STATE OF CONNECTICUT *v.* MARK CUSSON (AC 43352)

Prescott, Cradle and DiPentima, Js.

Syllabus

Convicted, after a jury trial, of the crimes of cruelty to persons and disorderly conduct, the defendant appealed to this court. The defendant, a former forensic nurse for a maximum security psychiatric facility operated by the Department of Mental Health and Addiction Services, and other facility staff, physically abused and demeaned the victim, who suffered from several mental health disorders and was committed to the facility. After the department learned of the defendant's conduct, it informed state law enforcement and launched an administrative investigation, which led to criminal charges and adverse employment actions against several employees, including the defendant. Prior to trial, the trial court held a hearing on the state's motion in limine seeking to preclude the admissibility of the victim's testimony on the ground that he was incompetent to testify at trial pursuant to the relevant section (§ 6-3) of the Connecticut Code of Evidence. At that hearing, the state offered expert testimony from the victim's treating psychiatrist, who had personally observed the victim multiple times per day, nearly every day, for a period of two years. The defendant argued that the psychiatrist's testimony alone was insufficient to establish that the victim was incapable of providing reliable and truthful testimony and moved for an independent psychiatric evaluation of the victim, which the court denied, or, in the alternative, the defendant requested that the court evaluate the victim under oath. The court granted the state's motion to preclude the victim's testimony and credited the testimony of the victim's psychiatrist, who testified that the victim had poor cognitive memory, had trouble retaining information, was unable to narrate events or recall past experiences in a rational way, and posed a safety risk to others. Before trial, the defendant moved for sanctions and argued that the prosecution had engaged in witness intimidation because the department attempted to intimidate the defense witnesses, H and L, facility employees, from testifying at trial on the defendant's behalf and such misconduct was attributable to the state through a theory of vicarious liability. H and L previously appeared at a sentencing proceeding for another facility employee who was accused of similar misconduct toward the victim as the defendant. At that proceeding, H and L allegedly exposed the victim's confidential and protected medical information while giving their statements to the court in violation of work rule policies and the Health Insurance Portability and Accountability Act (HIPAA), and, subsequently, were placed on administrative leave by the department, pending investigation. When called to testify at the pretrial hearing for the defendant, the prosecutor

informed the court that there was a possibility that L could incriminate herself if she were to testify at the hearing. L invoked her fifth amendment right against self-incrimination and provided little substantive testimony, and H testified that she was afraid to lose her job but would appear at the defendant's trial if subpoenaed and would testify at trial if ordered to by the court with the understanding that her testimony would not violate work rules. At that same hearing, another defense witness, B, a human resources manager for the department, who was responsible for investigating and conducting fact-finding for alleged work rule and policy violations, testified that the victim's conservator had signed releases that permitted the defense witnesses to testify regarding the victim's health status and, therefore, the department would not take action against witnesses who testified regarding the victim. On the defendant's appeal to this court, *held*:

1. The defendant could not prevail on his claim that the trial court violated his sixth amendment right to present a defense by failing to take adequate procedural measures before ruling that the victim was incompetent to testify at the defendant's trial:

a. The trial court properly exercised its discretion when it declined the defendant's request to contemporaneously observe the victim before ruling on his competency to testify at trial, contrary to the defendant's claim, *State* v. *Weinberg* (215 Conn. 231) did not stand for the proposition that the court must personally observe a potential witness prior to making a competency determination; moreover, in *Weinberg*, the trial court relied on the substance of the expert psychiatrist's testimony, and not its own contemporaneous examination, to make its legal determination regarding the witness' capacity for truthfulness, cognitive memory, and ability to receive correct sensory impressions; furthermore, under the circumstances of the present case, the expert, who had personally observed the victim multiple times per day, nearly every day, for two years, had provided firsthand, expert testimony, which established that the victim had limited cognitive memory, was not oriented to time, and offered irrational responses to even the most basic questions and, therefore, provided an adequate evidentiary basis to determine that the victim was not competent to testify.

b. The trial court properly exercised its discretion when it denied the defendant's motion to have the victim examined by an independent expert witness before ruling on his competency to testify, the decision to order a psychiatric examination is within the discretion of the trial court judge; moreover, the victim had undergone a psychiatric assessment by a board certified psychiatrist who, having personally observed him nearly every day for two years prior to the hearing, was uniquely positioned to assist the court in evaluating the victim's testimonial capacity; furthermore, the court reasonably could have determined that ordering a second evaluation would have been redundant and a waste of judicial resources.

