credibility of the witnesses. During closing argument, the prosecutor stated: "[I]t's up to you to determine [M's] credibility and capacity to recall incidents that actually happened to her and to explain those to you folks." Again, during rebuttal argument, he reminded the jurors that "[y]ou make a decision on whether she's a credible witness." Accordingly, in light of the context in which the statement was made and the several instances in which the prosecutor reminded the jurors of their proper role to determine the credibility of the witnesses, we conclude that this comment was not improper.

The defendant next claims that the prosecutor's statement that the forensic interview procedure was the "most . . . reliable interview"[17] constituted improper vouching for M's credibility. We disagree. We previously concluded in part I A of this opinion that this comment

[17] See footnote 9 of this opinion.

was supported by the evidence. Consequently, the prosecutor's statement was a fair comment that was based on the evidence adduced at trial, specifically, a fair argument as to why the jury should credit the statements M made during the forensic interview. The prosecutor argued to the jurors that they should infer that M's statements are truthful because of the circumstances in which the statements were made, which we conclude does not constitute improper vouching for the credibility of a witness.

Finally, the defendant argues that the prosecutor's statement that a child is "gonna give [medical personnel] information that is accurate"[18] improperly vouched for M's credibility during the forensic interview. We previously concluded that this statement was proper in part I A of this opinion. The prosecutor's statement was based on a reasonable inference drawn from the testimony adduced at trial regarding M's concern about the effect of the defendant's conduct on the growth of her breasts. For the reasons we previously stated in part I A of this opinion, we conclude that this statement was proper.

C

Appealing to Jurors' Emotions

The defendant next claims that the prosecutor improperly appealed to the passions, emotions, and prejudices of the jurors in four different ways. The state responds that the prosecutor's comments properly invited the jurors to draw reasonable inferences from the evidence and to apply common knowledge and their life experiences to interpret the evidence.

"[A] prosecutor may not appeal to the emotions, passions and prejudices of the jurors. . . . [S]uch appeals should be avoided because they have the effect of

[18] See footnote 11 of this opinion.

diverting the [jurors'] attention from their duty to decide the case based on evidence. . . . When the prosecutor appeals to emotions, he invites the jury to decide the case, not according to a rational appraisal of the evidence, but on the basis of powerful and irrelevant factors which are likely to skew that appraisal." (Internal quotation marks omitted.) *State* v. *Bell*, 283 Conn. 748, 773, 931 A.2d 198 (2007). "[T]he line between comments that risk invoking the passions and prejudices of the jurors and those that are permissible rhetorical flourishes is not always easy to draw. The more closely the comments are connected to relevant facts disclosed by the evidence, however, the more likely they will be deemed permissible." *State* v. *Albino*, supra, 312 Conn. 773. "[J]urors are not expected to lay aside matters of common knowledge or their own observations and experiences . . . . Therefore, it is entirely proper for counsel to appeal to [the jurors'] common sense in closing remarks." (Internal quotation marks omitted.) *State* v. *Ciullo*, supra, 314 Conn. 45–46.

In the present case, the defendant challenges four separate statements made by the prosecutor during closing and rebuttal arguments that he argues improperly appealed to the emotions, passions, and prejudices of the jurors and, thus, amounted to improprieties. We address each statement in turn.

The defendant first challenges the prosecutor's invitation to the jurors to consider whether they would want their own children or grandchildren to go through multiple rounds of interviews if they had been sexually abused.[19] We conclude this statement was not improper.

[19] Specifically, the prosecutor stated: "Not to have four, five different people go into great detail with the child about what happened. Nobody wants to have to go through that. If any of you ever experienced a traumatic situation, you wouldn't want to have to do that, either. And for those of you that have children or grandchildren or nieces or nephews, you understand that development process."

In *State* v. *Felix R.*, 319 Conn. 1, 10, 124 A.3d 871 (2015), the defendant challenged "statements wherein the prosecutor recounted the difficulties that the victim faced during the investigation and trial," including being interviewed by strangers and having to relive the experience at trial. Our Supreme Court found the prosecutor's comments were proper, because "when put into the context of the entire trial and closing argument, the incendiary potential of the statements" was extinguished. Id. Particularly, the jury had already heard the victim's experience at the time the prosecutor made those statements. Likewise, in the present case, the jury had already heard M's experience, specifically, that M was only interviewed once. In making this statement, the prosecutor was merely drawing on the evidence adduced at trial and inviting the jurors to draw from their common sense and experience rather than reach a decision that was based on emotion.

The defendant next challenges that the prosecutor's request that the jurors consider whether their children or grandchildren would have had any frame of reference for understanding that something sexual such as having their nipples sucked was improper.[20] We previously concluded, in part I A of this opinion, that it was improper for the prosecutor to remark to the jury that a ten year old child does not have a frame of reference for sexual behavior, such as sucking one's nipples, because we concluded that the prosecutor improperly drew on facts outside of the evidence. We do not believe, however, that this comment improperly appealed to the emotions of the jurors. Although the prosecutor's comment improperly invited the jurors to draw an inference that was based on facts not in evidence, it asked that they do so on a reasoned basis and did not suggest that they do so on the basis of emotion. Thus, we conclude that

[20] See footnote 12 of this opinion.

this comment was not an improper appeal to the jurors' emotions.

The defendant next challenges the prosecutor's comment to the jury that sexual abuse goes against the core "of our being to protect children, to nurture children and to raise children appropriately. When we hear of these things, and, unfortunately, I'm sure you folks have heard of incidents in the past of child abuse, child sexual abuse; it just shakes us right to the core."[21] We conclude this comment was not improper. We find instructive our Supreme Court's recent discussion in *State* v. *Michael T.*, supra, 338 Conn. 726–27. In *Michael T.*, the prosecutor stated that, "[i]f wishes could come true . . . we wouldn't have . . . children, who have to . . . become embarrassed, they have to show you their pain, they have to describe to you their betrayal of trust, and show you [their] tears, all when [the victim] was seven and eight [years old]." (Internal quotation marks omitted.) Id., 727. In concluding that this comment was proper, our Supreme Court looked to *State* v. *Williams*, 65 Conn. App. 449, 783 A.2d 53, cert. denied, 258 Conn. 927, 783 A.2d 1032 (2001), in which this court found proper, in light of the evidence presented, a prosecutor's comment that "[the] case involves many brutal, violent and unpleasant facts . . . . The six year old . . . was the victim of horrible and repulsive crimes and she suffered this degradation at the hands of the defendant . . . . She was humiliated in the worst way imaginable." (Internal quotation marks omitted.) Id., 467. Moreover, in *Michael T.*, defense counsel himself stated that the case was "exceptionally difficult . . . and disgusting . . . . [I]t's a very emotionally compelling

[21] Specifically, the prosecutor stated: "No one wants to believe that sexual abuse of children happens. Nobody wants to. Because when we realize that, it goes against the—core of our—of our being to protect children, to nurture children and to raise children appropriately. When we hear of these things, and, unfortunately, I'm sure you folks have heard of incidents in the past of child abuse, child sexual abuse; it just shakes us right to the core."

case; it's a case that gets you fired up . . . ." (Internal quotation marks omitted.) *State* v. *Michael T.*, supra, 714.

In the present case, defense counsel stated to the jury during his closing argument, "[n]ow, imagine you're the one accused of a crime. Something so awful, so outside the boundaries of anything that you could or ever would do, anything that your morals would ever allow, something unfathomable . . . ." The prosecutor, in his rebuttal, agreed with defense counsel, stating, "[w]hen we hear of these things, and, unfortunately, I'm sure you folks have heard of incidents in the past of child abuse, child sexual abuse; it just shakes us right to the core. And I don't think anybody disagrees with that. What we do have a disagreement on, [defense counsel] and I, is what the evidence showed in this case." In the present case, as in *Michael T.*, defense counsel himself made statements to the jury acknowledging that the case involved facts and crimes that were outside the bounds of morality. The prosecutor's comment in this case, that child sexual abuse "shakes us right to the core," was merely in response to defense counsel's comment. The prosecutor then brought the jury back to the real issue in the case—the parties' disagreement over what the evidence proved. In the context in which it was said, the prosecutor's comment was not improper.

Finally, the defendant challenges the prosecutor's comment to the jury that M "is bilingual and learning English every day," and, "that just shows you how much she is trying to learn a language, as well as keeping her own culture."[22] We conclude that this comment

[22] Specifically, the prosecutor stated: "She thanked [defense counsel] when he complimented her on her English language, as well as Spanish. [M], obviously, is bilingual and learning English every day. To the point where, again, she now calls the defendant Patrick as opposed to Patricio. Maybe that's natural for, you know, an immigrant to kind of want to become more [assimilated], but that just shows how much she is trying to learn a language, as well as keeping her own culture."

amounts to an impropriety because it has no connection to the issues in the present case. The fact that M is working hard to learn a language has no relevance to the issues in the present case and would seem calculated solely to appeal to the jurors' emotions to elicit sympathy for M. See *State* v. *Albino*, supra, 312 Conn. 775 (concluding that prosecutor's statement was calculated solely to appeal to jurors' emotions because of lack of relevance to issues in case); *State* v. *Reddick*, 174 Conn. App. 536, 565, 166 A.3d 754 (concluding that prosecutor's reference to broader issue of gun violence in New Haven was improper because it was extraneous and irrelevant to issues before jury), cert. denied, 327 Conn. 921, 171 A.3d 58 (2017), cert. denied, U.S. , 138 S. Ct. 1027, 200 L. Ed. 2d 285 (2018). Accordingly, because this comment was entirely irrelevant to the issues in the present case, we conclude that it improperly appealed to the emotions of the jurors.

D

Impugning Integrity and Role of Defense Counsel

The defendant's final claim is that the prosecutor improperly impugned the integrity and institutional role of defense counsel by repeatedly telling the jury that defense counsel "bashed"[23] the witnesses during cross-examination. Specifically, the prosecutor criticized

[23] The prosecutor used the word "bash" in reference to defense counsel when arguing to the jury on several occasions. During closing argument the prosecutor stated: "Speaking of that, the charges in this case are brought, and I mentioned this earlier, by me. Different people were involved in the investigation. Three of the witnesses have testified, other people who didn't testify. But once the arrest is made, the case is the state's attorney's case. So, if [defense counsel] wants to *bash* heads, mine is the head to bash . . . ." (Emphasis added.)

The prosecutor next stated: "[Defense counsel's] read on the case, as I had suggested when I ended my first part [of closing argument], is very different than mine. That's not unusual. That's his job, and my job is also to highlight what I believe to be important aspects of this case. During the course of closing argument of the defense, [defense counsel] took a lot of time *bashing* some of the witnesses, particularly the detective in this case.

defense counsel's approach of questioning the detective's failure to pursue investigatory leads, characterized defense counsel to the jury as "want[ing] to bash heads," and accused defense counsel of having "bashed" Szlachetka, Silva, and Moller. The state responds that the prosecutor's use of the word "bashed" was rhetorical shorthand for defense counsel's having "challenged" the witnesses. We agree with the state.

"It has been held improper for the prosecutor to impugn the role of defense counsel. . . . Such comments invite the jury to conclude that everyone the [g]overnment accuses is guilty, that justice is done only when a conviction is obtained, and that defense counsel are impairing this version of justice by having the temerity to provide a defense and to try to get the guilty off." (Citation omitted; internal quotation marks omitted.) *State* v. *Luster*, supra, 279 Conn. 433–34.

"We previously have expressed our disapproval of a prosecutor's use of [the] term [smoke and mirrors], even as an isolated reference . . . because it implie[s], to whatever degree, that defense counsel had not based his argument on fact or reason . . . but had intended to mislead the jury by means of an artfully deceptive argument. . . . Indeed . . . a prosecutor who uses the phrase smoke and mirrors implie[s] that the defendant's attorney intended to deceive and thereby impugn[s] the integrity of the defendant's attorney." (Internal quotation marks omitted.) *State* v. *Albino*, supra, 312 Conn. 777–78. "There is a distinction between argument that disparages the integrity or role of defense counsel and argument that disparages a theory of defense." *State* v. *Orellana*, 89 Conn. App. 71, 101, 872 A.2d 506, cert. denied, 274 Conn. 910, 876 A.2d 1202 (2005).

. . . Not only *bashed* the detective, bashed the two workers from [Yale-New Haven Hospital]." (Emphasis added.)

Although we do not condone the use of the word "bash," as employed by the prosecutor, we do not find that it rises to the level of prosecutorial impropriety. We conclude that the prosecutor's use of forms of the word "bash" was not intended to mislead the jury or to suggest that defense counsel engaged in unethical conduct. Instead, the prosecutor used it to describe what he viewed as one of defense counsel's points of emphasis during his closing argument—suggesting that the state had failed to meet its burden of proof because its witnesses were unreliable. Although "bash" may be harsher than "criticize" or "attack," its use was the functional equivalent of those terms. After using forms of the word, the prosecutor then argued to the jurors why they should rely on the witnesses, despite defense counsel's criticisms. Furthermore, the prosecutor, when concluding this section of his rebuttal argument, put his comments in context by explaining to the jury: "You might be unhappy with how I decided to run the case, how [defense counsel] decided to defend the case, how a detective or a medical personnel did their job. Bottom line is . . . are the elements of the crimes proven beyond a reasonable doubt?" Thus, the prosecutor's argument was based on the evidence and the state's burden to prove its case and was not a suggestion that defense counsel acted improperly.

We conclude that the prosecutor's comments are analogous to those used in *State* v. *Young*, 76 Conn. App. 392, 819 A.2d 884, cert. denied, 264 Conn. 912, 826 A.2d 1157 (2003). In *Young*, the prosecutor argued to the jurors that they should not to be " 'fooled' " by defense counsel's arguments and stated that defense counsel's questions during cross-examination were designed to distract the jury from the real issues in the case. Id., 405. This court concluded that these comments "did not overstep the bounds of permissible argument"; id., 405; when the prosecutor suggested to the

jurors that defense counsel had attempted to divert their attention away from the defendant's action by allocating a significant share of his closing argument to discussing what he deemed to be weaknesses in the witnesses' credibility. Id., 400.

In the present case, the prosecutor's comments likewise attempted to highlight the fact that defense counsel's view of the case was very different from that of the prosecutor, specifically, that they shared different views on the credibility of the witnesses. Thus, during the part of his rebuttal when he used the terms bash, bashed, and bashing, the prosecutor stated that defense counsel had a different read on the case, which is "not unusual. That's his job . . . ." Therefore, we conclude that, read in context, the prosecutor's use of forms of the word "bash" did not overstep the bounds of permissible argument.

II

DUE PROCESS

Having found that improprieties occurred, we now turn to whether those improprieties deprived the defendant of his due process right to a fair trial. "When a defendant demonstrates improper questions or remarks by the prosecutor during the course of trial, the defendant bears the burden of showing that, considered in light of the whole trial, the improprieties were so egregious that they amounted to a denial of due process." (Internal quotation marks omitted.) *State* v. *Albino*, supra, 312 Conn. 790. "[A defendant is not entitled to prevail when] the claimed [impropriety] was not blatantly egregious and merely consisted of isolated and brief episodes that did not reveal a pattern of conduct repeated throughout the trial. . . . The question of whether the defendant has been prejudiced by prosecutorial [impropriety], therefore, depends on whether there is a reasonable likelihood that the jury's verdict

would have been different absent the sum total of the improprieties." (Citation omitted; internal quotation marks omitted.) *State* v. *Luster*, supra, 279 Conn. 442.

"[O]ur determination of whether any improper conduct by the [prosecutor] violated the defendant's fair trial rights is predicated on factors set forth in *State* v. *Williams*, [supra, 204 Conn. 540], with due consideration of whether that [impropriety] was objected to at trial. . . . These factors include: [1] the extent to which the [impropriety] was invited by defense conduct or argument . . . [2] the severity of the [impropriety] . . . [3] the frequency of the [impropriety] . . . [4] the centrality of the [impropriety] to the critical issues in the case . . . [5] the strength of the curative measures adopted . . . [6] and the strength of the state's case. . . . The question of whether the defendant has been prejudiced by prosecutorial [impropriety] . . . depends on whether there is a reasonable likelihood that the jury's verdict would have been different absent the sum total of the improprieties. . . . Under the *Williams* general due process standard, the defendant has the burden to show both that the prosecutor's conduct was improper and that it caused prejudice to his defense." (Internal quotation marks omitted.) *State* v. *Hargett*, 196 Conn. App. 228, 265–66, 229 A.3d 1047, cert. granted, 335 Conn. 952, 238 A.3d 730 (2020). "Ultimately, [t]he issue is whether the prosecutor's conduct so infected the trial with unfairness as to make the resulting conviction a denial of due process." (Internal quotation marks omitted.) *State* v. *Courtney G.*, supra, 339 Conn. 362.

The first of the *Williams* factors is whether the improprieties were invited by defense counsel. See *State* v. *Williams*, supra, 204 Conn. 540. It is undisputed by the state, and our thorough review of the record confirms, that the prosecutorial improprieties were not invited by the conduct of defense counsel.

The second *Williams* factor is the severity of the improprieties. Id. When evaluating severity, we must consider "whether defense counsel objected to the improper remarks, requested curative instructions, or moved for a mistrial. . . . Additionally, we look to whether the [improprieties were] blatantly egregious or inexcusable." (Citation omitted; internal quotation marks omitted.) *State* v. *Courtney G.*, supra, 339 Conn. 362. Although lack of an objection is not fatal to the defendant's claim for a new trial, we must consider this in assessing whether the defendant's right to a fair trial was violated. The failure to object "demonstrates that defense counsel presumably [did] not view the alleged impropriety as prejudicial enough to jeopardize seriously the defendant's right to a fair trial." (Internal quotation marks omitted.) *State* v. *Fauci*, supra, 282 Conn. 51. In the present case, not only did defense counsel fail to object to any of the alleged improprieties when they occurred, he did not take the opportunity to address the alleged improprieties in the prosecutor's closing argument during his own closing argument to the jury. Rather, defense counsel began his closing argument to the jury by stating, "[y]ou heard the state over the last few days present their evidence and summarize it for you a few minutes ago." At no point in his closing argument did defense counsel challenge the improper comments made by the prosecutor during his closing, further highlighting that, at trial, defense counsel presumably did not view the improprieties as so prejudicial as to jeopardize seriously the defendant's right to a fair trial. See *State* v. *Fauci*, supra, 51. Furthermore, defense counsel never requested a curative instruction from the court or a mistrial due to any of the improprieties.

Additionally, "the severity of the impropriety is often counterbalanced in part by the third *Williams* factor, namely, the frequency of the [impropriety] . . . ." (Internal quotation marks omitted.) *State* v. *Daniel W.*,

180 Conn. App. 76, 113, 182 A.3d 665, cert. denied, 328 Conn. 929, 182 A.3d 638 (2018); see *State* v. *Williams*, supra, 204 Conn. 540. "Improper statements that are minor and isolated will generally not taint the overall fairness of an entire trial." (Internal quotation marks omitted.) *State* v. *Felix R.*, supra, 319 Conn. 17; see also *State* v. *Payne*, 303 Conn. 538, 567, 34 A.3d 370 (2012) (With respect to the second and third *Williams* factors, "all three of the contested statements by the prosecutor were isolated and occurred within the state's lengthy closing argument. Additionally, the trial court cured any harm by instructing the jury that the arguments of counsel were not evidence . . . ." (Footnote omitted.)). In the present case, all of the improper comments were single, isolated statements made during closing and rebuttal argument, rather than having been repeated throughout the trial for dramatic effect. See *State* v. *Felix R.*, supra, 17.