2. Contrary to the defendant's claim, the trial court did not violate his due process right to present witnesses and properly exercised its discretion when it denied the defendant's motion to sanction the prosecution for intimidating potential defense witnesses from testifying at trial: there was no evidence that the department sought to intimidate defense witnesses through administrative discipline, any prior disciplinary action taken by the department against H and L was the sole result of their alleged HIPAA violations, and, at the time of the evidentiary hearing, H and L were not under threat of administrative discipline as the victim's conservator had signed releases that permitted them to testify regarding the victim's health status without violating HIPAA; moreover, the department was not acting as an arm of the state, although prosecutorial misconduct may extend to state agencies acting on the prosecution's behalf, there was no demonstrated relationship between the prosecution and the specific adverse employment actions taken by the department against H and L, and there was no evidence that B, who was primarily responsible for the internal investigation, had any contact with any law enforcement body during the pendency of the investigation.
3. The defendant could not prevail on his claim that the prosecution engaged in impropriety when it alerted the trial court to a potential fifth amendment concern with a defense witness' expected testimony during a pretrial hearing, thereby violating his constitutional right to a fair trial: there was no evidence to indicate that the prosecutor undertook his warning with the intention to chill L from testifying; moreover, the prosecutor repeatedly stated that the state did not intend to pursue criminal charges against the witness; furthermore, the defendant could not prevail on his claim that the trial court denied his right to present a defense and compel testimony in his favor by improperly granting L a blanket fifth amendment privilege during the pretrial hearing on the defendant's motion for sanctions, the court having explicitly limited its ruling to the defendant's motion for sanctions, and the defendant, having made no effort to call L as a witness at trial, therefore failed to take steps to exercise his right to present a defense where the witness' absence at trial was due to his failure to call her.

Argued September 13, 2021—officially released January 25, 2022

Procedural History

Substitute information charging the defendant with eight counts each of the crimes of cruelty to persons and disorderly conduct, brought to the Superior Court in the judicial district of Middlesex and tried to the jury before *Suarez, J.*; verdict and judgment of guilty of three counts of cruelty to persons and five counts of

disorderly conduct, from which the defendant appealed to this court. *Affirmed.*

Norman A. Pattis, with whom, on the brief, was *Kevin Smith*, for the appellant (defendant).

James A. Killen, senior assistant state's attorney, with whom, on the brief, were *Michael A. Gailor*, state's attorney, and *Jeffrey Doskos*, supervisory assistant state's attorney, for the appellee (state).

Opinion

CRADLE, J. The defendant, Mark Cusson, appeals from the judgment of conviction, rendered after a jury trial, of three counts of cruelty to persons in violation of General Statutes § 53-20 (a) (1), and five counts of disorderly conduct in violation of General Statutes § 53a-182 (a) (2). On appeal, the defendant claims that (1) the trial court violated his sixth amendment right to present a defense by failing to take adequate procedural measures before ruling that the victim was incompetent to testify, (2) the trial court violated his due process right to offer witness testimony by failing to sanction the prosecution for intimidating potential defense witnesses from testifying at trial, and (3) the state engaged in prosecutorial impropriety by alerting the trial court as to potential fifth amendment concerns with a defense witness' expected testimony during a pretrial hearing, effectively precluding the witness from testifying and denying the defendant his due process right to a fair trial. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. From January, 1998, until March, 2017, the defendant was employed as a forensic nurse at Whiting Forensic Hospital (Whiting), a maximum security psychiatric facility in Middletown operated by the Department of Mental Health and Addiction Services (department). At the time of the March, 2017 incidents that led to his

prosecution, the defendant held the title of forensic head nurse and was assigned to Unit 6 of the facility.[1]

The victim, William Shehadi, was committed to Whiting in 1995 after being found not guilty, by reason of mental disease or defect, of killing his father and seriously injuring his mother. Although the victim's initial commitment was for a period of ten years, his term of commitment has been subject to review and extended every two years by the Psychiatric Security Review Board (board).[2] He was assigned to Unit 6 from 2002 until the March, 2017 incidents that led to the defendant's arrest, at which point the victim was transferred to a different unit.

The victim suffers from several diagnosed mental health illnesses, including schizoaffective disorder, bipolar type; autism spectrum disorder; and a personality disorder with borderline narcissistic and antisocial traits. He is physically aggressive and tends to make racially hostile and sexually inappropriate statements to others. The victim's mental health disorder also causes sudden and significant mood swings, which render him easily agitated and prone to violent outbursts. This behavior has caused Whiting staff to frequently place the victim in physical restraints. On several occasions, he has caused injury to hospital staff, other patients, and himself.

[1] The forensic head nurse supervises the nursing staff in a given unit. As forensic head nurse, the defendant was responsible for supervising the administration of medication and patient care, executing behavioral treatment plans and treatment plans, responding to and documenting patient behavior, and fulfilling various other managerial and administrative duties.

[2] The board is comprised of six members appointed by the governor. It is charged with conducting biennial hearings to determine whether a given patient may be transferred out of a maximum security setting or whether the individual remains mentally ill and potentially dangerous to others, and, consequently, must continue to remain at Whiting. Since 2005, the board has made successive determinations that the victim remains a threat to himself and those around him. At the time of trial, the victim's most recent recommitment was in 2018.