The fourth *Williams* factor considers the centrality of the improprieties. *State* v. *Williams*, supra, 204 Conn. 540. In light of the lack of eyewitnesses or physical evidence, the critical issue in this case was the credibility of the witnesses' testimony. We conclude that two of the improper statements directly implicated M's credibility, specifically, the prosecutor's statement that children do not have a point of reference for sexual behavior such as sucking one's nipples and the prosecutor's statement to the jury concerning M's efforts to become bilingual and maintain her culture.[24] Although we conclude that these two comments bear on the centrality of the state's case, given their brief and isolated nature and the lack of any objection from the defense, we are not convinced that the defendant was denied a fair trial. Furthermore, the prosecutor reminded the jurors on several occasions that it was their role, and only their role, to determine witness credibility. See part I B of

[24] See footnotes 12 and 23 of this opinion.

this opinion. Thus, to the extent that the improprieties did bear on the central issue of the credibility of witness testimony, we are confident that, when viewed in the context of the entire trial, the impact of the improper comments was minimal.

The fifth *Williams* factor considers the strength of curative measures adopted. *State* v. *Williams*, supra, 204 Conn. 540. Although the court did not address any of the prosecutor's improper comments, we conclude that the court's extremely thorough jury instructions were sufficiently curative. "We recognize that general jury instructions can cure the potential effects of minor prosecutorial improprieties." *State* v. *Felix R.*, supra, 319 Conn. 18. We presume that the jury followed the court's instructions "in the absence of any indication to the contrary." *State* v. *Collins*, 299 Conn. 567, 590, 10 A.3d 1005, cert. denied, 565 U.S. 908, 132 S. Ct. 314, 181 L. Ed. 2d 193 (2011). A thorough search of our jurisprudence reveals that the judgment in very few cases has been reversed on the basis of prosecutorial impropriety when defense counsel has not objected to the challenged remarks, moved for a curative instruction, or moved for a mistrial, particularly when the trial court's general jury instructions addressed the improprieties.[25] Our Supreme Court has "note[d] that, in

[25] We note that the cases in which our appellate courts have ordered a new trial on the basis of prosecutorial improprieties, in the absence of any objection by defense counsel, involved conduct substantially more egregious than what occurred in the present case. In *State* v. *A. M.*, 324 Conn. 190, 192–93, 152 A.3d 49 (2016), our Supreme Court upheld the decision of this court, concluding that the prosecution's references to the defendant's decision not to testify were improper and deprived him of his right to a fair trial.

In *State* v. *Angel T.*, 292 Conn. 262, 291, 973 A.2d 1207 (2009), our Supreme Court concluded that the trial court's general jury instructions were insufficient to cure improprieties that occurred repeatedly throughout the trial because the instructions did not specifically address all of the improprieties.

Further, in *State* v. *Maguire*, 310 Conn. 535, 562, 78 A.3d 828 (2013), the prosecutor, during both closing and rebuttal remarks, repeatedly stated that the defendant and defense counsel were asking the jury to condone child abuse. Our Supreme Court held that these remarks were "particularly harm-

nearly all cases where defense counsel fails to object . . . and [to] request a specific curative instruction in response to a prosecutorial impropriety . . . and the court's general jury instruction addresses that impropriety, [it has] held that the court's general instruction cures the impropriety." *State* v. *A. M.*, 324 Conn. 190, 207, 152 A.3d 49 (2016).

In the present case, the court instructed the jury as follows: "The law prohibits the [prosecutor] or defense counsel from giving personal opinions as to whether the defendant is guilty or not guilty. *It is not their assessment of the credibility of the witnesses that matters, only yours. . . . Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their closing argument is intended to help you interpret the evidence, but their arguments are not evidence.* If the facts as you remember them differ from the way the lawyers have stated them, *your memory of them controls. It is not proper for the attorneys to express their opinion on the ultimate issue in this case or to appeal to your emotions. . . .*

ful because, in a close case, the jurors may have felt compelled to find the defendant guilty, lest they be viewed by the state as condoning such contemptible conduct." Id.

In the present case, the prosecutor's remarks did not violate any state statutes or implicate the defendant's constitutional right to remain silent. We do not find the prosecutor's remarks to be particularly egregious in light of the trial as a whole. Further, we conclude that the trial court's general instructions were sufficient to cure any potential harm resulting from the prosecution's improprieties.

Unlike in *Angel T.*, the prosecutor's comments in the present case were confined to only closing and rebuttal arguments, and did not occur repeatedly throughout the trial. Furthermore, the trial court in the present case addressed all of the improprieties in its general instructions to the jury.

Finally, none of the improprieties in this case approaches the prosecutor's conduct in *State* v. *Maguire*, supra, 310 Conn. 546–52. Indeed, the integrity and veracity of defense counsel was not disparaged, as was the case in *Maguire*. See id., 556–58.

"As I already indicated, and, I guess, I'm indicating again, *you should keep in mind that the arguments and statements by the attorneys in final argument or during the course of the trial are not evidence. You should not consider as evidence their recollection of the facts, nor their personal belief as to any facts or as to the credibility of any witness, nor any facts which any attorney may have presented to you in argument from that attorney's knowledge which was not presented to you as evidence during the course of trial.* If there are—is any difference between what any attorney recalls as the evidence and what you recall as the evidence, *it is your recollection that controls.* Follow your recollection, not anyone else's. . . . *You should not be influenced by any sympathy for the defendant, the defendant's family, the complainant, the complainant's family or for any other person who might, in any way, be affected by your decision.* In addition, as I indicated earlier, *your verdict must be based on the evidence, and you may not go outside the evidence to find facts*; that is, you may not resort to guesswork, conjecture or suspicion, and *you must not be influenced by any personal likes or dislikes, opinions, prejudices, biases or sympathy.*" (Emphasis added.)

We are confident that that these jury instructions had the curative effect of reminding the jurors that it was their responsibility, and only their responsibility, to assess the credibility of the witnesses solely on the basis of the evidence presented and to determine the facts on the basis of their recollections of the evidence. Additionally, the court made clear several times that the attorneys' arguments were *not* evidence and, thus, should not influence the jury's verdict. This factor weighs heavily in favor of our conclusion that the defendant was not deprived of a fair trial.

The sixth and final *Williams* factor considers the strength of the state's case. See *State* v. *Williams*, supra,

204 Conn. 540. As our Supreme Court has stated, "[t]he sexual abuse of children is a crime which, by its very nature, occurs under a cloak of secrecy and darkness. It is not surprising, therefore, for there to be a lack of corroborating physical evidence . . . . Given the rarity of physical evidence in [sexual assault cases involving children], a case is not automatically weak just because a child's will was overborne and he or she submitted to the abuse . . . ." *State* v. *Felix R.*, supra, 319 Conn. 18. Notably, our Supreme Court has "never stated that the state's evidence must have been overwhelming in order to support a conclusion that prosecutorial [impropriety] did not deprive the defendant of a fair trial." (Internal quotation marks omitted.) *State* v. *Stevenson*, supra, 269 Conn. 596.

We conclude that the state's case was not weak due to the lack of conclusive physical evidence. The evidence to support the defendant's conviction included M's testimony, which provided very detailed descriptions of the defendant's conduct and was consistent with both the testimony of the other three witnesses at trial as well as with the video of M's forensic interview conducted years earlier. Furthermore, Silva testified as to reasons why children may delay disclosing abuse and why it was common for children do so. In addition, Silva testified that it was common for children to disclose abuse when their emotions were heightened, as M did in this case. Although two of the improper comments bore on M's credibility, which we acknowledge was central in this case, M's testimony was not the only evidence for the jury to assess. Furthermore, in light of the failure of defense counsel to object to the improprieties, the thorough general jury instructions given by the court, and the prosecutor's repeated reminders to the jurors that it was ultimately their responsibility to assess the credibility of the witnesses, we conclude that the defendant was not deprived of a fair trial.

Finally, our analysis must consider "the fairness of the entire trial, and not the specific incidents of the [impropriety] themselves." (Internal quotation marks omitted.) *State* v. *Ciullo*, supra, 314 Conn. 36. Although the prosecutor made some improper comments, we are confident that, in light of the entire trial, the improprieties did not so taint the defendant's trial as to render it fundamentally unfair. We conclude that, considered in light of the whole trial, the improprieties were not so egregious that they amounted to a denial of due process. See *State* v. *Payne*, supra, 303 Conn. 567.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ULYSES R. ALVAREZ (AC 43506)

Bright, C. J., and Suarez and Sullivan, Js.

Syllabus

Convicted of two counts of the crime of sexual assault in the fourth degree and two counts of the crime of risk of injury to a child, the defendant appealed to this court. The defendant's conviction stemmed from his alleged sexual abuse of the minor victim, K, who was a resident of the rehabilitation facility where the defendant was employed. 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 A, another resident of the rehabilitation facility, and P, a woman the defendant allegedly had assaulted while he was employed as a police officer. Prior to trial, both the state and defense counsel subpoenaed records pertaining to K and A from, inter alia, the Department of Children and Families and various mental health facilities that had treated K and A. The court conducted an in camera review of these records for exculpatory material and released certain unspecified records to the parties; the rest of the records remained under seal. *Held*:

1. The trial court abused its discretion in keeping certain confidential records under seal and by not taking the steps required by *State* v. *Esposito* (192 Conn. 166) to disclose those records to the parties: several of the

sealed records not disclosed to the defendant contained references to A's credibility and capacity for truthfulness, and the defendant did not have access to this information about A from another source; moreover, the court's failure to disclose these records was not harmless, as, although the state relied on evidence other than A's testimony to corroborate K's testimony, there was little physical evidence that corroborated K's allegations, A was the only witness who testified at trial to seeing the defendant act in an inappropriate manner toward K, the prosecutor focused a significant portion of her closing argument on A's testimony, and defense counsel's probe of A's credibility during cross-examination might not have been adequate in light of the court's failure to disclose the records; accordingly, the defendant was entitled to a new trial at which A could testify only if she waived her privilege to the relevant sealed records.

2. The trial court erred in admitting uncharged misconduct evidence relating to P as propensity evidence pursuant to § 4-5 (b) of the Connecticut Code of Evidence; the defendant's uncharged misconduct toward P was not sufficiently similar to the charged conduct involving K to be admissible at trial, as the frequency and the severity of the assaults were different, with the defendant's conduct toward K occurring multiple times over a period of two months and his interaction with P happening once, the position of authority he held over K, who was a resident at a facility where the defendant was an employee, and P, who interacted with the defendant in her own home, was different, and the locations of the assaults were materially different, with the defendant's assaults on K occurring in a facility with a risk of detection and his alleged assault of P occurring while they were alone in her home, and the few similarities between the charged and uncharged misconduct provided an insufficient basis to render the uncharged conduct admissible.

Argued September 7—officially released December 14, 2021

Procedural History

Substitute information charging the defendant with two counts each of the crimes of sexual assault in the fourth degree and risk of injury to a child, brought to the Superior Court in the judicial district of Litchfield, where the court, *Wu*, *J.*, granted the state's motion to introduce uncharged misconduct evidence and denied the defendant's motion in limine to introduce certain evidence; thereafter, the matter was tried to the jury before *Wu*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Reversed*; *new trial*.

Norman A. Pattis, for the appellant (defendant).

Samantha L. Oden, former deputy assistant state's attorney, with whom, on the brief, were *Dawn Gallo*, state's attorney, and *Jessica Gouveia*, deputy assistant state's attorney, for the appellee (state).

Opinion

BRIGHT, C. J. The defendant, Ulyses R. Alvarez, appeals from the judgment of conviction, rendered by the court following a jury trial, of sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (1) (E) and (8), and risk of injury to a child in violation of General Statutes § 53-21 (a) (1) and (2). On appeal, the defendant claims that the trial court abused its discretion by (1) allowing the state to introduce evidence of uncharged misconduct, (2) withholding relevant sealed records from the defendant, and (3) barring defense counsel from inquiring into the sexual history of the complaining witness, K.[1] We agree with the defendant's second claim and, accordingly, reverse the judgment of the trial court and remand the case for a new trial. We also address the defendant's first claim because the issues underlying the claim are likely to arise on remand.[2]

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

[2] We decline to review the defendant's third claim because he makes a different argument on appeal than was made at trial, thus rendering the claim unpreserved. Specifically, on appeal, the defendant contends that evidence of K's sexual history should have been admissible for credibility purposes. This differs from the argument made before the trial court, which was that K's sexual history was admissible under *State* v. *Rolon*, 257 Conn. 156, 777 A.2d 604 (2001), to demonstrate an alternative source of information for her sexual knowledge. As such, we are not required to review this claim. See *State* v. *Scott C.*, 120 Conn. App. 26, 34, 990 A.2d 1252 (declining to review claim based on grounds different from those raised before trial court), cert. denied, 297 Conn. 913, 995 A.2d 956 (2010).

Moreover, the record is unclear as to whether the court explicitly barred the introduction of evidence concerning alleged conduct that could be

The following facts, which the jury heard, and procedural history are relevant to our resolution of the defendant's claims. From January to April, 2017, K, a fifteen year old girl, resided at Touchstone, a residential rehabilitation facility for at risk girls. During this same time period, the defendant was employed by Touchstone as an adolescent development specialist and was responsible for the general welfare and care of Touchstone's residents.

At trial, K testified to the following. In February, 2017, the defendant began acting inappropriately toward her. During her first week at Touchstone, the defendant looked K up and down, an act she described as "how guys normally check females out." A few days later, he blew K a kiss when the two passed on the stairs.

A couple of weeks later, when K was by herself in one of Touchstone's common rooms and the defendant was sitting in a chair facing the entryway to the room, he told K to masturbate in front of him. K did so, and, while she was masturbating, the defendant used signals to direct her movements. If his legs were up and resting on the wall, that was a sign that K should continue masturbating. If he lowered his legs, that indicated to K to stop. Additionally, when the defendant placed his hand inside of the cuff of his pants, that meant that he wanted K "to go inside [of her] underwear," and when he rubbed the top of his pants, that indicated to K to masturbate "outside of [her] pants."

K testified that the defendant had her masturbate for him at least nine more times. During some of those incidents, he showed K pictures on his phone of sexual positions and asked her to pose similarly. On one occasion, the defendant gestured for K to masturbate and

viewed as distinct from K's prior sexual history. Given this, we further decline to review the defendant's third claim because it is unclear, based on the record, if or how that issue might arise on remand.

then wipe her vaginal fluid on his hand. K complied, and the defendant licked his hand. On two occasions, she masturbated for him in her bedroom and without any pants on.

K further testified that the defendant's actions toward her did not stop at masturbation. He commented on her body, told her that she had a "nice butt," and mentioned that he wanted her to wear leggings around him. He also showed K a picture of his naked back and back tattoo and made sexual gestures to her, including putting his index finger and middle finger in a "V" shape underneath his mouth and then sticking his tongue through the "V," which K understood as a reference to oral sex. At one point, the defendant gave K a note telling her that he wanted to have sex with her. He also showed K notes in his phone that said, "I want to fuck you so bad" and "lick, lick."

K testified that, on one occasion, the defendant took her and some other residents to Walmart. During the ride, he held K's hand. After the group returned to Touchstone, the defendant reached for his backpack, which was at K's feet, and, in the process, slid his hand along K's inner thighs, almost up to her vagina. Then, when K got out of the car, he asked her to put a bag into his car. As she did so, he touched and gripped her buttocks.

A, another Touchstone resident, testified at the defendant's trial. During her testimony, A stated that K told her that the defendant asked K to masturbate for him multiple times and generally had been acting inappropriately toward her. A further stated that she saw the defendant and K holding hands during the Walmart trip and previously had seen the defendant blow kisses at K. A also testified that the defendant had behaved inappropriately toward her. According to A, the defendant told her that she had the body of a twenty-four year

old, repeatedly winked at her, and made sexual gestures at her. A further stated that the defendant often had an erection when he interacted with her and once said that he wished she could help him with his erection. A also testified that the defendant told her that he wanted to have sex with her and that he wanted to see her outside of the program.

On February 14, 2017, a Touchstone resident reported the defendant to a Touchstone employee for behaving inappropriately toward K, and an investigation was initiated, but K denied the allegations. Then, on April 12, 2017, when K was in the dining hall, she saw the defendant looking at another resident "the same way he looked at [her]." K became upset and started yelling at him. One of Touchstone's supervisors, Kristen Fracasso-Kersten, heard the noise and came downstairs to find K screaming, crying, and hyperventilating. Fracasso-Kersten then sent K to speak with Christina Borel, Touchstone's clinical director. While talking with Borel, K disclosed what the defendant had done to her. Fracasso-Kersten later reviewed Touchstone's surveillance video and saw footage of the defendant signaling with his legs in the manner K had described.

At trial, Detective Paul Lukienchuk of the Connecticut State Police testified about his efforts to serve a search warrant on the defendant. The warrant authorized Detective Lukienchuk to collect the defendant's phone. When he attempted to execute the warrant, the defendant tried to hide his cell phone by slipping it into his mother's purse. Detective Lukienchuk eventually was able to obtain the phone and review its contents. On the phone, he found pictures of the defendant's back and back tattoos, a picture of the defendant making the "V" sign that K had described, and a message containing the words "lick, lick."

On the basis of this evidence, a jury found the defendant guilty of two counts of sexual assault in the fourth

degree and two counts of risk of injury to a child. The court accepted the jury's verdict and sentenced the defendant to a total effective term of imprisonment of nineteen years, execution suspended after five years, with twenty-five years of probation and a $1000 fine. Additional facts and procedural history will be set forth below as necessary.

I

The defendant claims that the court abused its discretion by failing to disclose certain confidential records related to K and A, in violation of his constitutional right to confrontation.[3] We agree.

The following additional facts and procedural history are necessary to our resolution of this claim. Prior to trial, on the basis of an agreement between the parties, the state subpoenaed records related to K and A from the Department of Children and Families (department) and juvenile court, and defense counsel subpoenaed records from several hospitals and mental health facilities that had treated K and A. These records were provided to the court under seal, and the court reviewed the records in camera. Certain unspecified department records were then released to the parties.[4] The rest of the records, none of which were released, remained under seal. These sealed records were later made part of the appellate record, and we, at the defendant's request, conducted our own in camera review of the sealed records to determine whether they contain information related to the credibility and truthfulness of K and A.

"A criminal defendant has a constitutional right to cross-examine the state's witnesses, which may include

[3] For the sake of clarity and ease of discussion, we have reordered the claims as they are set forth in the defendant's brief.

[4] Nothing in the record identifies which department documents were released to the parties. It appears from the parties' briefs that at least two different department records were, at some point, released to the defendant. Those records, however, are also not included in the record on appeal.

impeaching or discrediting them by attempting to reveal to the jury the witnesses' biases, prejudices or ulterior motives, or facts bearing on the witnesses' reliability, credibility, or sense of perception." *State* v. *Slimskey*, 257 Conn. 842, 853, 779 A.2d 723 (2001). Thus, in certain instances, a witness' right to keep certain records confidential must give way to a defendant's constitutional right to confrontation. See id., 853–84. Our Supreme Court has set forth a procedure to be used by trial courts when these two rights potentially come into conflict. "If, for the purposes of cross-examination, a defendant believes that certain privileged records would disclose information especially probative of a witness' ability to comprehend, know or correctly relate the truth, he may, out of the jury's presence, attempt to make a preliminary showing that there is a reasonable ground to believe that the failure to produce the records would likely impair his right to impeach the witness. . . . If in the trial court's judgment the defendant successfully makes this showing, the state must then obtain the witness' permission for the court to inspect the records in camera. . . . Upon inspecting the records in camera, the trial court must determine whether the records are especially probative of the witness' capacity to relate the truth or to observe, recollect and narrate relevant occurrences. . . . If the court discovers no probative and impeaching material, the entire record of the proceeding must be sealed and preserved for possible appellate review." (Internal quotation marks omitted.) *State* v. *McMurray*, 217 Conn. 243, 257, 585 A.2d 677 (1991); see also *State* v. *Esposito*, 192 Conn. 166, 179–80, 471 A.2d 949 (1984) (setting forth procedure by which confidential records can be disclosed to parties); but see *State* v. *Pierson*, 201 Conn. 211, 228, 514 A.2d 724 (1986) (modifying procedure established in *Esposito*).

Thereafter, on appeal, when so requested by the parties, this court "has the responsibility to conduct its own

in camera review of the sealed records to determine whether the trial court abused its discretion in refusing to release those records to the defendant." (Internal quotation marks omitted.) *State* v. *Gainey*, 76 Conn. App. 155, 158, 818 A.2d 859 (2003). "The linchpin of the determination of the defendant's access to the records is whether they sufficiently disclose material especially probative of the [witness'] ability to comprehend, know and correctly relate the truth . . . so as to justify breach of their confidentiality and disclosing them to the defendant in order to protect his right of confrontation." (Citation omitted; internal quotation marks omitted.) *State* v. *Storlazzi*, 191 Conn. 453, 459, 464 A.2d 829 (1983). The determination of a defendant's access to confidential records lies in the sound discretion of the trial court, and we will not disturb that discretion unless it is abused. See *State* v. *McMurray*, supra, 217 Conn. 257; see also *State* v. *Slimskey*, supra, 257 Conn. 856 ("[a]ccess to confidential records should be left to the discretion of the trial court which is better able to assess the probative value of such evidence as it relates to the particular case before it . . . and to weigh that value against the interest in confidentiality of the records" (internal quotation marks omitted)).

Following a thorough in camera review of the subject records, we conclude that the court should have disclosed several of the sealed records to the parties. Although none of the records contains any references to K's credibility or truthfulness, several records from the Albert J. Solnit Children's Center (Solnit records) contain references to A's credibility and capacity for truthfulness. Specifically, these records contain information that was highly relevant to an assessment of whether A's description of events involving the defendant and K was truthful.[5] Our review of the available

[5] We decline to divulge specific information or any details about what our in camera review revealed because A might decide to preclude the disclosure of the relevant records. See *State* v. *Olah*, 60 Conn. App. 350, 355, 759 A.2d

trial court record indicates that the Solnit records were never disclosed to the defendant.[6] Given that the information contained in these records was clearly material and relevant to A's credibility and her " 'ability to comprehend, know or correctly relate the truth,' " these records should have been disclosed to the parties and the court abused its discretion in failing to do so. *State* v. *McMurray*, supra, 217 Conn. 257.

We further conclude that the trial court's failure to disclose the relevant Solnit records was not harmless. In cases in which a defendant's constitutional right to confrontation is infringed, the state must prove that the trial court's decision to deny the defendant access to the sealed records was harmless beyond a reasonable doubt. See *State* v. *Slimskey*, supra, 257 Conn. 859. "Whether such error is harmless . . . depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." (Internal quotation marks omitted.) Id.

First, after comparing the entirety of the department records that are part of the trial court record with the sealed Solnit records, we conclude that none of the relevant impeachment material regarding A is included

548 (2000) ("The state must obtain the witness' consent to waive his or her privilege so that the relevant portion of the record may be released to the defendant. If such waiver is not forthcoming, the witness' testimony must be stricken.").

[6] Although the record of what documents were released to the parties is not entirely clear, according to the parties' briefs and the trial transcripts, it appears that the only records that were disclosed were records from the department, which were subpoenaed by the state and did not include the Solnit records in question that were subpoenaed by the defendant.

in the disclosed department records.[7] Consequently, the defendant did not have access to this information about A from another source.

Additionally, in the present case, the impeachment material was particularly important because there was little physical evidence that corroborated K's allegations, and A was the only witness who testified to seeing the defendant act inappropriately toward K. As a result, the prosecutor focused a significant part of her closing argument on A's testimony. She first argued that A corroborated K's testimony as to the defendant's conduct with K. She then argued that A's testimony regarding the defendant's conduct toward her proved that the defendant had the propensity or tendency "to engage in the type of criminal sexual behavior with which he is charged." She then discussed the details of A's allegations and the similarity of the actions the defendant took toward A and those he was charged with taking toward K. Ultimately, the prosecutor relied on the personal similarities between A and K, and in their testimony about the defendant's conduct, to bolster each witness' credibility and to suggest that the jury could infer the defendant's guilt. As such, the defendant's guilt, or lack thereof, turned in significant part on A's credibility. If her testimony had been discredited by the information in the Solnit records, we cannot conclude, beyond a reasonable doubt, that the jury nevertheless would have returned a guilty verdict. Further, although defense counsel was able to probe A's credibility during cross-examination, we cannot conclude that such cross-examination was adequate in light of the court's failure to disclose the Solnit records.

[7] Because the record does not reflect what department records were disclosed to the parties, we have reviewed the entirety of the department records that are part of the trial court record, and none of them includes the information that is in the sealed Solnit records.

We acknowledge that the state relied on evidence other than A's testimony to corroborate K's testimony. For example, the contents of the defendant's phone did contain incriminating evidence that corroborated some of K's claims, including pictures of the defendant's back and back tattoos, a picture of the "V" gesture that K described, and a text message containing the words "lick, lick." That evidence, however, does not corroborate most of the acts to which K testified, including the defendant's alleged requests for her to masturbate. Furthermore, Fracasso-Kersten's testimony that Touchstone surveillance cameras captured images of the defendant moving his legs up and down the wall, as K said he did to signal her, corroborated K's testimony, but only to a limited extent. On the basis of the totality of the evidence presented at trial, we cannot conclude that the court's error in not disclosing to the parties the existence of the highly relevant Solnit records was harmless beyond a reasonable doubt. See *State* v. *Slimskey*, supra, 257 Conn. 859–60 (error in not disclosing records relevant to impeachment was not harmless despite other evidence that corroborated some aspects of victim's testimony).

Accordingly, we conclude that the court abused its discretion in keeping the relevant Solnit records under seal and not taking the steps required under *Esposito* to disclose those records to the parties. See *State* v. *Esposito*, supra, 192 Conn. 179–80. The judgment of conviction is reversed and the case is remanded for a new trial, at which the relevant Solnit records must be disclosed, contingent on A's waiver of any privilege. See *State* v. *Olah*, 60 Conn. App. 350, 355, 759 A.2d 548 (2000). If A refuses to waive the privilege, she cannot testify at a new trial. See id.

II

The defendant also claims that the court abused its discretion by allowing the state to introduce evidence of

certain uncharged misconduct as propensity evidence pursuant to § 4-5 (b) of the Connecticut Code of Evidence[8] because the alleged misconduct was qualitatively different from the charged conduct. We agree.[9]

The following additional facts and procedural history are relevant to the defendant's claim. On May 28, 2019, pursuant to § 4-5 (b) of the Connecticut Code of Evidence, the state filed a notice regarding its intent to introduce at trial evidence of the defendant's other acts of sexual misconduct, specifically, evidence of the defendant's (1) misconduct toward A,[10] and (2) misconduct during his time as a police officer with the Middletown Police Department. On May 31, 2019, the defendant filed an objection, arguing that the evidence sought to be offered regarding the latter incident was too

[8] 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."

[9] On appeal, the defendant also argues that the trial court erred in admitting evidence of uncharged misconduct because the court never made a finding that his conduct was both aberrant *and* compulsive, as required by § 4-5 (b) of the Connecticut Code of Evidence. We decline to address this argument, however, because, as defense counsel conceded at oral argument before this court, it was not raised before the trial court. Instead, the only issue raised before the trial court as to uncharged misconduct under § 4-5 (b) was whether the uncharged misconduct was similar enough to the charged conduct to be admissible. The defendant never challenged whether or not the uncharged misconduct was aberrant and compulsive in nature. As such, we will not consider this claim. See Practice Book § 60-5 ("[t]he court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial"). We also decline to address this argument because it is not likely to arise during the proceedings on remand.

[10] On appeal, the defendant does not challenge the admissibility of the uncharged misconduct evidence concerning A.

remote and dissimilar to the charged conduct for proper admission under § 4-5 (b) of the Connecticut Code of Evidence.

Thereafter, on June 4, 2019, the court held a hearing on the state's notice. The state argued that, under *State* v. *DeJesus*, 288 Conn. 418, 470–71, 953 A.2d 45 (2008), and § 4-5 (b) of the Connecticut Code of Evidence, evidence of the uncharged misconduct in question was sufficiently similar to the charged misconduct to be admissible. The state began by summarizing a February, 2015, incident that occurred while the defendant was employed as a Middletown police officer. During that incident, the defendant responded to an alleged violation of a protective order that had been reported by a woman, P. According to P, her sister and her sister's boyfriend were at P's house, in violation of a protective order that P had against them. After arriving at P's house, the defendant made the sister and her boyfriend leave. Then, while P had her back to the defendant, he groped her buttocks and touched her breasts. Moments later, the defendant took P's hand and placed it on his crotch. From this act, P got the impression that he was asking for oral sex. The defendant eventually left without further incident, but before he left, P gave him her phone number. A few days later, she saw him at court and he ignored her. P then reported the incident to the Middletown Police Department. At the time of the alleged assault, P was in her early twenties.

The state argued that the incident involving P was sufficiently similar to the charged conduct regarding K and, thus, that evidence of that incident was admissible at the defendant's trial. According to the state, both of the incidents were close in time, the alleged victims were both "girls who are in the prime of their sexual blossom," the conduct was similar, both young women were in vulnerable situations when targeted by the defendant, the defendant used his employment to gain

access to the young women, and the defendant was in a position of authority over them.

The defendant contended that the uncharged misconduct involving P should be excluded at trial because there were significant differences between that misconduct and the conduct with which the defendant was charged. According to the defendant, evidence of the incident involving P was too dissimilar to be admissible because P was older than K at the time of P's assault, P was in her own home when the assault allegedly occurred, the incident happened two years before the charged conduct, and the conduct in that incident was different from the defendant's conduct toward K. Furthermore, evidence of the incident involving P was more prejudicial than probative because it would lead the jury to speculate as to why the defendant left the Middletown Police Department.

The court concluded that evidence of the incident involving P was admissible at trial. The court noted that the uncharged misconduct evidence was different from what happened to K because the young women's ages and the defendant's conduct were different. The court, however, concluded that those differences were not enough to exclude the evidence because the situations that both alleged victims had found themselves in, specifically, interacting with someone in a position of authority, were sufficiently similar for the evidence to be admissible. The court also concluded that evidence of the incident was not unduly prejudicial because P could be cross-examined at trial.

At trial, P testified that, after the defendant made her sister and the boyfriend leave, he remained at her residence and the two made small talk. During that time, he noticed a marijuana bong in P's living room, joked about the bong, and told P to put it away. Then, while P was in the kitchen looking for her copy of the protective

order, the defendant came up behind her and groped her breasts and buttocks. He next began wandering around P's home, eventually stopping in the bathroom. P followed him, and, while the defendant was in the bathroom, he grabbed her hand and pulled it to his crotch. When P touched his crotch, she noticed that he had an erection. P testified that she understood the defendant's action of pulling her hand to his crotch to mean that the defendant wanted her to perform oral sex on him. P rejected his advances, and the defendant eventually left.

We begin by setting forth the applicable standard of review and principles of law that guide our analysis. "The admission of evidence of prior uncharged misconduct is a decision properly within the discretion of the trial court. . . . [Every] reasonable presumption should be given in favor of the trial court's ruling. . . . [T]he trial court's decision will be reversed only where abuse of discretion is manifest or where injustice appears to have been done." (Internal quotation marks omitted.) *State* v. *Daniel W.*, 180 Conn. App. 76, 88, 182 A.3d 665, cert. denied, 328 Conn. 929, 182 A.3d 638 (2018).

As a general rule, evidence of "other crimes, wrongs or acts of a person is inadmissible to prove the bad character, propensity, or criminal tendencies of that person." Conn. Code Evid. § 4-5 (a). In *DeJesus*, however, our Supreme Court held that evidence of uncharged sexual misconduct can be introduced as propensity evidence in criminal cases if certain conditions are met. *State* v. *DeJesus*, supra, 288 Conn. 470–71. Specifically, evidence of uncharged sexual misconduct is admissible "if it is relevant to prove that the defendant had a propensity or a tendency to engage in the type of aberrant and compulsive criminal sexual behavior with which he or she is charged. . . . [E]vidence of uncharged misconduct is relevant to prove that the

defendant had a propensity or a tendency to engage in the crime charged only if it is: (1) . . . not too remote in time; (2) . . . similar to the offense charged; and (3) . . . committed upon persons similar to the prosecuting witness. . . . Second, evidence of uncharged misconduct is admissible only if its probative value outweighs the prejudicial effect that invariably flows from its admission." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 473.

In *DeJesus*, our Supreme Court concluded that evidence of the defendant's uncharged misconduct—an incident involving a woman identified as N—was admissible to prove that the defendant had a propensity to "sexually assault young women of limited mental ability with whom he worked and over whom he had supervisory authority." Id., 474–75. This was so because of the similarities between the two assaults: "The women were similar in age and appearance. Both suffered from a mental disability and had a difficult time learning new skills. The defendant had hired both the victim and N and was aware of their mental limitations. The defendant's assaults of the two women occurred in a similar manner as well." (Internal quotation marks omitted.) Id., 475.

In contrast, in *State* v. *Ellis*, 270 Conn. 337, 358, 852 A.2d 676 (2004), our Supreme Court held that certain uncharged misconduct evidence was too dissimilar from the charged crime to be admissible.[11] In *Ellis*, the

[11] We acknowledge that *Ellis* predates *DeJesus* and also involves the admissibility of prior misconduct evidence to show a common plan or scheme and not, as in *DeJesus*, to demonstrate that the defendant had a propensity to commit sexual assault. *State* v. *Ellis*, supra, 270 Conn. 352. Nevertheless, in *State* v. *Gupta*, 297 Conn. 211, 225 n.7, 998 A.2d 1085 (2010), overruled on other grounds by *State* v. *Payne*, 303 Conn. 538, 34 A.3d 370 (2012), our Supreme Court made clear that, although in *DeJesus* it "changed the label of the exception" from the common plan or scheme exception to the propensity exception, it "did not change the parameters that such evidence must satisfy to be admissible. . . . Therefore, *DeJesus* in no way undermines the vitality of the reasoning in *Ellis*." (Citations omitted.) Consequently, both this court and our Supreme Court still consider the factors

defendant was charged with sexual misconduct toward a teenager, Sarah S. Id., 352. During the trial, the prosecution, over the defendant's objections, introduced the testimony of three other victims to help establish a common plan or scheme on the part of the defendant.[12] Id. On appeal, the defendant argued that this evidence was erroneously admitted because the incidents involving Sarah S. differed in frequency and severity from those involving the other girls, and the defendant had a different relationship with Sarah S. than he had with the other girls. Id. Our Supreme Court agreed and concluded that the trial court erred in admitting the testimony of the other girls because (1) Sarah S. had been assaulted at least eight times, while the others were assaulted only once or twice, (2) the defendant's abuse of Sarah S. was far more extreme than his abuse of the other girls, and (3) the other girls had a relationship with the defendant and had frequent and continuous contact with him while Sarah S. did not. Id., 358–61. On the basis of these differences, our Supreme Court held that the evidence concerning the other girls was too dissimilar to the charged conduct to be admissible. Id., 365; see also *State* v. *Gupta*, 297 Conn. 211, 229, 998 A.2d 1085 (2010) (victims in one case were too dissimilar to support cross admissibility in separate case because defendant's conduct toward one victim was more frequent and severe than his conduct toward

set out in *Ellis* when analyzing the admissibility of uncharged misconduct evidence pursuant to *DeJesus*. See, e.g., *State* v. *Devon D.*, 321 Conn. 656, 671, 138 A.3d 849 (2016); *State* v. *Eddie N. C.*, 178 Conn. App. 147, 163, 174 A.3d 803 (2017), cert. denied, 327 Conn. 1000, 176 A.3d 558 (2018). Thus, the factors set forth in *Ellis* are relevant to our analysis in the present case.

[12] In *Ellis*, the defendant also was charged with sexual misconduct as to two of the other three witnesses whose testimony the state relied on in Sarah S.'s case, and the three cases were consolidated for trial. *State* v. *Ellis*, supra, 270 Conn. 365. Consistent with its conclusion that the court erred in allowing the testimony of the other three witnesses to be used in Sarah S.'s case, our Supreme Court also held that the trial court erred in consolidating Sarah S.'s case with the other two cases. Id., 381.

others), overruled on other grounds by *State* v. *Payne*, 303 Conn. 538, 34 A.3d 370 (2012).

In applying *DeJesus* and *Ellis*, our appellate courts consistently have considered several factors to determine whether evidence of uncharged misconduct is sufficiently similar to the charged conduct to be admissible. Those factors include the location of the assaults, the defendant's conduct, the relationship between the defendant and the victims, the ages of the victims, and the frequency and severity of the assaults. See, e.g., *State* v. *Acosta*, 326 Conn. 405, 416–18, 164 A.3d 672 (2017) (uncharged misconduct evidence admissible where defendant's conduct was similar, victims were similar in age, and victims were both nieces of defendant); *State* v. *Gupta*, supra, 297 Conn. 229 (considering frequency and severity of defendant's assaults on different victims in determining admissibility of uncharged misconduct evidence); *State* v. *Angel M.*, 180 Conn. App. 250, 261–62, 183 A.3d 636 (2018) (uncharged misconduct evidence was admissible where assaults occurred in same location, charged and uncharged conduct was identical, victims were same age, and defendant was "parental figure" to both victims), aff'd, 337 Conn. 655, 255 A.3d 801 (2020); *State* v. *Daniel W.*, supra, 180 Conn. App. 85–86 (uncharged misconduct evidence was admissible where assaults occurred in same location, assaults began while both victims were asleep, victims were both young girls, and charged and uncharged conduct was identical).