Due to the challenges posed by the victim's condition, Whiting placed him under special "two-to-one" observation orders.[3] The hospital also installed a continuous video feed in the victim's room to more closely monitor his behavior without the physical intrusion of staff.[4] Between March 3 and 17, 2017, the video camera in the victim's room recorded several incidents that led to the defendant's arrest. Those recordings appeared to depict the defendant, and other Whiting staff, physically abusing and demeaning the victim. Specifically, the video recordings show the defendant repeatedly kicking the victim as he lay in bed and kicking the victim off the bed and onto the floor. On several occasions, the defendant restrained the victim by wrapping his legs around the victim's head. The defendant was also shown pouring a cup of liquid on the victim and draping a mop on top of the victim's head. In one instance, the defendant positioned his buttocks near the victim's face and held that position for several seconds. In another, the defendant climbed on top of and straddled the victim, placing his groin near the victim's face, and appeared to thrust his crotch in the victim's direction. During these incidents, other Whiting staff were present in the victim's room and observed the defendant's actions. These interactions and uses of physical restraint were not recorded in Whiting's observation logs.[5]

[3] Under those orders, two staff members were required to physically observe the victim at all times and document his behavior in writing every fifteen minutes. Two-to-one observation is the most intense level of observation at Whiting.

[4] The camera in the victim's room was installed to relieve stress on the victim and reduce physical contact between the victim and Whiting staff. It had been operative for at least a decade prior to the March, 2017 incidents that led to the defendant's prosecution. Notably, the camera only captured video footage, which was admitted into evidence by the state at trial. No audio recording equipment was included with the camera when it was initially installed and it was not installed thereafter. Consequently, the security footage taken from the victim's room does not include sound.

[5] Whiting hospital policy mandated that nursing staff submit a detailed report of each use of physical restraint imposed on a patient under that staff member's care. As mentioned above, nursing staff was also required

The department and Whiting administration learned of the defendant's conduct in late March, 2017.[6] The department then informed state law enforcement and launched an administrative investigation.[7] The defendant was subsequently arrested and charged with eight counts of cruelty to persons and eight counts of disorderly conduct.

A jury trial commenced on March 25, 2019. At trial, the defendant testified that his conduct was intended to be therapeutic rather than abusive. He claimed that he acted in response to the victim's growing agitation, that the victim was soothed by human touch, and that the use of leg restraints was an attempt to perform a swaddling technique meant to comfort the victim. On cross-examination, the defendant admitted that these techniques were neither part of the victim's treatment plan nor approved by Whiting. The defendant also stated that he failed to document the use of physical restraint, which is required under Whiting policy.

The jury subsequently found the defendant guilty of three counts of cruelty to persons and five counts of disorderly conduct. On August 14, 2019, the trial court, *Suarez, J.*, sentenced the defendant to fifteen years of incarceration, execution suspended after five years, followed by three years of probation with special conditions. This appeal followed. Additional facts and procedural history will be set forth as necessary.

to document the victim's behavior every fifteen minutes. See footnote 3 of this opinion.

[6] The record is unclear as to how exactly the defendant's behavior was first brought to the attention of the department's administration.

[7] The investigation led to criminal charges and adverse employment actions against several department employees involved in the victim's treatment. The defendant was suspended from his position at Whiting, pending administrative review. He retired from the department before it held a hearing to review his conduct.

I

The defendant first claims that the trial court violated his sixth amendment right to present a defense[8] by ruling that the victim was incompetent to testify at the defendant's trial. Specifically, the defendant argues that the court abused its discretion by (1) failing, as a matter of procedure, to conduct its own examination of the victim before making a competency determination, and (2) denying the defendant's motion to order an independent psychiatric evaluation of the victim. We disagree with the defendant's arguments and will address them in turn.

The following additional facts and procedural history are relevant to the resolution of this claim. On February 26, 2019, the state filed a motion in limine, pursuant to § 6-3 of the Connecticut Code of Evidence, seeking to preclude the victim's testimony on the basis that "[he] suffers from a serious mental illness, which makes him incapable of understanding the duty to tell the truth and incapable of sensing, remembering, or expressing

[8] In his brief to this court, the defendant also argues that the "the trial court denied [his right to confront witnesses against him] when it granted the state's motion [in limine] and precluded the testimony of [the victim] . . . ." He has failed, however, to analyze this particular constitutional claim or support it with relevant authority. "It is well established that the appellate courts of this state are not obligated to consider issues that are not adequately briefed. . . . Whe[n] an issue is merely mentioned, but not briefed beyond a bare assertion of the claim, it is deemed to have been waived. . . . In addition, mere conclusory assertions regarding a claim, with no mention of relevant authority and minimal or no citations from the record, will not suffice. [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. We do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed . . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited." (Citation omitted; internal quotation marks omitted.) *Manere* v. *Collins*, 200 Conn. App. 356, 358–59 n.1, 241 A.3d 133 (2020). Because we conclude that the defendant's confrontation clause claim was not adequately briefed, we decline to review it.

himself."[9] In support of its motion, the state sought to offer expert testimony from Shana Berger, the principal psychiatrist for the department and, at the time of trial, the victim's treating psychiatrist at Whiting. On March 6, 2019, the defendant filed an objection to the state's motion, arguing that Dr. Berger's testimony alone was legally insufficient to preclude the victim's testimony on the basis of incompetence.

On March 13, 2019, the trial court held a pretrial hearing on the state's motion in limine. At the hearing, the state called Dr. Berger to testify as to the victim's ability to receive and remember sensory impressions, his capacity for truthfulness, and his ability to express himself in ways that others can understand. Dr. Berger testified that she became a board certified psychiatrist in 2011. She stated that she was currently serving as the victim's treating psychiatrist and had been the victim's treating psychiatrist since March 22, 2017.[10] She clarified that her treatment plan involved personally observing and conversing with the victim "every weekday and [on] some weekends." Those interactions lasted anywhere from a few minutes to one-half hour and occurred multiple times throughout the day.

Dr. Berger testified that the victim was diagnosed with schizoaffective disorder, bipolar type; autism spectrum disorder; and a personality disorder with borderline antisocial and narcissistic traits, and had been diagnosed with other mental afflictions in the past. Dr.

[9] Specifically, the state moved to exclude the victim's testimony on the basis of both § 6-3 (a) of the Connecticut Code of Evidence, which provides that "[a] person may not testify if the court finds the person incapable of understanding the duty to tell the truth, or if the person refuses to testify truthfully," and § 6-3 (b) of the Connecticut Code of Evidence, which provides that "[a] person may not testify if the court finds the person incapable of receiving correct sensory impressions, or of remembering such impressions, or of expressing himself or herself concerning the matter so as to be understood by the trier of fact either directly or through interpretation by one who can understand the person."

[10] The victim was transferred out of Unit 6 after allegations against the defendant, and others, were brought to the attention of Whiting administra-

Berger explained that these disorders have resulted in several cognitive and communicative problems. She also clarified that these issues are rooted in the victim's psychosis and that his condition has been worsening over time.

Dr. Berger explained further that the victim has poor cognitive memory, has trouble retaining information, and is unable to accurately "observe what's going on around him and report it back in a factual manner." She testified that he is not oriented to time as are typical individuals, and he experiences difficulty understanding temporal concepts like days and months. As a result, the victim is unable to narrate events or recall past experiences in a rational way. Although he is occasionally capable of expressing preferences, his answers to questions tend to be illogical and disjointed. When the victim was asked specifically about the March, 2017 incidents at issue, Dr. Berger testified that the victim "didn't respond . . . wasn't able to answer questions . . . ignored the question or answered in a manner that didn't make sense."

Dr. Berger also revealed that the victim has been diagnosed with tardive dyskinesia, a neurological disorder that affects the musculature of his tongue and mouth.[11] Consequently, the victim has difficulty expressinghimself when speaking. Dr. Berger estimated that others can only understand "maybe 30 to 40 percent of what he says."

Dr. Berger asserted that the victim would not respond well to being transported to court for a competency determination. She explained that the victim had not left Whiting voluntarily for several years and that he

tion. Dr. Berger subsequently assumed responsibility as the victim's treating psychiatrist.

[11] Dr. Berger testified that the victim's tardive dyskinesia stems from antipsychotic medication treatment over a long period of time.

becomes "very agitated" when forced to leave for medical emergencies, requiring physical restraint and involuntary medication to effectively transport him to the hospital. Notably, Dr. Berger testified that, in 2017, a probate judge attempted to conduct a hearing in the victim's room because the victim refused to leave Whiting. When the judge asked the victim questions, the victim "hid under blankets and didn't answer anything."

The court proceeded to hear argument from both sides. The state contended that Dr. Berger's testimony alone was sufficient to establish that the victim was incapable of providing reliable and truthful testimony. In response, defense counsel moved for an independent psychiatric evaluation of the victim. Specifically, defense counsel argued that an independent evaluation would help clarify whether the victim was *unable* to testify, or whether he was simply *unwilling* to answer questions regarding the March, 2017 incidents that led to the defendant's arrest. The court denied the defendant's motion, stating that the decision whether to order a psychiatric evaluation is "left to the sound discretion of the [trial] court, and . . . should be [done] on a limited basis."