After considering the applicability of these factors to the present case, we conclude that the defendant's uncharged misconduct toward P was not sufficiently similar to the charged conduct involving K to be admissible at trial. First, both the frequency and severity of the assaults were different. With K, the defendant's conduct occurred repeatedly over a period of two

months. Further, according to K's testimony, throughout that time, the defendant (1) groped her buttocks, (2) made explicit references to wanting her to perform oral sex on him, (3) had her masturbate in front of him at least ten times, (4) used a series of signals to tell her how he wanted her to masturbate, (5) ran his hand up her inner thigh, almost to the point of vaginal penetration, (6) had her wipe her vaginal fluid on his hand, and (7) showed her sexually inappropriate notes and pictures on his phone. In contrast, the defendant's alleged assault of P was a one time, relatively brief encounter, and his conduct was limited to (1) groping her buttocks and breasts, (2) pulling her hand to his crotch, and (3) insinuating that he wanted her to perform oral sex on him.

The state contends that the defendant's assault of P was less frequent and less severe than his assault of K only because the defendant had just one interaction with P. We are not persuaded. The defendant had P's phone number and knew where she lived. The defendant also saw P at court on at least one occasion. Yet, despite this, he never made a second attempt to assault her. In fact, he chose to ignore her.

Moreover, although the defendant was in a position of authority over both young women, the position of authority that he held in each incident was materially different. As a Touchstone employee, the defendant was responsible for providing K with trauma informed care and for teaching her important life skills. As such, the defendant had significant control over most aspects of her daily life. K also was confined to Touchstone and could not escape the defendant's presence nor tell him to leave the facility. In contrast, the defendant had little control over P. At the time of the alleged assault, P was neither under arrest nor a suspect in a crime. Moreover, given that the incident occurred in P's home, she was not precluded from asking the defendant to

leave or leaving herself. The state argues that the defendant did have control over P because he could have arrested her for possessing drug paraphernalia. P testified, however, that the defendant instructed her to put away the bong before he assaulted her. Furthermore, P did not testify that the defendant threatened to arrest her if she did not accede to his assaultive conduct or that she ever felt at risk of being arrested. Consequently, to the extent that the defendant had any control over P, it was minimal as compared to the pervasive control that he exercised over K.

The locations of the assaults also were materially different. The defendant's alleged assault of P occurred when she was alone and in her home with the defendant, while the defendant's assault of K occurred when she was in a group facility where there was a risk of detection. Moreover, the defendant had a relationship with K while P was a total stranger to him. The young women were also different ages at the time of the alleged assaults, as P was in her early twenties and K was fifteen. But see *State* v. *Johnson*, 76 Conn. App. 410, 419, 819 A.2d 871 (victims were sufficiently similar even though three were adult women and one was teen), cert. denied, 264 Conn. 912, 826 A.2d 1156 (2003).

The state is correct that the uncharged misconduct evidence was not too remote in time to be admissible because the charged conduct occurred just two years after the incident involving P. See id. (three year gap between uncharged and charged incidents was sufficiently proximate). We also agree with the state that there are some similarities between the charged and uncharged misconduct, namely, that (1) both K and P were in vulnerable situations when the assaults occurred, (2) the defendant used his employment to gain access to both young women, and (3) in both incidents, the defendant allegedly groped the young women's buttocks and hinted at them performing oral sex

on him. These few similarities, however, provide an insufficient basis upon which to conclude that evidence of the incident involving P was admissible, given the many significant differences between the charged conduct and the uncharged conduct. Thus, we conclude that evidence of that incident was too dissimilar from the charged conduct to be admissible at the defendant's trial and that the trial court erred in admitting that evidence.[13]

The judgment is reversed and the case is remanded for a new trial.

In this opinion the other judges concurred.

BRIARWOOD OF SILVERMINE, LLC, ET AL. *v.* YEW STREET PARTNERS, LLC, ET AL.
(AC 43487)

Prescott, Cradle and DiPentima, Js.

Syllabus

The plaintiffs, B Co., the owner of certain real property in Norwalk, and D, the former owner of that property and the sole member of B Co., brought claims, inter alia, of adverse possession with respect to a contested area abutting property owned by the defendant, Y Co., and formerly owned by the defendant A. Following a bench trial, the trial court granted the defendants' oral motion to dismiss pursuant to the applicable rule of practice (§ 15-8). In concluding that the plaintiffs failed to establish a prima facie case of adverse possession, the court relied on its finding that D thought, erroneously, that the contested area belonged to her. Thereafter, the court, relying on its erroneous reasoning underlying its

[13] We note that the state contends that any error in this regard was harmless. Because we address this claim as an issue likely to arise on remand, we need not address questions of harmless error in the present appeal. See *State* v. *Ashby*, 336 Conn. 452, 496 n.43, 247 A.3d 521 (2020). Nevertheless, we do note that, in arguing that any error in admitting P's testimony was harmless, the state relies, in part, on A's testimony corroborating K's allegations and A's testimony that the defendant "similarly asked her to masturbate for him." This reliance buttresses our conclusion in part I of this opinion that the failure to disclose relevant impeachment material regarding A was not harmless.

dismissal of the complaint, also rendered judgment for the defendants on their counterclaims seeking to quiet title and for trespass. On appeal, the plaintiffs claimed that the trial court erred by dismissing their complaint pursuant to Practice Book § 15-8, and by rendering judgment in favor of Y Co. on its counterclaim to quiet title, and in favor of A on her counterclaim for trespass. *Held* that the trial court erred in dismissing the plaintiffs' adverse possession claim because, when determining whether the plaintiffs had established a prima facie case, the court misapplied the law of adverse possession: the court operated under the mistaken understanding that a claimant's possession cannot be hostile if he or she believes that the contested property belongs to him or her, which represented a misunderstanding of the essential element of hostility; moreover, the court misunderstood and misapplied two additional elements of the law of adverse possession, namely, that a claimant's possession of contested property must last for an uninterrupted period of fifteen years and that a claimant's possession must be open and visible, the court having erroneously stated that the requirement that a claimant possess the contested property notoriously or hostilely is intended to allow the record owner to toll the fifteen year period of possession, the requisite fifteen year period begins when a claimant possesses the property at issue in such a way that puts the record owner on constructive notice, not when the record owner has actual knowledge of the possession, and, thus, the court's rejection of the plaintiff's claim of adverse possession was based on a misapplication of the law as to the elements of adverse possession relating to how long, and in what manner, the plaintiffs possessed the contested property; accordingly, the case was remanded for a new trial on the complaint and on the counterclaims.

Argued September 13—officially released December 14, 2021

Procedural History

Action, inter alia, seeking to quiet title to certain real property, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendants filed counterclaims; thereafter, the matter was tried to the court, *Kavanewsky, J.*; subsequently, the court granted the defendants' motion to dismiss the complaint and rendered judgment for the defendants on the complaint and in part for the defendants on their counterclaims, from which the plaintiffs appealed to this court. *Reversed in part*; *new trial.*

Igor G. Kuperman, for the appellants (plaintiffs).

Richard J. Meehan, with whom, on the brief, were *Richard T. Meehan, Jr.*, and *Caitlin R. Pfeiffer*, for the appellees (defendants).

Opinion

DiPENTIMA, J. In this adverse possession action, the plaintiffs, Briarwood of Silvermine, LLC (Briarwood), and Ganga Duleep, appeal from the judgment in favor of the defendants, Yew Street Partners, LLC (Yew Street), and Juliann Altieri, rendered by the trial court after it granted the defendants' motion to dismiss, which was made orally pursuant to Practice Book § 15-8,[1] after the plaintiffs had rested their case-in-chief, and on the counts of the defendants' counterclaims seeking to quiet title and for trespass. On appeal, the plaintiffs claim that the court erred by (1) dismissing their claims pursuant to § 15-8, (2) rendering judgment in favor of Yew Street on its counterclaim seeking to quiet title, and (3) rendering judgment in favor of Altieri on the count of her counterclaim for trespass. Because we conclude that the trial court incorrectly applied the law of adverse possession when determining whether the plaintiffs established a prima facie case of adverse possession, we reverse the judgment of the court.[2]

The properties at issue in this case are located at 3 Briarwood Road (Briarwood property)[3] and 14 Yew

[1] Practice Book § 15-8 provides in relevant part: "If, on the trial of any issue of fact in a civil matter tried to the court, the plaintiff has produced evidence and rested, a defendant may move for judgment of dismissal, and the judicial authority may grant such motion if the plaintiff has failed to make out a prima facie case. . . ."

[2] Because we reverse the trial court's judgment dismissing the plaintiffs' complaint, we need not address in detail the two claims challenging the court's judgment on the defendants' counterclaims. The court's decision on the counterclaims relied on its reasoning and conclusions underlying the dismissal of the complaint. Accordingly, a new trial is required on the challenged counts of the counterclaims as well.

[3] Duleep initially held title to the Briarwood property but transferred title to Briarwood in 1994. Duleep is the sole member of Briarwood.

Street (Yew Street property)[4] in Norwalk. The properties share a common property line. As described by the trial court in its oral decision on the defendants' counterclaims, "the northern border of [the Briarwood property] is the southern border of [the Yew Street property]. That border is approximately 290 feet in length. The property over which the plaintiff[s] [have] asserted a claim of adverse possession is immediately north of the . . . southern border [of the Yew Street property]. More specifically, the [contested area] begins in the southeastern most corner of the [Yew Street] property, extending inward to a point approximately forty feet north of the [Yew Street property's] southern boundary, and then extending westerly for approximately 160 feet." In their complaint, the plaintiffs, as to both Altieri and Yew Street and with regard to the contested area, asserted claims of adverse possession, adverse prescription, trespass, obstruction of right to way, nuisance, absolute nuisance, and destruction of personal property, and sought to permanently enjoin Yew Street "from performing any excavation work . . . ." In response, Altieri filed a counterclaim alleging counts of trespass and intentional infliction of emotional distress, and Yew Street filed a counterclaim seeking to quiet title to the Yew Street property.

The plaintiffs presented evidence in support of their case-in-chief, that, if believed, established the following facts. See *Moutinho* v. *500 North Avenue, LLC*, 191 Conn. App. 608, 620, 216 A.3d 667 (under Practice Book § 15-8, standard is whether plaintiff presented sufficient evidence that, if believed, would establish prima facie case), cert. denied, 333 Conn. 928, 218 A.3d 68 (2019). In or around 1973, Duleep and her now deceased husband

[4] In 2009, Altieri acquired title to the Yew Street property. In 2019, Altieri transferred title to the Yew Street property to Yew Street. At all relevant times, the Yew Street property was an "unimproved vacant parcel."

purchased and began to reside at the Briarwood property. Duleep has continuously resided there since that time. At the time Duleep began to reside at the Briarwood property, a stone wall already had been erected. This wall ran along the right side of the Briarwood property, adjacent to Briarwood Road, and it bordered the contested area on the east side. Duleep continuously maintained and repaired the wall, installed a white stockade fence on top of it, and installed a gate. In 1973, Duleep constructed a barbecue area in the contested area. The barbecue area at that time consisted of a cement floor, chairs, and a table. Duleep continuously maintained the barbecue area.

In 1974, Duleep installed a silver wire fence on the property, which began where the stone wall ended and also bordered the contested area. Duleep continuously maintained and repaired the fence. In 1975 or 1976, Duleep installed a shed on the property, which she routinely used for gardening and welding work. Although the shed was not located in the contested area, there was a walkway affixed to it that did extend onto the contested area. In 1978, Duleep planted five fig trees—three of them in the contested area—that she cared for continuously. Duleep also had a metal structure erected to protect the fig trees, one-half of which extended into the contested area.

In approximately 1989, Duleep established a covered, open area in the contested area, which she continuously used to store metal for welding projects. In approximately that same year, Duleep replaced the silver wire fence with a taller, green wire fence. The purpose of both fences was to keep Duleep's children within the boundaries of the Briarwood property, and to keep others out. Duleep continued to maintain and to repair the fence. At some point in the 1990s, Duleep planted a vegetable garden in the contested area, which she consistently and continuously maintained.

In 1993, Duleep erected an arbor in the contested area and placed six pots in the contested area near the barbecue. She consistently and continuously used and maintained these pots. In 1993 or 1994, Duleep established a memorial garden in memory of her late husband in the contested area. The garden contained various plants, including Japanese maple trees, as well as a pergola and an ornamental bridge. The memorial garden was continuously cared for by Duleep, and was consistently used by Duleep and her family. In 1998, Duleep upgraded the barbecue station by installing a deck, an awning, stainless steel tables, a three bay sink, and three barbecue grills. In the 1990s, Duleep planted a "moon garden" on the property that partially extended into the contested area. Duleep consistently and regularly cared for the plants in this garden.

In approximately 2000, Duleep converted the covered, open area that she had used for storing metal into a second shed, which she continuously and consistently used for potting plants and composting. Also, in approximately that same year, Duleep planted six cherry trees at the property, three of which were located in the contested area. Duleep regularly and consistently cared for the cherry trees, fertilizing, weeding, and pruning them, and harvesting their fruit. In 2008, Duleep installed motion lights in the contested area, as well as a memorial garden for a family dog that consisted of annual and perennial plants. Duleep consistently and continuously maintained the garden. In 2015 or 2016, Duleep installed an additional shed and three roofed benches in the contested area.

On August 2, 2018, Altieri removed from the contested area the potting shed, one half of the walkway, the two arbors, and one half of the metal structure above the fig trees, as well as the white stockade fence, gate and sink. Altieri also installed an orange mesh barrier on the property line between the Briarwood property and

Yew Street property that prevented Duleep from accessingone half of her fig trees, the remaining one half of the metal structure above the fig trees, three of her cherry trees, part of the moon garden, the bridge, and the memorial garden.

At the conclusion of the plaintiffs' case-in-chief, and after introducing one of their own witnesses out of order, the defendants moved to dismiss the case pursuant to Practice Book § 15-8. In an oral ruling, the court granted the defendants' motion and found that the plaintiffs had failed to make out a prima facie case of adverse possession.[5] Thereafter, the trial continued and the court heard evidence on the defendants' counterclaims. After the defendants had rested their case, the court, relying on the findings that it made when it dismissed the plaintiffs' complaint, granted Yew Street's counterclaim seeking to quiet title and reserved decision as to Altieri's counterclaim that alleged counts of trespass and intentional infliction of emotional distress. In its memorandum of decision, the court addressed Altieri's counterclaim, rendering judgment in favor of Altieri on her count of trespass and in favor of the plaintiffs on her count of intentional infliction of emotional distress. In rendering judgment on the count of Altieri's counterclaim alleging trespass, the court relied on the determination it had made in its dismissal of the plaintiffs' complaint that "[the plaintiffs] had no lawful ownership or possessory interest in the [contested area of the Yew Street property]." This appeal followed.

On appeal, the plaintiffs claim that the court erred in dismissing their claim of adverse possession because the evidence that they had produced at trial established

[5] Although the defendants did call a witness before the plaintiffs concluded their case-in-chief, the court explicitly stated that it would not consider the testimony of that witness, or any full exhibits introduced by the defendants through that witness, in addressing the defendants' motion to dismiss.

a prima facie case of adverse possession.[6] "The standard for determining whether the plaintiff has made out a prima facie case, under Practice Book § 15-8, is whether the plaintiff put forth sufficient evidence that, if believed, would establish a prima facie case, not whether the trier of fact believes it. . . . For the court to grant the motion [for a judgment of dismissal pursuant to § 15-8], it must be of the opinion that the plaintiff has failed to make out a prima facie case. In testing the sufficiency of the evidence, the court compares the evidence with the allegations of the complaint. . . . In order to establish a prima facie case, the proponent must submit evidence, which, if credited, is sufficient to establish the fact or facts which it is adduced to prove. . . . [T]he evidence offered by the plaintiff is to be taken as true and interpreted in the light most favorable to [the plaintiff], and every reasonable inference is to be drawn in [the plaintiff's] favor." (Internal quotation marks omitted.) *Moutinho* v. *500 North Avenue, LLC*, supra, 191 Conn. App. 620.

The plaintiffs claim that the court erred in dismissing their claim of adverse possession, pursuant to Practice Book § 15-8, because the court incorrectly recited and applied the law of adverse possession, and because they did, in fact, make out a prima facie case of adverse possession. In response, the defendants argue that the court properly found that "a prima facie case for adverse possession had not been proven, and that [t]he plaintiffs' evidence simply would not permit the trier of fact to reasonably conclude that the elements of adverse . . . possession have been established . . . ." (Internal quotation marks omitted.)

[6] Although the plaintiffs argue that the court applied an incorrect standard in resolving the defendants' motion to dismiss pursuant to Practice Book § 15-8, we do not address that argument in light of our determination that the court's judgment, regardless of the standard applied, was based on a misapplication of the law of adverse possession.

"[T]o establish title by adverse possession, the claimant must oust an owner of possession and keep such owner out without interruption for fifteen years by an open, visible and exclusive possession under a claim of right with the intent to use the property as his [or her] own and without the consent of the owner." (Internal quotation marks omitted.) *Schlichting* v. *Cotter*, 109 Conn. App. 361, 364–65, 952 A.2d 73, cert. denied, 289 Conn. 944, 959 A.2d 1009 (2008). "The legal significance of the open and visible element is not . . . an inquiry into whether a record owner subjectively possessed an understanding that a claimant was attempting to claim the owner's property as his [or her] own. Rather, the open and visible element requires a fact finder to examine the extent and visibility of the claimant's use of the record owner's property so as to determine whether a reasonable owner would believe that the claimant was using that property as his or her own." Id., 368.

"Our Supreme Court has explained that [i]n general, exclusive possession can be established by acts, which at the time, considering the state of the land, comport with ownership . . . such acts as would ordinarily be exercised by an owner in appropriating land to his [or her] own use and the exclusion of others. . . . Thus, the claimant's possession need not be absolutely exclusive; it need only be a type of possession which would characterize an owner's use. . . . It is sufficient if the acts of ownership are of such a character as to openly and publicly indicate an assumed control or use such as is consistent with the character of the premises in question." (Internal quotation marks omitted.) *Eberhart* v. *Meadow Haven, Inc.*, 111 Conn. App. 636, 641–42, 960 A.2d 1083 (2008). "[A] claimant's mistaken belief that [s]he owned the property at issue is immaterial in an action for title by adverse possession, as long as the other elements of adverse possession have been established." (Internal quotation marks omitted.) Id.,

646. In other words, a "mistaken belief as to boundary does not bar [a] claim of right or negate [the] essential element of hostility" in a claim of adverse possession. Id.

In the present case, the court, in applying the law of adverse possession to the evidence presented by the plaintiffs, stated: "The plaintiffs' evidence simply would not permit the trier of fact to reasonably conclude that the elements of adverse possession have been established by clear and convincing evidence. . . . [T]here has been absolutely no showing that, prior to 2018, [Duleep] was asserting a claim of ownership to the tract in question, and that she was ousting the defendant[s]. The record clearly demonstrates the contrary. [*Duleep*] *thought, erroneously, that the subject tract belonged to her. She did not engage in any activities with a hostile or notorious intention to oust the owner*. . . . Moreover, *there has been no evidence that the defendant*[*s*] [*were*] *even aware of these activities until very recently*. That is, prior to July, 2018. Likewise, there [has] been no evidence from which a trier could find that any reasonably prudent owner would have been aware of these activities. *The requirement that the possession be done notoriously or hostilely is important. That requirement is intended to allow the record owner to effectively toll the required fifteen year period of continuous adverse possession*, and to protect her interest. And, to this court's way of thinking, and under this record, a trier could not reasonably conclude that . . . by clear and convincing evidence . . . the fifteen year period even commenced until the defendant[s] made [a] specific demand upon [Duleep] to remove the encroachments and [Duleep] refused to do so." (Emphasis added.)