Alternatively, defense counsel requested that the court arrange a "face-to-face" opportunity to evaluate the victim under oath, either at Whiting or via electronic video conference. The court asked defense counsel for a proffer as to the "relevant testimony" that the victim would present at trial. Defense counsel responded that he intended to show the victim the March, 2017 video recordings and have the victim explain the context behind the video. Specifically, defense counsel sought to ask the victim "about what was said at those times, what [the victim] said, [and] whether there was any provocation at any point."

On March 19, 2019, the court issued an oral decision granting the state's motion in limine. Crediting Dr. Berger's testimony, the court explained that the victim experiences difficulty communicating, has limited cognitive memory, is incapable of reliably answering questions, and poses a physical safety risk to those around him. The court made a finding that "he's not oriented to date, day or month. He's incapable of applying information. His recollection is poor and he's not able to respond to questions. He's incapable of narrating events." The court concluded that the victim "does not have the capacity to perceive, remember, and relay facts in a truthful manner, and for those reasons . . . is not minimally credible or otherwise minimally competent to testify." The court also denied the defendant's renewed motion to voir dire the victim via video conference, stating that the court was capable of making the necessary findings "based on the evidence presented to it . . . ."

Having discussed the court's ruling, we begin by setting forth the legal principles and standard of review that guide our analysis of this claim. "A [criminal] defendant has a constitutional right to present a defense, but he is [nonetheless] bound by the rules of evidence in presenting a defense. . . . Although exclusionary rules of evidence cannot be applied mechanistically to deprive a defendant of his rights, the constitution does not require that a defendant be permitted to present every piece of evidence he wishes." (Internal quotation marks omitted.) *State* v. *Mark T.*, 339 Conn. 225, 231–32, 260 A.3d 402 (2021). Indeed, "[t]he right to present a defense does not compel the admission of any and all evidence offered for that purpose. . . . The trial court retains the discretion to rule on the admissibility, under the traditional rules of evidence, regarding the defense offered." (Citation omitted.) *State* v. *Shabazz*, 246 Conn. 746, 758 n.7, 719 A.2d 440 (1998), cert. denied, 525 U.S.

1179, 119 S. Ct. 1116, 143 L. Ed. 2d 111 (1999). "Accordingly, [i]f the proffered evidence is not relevant [or is otherwise inadmissible], the defendant's right to [present a defense] is not affected, and the evidence was properly excluded." (Internal quotation marks omitted.) *State* v. *Mark T.*, supra, 232.

"We first review the trial court's evidentiary rulings, if premised on a correct view of the law . . . for an abuse of discretion. . . . If, after reviewing the trial court's evidentiary rulings, we conclude that the trial court properly excluded the proffered evidence, then the defendant's constitutional claims necessarily fail." (Internal quotation marks omitted.) *State* v. *David N.J.*, 301 Conn. 122, 133, 19 A.3d 646 (2011).

A

The defendant first claims that the court abused its discretion by failing to personally observe the victim before ruling as to the victim's capacity to testify. More generally, he contends that a trial court's determination regarding witness competency is procedurally insufficient in the absence of the court's contemporaneous examination of the witness in question. In response, the state argues that Dr. Berger's testimony provided an adequate evidentiary basis to determine that the victim was incompetent to testify at trial. We agree with the state.

Although every person is presumed competent to be a witness; Conn. Code Evid. § 6-1; a person may not testify if (1) "the court finds the person incapable of understanding the duty to tell the truth, or if the person refuses to testify truthfully," or (2) "the court finds the person incapable of receiving correct sensory impressions, or of remembering such impressions, or of expressing himself or herself concerning the matter so as to be understood by the trier of fact either directly

or through interpretation by one who can understand the person." Conn. Code Evid. § 6-3.[12]

Insanity or other mental incapacity does not automatically, or even typically, cause testimonial incompetency. *Taborsky* v. *State*, 142 Conn. 619, 629, 116 A.2d 433 (1955); E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 6.3.3, p. 327. Rather, where the competency of a witness is challenged, "the threshold question to be answered by the court is whether the testimony of that witness is minimally credible. If the testimony of a witness passes the test of minimum credibility, and is otherwise relevant, the testimony is admissible and the weight to be accorded it, in light of the witness' incapacity, is a question for the trier of fact." *State* v. *Weinberg*, 215 Conn. 231, 243–44, 575 A.2d 1003, cert. denied, 498 U.S. 967, 111 S. Ct. 430, 112 L. Ed. 2d 413 (1990). "The competency of a witness is

[12] Although questions of witness competency and questions involving a criminal defendant's competency to stand trial both require the trial court to determine whether an individual is "competent," we note that "[t]he mental or emotional state of a person sufficient to be competent to 'testify' as a witness should be *sharply distinguished* from the mental or emotional state of an accused sufficient to be competent 'to stand trial.' " (Emphasis added.) E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 6.3.3, p. 326; see also General Statutes § 54-56d (f). General Statutes § 54-56d (a) clarifies in relevant part that a criminal defendant is not competent to stand trial "if [he] is unable to understand the proceedings against him . . . or to assist in his . . . own defense." The "due process clause of the fourteenth amendment to the United States constitution prohibits the criminal prosecution of a defendant who is not competent to stand trial . . . [and] demands that, once a defendant's competence to stand trial has been sufficiently called into question, the trial court must order an adequate hearing on his competence to stand trial . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Dort*, 315 Conn. 151, 162, 106 A.3d 277 (2014). In contrast, a person with mental or psychiatric problems serving as a witness should be "judged on the standard whether the person has useful information to impart to the trier of fact as a witness, not on the basis that he or she is incapable in some other role." E. Prescott, supra, § 6.3.3, p. 326. Accordingly, "a person who is found not competent to stand trial when charged with a crime may still be competent to testify at someone else's trial." Id.

a matter peculiarly within the discretion of the trial court and its ruling will be disturbed only in a clear case of abuse or of some error in law." (Internal quotation marks omitted.) *State* v. *Canady*, 187 Conn. 281, 291–92, 445 A.2d 895 (1982).

Applying this framework to the present case, we conclude that the court did not abuse its discretion by declining to conduct a contemporaneous examination of the victim before making a competency determination. At the pretrial hearing, Dr. Berger testified that she had personally observed the victim multiple times per day, nearly every day, for a period of two years. As a result, she provided firsthand, expert testimony establishing that the victim has limited cognitive memory, is not oriented to time, and offers irrational responses to even the most basic questions. Dr. Berger clarified that the victim has poor recall and that his narration is unreliable. She also indicated that, when the victim describes memories, or attempts to convey past events, his speech becomes "disjointed," "disorganized," and he loses touch with reality.[13] Accordingly, the trial judge reasonably could have concluded on the basis of Dr. Berger's testimony that the victim lacks "sufficient powers of observation, recollection, narration and truthfulness [necessary] to meet the threshold requirement of minimum credibility." *State* v. *Weinberg*, supra, 215 Conn. 244; see E. Prescott, supra, § 6.3.3, p. 327.

The defendant nevertheless contends that Dr. Berger's testimony, standing alone, provided an insufficient basis for the court's ruling without the court's own

[13] Additionally, Dr. Berger testified that the victim's speech is often unintelligible due to involuntary oral movements caused by tardive dyskinesia, and, thus, he is largely incapable of expressing himself in a manner "so as to be understood by the trier of fact . . . ." Conn. Code Evid. § 6-3 (b). Even Dr. Berger, who converses with the victim almost every day, testified that she could only understand 40 to 50 percent of what he says.

contemporaneous and independent observation of the victim. He has failed, however, to identify any authority holding that a trial court *must* personally observe a potential witness before making a competency determination. Instead, the defendant relies on several cases, including *State* v. *Weinberg*, supra, 215 Conn. 231, in support of his argument. Specifically, the defendant claims that the trial court in *Weinberg* found a witness to be competent, despite the expert psychiatrist's conclusion to the contrary, after listening to the witness' proffered testimony. He argues that this result demonstrates that a trial court's firsthand examination of a proposed witness is procedurally necessary before ruling on his or her competency and that failing to make such an examination constitutes an abuse of discretion.

The trial court in *Weinberg* determined that a witness suffering from " 'severe chronic paranoid schizophrenia' " was, nevertheless, competent to testify at trial. Id., 241–42. Notably, the court disregarded an expert psychiatrist's opinion that the witness was incompetent, finding instead that she was capable of reliably and accurately describing the crime scene where the defendant had taken her. Id., 242–44. Our Supreme Court held that the trial court did not abuse its discretion in reaching a different determination from the expert witness and, consequently, admitting the contested testimony. Id., 244. Although the trial court disagreed with the expert's ultimate conclusion regarding the witness' competency, it focused on the "substance of [the expert's] testimony," which revealed that the witness' "cognitive memory was intact, her factual reports tended to be accurate, and she understood the moral duty of truthfulness." Id. Moreover, despite his ultimate conclusion, the expert noted that the witness' testimony might be credible if it were independently corroborated by other evidence, which the trial court found to be the case. Id. Under those facts, our Supreme

Court found that the court correctly determined that the witness met the minimum credibility requirement necessary to testify at trial. Id.