The court's conclusion that the plaintiffs failed to establish a prima facie case of adverse possession is

premised on two distinct, fundamental misunderstandings as to the elements of a claim of adverse possession. First, the court operated under the mistaken understanding that a claimant's possession cannot be hostile if he or she believes that the contested property belongs to him or her. Second, the court erroneously stated that the requirement that a claimant possess the contested property "notoriously or hostilely" is intended to allow the record owner to toll the fifteen year period of possession. We address each of these errors in turn.

First, in concluding that the plaintiffs failed to establish a prima facie case of adverse possession, the court found that Duleep "thought, erroneously, that the subject tract belonged to her. She did not engage in any activities with a hostile or notorious intention to oust the owner. . . . Moreover, there has been no evidence that the defendant[s] [were] even aware of these activities until very recently." The court's reliance on these findings represents a fundamental misunderstanding of an essential element of a claim of adverse possession, namely, that a claimant's possession of contested property be hostile. See *Eberhart* v. *Meadow Haven, Inc.*, supra, 111 Conn. App. 646. Under the court's stated understanding of this element, possession of contested property cannot be hostile if the claimant has operated under the belief that she owns the contested property. This understanding is clearly at odds with the law, as set forth previously in this opinion, that a "mistaken belief as to boundary does not bar [a] claim of right or negate [the] essential element of hostility" in a claim of adverse possession. Id. Accordingly, the court's judgment dismissing the plaintiffs' claim of adverse possession is based on a misapplication of the law, specifically with regard to the element of hostility.

Second, in concluding that the plaintiffs failed to establish a prima facie case of adverse possession, the court found that "there has been absolutely no showing

that, prior to 2018, [Duleep] was asserting a claim of ownership to the tract in question, and that she was ousting the defendant[s]." The court further held that "[t]he requirement that the possession be done notoriously or hostilely . . . is intended to allow the record owner to effectively toll the required fifteen year period of continuous adverse possession . . . ." These statements represent a fundamental misunderstanding, and misapplication, of two additional elements of the law of adverse possession, namely, that a claimant's possession of contested property must last for an uninterrupted period of fifteen years, and that a claimant's possession must be open and visible. See *Schlichting* v. *Cotter*, supra, 109 Conn. App. 364–65.

It is well established that, for a claimant to establish title by adverse possession, the claimant must possess the contested property "without interruption for fifteen years . . . ." (Internal quotation marks omitted.) Id., 364. In the present case, the trial court was mistaken in its understanding of when the fifteen year period began. According to the court, the period does not begin until the record owner has *actual notice* of the claimant's possession of the contested property, because "[t]he requirement that the possession be done notoriously or hostilely . . . is intended to allow the record owner to effectively toll the required fifteen year period of continuous adverse possession . . . ." This construction is at odds with the law relative to the requisite fifteen year period of possession in a claim of adverse possession.

As we have previously established, "[t]he legal significance of the open and visible element is not . . . an inquiry into whether a record owner subjectively possessed an understanding that a claimant was attempting to claim the owner's property as his [or her] own. Rather, the open and visible element requires a fact

finder to examine the extent and visibility of the claimant's use of the record owner's property so as to determine *whether a reasonable owner would believe that the claimant was using that property as his or her own*." (Emphasis added.) *Schlichting* v. *Cotter*, supra, 109 Conn. App. 368. Accordingly, the fifteen year period begins when a claimant begins to possess the property at issue in such a way that puts the record owner on *constructive notice*, not when the record owner has actual knowledge of the possession. See id. Therefore, the court's rejection of the plaintiffs' claim of adverse possession was based on a misapplication of the law as to the elements of adverse possession relating to how long, and in what manner, the plaintiffs possessed the contested property.

The judgment is reversed with respect to the complaint and with respect to the counts of the defendants' counterclaims seeking to quiet title and for trespass, and the case is remanded for a new trial on the complaint and the quiet title and trespass counts of the counterclaims; the judgment is affirmed with respect to the count of the counterclaim alleging intentional infliction of emotional distress.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* BEN B. OMAR
(AC 44263)

Prescott, Moll and Flynn, Js.

Syllabus

The defendant, who previously had been convicted of various drug related offenses, appealed to this court following the trial court's denial of his motion to correct an illegal sentence. In 2016, after the defendant had provided information to the state in connection with another case, the trial court granted the defendant's application for sentence modification, reducing his sentence to eight years of incarceration followed by five years of special parole. In 2018, our legislature enacted a public act

(P.A. 18-63), which amended certain statutes (§§ 53a-28 (b) and 54-125e (b)) to eliminate special parole as a punishment for certain drug related offenses, including those for which the defendant had been convicted and sentenced, and to require that the trial court make certain determinations prior to the imposition of a period of special parole. Thereafter, the defendant filed a motion to correct his sentence, requesting that his term of special parole be eliminated. The trial court denied the motion, stating that the amendments to §§ 53a-28 (b) and 54-125e (b) required by P.A. 18-63 did not apply retroactively, and the defendant appealed to this court. *Held* that the trial court properly denied the defendant's motion to correct an illegal sentence: contrary to the defendant's claim, *State* v. *Nathaniel S.* (323 Conn. 290) did not control this court's retroactivity analysis because our Supreme Court found that the juvenile transfer statute at issue in that case was automatic and, by its nature, procedural, permitting the amendment to that statute to be applied retroactively, whereas the special parole punishment at issue in the present case was not automatic, rather, prior to the enactment of P.A. 18-63, choosing to impose it was an act of judicial discretion; moreover, in accordance with *State* v. *Bischoff* (337 Conn. 739) and *State* v. *Kalil* (314 Conn. 529), certain statutes (§§ 54-194 and 1-1 (t)), which create the presumption that changes to criminal statutes prescribing or defining punishment apply prospectively only unless such statutes expressly state otherwise, applied to § 53a-28 (b), a criminal statute that prescribes or defines a punishment; furthermore, the effective date of P.A. 18-63 is the only textual reference to the date of applicability found in the act and the act does not reference retroactivity, which, in light of §§ 54-194 and 1-1 (t), evidenced a legislative intent for prospective application only; accordingly, the plain language of P.A. 18-63 clearly and unambiguously prohibited retroactive application and such an interpretation did not lead to an absurd or unworkable result, especially when viewed in the context of §§ 54-194 and 1-1 (t).

Argued October 4—officially released December 14, 2021

Procedural History

Substitute information charging the defendant with the crimes of possession of narcotics with intent to sell by a person who is not drug-dependent, sale of narcotics by a person who is not drug-dependent, conspiracy to sell narcotics by a person who is not drug-dependent, sale of a controlled substance within 1500 feet of a school, and possession of a controlled substance within 1500 feet of a school, brought to the Superior Court in the judicial district of Waterbury, geographical area

number four, and tried to the jury before *Adelman, J.*; verdict and judgment of guilty; thereafter, the court, *Fasano, J.*, granted the defendant's application for a sentence modification; subsequently, the court, *Hon. Roland D. Fasano*, judge trial referee, denied the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Affirmed.*

Gary A. Mastronardi, assigned counsel, for the appellant (defendant).

Michele C. Lukban, senior assistant state's attorney, with whom, on the brief, were *Maureen T. Platt*, state's attorney, and *Alexandra Arroyo*, former special deputy assistant state's attorney, for the appellee (state).

Opinion

FLYNN, J. This is an appeal from the judgment of the trial court denying the amended motion to correct an illegal sentence filed by the defendant, Ben B. Omar, pursuant to Practice Book § 43-22. On appeal, the defendant claims that the court erred in concluding that certain amendments to Connecticut's special parole statute, embodied in No. 18-63, §§ 1 and 2, of the 2018 Public Acts (P.A. 18-63), which became effective on October 1, 2018, did not apply retroactively to render his 2016 modified sentence imposing special parole void.[1] We disagree and, accordingly, affirm the judgment of the trial court.

We conclude that when the legislature enacted P.A. 18-63, which changed the law by prohibiting special parole as a sentence for certain narcotics offenses, it

[1] At the time of oral argument of this case, defense counsel withdrew the defendant's claim that the trial court erroneously concluded that it lacked jurisdiction to hear his claim of improper or insufficient canvassing. At the same time, defense counsel withdrew the defendant's claim that the trial court abused its discretion in concluding that the defendant's special parole term had not been imposed in a manner that violated federal due process.

did so prospectively, not retroactively. We also conclude that the silence in P.A. 18-63 regarding retroactivity is evidence of intent for prospective application only; see *State* v. *Bischoff*, 337 Conn. 739, 756, 258 A.3d 14 (2021); that prospective application creates neither an absurd nor an unworkable result; and that General Statutes §§ 54-194 and 1-1 (t) apply and, when read together, provide that the repeal of a statute prescribing the punishment for a crime shall not affect any liability for punishment incurred before the repeal is effective, unless a contrary legislative intent is expressed within an amendatory statute.

The following facts are pertinent to our resolution of this appeal. On April 22, 2010, the defendant was convicted, after a jury trial, of the following drug offenses, which occurred on March 25, 2009: in count one, possession of narcotics with intent to sell by a person who is not drug-dependent in violation of General Statutes (Rev. to 2009) § 21a-278 (b);[2] in count two, sale of narcotics by a person who is not drug-dependent in violation of § 21a-278 (b); in count three, conspiracy to sell narcotics by a person who is not drug-dependent in violation of § 21a-278 (b) and General Statutes § 53a-48 (a); in count four, sale of a controlled substance within 1500 feet of a school in violation of General Statutes § 21a-278a (b); and in count five, possession of a controlled substance within 1500 feet of a school in violation of § 21a-278a (b). Under what was then the authority of *State* v. *Chicano*, 216 Conn. 699, 725, 584 A.2d 425 (1990) (overruled by *State* v. *Polanco*, 308 Conn. 242, 61 A.3d 1084 (2013)), cert. denied, 501 U.S. 1254, 111 S. Ct. 2898, 115 L. Ed. 2d 1062 (1991), the trial court merged the second count with the first count and

[2] Our references in this opinion to § 21a-278 (b) are to the 2009 revision of the statute.

the fifth count with the fourth count.[3] On all charges, the defendant was sentenced to a total effective sentence of twenty-one years of incarceration, eight of which were mandatory, execution suspended after twelve years, followed by five years of probation.

On March 2, 2016, due to his cooperation in providing unsolicited information to the state that produced a guilty plea in the case of a person who had been charged in connection with a shooting, the defendant submitted an application for sentence modification. His cooperation resulted in a proceeding on that same date before the court, *Fasano, J.*, in which the defendant moved to modify his sentence, to which the state agreed. The new sentence modified his original sentence to a total effective sentence of eight years of incarceration followed by five years of special parole. It is the imposition of special parole that creates the principal issue in this appeal.

After the defendant's sentence was modified to include a term of special parole, our legislature enacted P.A. 18-63, effective October 1, 2018, which eliminated special parole as a punishment for certain drug offenses. Public Act 18-63 is titled "An Act Concerning Special Parole for High-Risk, Violent and Sexual Offenders" and contains three sections. Relevant to the present appeal are §§ 1 and 2 of P.A. 18-63,[4] which amended

[3] We note that, pursuant to *State* v. *Polanco*, supra, 308 Conn. 245, which was decided after the defendant in the present case was sentenced, when a defendant has been convicted of greater and lesser included offenses, the trial court must vacate, rather than merge, the judgment of conviction for the lesser included offense.

[4] Public Act 18-63 provides in relevant part: "Be it enacted by the Senate and House of Representatives in General Assembly convened:

"Section 1. Subsection (b) of section 53a-28 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2018*):

"(b) Except as provided in section 53a-46a, when a person is convicted of an offense, the court shall impose one of the following sentences . . . (9) a term of imprisonment and a period of special parole as provided in section 54-125e, *as amended by this act, except that the court may not*

General Statutes (Rev. to 2009) §§ 53a-28 (b) and 54-125e (b),[5] respectively. Prior to the enactment of P.A. 18-63 and at the time of the defendant's sentence modification, § 53a-28 (b) (9) authorized a court to impose as a punishment "a term of imprisonment and a period of special parole as provided in section 54-125e." Section 1 of P.A. 18-63 amended that portion of § 53a-28 (b) (9) by adding in relevant part that "the court may not impose a period of special parole for convictions of offenses under chapter 420b." Sections 21a-278 and 21a-278a, two of the statutes under which the defendant was convicted, are included in chapter 420b of the General Statutes. Section 2 of P.A. 18-63 amended § 54-125e (b) by adding in relevant part that "the court may not impose a period of special parole unless the court determines, based on the nature and circumstances of the offense, the defendant's prior criminal record and the defendant's history of performance on probation or parole, that a period of special parole is necessary to ensure public safety." Public Act 18-63 lists an effective date of October 1, 2018.

The defendant, in a self-represented capacity, filed an amended motion to correct the March 2, 2016 sentence with the clerk on June 28, 2019. On November 25, 2019, his counsel filed a newly amended motion to correct his sentence.[6] In effect, the motion asked that

impose a period of special parole for convictions of offenses under chapter 420b.

"Sec. 2. Subsection (b) of section 54-125e of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2018*): (b) *(1)* When sentencing a person, *the court may not impose a period of special parole unless the court determines, based on the nature and circumstances of the offense, the defendant's prior criminal record and the defendant's history of performance on probation or parole, that a period of special parole is necessary to ensure public safety. . . .*" (Emphasis in original.)

[5] Unless we state otherwise, our references in this opinion to §§ 53a-28 (b) and 54-125e are to the 2009 revisions of those statutes.

[6] In his November 25, 2019 motion to correct an illegal sentence, the defendant stated: "On or about December 10, 2018, while on his special

Judge Fasano's modification of the defendant's sentence be corrected to eliminate the term of special parole, which had been imposed three years earlier, in 2016, because P.A. 18-63, effective October 1, 2018, had eliminated special parole as a possible sentence for the kind of drug offenses for which the defendant had been convicted and sentenced. On January 6, 2020, the state filed an objection to the amended motion to correct.

On June 9, 2020, the court, *Hon. Roland D. Fasano*, judge trial referee, denied the defendant's amended motion to correct an illegal sentence and issued a memorandum of decision. The court stated in relevant part: "[T]here is no language in the modified statute nor in the case law to support the proposition that the modification of the special parole statute applies retroactively. Such an application would result in a multitude of cases returned for resentencing." This appeal followed. Additional facts and procedural history will be set forth as necessary.

We now turn to the principal issue to be decided in this appeal, namely, whether P.A. 18-63, §§ 1 and 2, should be applied retroactively to the defendant's March 2, 2016 sentence. We agree with the trial court that P.A. 18-63 does not apply retroactively.

We begin by setting forth the standard of review applicable to this claim. Ordinarily, claims that the trial court improperly denied a defendant's motion to correct an illegal sentence are reviewed pursuant to an abuse

parole, [the defendant] was charged with [assault in the third degree] which violated his special parole. Significantly, he was free in the community for about three years when this new charge took place. On or about April 22, 2019, he was sentenced [to] a charge of reckless endangerment and was sentenced to one year [of incarceration], execution suspended, followed by three years of probation.

"Following his conviction . . . he was then presented to the parole board on or about June 11, 2019, and was incarcerated for one year to serve with the earliest discharge date being February 4, 2020."

of discretion standard. *State* v. *Fairchild*, 155 Conn. App. 196, 210, 108 A.3d 1162, cert. denied, 316 Conn. 902, 111 A.3d 470 (2015). Nonetheless, a trial court's determination of whether a new statute is to be applied retroactively or only prospectively presents a question of law over which this court exercises plenary review. See *State* v. *Bischoff*, supra, 337 Conn. 745, citing *Walsh* v. *Jodoin*, 283 Conn. 187, 195, 925 A.2d 1086 (2007).

The defendant, relying on *State* v. *Nathaniel S.*, 323 Conn. 290, 295, 146 A.3d 988 (2016), argues that the statutes amended by P.A. 18-63 are procedural in nature and, thus, that the amendments are intended to apply retroactively in the absence of a clear expression of legislative intent to the contrary. The state argues that the defendant's reliance on *Nathaniel S.* is misplaced. It argues that, because P.A. 18-63, §§ 1 and 2, repealed and replaced the imposition of a form of punishment for a criminal conviction, this court's retroactivity analysis is controlled by *State* v. *Kalil*, 314 Conn. 529, 107 A.3d 343 (2014), and *State* v. *Bischoff*, supra, 337 Conn. 739, along with our savings statutes, §§ 54-194 and 1-1 (t). The state contends that, because the legislature did not clearly and unequivocally express an intent for retroactive application of §§ 1 and 2 of P.A. 18-63, they should apply prospectively only. We agree with the state.

In *State* v. *Nathaniel S.*, supra, 323 Conn. 292, our Supreme Court addressed the retroactivity of No. 15-183, § 1, of the 2015 Public Acts, which amended the juvenile transfer statute by increasing the age of a child from fourteen to fifteen whose case is subject to automatic transfer from the docket for juvenile matters to the regular criminal docket of the Superior Court. The defendant in *Nathaniel S.* was fourteen years old when he allegedly committed an offense that was subject to automatic transfer, and his case was transferred to the criminal docket in accordance with the statute in effect

at that time. Id., 292–93. The amendment, however, went into effect before his case was tried. Id. On appeal, our Supreme Court addressed whether the amendment applied retroactively, such that a child's case that already had been transferred to the criminal docket should be transferred back to the juvenile docket. Id.

Our Supreme Court stated: "Several rules of presumed legislative intent govern [a court's] retroactivity analysis. Pursuant to those rules, [a court's] first task is to determine whether a statute is substantive or procedural in nature." Id., 294. The court added that "[p]rocedural statutes have been traditionally viewed as affecting remedies, not substantive rights, and therefore leave the preexisting scheme intact. . . . [Accordingly] we have presumed that procedural . . . statutes are intended to apply retroactively absent a clear expression of legislative intent to the contrary . . . ." (Internal quotation marks omitted.) Id., 295. The court concluded that the juvenile transfer statute was procedural in nature and held that the amendment applied retroactively. Id., 293, 296. The court stated that "the amended statute, on its face, dictates only a procedure—automatic transfer . . . ." Id., 296. It further stated that, in a previous case, it had "characterized the juvenile transfer statute as akin to a change of venue and, 'by its nature, procedural.' " Id.