We find the defendant's reliance on *Weinberg* to be misplaced. As an initial matter, the trial court in *Weinberg* did not rely solely on its own contemporaneous observation of the witness in making its competency ruling. Rather, as our Supreme Court explicitly stated, the trial court focused on the *substance of the expert's testimony* in determining that the witness could remember relevant events and recount them in a reliable and truthful manner. Id. Put another way, the trial court credited the expert's description of the witness' mental illness but reached its own determination as to whether the witness met the minimum credibility requirement necessary to be deemed competent. Although the court did listen to the witness' proffered testimony, it did so to determine whether her factual account could be independently corroborated, and not to appraise the degree of her mental illness. Moreover, the court's decision to evaluate the witness' testimony for evidence of independent corroboration came at the expert's suggestion. See id. ("[expert's] conclusion that the witness was not competent to testify was . . . based upon his clinical diagnosis of [the witness'] mental illness, although he acknowledged that her testimony, if independently corroborated, might be credible"). Stated plainly, the trial court in *Weinberg* relied on the substance of the expert psychiatrist's testimony, and not its own contemporaneous examination, to determine the witness' capacity for truthfulness, cognitive memory, and ability to receive correct sensory impressions. As such, *Weinberg* does not stand for the proposition that a trial court necessarily abuses its discretion by declining to conduct an in-person examination of a proposed witness.

Second, *Weinberg* only underscores the discretionary power of trial courts to make competency rulings. In that case, the expert's conclusion that the witness was incompetent to testify was based on his *clinical diagnosis* that the witness suffered from severe chronic paranoid schizophrenia. Id., 242. Despite that diagnosis, the trial court reached the *legal determination*, on the basis of that expert's account, that the witness was able to provide reliable and truthful testimony, which is a matter within the discretion of the trial court. Id., 242–44. Although some federal courts have noted that "it is the better practice for the trial judge either to question the witness [personally] or to be present when the examination is conducted by counsel"; *Shuler* v. *Wainwright*, 491 F.2d 1213, 1224 (5th Cir. 1974); see also *Henderson* v. *United States*, 218 F.2d 14, 17 (6th Cir.), cert. denied, 349 U.S. 920, 75 S. Ct. 660, 99 L. Ed. 1253 (1955); we have found no relevant authority holding that a trial judge is mandated to do so. So long as there is no " 'clear case of abuse' " or " 'some error in law,' " a reviewing court will not disturb the trial judge's ruling. *State* v. *Weinberg*, supra, 215 Conn. 244.

We conclude that, under the factual circumstances presented in this case, the trial court was not required to personally observe the victim before ruling on his competency to testify. Here, the court chose to credit the substance of Dr. Berger's testimony, which demonstrated the victim's incapacity to accurately and reliably recount past events and agreed with her ultimate conclusion regarding the victim's ability to testify.[14] Likewise, Dr. Berger did not testify, as did the expert in

[14] Additionally, we note that this case does not present a situation in which the expert psychiatrist was appointed just prior to trial. In such circumstances, an expert may only meet with a proposed witness on a few, limited occasions before offering an opinion regarding the witness' competency. Conclusions drawn from such cursory examinations may be less valuable than those produced by an expert's continued observation of a witness over time. Stated otherwise, an expert witness' limited examination may be no more revealing than a trial court's personal voir dire of the

Weinberg, that the victim might be found credible if his testimony were independently corroborated. Accordingly, the court did not err in deciding that a brief, in-person observation of the victim was not necessary in light of the detailed testimony of his treating psychiatrist who had interacted with the victim nearly every day for a period of two years.[15] For the foregoing reasons, we conclude that the court did not abuse its discretion in declining to contemporaneously observe the victim before ruling on his competency to testify at trial.

B

In the alternative, the defendant contends that the trial court abused its discretion by denying his motion to have the victim examined by an independent expert witness before ruling on the victim's competency to testify. He argues that Dr. Berger was not specifically "trained to perform competency examinations" and that her role as the victim's treating psychiatrist presented a conflict of interest. We are not persuaded.

It is well established that a "court may order a mental examination of a witness if the court is in doubt as to the witness's mental competency . . . but the court is not bound to order such an examination in all cases or merely because it is requested by a party." (Citation omitted.) E. Prescott, supra, § 6.3.6, p. 329; see also *State* v. *Vars*, 154 Conn. 255, 268, 224 A.2d 744 (1966). The decision to order a psychiatric examination is a

witness in question. By contrast, in this case, the expert's testimony drew on her extensive, firsthand experience treating the victim over the course of multiple years. Accordingly, she was able to provide insight into the victim's cognitive and communicative state that could not have been ascertained through the trial court's limited examination.

[15] We also note that the previous attempt to question the victim in a judicial setting had been unsuccessful. The 2017 probate hearing was a contemporaneous, in-person proceeding that resulted in the victim hiding from the probate judge and refusing to answer any of the judge's questions. As Dr. Berger also made clear, the victim's condition continues to deteriorate.

matter within the discretion of the trial judge. *State* v. *Canady*, supra, 187 Conn. 291–92.