In the present case, P.A. 18-63, § 1, eliminates a class of people on whom a judge can impose the punishment of special parole. Specifically, it modifies § 53a-28 (b) so that a person convicted of narcotics offenses under chapter 420b will no longer be exposed to this punishment. P.A. 18-63, § 1. Furthermore, unlike in *Nathaniel S.*, there is nothing "automatic" about special parole. Rather, prior to the enactment of P.A. 18-63, judges merely had the option of imposing special parole as one of multiple punishments. Thus, choosing to impose special parole was an act of discretion, as opposed to

the automatic transfer statute at issue in *Nathaniel S.*, which applies to every fifteen year old charged with certain types of crimes. Accordingly, we reject the defendant's claim that *Nathaniel S.* governs this court's retroactivity analysis.

We now turn to the retroactivity analysis that our Supreme Court has applied in cases such as *State* v. *Kalil*, supra, 314 Conn. 529, and *State* v. *Bischoff*, supra, 337 Conn. 739. "In criminal cases, to determine whether a change in the law applies to a defendant, we generally have applied the law in existence on the date of the offense, regardless of its procedural or substantive nature." (Internal quotation marks omitted.) *State* v. *Kalil*, supra, 552. In contrast to *Nathaniel S.*, amendments that change the punishment structure for certain crimes instead implicate the savings clauses codified in §§ 54-194 and 1-1 (t), "which apply to changes to criminal statutes prescribing punishment and create a presumption against retroactivity." *State* v. *Bischoff*, supra, 748 n.4. Section 54-194 provides: "The repeal of any statute defining or prescribing the punishment for any crime shall not affect any pending prosecution or any existing liability to prosecution and punishment therefor, unless expressly provided in the repealing statute that such repeal shall have that effect." Section 1-1 (t) provides: "The repeal of an act shall not affect any punishment, penalty or forfeiture incurred before the repeal takes effect, or any suit, or prosecution, or proceeding pending at the time of the repeal, for an offense committed, or for the recovery of a penalty or forfeiture incurred under the act repealed." Our Supreme Court "has interpreted [the plain meaning of] these statutes to mean that there is a presumption that changes to criminal statutes prescribing or defining punishment apply prospectively only, unless the statute expressly states otherwise." *State* v. *Bischoff*, supra, 749.

In *State* v. *Bischoff*, supra, 337 Conn. 742, the defendant was convicted of, among other crimes, possession of narcotics in violation of General Statutes (Rev. to 2013) § 21a-279 (a). After he was arrested and charged with the crime, but prior to his conviction and sentencing, the legislature enacted Public Acts, Spec. Sess., June, 2015, No. 15-2, §1 (Spec. Sess. P.A. 15-2), which amended § 21a-279 to reclassify a first offense for possession of narcotics from a class D felony subject to a maximum sentence of imprisonment of seven years, to a class A misdemeanor subject to a maximum sentence of one year of incarceration. Id., 741–42. The defendant argued that, although the amendment did not mention retroactivity, "a prospective-only application of the amendment would lead to an absurd or unworkable result . . . ." Id., 742. The court disagreed and concluded that the language of Spec. Sess. P.A. 15-2, § 1, "clearly and unambiguously" prohibited retroactive application. Id., 761.

In reaching its conclusion, our Supreme Court, quoting *Nathaniel S.*, stated that the question of whether a criminal statute has retroactive application "is one of legislative intent and is governed by well established rules of statutory construction." (Internal quotation marks omitted.) Id., 746. General Statutes § 1-2z directs that "[t]he meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. . . ." In *Bischoff*, the court stated: "In enacting amendments . . . our legislature explicitly repeals the prior version of the amended statute. . . . Thus, this court consistently has held . . . that amendments and substitutions to statutes are the equivalent of repeals, and, thus, the savings statutes apply to any change—amendment, substitution, or repeal—to a criminal statute *prescribing or defining punishment*." (Emphasis added.) *State* v. *Bischoff*, supra, 337 Conn. 748 n.5.

Our Supreme Court in *Bischoff* first looked to the effective date of the amendment, which was "the only textual reference to the date of applicability" found in the bill. Id., 747. The court noted that, although the effective date of an amendment is not dispositive of the legislature's intent regarding retroactivity, it "consider[s] the effective date in light of the applicable savings statutes and the legislature's lack of any reference to retroactivity." Id., 748. Additionally, the court noted that §§ 54-194 and 1-1 (t) applied because Spec. Sess. P.A. 15-2, § 1, "repealed and replaced the penalty structure for the crime of possession of narcotics . . . ." (Footnote omitted.) Id., 748–49.

Our Supreme Court in *Bischoff* also rejected the defendant's argument that the legislature did not intend for §§ 54-194 and 1-1 (t) to apply to ameliorative changes to sentencing schemes. Id., 750. It stated that, "[s]ince at least 1936, this court has held that changes to criminal sentencing schemes, even those that provide a benefit to defendants, are subject to these savings statutes." Id., 751–52. In concluding that the amendment did not apply retroactively, the court stated that its interpretation of the statute "does not lead to an absurd or unworkable result, especially when viewed in context of the related savings statutes, §§ 54-194 and 1-1 (t)." Id., 761.

In the present case, P.A. 18-63, §§ 1 and 2, both provide that subsection (b) of § 53a-28 and subsection (b) of § 54-125e are "*repealed* and the following is substituted in lieu thereof . . . ." (Emphasis added.) Furthermore, special parole is a form of punishment and § 53a-28 (b) (9) sets forth the circumstances in which a court can impose this punishment. Thus, it is fair to characterize § 53a-28 (b) as a criminal statute that prescribes or defines a punishment. Accordingly, pursuant to *Bischoff*, §§ 54-194 and 1-1 (t) apply to the present case.

Having concluded that our savings statutes apply to the present case, we must interpret the plain meaning of the amendments to §§ 53a-28 (b) and 54-125e (b). As stated previously, § 1-2z directs us to first look at the text of the statutes themselves and their relationships to other statutes. "If, after examining such text and considering such relationship[s], 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[s] shall not be considered." (Internal quotation marks omitted.) *State* v. *Heredia*, 310 Conn. 742, 756, 81 A.3d 1163 (2013). "[T]he fact that . . . relevant statutory provisions are silent . . . does not mean that they are ambiguous. . . . [O]ur case law is clear that ambiguity exists only if the statutory language at issue is susceptible to more than one plausible interpretation." (Internal quotation marks omitted.) *State* v. *Jackson*, 153 Conn. App. 639, 644, 103 A.3d 166 (2014), cert. denied, 315 Conn. 912, 106 A.3d 305 (2015).

The effective date of P.A. 18-63 is October 1, 2018. As in *Bischoff*, this date is the only textual reference to the date of applicability found in the act, and there is no mention of retroactivity. The silence of P.A. 18-63 regarding retroactivity does not mean that the act is ambiguous. As our Supreme Court stated in *State* v. *Bischoff*, supra, 337 Conn. 756, "because we must assume that the legislature is aware that we have interpreted §§ 54-194 and 1-1 (t) as requiring an explicit expression of intent regarding retroactivity to overcome this presumption, we likewise must assume that the legislature's silence regarding retroactivity in [a particular act] is evidence of an intent for prospective application only." If the legislature had intended the amendments in the present case to apply retroactively, it would have used " 'clear and unequivocal' language to evince such an intent." *State* v. *Kalil*, supra, 314 Conn.

558. In the absence of any express language in the statute stating otherwise, the amendments apply prospectively only. In light of our well established interpretation of §§ 54-194 and 1-1 (t), the fact that P.A. 18-63, §§ 1 and 2, are silent regarding retroactivity does not create ambiguity. See *State* v. *Bischoff*, supra, 756. Thus, there is no ambiguity in P.A. 18-63, §§ 1 and 2, that would require us to examine the act's legislative history.

Accordingly, we conclude that the plain language of P.A. 18-63, §§ 1 and 2, clearly and unambiguously prohibits retroactive application and that this interpretation does not lead to an absurd or unworkable result, especially when viewed in context of the related savings statutes, §§ 54-194 and 1-1 (t). See id., 761. Therefore, we conclude that the trial court properly denied the defendant's amended motion to correct an illegal sentence.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* DEJON A. SMITH (AC 44156)

Prescott, Moll and Flynn, Js.

Syllabus

The defendant, who previously had been convicted on a plea of guilty of the crime of possession of narcotics with intent to sell, appealed to this court following the trial court's denial of his motion to correct an illegal sentence. In 2013, as part of his plea agreement, the defendant was sentenced to five years of incarceration, followed by five years of special parole. In 2018, our legislature enacted a public act (P.A. 18-63), which amended certain statutes (§§ 53a-28 (b) and 54-125e (b)) to eliminate special parole as a punishment for certain drug related offenses, including that for which the defendant had been convicted and sentenced, and to require the trial court to make certain determinations prior to the imposition of a period of special parole. Thereafter, the defendant filed a motion to correct an illegal sentence. The defendant argued that he should be resentenced because P.A. 18-63 eliminated special parole

as a possible punishment for the offense for which he had been sentenced. The state filed an objection to the motion. The trial court denied the motion, stating that §§ 53a-28 (b) and 54-125e (b) were substantive, rather than procedural, in nature and, as such, the amendments required by P.A. 18-63 did not apply retroactively. *Held* that the trial court properly denied the defendant's motion to correct an illegal sentence: contrary to the defendant's claim, this court's retroactivity analysis was not controlled by the doctrine of clarifications because P.A. 18-63 was a change in the law, rather than clarifying legislation, as the legislature did not incorporate into the act an explicit statement of its intent to clarify §§ 53a-28 (b) and 54-125e (b), the prior language of those statutes was already clear, and, through the enactment of P.A. 18-63, the legislature added language to change such statutes by narrowing their application, and, accordingly, this court was not required to consider the legislative history of the act in determining the legislature's intent with regard to retroactivity; moreover, pursuant to *State* v. *Omar* (209 Conn. App. 283), because P.A. 18-63 repealed and replaced the imposition of a form of punishment for a criminal conviction, this court's retroactivity analysis was instead controlled by *State* v. *Bischoff* (337 Conn. 739), *State* v. *Kalil* (314 Conn. 529), and the savings statutes (§§ 54-194 and 1-1 (t)), and, interpreted in accordance therewith, P.A. 18-63 clearly and unambiguously prohibited retroactive application of the amendments to §§ 53a-28 (b) and 54-125e (b), and such an interpretation did not lead to an absurd or unworkable result.

Argued October 4—officially released December 14, 2021

Procedural History

Information charging the defendant with the crimes of possession of narcotics with intent to sell, possession of drug paraphernalia, and illegal operation of a motor vehicle while under suspension, brought to the Superior Court in the judicial district of Litchfield, geographical area number eighteen, where the defendant was presented to the court, *Ginocchio, J.*, on a plea of guilty to possession of narcotics with intent to sell; thereafter, the state entered a nolle prosequi as to each of the remaining charges; judgment of guilty; subsequently, the court, *Danaher, J.*, denied the defendant's amended motion to correct an illegal sentence, and the defendant appealed to this court. *Affirmed*.

Emily H. Wagner, assistant public defender, for the appellant (defendant).

Thadius L. Bochain, deputy assistant state's attorney, with whom, on the brief, was *Dawn Gallo*, state's attorney, for the appellee (state).

Opinion

FLYNN, J. This is an appeal from the judgment of the trial court denying the amended motion to correct an illegal sentence filed by the defendant, Dejon A. Smith, pursuant to Practice Book § 43-22. On appeal, the defendant claims that the court erred in concluding that certain amendments to Connecticut's special parole statute, embodied in No. 18-63, §§ 1 and 2, of the 2018 Public Acts (P.A. 18-63), which became effective on October 1, 2018, did not apply retroactively to render his 2013 sentence imposing special parole void.[1] We disagree and, accordingly, affirm the judgment of the trial court.

We conclude that, when the legislature enacted P.A. 18-63, which changed the law by prohibiting special parole as a sentence for certain narcotics offenses, it did so prospectively, not retroactively. We also conclude that the silence in P.A. 18-63 regarding retroactivity is evidence of intent for prospective application only; see *State* v. *Bischoff*, 337 Conn. 739, 756, 258 A.3d 14 (2021); that prospective application creates neither an absurd nor an unworkable result; and that General Statutes §§ 54-194 and 1-1 (t) apply and, when read together, provide that the repeal of a statute prescribing the punishment for a crime shall not affect any liability for punishment incurred before the repeal is effective, unless a contrary legislative intent is expressed within an amendatory statute.

The following facts are pertinent to our resolution of this appeal. On May 14, 2013, the defendant was

[1] In *State* v. *Omar*, 209 Conn. App. 283, A.3d (2021), which was released on the same date as this opinion, the defendant makes the same claim.

arrested in Torrington. The state charged him with, among other crimes, possession of narcotics with intent to sell in violation of General Statutes (Rev. to 2013) § 21a-277 (a). On October 8, 2013, the defendant pleaded guilty to that charge. On December 19, 2013, as part of a plea agreement, he was sentenced to an agreed upon sentence of five years to serve, followed by five years of special parole.

After the defendant was sentenced, our legislature enacted P.A. 18-63, which eliminated special parole as a punishment for certain drug offenses. Public Act 18-63 is titled "An Act Concerning Special Parole for High-Risk, Violent and Sexual Offenders" and contains three sections. Relevant to the present appeal are §§ 1 and 2 of P.A. 18-63,[2] which amended General Statutes (Rev. to 2013) §§ 53a-28 (b) and 54-125e (b),[3] respectively. Prior to the enactment of P.A. 18-63 and at the time the defendant committed the crimes for which he was convicted, § 53a-28 (b) (9) authorized a court to impose

[2] Public Act 18-63 provides in relevant part: "Be it enacted by the Senate and House of Representatives in General Assembly convened:

"Section 1. Subsection (b) of section 53a-28 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2018*):

"(b) Except as provided in section 53a-46a, when a person is convicted of an offense, the court shall impose one of the following sentences . . . (9) a term of imprisonment and a period of special parole as provided in section 54-125e, *as amended by this act, except that the court may not impose a period of special parole for convictions of offenses under chapter 420b*.

"Sec. 2. Subsection (b) of section 54-125e of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2018*): (b) *(1)* When sentencing a person, *the court may not impose a period of special parole unless the court determines, based on the nature and circumstances of the offense, the defendant's prior criminal record and the defendant's history of performance on probation or parole, that a period of special parole is necessary to ensure public safety. . . .*" (Emphasis in original.)

[3] Unless we state otherwise, our references in this opinion to §§ 53a-28 (b) and 54-125e are to the 2013 revisions of those statutes.

as a punishment "a term of imprisonment and a period of special parole as provided in section 54-125e." Section 1 of P.A. 18-63 amended that portion of § 53a-28 (b) (9) by adding in relevant part that "the court may not impose a period of special parole for convictions of offenses under chapter 420b." Section 21a-277 (a), the statute under which the defendant was convicted, is included in chapter 420b of the General Statutes. Section 2 of P.A. 18-63 amended § 54-125e (b) by adding in relevant part that "the court may not impose a period of special parole unless the court determines, based on the nature and circumstances of the offense, the defendant's prior criminal record and the defendant's history of performance on probation or parole, that a period of special parole is necessary to ensure public safety." Public Act 18-63 lists an effective date of October 1, 2018.

On June 20, 2019, the defendant, in a self-represented capacity, filed a motion to correct an illegal sentence. On August 13, 2019, the court appointed a public defender to conduct a "sound basis" determination under *State* v. *Casiano*, 282 Conn. 614, 627, 922 A.2d 1065 (2007), regarding the defendant's motion. The public defender determined that there was a sound basis as to one of the issues raised in the defendant's motion and, on November 27, 2019, filed an amended motion to correct an illegal sentence on the defendant's behalf. In that motion, the defendant argued that he should be resentenced because P.A. 18-63 had eliminated special parole as a possible sentence for the drug offense for which he had been convicted and sentenced. On December 27, 2019, the state filed an objection to the amended motion to correct. On January 3, 2020, the parties appeared before the court, *Danaher, J.*, and agreed to have the matter considered on the papers.

On February 4, 2020, the court, *Danaher, J.*, denied the defendant's amended motion to correct an illegal

sentence and issued a memorandum of decision. The court, relying in part on *State* v. *Nathaniel S.*, 323 Conn. 290, 146 A.3d 988 (2016), concluded that the statutes amended by P.A. 18-63, §§ 1 and 2, are substantive, rather than procedural, in nature and, thus, cannot be applied retroactively. The court also stated that "there [was] no need to attempt to resolve the retroactivity issue by analyzing the legislative history regarding P.A. 18-63."

We now turn to the principal issue to be decided in this appeal, namely, whether P.A. 18-63, §§ 1 and 2, should be applied retroactively to the defendant's agreed upon December 19, 2013 sentence. We agree with the trial court that P.A. 18-63 does not apply retroactively, but we reach our conclusion by applying the retroactivity analysis that our Supreme Court has applied in cases such as *State* v. *Kalil*, 314 Conn. 529, 107 A.3d 343 (2014), and *State* v. *Bischoff*, supra, 337 Conn. 739.

We begin by setting forth the standard of review applicable to this claim. Ordinarily, claims that the trial court improperly denied a defendant's motion to correct an illegal sentence are reviewed pursuant to an abuse of discretion standard. *State* v. *Fairchild*, 155 Conn. App. 196, 210, 108 A.3d 1162, cert. denied, 316 Conn. 902, 111 A.3d 470 (2015). Nonetheless, a trial court's determination of whether a new statute is to be applied retroactively or only prospectively presents a question of law over which this court exercises plenary review. See *State* v. *Bischoff*, supra, 337 Conn. 745, citing *Walsh* v. *Jodoin*, 283 Conn. 187, 195, 925 A.2d 1086 (2007).

The defendant advances two distinct arguments as to why the legislature intended P.A. 18-63 to apply retroactively. He first argues that P.A. 18-63 is clarifying legislation and that the legislature "rewrote [§ 53a-28 (b)] to comport with its original intent." Relying on the

legislative history of P.A. 18-63, he contends that "the legislature took direct, corrective action to resolve the misuse or overuse of special parole as a sentencing tool by the judiciary . . . ." Thus, he contends, "[b]ecause the law was never intended to authorize special parole for nonviolent drug offenders, the defendant's sentence of special parole is not authorized by statute and is illegal." In other words, the defendant argues that courts were never permitted to impose sentences of special parole on nonviolent drug offenders and that "the law was being misapplied on a consistent basis by the judiciary . . . ." Alternatively, the defendant argues that if this court interprets P.A. 18-63 as a change in the law, as opposed to clarifying legislation, it is clear that the legislature intended that special parole not be imposed on any nonviolent drug offender. As part of this argument, he requests that, to the extent that *State* v. *Kalil*, supra, 314 Conn. 529, requires this court to apply a different interpretation, *Kalil* should be overruled.[4] Because *Kalil* is binding on this court, we will not address this part of the defendant's argument.

The state argues that P.A. 18-63 is a change in the law, rather than clarifying legislation, and that § 53a-28 (b) (9) prescribes or defines a punishment. Thus, it argues that the savings clauses codified in §§ 54-194[5] and 1-1 (t),[6] which prohibit retroactivity in the absence

[4] In his brief to this court, the defendant acknowledges that *Kalil* is binding on this court. He claims that this section of his brief "is written with the [Connecticut] Supreme Court as its intended audience and is included in order to preserve the issue for future review by the Supreme Court."

[5] General Statutes § 54-194 provides: "The repeal of any statute defining or prescribing the punishment for any crime shall not affect any pending prosecution or any existing liability to prosecution and punishment therefor, unless expressly provided in the repealing statute that such repeal shall have that effect."

[6] General Statutes § 1-1 (t) provides: "The repeal of an act shall not affect any punishment, penalty or forfeiture incurred before the repeal takes effect, or any suit, or prosecution, or proceeding pending at the time of the repeal, for an offense committed, or for the recovery of a penalty or forfeiture incurred under the act repealed."

of an express statement by the legislature, apply to the amended version of § 53a-28 (b) (9). The state further argues that this court need not analyze the legislative history of P.A. 18-63 to determine whether it is clarifying legislation. In his reply brief, the defendant counters that the doctrine of clarifications requires this court to first determine whether the legislation clarified an existing law or changed it. He contends that, "in making this initial determination, our courts look to the amendatory language as well as the legislative history and circumstances surrounding the amendment's enactment." He argues that "the reviewing court only conducts its retroactivity analysis as articulated in *Kalil* and *Bischoff* if it first determines that the amendment is a change in the law rather than a clarification." We agree with each of the state's arguments.

We first address the defendant's argument that P.A. 18-63 is clarifying legislation. Although a criminal statute is at issue in the present case, the defendant relies heavily on *Middlebury* v. *Dept. of Environmental Protection*, 283 Conn. 156, 927 A.2d 793 (2007), which is a civil case. He does so despite the existence of criminal case law and criminal savings statutes that specifically control how we must interpret amendatory legislation relating to the punishment for crimes. The defendant does not cite any criminal case in which this court or our Supreme Court has looked at the legislative history and circumstances surrounding the enactment of an amendment affecting the punishment for a crime before applying these savings statutes. "The savings statutes that govern amendments to criminal laws contemplate only prospective application. . . . Our courts have repeatedly held that these savings statutes preserve all prior offenses and liability therefor so that when a crime is committed and the statute violated is later amended or repealed, defendants remain liable under the revision of the statute existing at the time of the commission

of the crime." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Jackson*, 153 Conn. App. 639, 644–45, 103 A.3d 166 (2014), cert. denied, 315 Conn. 912, 106 A.3d 305 (2015). The defendant requests that we look beyond the plain language of P.A. 18-63 to ascertain the intent of the legislature regarding retroactivity, which is precisely what our criminal savings statutes and General Statutes § 1-2z[7] prohibit.

The defendant argues that the "original intent" of special parole "was to provide close monitoring for postrelease inmates and quick reincarceration for dangerous and violent offenders who posed an especially high risk to public safety." He contends that, over time, courts increasingly imposed special parole on nonviolent offenders beyond what the legislature intended. He argues that, "once the inappropriate use of special parole was brought to light, the legislature reacted by passing P.A. 18-63, which was designed, principally, to realign authorized sentences under § 53a-28 with the original intent of § 54-125e . . . . Nonviolent drug crimes were *never* intended to fall within its ambit." (Emphasis added.) In support of this argument, he cites the legislative history of both P.A. 18-63 and No. 98-234 of the 1998 Public Acts, which is the act that created special parole as a form of punishment.

We disagree with the defendant that we should consult the legislative history of P.A. 18-63 to determine the legislature's intent regarding retroactivity.[8] Our principles of statutory interpretation are well established.

[7] General Statutes § 1-2z provides: "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered."

[8] At oral argument before this court, the defendant reiterated his argument that we must look beyond the plain language of P.A. 18-63 to ascertain the legislature's intent when it created special parole in 1998. His appellate

"We will not give retrospective effect to a criminal statute absent a clear legislative expression of such intent." (Internal quotation marks omitted.) *State* v. *Moore*, 180 Conn. App. 116, 122, 182 A.3d 696, cert. denied, 329 Conn. 905, 185 A.3d 595 (2018). "[P]ursuant to § 1-2z, [the court is] to go through the following initial steps: first, consider the language of the statute at issue, including its relationship to other statutes, as applied to the facts of the case; second, if after the completion of step one, [the court] conclude[s] that, as so applied, there is but one likely or plausible meaning of the statutory language, [the court] stop[s] there; but third, if after the completion of step one, [the court] conclude[s] that, as applied to the facts of the case, there is more than one likely or plausible meaning of the statute, [the court] may consult other sources, beyond the statutory language, to ascertain the meaning of the statute." (Internal quotation marks omitted.) *State* v. *Prazeres*, 97 Conn. App. 591, 594–95, 905 A.2d 719 (2006).

"[T]he legislature knows how to make a statute apply retroactively when it intends to do so." *State* v. *Moore*, supra, 180 Conn. App. 123. "Courts cannot, by construction, read into legislation provisions not clearly stated." *Thornton Real Estate, Inc.* v. *Lobdell*, 184 Conn. 228, 230, 439 A.2d 946 (1981). Furthermore, criminal statutes are to be strictly construed; *State* v. *Smith*, 194 Conn.

counsel stated: "[T]he original legislation was intended to exclude offenses like drug offenses that are not considered high risk violent sexual offenses, but that . . . wasn't clear in its original state." His counsel later stated: "I do not see an ambiguity in the original legislation . . . I see silence and the Supreme Court has said numerous times that if the amendatory language is silent as to whether or not it clarifies, the court looks beyond that language to the legislative history."

By acknowledging that the original legislation was unambiguous, defense counsel contradicted the argument that P.A. 18-63 clarified the special parole statutes. In other words, if the original legislation was subject only to one interpretation, then there existed no language in the original statutes for the amendments to clarify. Thus, any amendments to those statutes would *change* their meaning.

213, 221–22 n.7, 479 A.2d 814 (1984); and "[w]e must look at the law as drafted, not at its purported aim. [I]n the interpretation of statutes, the intent of the legislature is to be found not in what it meant to say, but in what it did say. . . . A legislative intention not expressed in some appropriate manner has no legal existence." (Citations omitted; internal quotation marks omitted.) Id., 222.

In the present case, the legislature did not incorporate into the title or text of P.A. 18-63 an explicit statement of its intent to clarify §§ 53a-28 (b) and 54-125e (b). See *Greenwich Hospital* v. *Gavin*, 265 Conn. 511, 519, 829 A.2d 810 (2003). The defendant does not point to any ambiguities in the amendatory language of P.A. 18-63 that lead us to question the legislature's intent regarding clarification. Public Act 18-63 did not, for example, change the definition of a word or phrase that was subject to multiple interpretations. Rather, in enacting P.A. 18-63, the legislature eliminated a punishment that the plain language of §§ 53a-28 (b) and 54-125e explicitly allowed courts to impose on nonviolent drug offenders prior to its enactment.

Although some members of the legislature in 1998 might have intended that special parole be imposed only on violent offenders who posed a threat to public safety, the legislature included no language of that intent in the statutes governing special parole. The legislature in 2018 recognized that those statutes permitted courts to impose periods of special parole on nonviolent drug offenders and chose to amend the statutes. The 2018 amendments *changed* the statutory scheme by (1) adding a clause to § 53a-28 (b) (9), which established that any person convicted of a crime under chapter 420b could no longer be exposed to a punishment that previously was permissible, and (2) adding new language to § 54-125e (b) that requires courts, when sentencing a person, to make a determination that imposing

a period of special parole is necessary to ensure public safety. Put differently, the language in the prior versions of these statutes was already clear prior to the amendments, and the legislature added language to change them by narrowing their application. For the foregoing reasons, we conclude that the doctrine of clarifications does not guide our retroactivity analysis in the present case.

We addressed the retroactivity of P.A. 18-63 in *State* v. *Omar*, 209 Conn. App. 283, A.3d (2021), also released today. In *Omar*, the defendant was convicted of nonviolent drug offenses included in chapter 420b of our General Statutes. Id., 288. In 2016, his sentence was modified to include a period of special parole. Id., 287. In 2019, he filed a motion to correct an illegal sentence in which he argued that P.A. 18-63 should be applied retroactively and requested that the court eliminate the term of special parole that it had imposed three years earlier. Id., 288–89.

In *Omar*, the state advanced a similar argument as it does in the present case, namely, "that, because P.A. 18-63, §§ 1 and 2, repealed and replaced the imposition of a form of punishment for a criminal conviction, this court's retroactivity analysis is controlled by *State* v. *Kalil*, [supra, 314 Conn. 529], and *State* v. *Bischoff*, supra, 337 Conn. 739, along with our savings statutes, §§ 54-194 and 1-1 (t)." *State* v. *Omar*, supra, 209 Conn. App. 290. After applying the applicable principles of statutory interpretation, we held that "the plain language of P.A. 18-63, §§ 1 and 2, clearly and unambiguously prohibits retroactive application and that this interpretation does not lead to an absurd or unworkable result, especially when viewed in context of the related savings statutes, §§ 54-194 and 1-1 (t)." Id., 296. We see no reason to repeat the analysis set forth in *State* v.

Omar, supra, 283.[9] For the reasons set forth therein, we conclude that the trial court properly denied the defendant's amended motion to correct an illegal sentence.

The judgment is affirmed.

In this opinion the other judges concurred.

JOHN LOCKHART *v.* NAI ELITE, LLC, ET AL.
(AC 44273)

Suarez, Clark and Pellegrino, Js.

Syllabus

The plaintiff sought to recover unpaid commissions and hourly wages from the defendants pursuant to the applicable statutes (§§ 31-72 and 31-68). The defendants raised three special defenses and filed a five count counterclaim. Following a trial to the court, judgment was rendered in favor of the plaintiff as to his claims under § 31-72 and as to the defendant's counterclaim, but in favor of the defendant as to the plaintiff's claims under § 31-68. The trial court determined that the plaintiff was entitled to recover reasonable attorney's fees, and subsequently awarded the plaintiff the full amount of attorney's fees that he had sought. The defendants appealed to this court, claiming that the award of attorney's fees was excessive and unreasonable given that the plaintiff was only partially successful on his claims. *Held* that the trial court did not abuse its discretion in awarding the plaintiff the full amount of his attorney's fees: the court considered all twelve of the discretionary factors normally applied in determining a reasonable attorney's fee, and determined that the amount of the award sought by the plaintiff was reasonable, as the plaintiff not only prevailed on his case-in-chief but also successfully defended against three special defenses and a five count counterclaim;

[9] In *Omar*, the defendant, relying on *State* v. *Nathaniel S.*, supra, 323 Conn. 295, argued that the statutes amended by P.A. 18-63 are procedural in nature and, thus, that the amendments are intended to apply retroactively in the absence of a clear expression of legislative intent to the contrary. *State* v. *Omar*, supra, 209 Conn. App. 290. In the present case, the defendant argues that P.A. 18-63 should be applied retroactively because it is clarifying legislation. These arguments rely on two separate retroactivity analyses. Thus, it was necessary for us to analyze the defendant's clarification argument in its entirety prior to addressing our decision in *Omar*.

moreover, although the plaintiff did not prevail on all of his claims, all of his claims were interrelated.

Argued October 20—officially released December 14, 2021

Procedural History

Action to recover damages for nonpayment of wages, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the defendants filed a counterclaim; thereafter, the matter was tried to the court, *Dubay*, *J.*; subsequently, the court, *M. Taylor*, *J.*, rendered judgment in part for the plaintiff on the complaint and for the plaintiff on the counterclaim; thereafter, the court, *M. Taylor*, *J.*, granted the plaintiff's application for attorney's fees, and the defendants appealed to this court. *Affirmed.*

David L. Gussak, for the appellants (defendants).

Andrew L. Houlding, for the appellee (plaintiff).

Opinion

PELLEGRINO, J. This appeal arises from an action instituted by the plaintiff, John Lockhart, against the defendants, NAI Elite, LLC (NAI Elite), and Carl Berman.[1] In that action, the plaintiff asserted claims for the collection of unpaid commissions under General Statutes § 31-72, and hourly minimum and overtime wages under General Statutes § 31-68, and sought double damages, attorney's fees, and damages for duress. The defendants raised three special defenses[2] and filed a counterclaim asserting claims of breach of contract,

[1] Berman is the founder and managing director of NAI Elite.

[2] With respect to the special defenses, the defendants claimed that (1) "[u]nder the doctrine of estoppel, the plaintiff's claims are barred, in whole or in part, by the terms of the contract he signed with [NAI Elite]," (2) "the plaintiff's claims are barred, in whole or in part, by his own tortious acts and/or breaches of the [parties' employment agreement]," and (3) "the plaintiff's claims are barred, in whole or in part, by the release and waiver provisions contained in [the parties' termination agreement]."

tortious interference, conversion, and violation of General Statutes § 52-564, and seeking, pursuant to Practice Book § 17-54, an order of the court declaring, inter alia, the rights and liabilities of the parties and that the plaintiff is not entitled to a commission on the relevant transactions. A bench trial was held on the plaintiff's complaint and the defendants' special defenses and counterclaim. After the conclusion of the trial, and while awaiting posttrial briefs, the trial judge, *Dubay*, *J.*, unexpectedly died. Pursuant to General Statutes § 51-183f, the matter was assigned to a successor judge, *M. Taylor*, *J.*, for adjudication on the record. After reviewing the record, transcripts, exhibits, and briefs, the trial court found in favor of the plaintiff on his claim for unpaid commissions under § 31-72 and for attorney's fees, but determined that he was not entitled to unpaid minimum and overtime wages under § 31-68 and could not prevail on his claims for duress or double damages. The court rejected the defendants' special defenses. The trial court rendered judgment in favor of the plaintiff on his claims for unpaid commissions and attorney's fees, and with respect to all counts of the defendants' counterclaim.

The plaintiff subsequently filed an application for an award of attorney's fees, claiming that he had incurred attorney's fees in the amount of $68,831.24. The court granted the plaintiff's application for an award of attorney's fees, concluding that "the plaintiff should be made whole by requiring the defendant[s] to pay for his attorney's fees, which the court finds reasonable, but not punitive." The defendants then brought the present appeal from the trial court's judgment in favor of the plaintiff and the award of attorney's fees. On appeal, the defendants originally claimed that the court erred by (1) finding that the plaintiff was entitled to pursue an action under § 31-72, (2) concluding that the defendants produced insufficient evidence to offset the amount

of the plaintiff's commission, (3) concluding that the plaintiff met the burden of "the so-called 'ABC Test,' " and (4) awarding excessive and unreasonable attorney's fees to the plaintiff. At oral argument before this court, the defendants withdrew all of their claims except for their claim of excessive attorney's fees. We conclude that the amount of attorney's fees awarded to the plaintiff did not constitute an abuse of discretion and, accordingly, affirm the judgment of the trial court.

"We set forth the standard of review and applicable legal principles. We review the reasonableness of the court's award of attorney's fees under the abuse of discretion standard. . . . Under the abuse of discretion standard of review, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of [the amount of attorney's fees awarded] is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion it did. . . .

"The factors a court normally applies in determining a reasonable attorney's fee include (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee for similar work in the community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. . . . That list of factors is not, however, exclusive. The court may assess the reasonableness of the fees requested using any number of factors . . . ." (Citations omitted; internal quotation

marks omitted.) *Glastonbury* v. *Sakon*, 184 Conn. App. 385, 392–94, 194 A.3d 1277 (2018).

According to the defendants, the court's award of attorney's fees to the plaintiff is excessive because "[t]he court awarded . . . [only] 42 percent of the amount requested in the only two counts in which the plaintiff prevailed." Therefore, the defendants argue, "the fees requested by the plaintiff should be significantly modified to reflect the crucial factor of the results achieved weighed against the claims asserted." We conclude that the fact that the plaintiff was only partially successful on his claims does not demonstrate that the court abused its discretion in awarding the plaintiff the full amount of attorney's fees that he sought. In reaching this conclusion, we need only look to the court's order granting the plaintiff's application for an award of attorney's fees.

In his thorough and well reasoned order, Judge Taylor considered all twelve of the discretionary factors that are "normally applie[d] in determining a reasonable attorney's fee"; (internal quotation marks omitted) *Glastonbury* v. *Sakon*, supra, 184 Conn. App. 393; and concluded that the amount of the award sought by the plaintiff was reasonable. Specifically, with regard to the defendants' claim that the award was excessive, the court stated: "[T]he plaintiff prevailed in his case-in-chief in a skillful manner, as well as defending against three special defenses and [a] five [count] [counterclaim]. Preparation for the trial appeared extensive and posttrial briefs were professionally prepared, thorough and lengthy. The fee was fixed at a discounted, hourly rate involving three days of trial. Although the plaintiff did not prevail on his alternative claims made pursuant to our minimum wage law, the court finds they were *related wage claims*, although novel and unavailing. The plaintiff did not prevail on the double damages provision of § 31-72, *also a related claim*, due to the

defendants' subjective good faith in not paying wages owed. *The plaintiff's level of success on his interrelated claims was, therefore, substantial.*" (Emphasis added.) Clearly, the court considered the fact that the plaintiff was only partially successful on his claims and found that because all of his claims were interrelated, he should be awarded attorney's fees for the entirety of his case. We find the reasoning behind the court's order to be both properly grounded in the law and reasonable, and, accordingly, we conclude that the court did not abuse its discretion.

The judgment is affirmed.

In this opinion the other judges concurred.

MARIANNA GRZESZCZYK *v.* CONNECTICUT STATE EMPLOYEES RETIREMENT COMMISSION (AC 44281)

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

Syllabus

Pursuant to statute (§ 7-439g (a)), no retirement option of a member of the municipal employees retirement fund shall be effective until the member has retired, and, in the event the member dies prior to the effective date of commencement of benefits, any election of an option shall be deemed cancelled.

Pursuant further to statute (§ 7-440 (h)), if a member of the municipal employees retirement fund who has elected a retirement option but who has not completed the age and service requirements for retirement dies, his contributions to the fund shall be paid to the beneficiary named by the member.

The plaintiff, whose nephew, E, had been a municipal employee of the city of New Britain and who contributed to the municipal employees retirement fund, sought, after E's death, to have the defendant Connecticut State Employees Retirement Commission pay her a refund of the retirement contributions E made to the fund. E initially had submitted Form CO-931 designating his brother, J, as the beneficiary of any retirement benefits. E subsequently left municipal employment before attaining the retirement age of fifty-five. More than one year later, he applied for an early retirement benefit, which was administratively

denied. In connection with his application for the early retirement benefit, E filed Form CO-1203, designating the plaintiff to receive any refund, if applicable, of his retirement contributions. Following E's death before his fifty-fifth birthday, the defendant paid a refund of his contributions to J, pursuant to E's Form CO-931. The plaintiff thereafter filed an application to receive a refund, which the defendant denied. The plaintiff subsequently sought a declaratory ruling from the defendant regarding the application and interpretation of § 7-440 (h) and requested that she be deemed E's beneficiary and receive a refund of his contributions. Following the defendant's issuance of a declaratory ruling finding that E's Form CO-1203 was invalid pursuant to § 7-439g (a), because E, who had not reached the age and service requirements for retirement, was not retired, and, thus, that the contributions properly had been refunded to J, the plaintiff appealed to the trial court, which rendered judgment dismissing the appeal. On the plaintiff's appeal to this court, *held* that the trial court did not err in determining that there was substantial evidence in the record to support the commission's ruling and that the ruling was supported by the forms used and by the applicable statutes: E's designation of the plaintiff on Form CO-1203 as his beneficiary was cancelled pursuant to the mandate of § 7-439g (a), thus, he did not effectively change his beneficiary from his earlier election of J; moreover, as E's election of the plaintiff as his beneficiary pursuant to Form CO-1203 would have become effective only on his retirement, and E died before he retired, the benefits the plaintiff might have received never became effective and the designation of the plaintiff as beneficiary never became effective; furthermore, E's use of Form CO-1203 did not reflect his clear intent to change his beneficiary, and a letter to the plaintiff from the defendant's employee expressing her belief that E intended to change his beneficiary was merely the employee's opinion and not a finding as to E's intent, as the language on Form CO-1203 indicated only that E intended to designate the plaintiff as his beneficiary in connection with his election of a specific retirement option that never became effective, rather than change his beneficiary for all purposes.

Argued October 7—officially released December 14, 2021

Procedural History

Appeal from the decision of the defendant denying the plaintiff's claim for a refund of certain retirement benefits, and for other relief, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Cordani, J.*; judgment dismissing the appeal, from which the plaintiff appealed to this court. *Affirmed.*

Russell D. Zimberlin, with whom was *Winona Zimberlin*, for the appellant (plaintiff).

Cindy M. Cieslak, with whom, on the brief, was *Michael J. Rose*, for the appellee (defendant).

Opinion

BRIGHT, C. J. The plaintiff, Marianna Grzeszczyk, appeals from the judgment of the trial court dismissing her administrative appeal from the declaratory ruling issued by the defendant, the Connecticut State Employees Retirement Commission (commission),[1] denying the plaintiff's request for a refund of the retirement contributions made by her nephew, Edward Panus (Edward). The plaintiff claims that the court improperly determined that Edward designated his brother, John Panus (John), as the beneficiary who was entitled to receive a refund of Edward's retirement contributions. We affirm the judgment of the court.

The following facts, as found by the commission, and procedural history are relevant to our resolution of the plaintiff's claim. On February 5, 1985, Edward was hired by the city of New Britain (city), and he contributed to the Connecticut Municipal Employees Retirement System (retirement system) administered by the commission. On April 7, 1986, Edward submitted Form CO-931, titled "Designation of Retirement System-Tier-Plan-Beneficiary," designating John as his beneficiary. The form's certification provides: "I hereby revoke all previous appointments of beneficiaries made by me, if any, and designate the person(s) named above as beneficiary(ies) . . . to receive upon my death any and

[1] We note that the trial case caption misidentifies the defendant as "State of Connecticut Employee Retirement Commission." Under General Statutes § 5-155a (a), "[t]he general administration and responsibility for the proper operation of the state employees retirement system is vested in a single board of trustees to be known as the *Connecticut State Employees Retirement Commission*." (Emphasis added.)

all sums due me from the [r]etirement [s]ystem of which I am a member. This designation shall remain in effect unless I subsequently change it by written notice to the State Retirement Division."

In January, 2000, before attaining the retirement age of fifty-five years old, Edward stopped working for the city. On June 12, 2014, he applied "for an early retirement benefit pending a decision on his nonservice connected disability retirement application. . . . However, [his] application was administratively denied given that it was filed more than twelve months following the date his employment terminated." On June 19, 2014, in connection with his application for an early retirement, Edward submitted Form CO-1203, titled "Income Payment Election Form," electing to receive a reduced monthly benefit for his lifetime with payments guaranteed for twenty years from his date of retirement. The form includes the following explanation of the election: "If you should die within . . . [twenty] years . . . from your date of retirement, the remaining payments will be made to your contingent annuitant(s). Because this is a period certain option, if your annuitant dies before you, you may choose a new designated annuitant if you provide [the retirement system] with a certified copy of the death certificate. If you die before your annuitant and your annuitant dies before the expiration of the selected period, the commuted value of the remaining guaranteed payments shall be paid in one lump sum to the annuitant's estate." Despite his election, Edward did not designate a contingent annuitant in part II of the form, which explicitly calls for the "Designation of Contingent Annuitant." In part IV of the form, titled "Designation of Beneficiary to Receive Refund if Applicable," Edward did list the plaintiff as the "[b]eneficiary designated to receive remaining contributions and interest (if any) *after* the deaths of member and annuitant." (Emphasis in original.)

On October 22, 2015, before his fifty-fifth birthday, Edward died. The commission subsequently refunded $23,619.57, representing Edward's contributions to the retirement system and interest accumulated thereon, to John, pursuant to the Form CO-931 Edward completed in 1986. Nevertheless, in a December 8, 2017 letter to the plaintiff, Kimberly McAdam, a coordinator for the retirement system, stated: "[Edward] was scheduled to start receiving retirement benefits as of his [fifty-fifth] birthday . . . . When his records were reviewed, we discovered that he passed away . . . . [Edward] had chosen you to be his beneficiary in the event of his death. Consequently, you are entitled to receive a refund of his employee contributions and interest. I have enclosed an application for you to complete so that you may receive this refund."

The plaintiff submitted the completed application for a refund in December, 2017. In a June 7, 2018 letter, however, McAdam stated: "I did not realize that you had already received the refund, which is handled by a different staff member. I apologize for the error." Thereafter, in a June 20, 2018 letter, after realizing that a refund had previously been paid to John, McAdam denied the plaintiff's request for a refund, explaining that Edward's Form CO-1203 was not valid and that, as a result, the retirement system properly refunded Edward's retirement contributions and interest to John on December 31, 2015, in accordance with Edward's designation on the Form CO-931 Edward completed when he joined the retirement system in 1986. At the end of the letter, McAdam stated that "[i]t's an unfortunate situation. I believe that your nephew intended for you to be the beneficiary, but he did not take the appropriate steps to make that change."

On April 5, 2019, the plaintiff filed a petition with the commission seeking a declaratory ruling regarding the

application and interpretation of General Statutes § 7-440 (h).[2] The plaintiff requested that she be deemed Edward's intended beneficiary and receive a refund of his retirement contributions. On September 19, 2019, the commission issued its ruling finding that John was the individual entitled to a refund of Edward's retirement contributions and, therefore, denied the plaintiff's requests. The commission explained that "[Edward] had completed Form CO-1203 electing an optional form of payment, but he did not complete the age and service requirements for retirement because he had not reached age [fifty-five]. [General Statutes §] 7-439g (a) provides in [relevant] part: 'No option shall be effective until a member has retired, and in the event a member dies prior to the effective date of commencement of benefits, any election of an option shall be deemed cancelled . . . .' Accordingly, because [Edward] was not retired because he had not reached the age and service requirements, the election made on his [Form CO-1203] was not . . . valid, and the contributions were properly refunded to the beneficiary he designated on his Form CO-931, John Panus, which remained a valid beneficiary designation.

"Indeed, [Edward] elected a [twenty year] certain retirement benefit, and his Form CO-1203 identified [the plaintiff] as the beneficiary in [p]art IV. However, as indicated on the Form CO-1203, the beneficiary named in [p]art IV of this form is entitled to receive remaining contributions and interest (if any) *after the deaths of the member and the annuitant following retirement.*

[2] General Statutes § 7-440 (h) provides in relevant part: "In case of the death of a member before retirement, who has not elected a retirement income option in accordance with the provisions of this part or who has made such election but has not completed the age and service requirements that would permit him to retire on his own application . . . his contributions to the fund plus such five per cent interest, if any . . . shall be paid from the fund on the order of the Retirement Commission to the beneficiary or beneficiaries, if any, named by such member. . . ."

Here, [Edward] was not retired as his disability retirement application had been administratively denied." (Emphasis added; footnote omitted.)

On October 29, 2019, pursuant to General Statutes § 4-183 (a),[3] the plaintiff appealed to the Superior Court. On September 4, 2020, the court issued a memorandum of decision dismissing the administrative appeal. The court concluded that the commission's ruling was supported by substantial evidence in the record and was consistent with both the forms used and the applicable statutes. The court reasoned: "The Form CO-931 completed and filed by [Edward] on April 7, 1986, established his brother, [John] as the beneficiary generally of [his] retirement account. The designation of [John] as the beneficiary using this form was not tied to any particular retirement election or benefit. In contrast, the Form CO-1203 completed and filed by [Edward] on June 19, 2014, elected a particular retirement benefit, a twenty year certain benefit, and established the plaintiff as beneficiary *in connection with the elected benefit.* Thus under § 7-439g (a), because [Edward] died before the elected benefit commenced, both the election and the beneficiary appointment connected to the election were cancelled. In contrast, the beneficiary named in Form CO-931 was not connected to any particular benefit election and thus remained in place." (Emphasis in original.) This appeal followed.

We begin with the applicable standard of review. "[R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither this court nor the trial court may retry the case or

[3] General Statutes § 4-183 (a) provides in relevant part: "A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision may appeal to the Superior Court as provided in this section. . . ."

substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . [A]n agency's factual and discretionary determinations are to be accorded considerable weight by the courts. . . . It is well settled [however] that we do not defer to the board's construction of a statute—a question of law—when . . . the [provisions] at issue previously ha[v]e not been subjected to judicial scrutiny or when the board's interpretation has not been time tested." (Internal quotation marks omitted.) *Dept. of Public Safety* v. *Board of Labor Relations*, 296 Conn. 594, 598–99, 996 A.2d 729 (2010).

In the present case, neither § 7-439g nor § 7-440 (h) has been subject to judicial review, and the commission has not claimed that its interpretation of the statutes is time tested. Accordingly, to the extent that we are required to interpret the applicable statutes, our review is plenary. See *Commissioner of Public Safety* v. *Board of Firearms Permit Examiners*, 129 Conn. App. 414, 420, 21 A.3d 847, cert. denied, 302 Conn. 918, 27 A.3d 369 (2011).

On appeal, the plaintiff claims that the court erred in affirming the commission's ruling that John is entitled to the refund of Edward's retirement contributions under § 7-440 (h). She contends that Edward "complied with the plain language on the forms" and properly changed his beneficiary designation to the plaintiff by filing Form CO-1203. The commission responds that the denial of the plaintiff's request for a refund of retirement contributions was consistent with §§ 7-439g and 7-440 (h). We agree with the commission.

We begin with the relevant statutes. Section 7-439g (a) provides in relevant part that a member "may elect

one of the following optional forms for retirement income by filing with the Retirement Commission a written election on a form provided by the commission. . . . No option shall be effective until a member has retired, and in the event a member dies prior to the effective date of commencement of benefits, any election of an option shall be deemed cancelled except as provided in subsection (d) of this section. . . ."[4]

Under § 7-440 (h), if a member who has elected a retirement option but has not completed the age and service requirements for retirement dies, "his contributions to the fund plus such five per cent interest, if any . . . shall be paid from the fund on the order of the Retirement Commission to the beneficiary or beneficiaries, if any, named by such member."

In the present case, Edward initially filed a Form CO-931 designating John as his beneficiary. It is undisputed that, in the absence of an effective change of this designation, John was entitled to receive a refund of Edward's contributions to the retirement system and interest thereon if Edward died before retiring. Thereafter, in connection with his application for early retirement, Edward filed a Form CO-1203 electing an option for his retirement income and designating the plaintiff

[4] Subsection (d) does not apply in the present case because Edward died before completing the age and service requirements for retirement. See General Statutes § 7-439g (d) ("[I]f a member *who has completed the age and service requirements for retirement* . . . and who has elected to receive his retirement benefits under subdivision (2) or (3) of subsection (a) of this section, dies prior to the effective date of commencement of benefits but within ninety days after he first elects to receive his retirement benefits under subdivision (2) or (3) of said subsection (a), then his beneficiary or contingent annuitant shall receive an income in an amount equal to the benefit that would have been payable to the survivor had the member retired the day he died and had his benefit been paid under the option he had elected at the time of his death. This subsection shall not apply after ninety days after the date the member first elects to receive his benefit under subdivision (2) or (3) of subsection (a) of this section. . . ." (Emphasis added.))

as the beneficiary under that option, to receive remaining contributions and interest (if any) after his death and the death of his contingent annuitant. Because Edward died before reaching the required age for retirement, however, that option never became effective and was deemed cancelled under § 7-439g. The issue, then, is whether Edward's designation of the plaintiff as his beneficiary on his Form CO-1203, despite the statutorily mandated cancellation of the option he requested on that form, was an effective change of his beneficiary to receive a refund of his retirement system contributions and the interest thereon. We conclude that it was not.

Although each form allows a member to designate a beneficiary, the forms are not interchangeable. Form CO-931 specifies that the member is designating a beneficiary "to receive . . . any and all sums due [to the member] from the Retirement System . . . ." The form's certification provides that the member "hereby revoke[s] all previous appointments of beneficiaries made by me, if any, and designate[s] the person(s) named above as beneficiary(ies) . . . to receive upon my death any and all sums due me from the Retirement System of which I am a member. This designation shall remain in effect unless I subsequently change it by written notice to the State Retirement Division."

In contrast, Form CO-1203 concerns a member's retirement income options and specifies that the member is designating a beneficiary "to receive remaining contributions and interest (if any) *after* the deaths of member and annuitant." (Emphasis in original.) Significantly, the form's certification does not reference the designation of a beneficiary or the revocation of any prior designations. Instead, it provides: "I understand that my signature on this form means that I will retire with Option C in force and effect unless I make a contrary option election prior to retirement. I acknowledge

that prior to signing this election, I had opportunity to ask questions and obtain additional information from [the retirement system] staff with regard to the effect of such an election on my monthly payment. I understand that I must inform [the retirement system] if I receive a social security disability award prior to the age of 62. *I further understand that no change in this income payment election can be made after my retirement for any reason, that is, I can never change this payment election and choose another payment option.*" (Emphasis in original.) In addition, § 7-439g (a) makes clear that the election made on Form CO-1203 does not become effective until the member has retired and, "in the event a member dies prior to the effective date of commencement of benefits, any election of an option shall be deemed cancelled . . . ."

The differences between these forms are readily apparent. The designation of a beneficiary on Form CO-931 is unrelated to a member's choice of a retirement option, whereas the designation of a beneficiary on Form CO-1203 is attendant to the member's election of a retirement income option. Indeed, the designation of a beneficiary on Form CO-1203 is secondary to the member's designation of a contingent annuitant who would receive any remaining payments if the member dies after retiring and receiving benefits under the option selected. Moreover, although Form CO-931's certification unequivocally states that the member is revoking all previous appointments of beneficiaries, Form CO-1203's certification does not refer to the beneficiary designation in part IV or to any prior appointments of beneficiaries.

Despite these differences in the forms used by Edward, and the clear statement in § 7-439g that any election of an option is deemed cancelled if the member dies before receiving retirement benefits, the plaintiff argues that "[t]he explicit terms of [Form CO-1203 state]

that this form is used to identify a beneficiary to receive . . . remaining contributions, not survivor benefits." (Internal quotation marks omitted.) The plaintiff, however, omits a significant portion of the statement in part IV of Form CO-1203, which further specifies that the beneficiary is entitled to receive "remaining contributions plus interest (if any) *after the deaths of member and annuitant*." (Emphasis altered.) An annuitant is "a beneficiary of an annuity." Merriam-Webster's Collegiate Dictionary (11th Ed. 2014) p. 50. As such, one does not become an annuitant until the annuity exists. Pursuant to Form CO-1203, the option Edward chose would become effective only on his retirement and, accordingly, the annuity would come into existence only on his retirement. That the contingent annuitant's interest arises only after a member's retirement is confirmed by the general information and instructions portion of Form CO-1203, which provides: "If you should die within . . . 20 years (240 payments) *from your date of retirement*, the remaining payments will be made to your contingent annuitant(s)." (Emphasis added.) Consequently, when Edward died before retiring, the annuity option he chose never became effective, and the benefits identified in Form CO-1203, including those benefits the plaintiff as his designated beneficiary might have received, never materialized. Thus, it simply was not possible for the designation of the plaintiff as the beneficiary to receive any remaining contributions to ever take effect. This fact coupled with the language used in Form CO-1203 reinforces that the form is used for the sole purpose of electing a retirement income option that will become effective on the member's retirement, which never occurred in the present case.

The plaintiff also claims that this court should adopt a standard of substantial rather than strict compliance with the requirements for changing a beneficiary and should conclude that Edward substantially complied

with those requirements by filing his Form CO-1203. She cites several cases involving the designation of a beneficiary in a life insurance policy in which courts have applied the substantial compliance doctrine to determine whether the insured had made a valid change of the beneficiary despite the failure to comply strictly with the policy. See, e.g., *Engelman* v. *Connecticut General Life Ins. Co.*, 240 Conn. 287, 298, 690 A.2d 882 (1997) ("under the substantial compliance doctrine . . . the owner of a life insurance policy will have effectively changed the beneficiary if the following is proven: (1) the owner clearly intended to change the beneficiary and to designate the new beneficiary; *and* (2) the owner has taken substantial affirmative action to effectuate the change in the beneficiary" (emphasis in original)).

The plaintiff's argument misses the point. Section 7-440 (h) does not require that any particular form must be used for a participant in the retirement system to designate a beneficiary to receive a refund of his contributions on his death. In fact, counsel for the commission conceded at oral argument before this court that no particular form is required to change a beneficiary and that, had Edward submitted a letter to the commission expressing his intent to change his beneficiary, the commission would have honored that request. Thus, the issue is not whether Edward substantially complied with the statute by using Form CO-1203 instead of Form CO-931 to revoke his earlier designation of John as his beneficiary. The issue is whether Edward's use of Form CO-1203 reflected his clear intent to revoke his earlier designation. For the reasons previously stated in this opinion, we conclude that it did not.

The plaintiff claims that "the only evidence in the record regarding intent is McAdam and Comptroller [Kevin] Lembo's finding that Edward did intend that [the plaintiff] be his beneficiary and the plain language on the form." First, McAdam's statement in a letter

expressing her belief that Edward intended to designate the plaintiff as his beneficiary is not a finding as to Edward's intent, rather, it is simply McAdam's opinion. Second, the plain language of the form does not support the plaintiff's position. The designation of the plaintiff on Form CO-1203 was tied to Edward's election of a retirement benefit that never occurred because Edward died before he retired. Consequently, the designation of a beneficiary on Form CO-1203, particularly one that was not fully completed, forecloses a finding that Edward "clearly intended to change [his] beneficiary and to designate the new beneficiary" by submitting Form CO-1203. *Engelman* v. *Connecticut General Life Ins. Co.*, supra, 240 Conn. 298. In other words, there is no language in Edward's Form CO-1203 that would indicate that he intended to change his beneficiary for all purposes rather than to designate a beneficiary in connection with his election of a specific retirement income option that never became effective.

In sum, Edward never satisfied the age and service requirements for retirement, and, thus, his election on Form CO-1203 never became effective. See General Statutes § 7-439g (a). Because that option never became effective, Edward's designation of the plaintiff as his beneficiary under that option also never became effective. Accordingly, we conclude that the commission's ruling is supported by substantial evidence in the record and is consistent with the applicable statutes.

The judgment is affirmed.

In this opinion the other judges concurred.