Our Supreme Court has repeatedly held that a trial court's refusal to order a psychiatric examination does not constitute an abuse of discretion in the absence of a compelling reason to do so. See id., 292; see also *State* v. *Vars*, supra, 154 Conn. 268; *State* v. *Morant*, 242 Conn. 666, 679–85, 701 A.2d 1 (1997). In the present case, the victim had already undergone a psychiatric assessment by a board certified psychiatrist who, having personally observed him nearly every day for two years prior to the hearing, was uniquely positioned to assist the court in evaluating the victim's testimonial capacity.[16] The defendant cites no authority holding that a court is required to order a second evaluation, by a second expert, simply because a party disagrees with the first expert or because the expert had previously treated the proposed witness. See *State* v. *Boulay*, 189 Conn. 106, 109, 454 A.2d 724 (1983) (expert psychologist testifying at competency evaluation had treated potential witness for about two years). After hearing Dr. Berger's testimony, the court reasonably could have determined that ordering a second evaluation would have been redundant and a waste of judicial resources. In light of the foregoing, we conclude that the court did not abuse its discretion by denying the defendant's motion.

II

We now turn to the defendant's claim that the trial court violated his due process right to present witness testimony by failing to sanction the prosecution for engaging in witness intimidation. Specifically, the defendant contends that the department, through threat

[16] That Dr. Berger was not specifically "trained to perform competency examinations" is of no issue. As the defendant himself has emphasized, competency evaluations are *judicial* determinations within the discretion of the trial court. *State* v. *Canady*, supra, 187 Conn. 291–92.

of administrative and occupational discipline, attempted to intimidate current and former Whiting employees from testifying at his trial. Relying on a theory of vicarious liability first annunciated in *Demers* v. *State*, 209 Conn. 143, 153, 547 A.2d 28 (1988), he argues that the department was acting as an investigative arm of the state and, therefore, that its misconduct is attributable to the prosecution. We are not persuaded.

The following additional facts are relevant to this claim. On March 6, 2019, the defendant filed a motion entitled "Defendant's Motion for Sanctions Regarding Intimidation of Witnesses."[17] The defendant's argument centered on disciplinary action taken by the department against two Whiting employees, Sarah Lukman and Lori Hubbard, whom the defendant intended to call as character witnesses. Both Lukman and Hubbard previously had appeared at a sentencing proceeding on behalf of Gregory Giantonio, another Whiting employee accused of similar misconduct toward the victim. At that proceeding, Lukman and Hubbard allegedly exposed the victim's confidential and protected medical information while giving their statements to the court. As a result, the department placed Lukman and Hubbard on administrative leave, pending investigation, for allegedly violating the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. § 1320d et seq.[18] The

[17] The defendant also filed a "Supplemental Memorandum in Support of [his] Motion for Sanctions Addressing the Scope of State Action" on March 14, 2019.

[18] HIPAA created national standards to protect sensitive patient health information from being disclosed without the patient's consent or knowledge. "[HIPAA's] Privacy Rule forbids an organization subject to its requirements (a covered entity) from using or disclosing an individual's health information (protected health information) except as mandated or permitted by its provisions . . . . Covered entities generally include health plans, health care clearinghouses and health care providers such as physicians, hospitals and [health maintenance organizations] . . . . Protected health information encompasses any individually identifiable health information held or transmitted by a covered entity in any form or medium, whether electronic, paper or oral." (Internal quotation marks omitted.) *Byrne* v.

defendant argued that the administrative actions, and the threat of future actions, "chilled" those witnesses from testifying fully on his behalf. As a remedy, the defendant sought either a dismissal of the charges or a "delay of one year in his trial . . . [to] permit corrective action to be taken by the state so as to assure potential witnesses that there is nothing to be feared by offering truthful testimony."

On March 13 and 18, 2019, the court heard evidence on the defendant's motion for sanctions. The defense first called Lukman to testify as to her fear of appearing as a character witness for the defendant. Lukman, however, invoked her fifth amendment right against self-incrimination and provided little substantive testimony at the hearing.[19]

Next, defense counsel called Hubbard to testify as to her fear of appearing as a witness for the defense. Hubbard testified that she was placed on administrative leave after Giantonio's sentencing hearing, that she was currently under investigation for divulging confidential medical information, and that she was afraid of "losing [her] job" should she testify on the defendant's behalf. Hubbard also indicated, however, that she appeared at Giantonio's sentencing voluntarily, and that she would appear at the defendant's trial if subpoenaed. She further explained that she would testify at trial if ordered to by the court with the understanding that her testimony would not violate any confidentiality laws.

Defense counsel then called Harold Hempstead, the lead forensic treatment specialist at the department and union delegate for forensic nurses and staff. Hempstead testified that he had concerns that union members

Avery Center for Obstetrics and Gynecology, P.C., 314 Conn. 433, 449 n.15, 102 A.3d 32 (2014).

[19] The circumstances surrounding Lukman's fifth amendment invocation will be addressed more fully in part III of this opinion.

would face administrative discipline should they testify on the defendant's behalf or on behalf of others facing similar charges. Specifically, he stated that "[union members] don't truly understand the legalities of everything that's going on, I don't want to violate HIPAA in any way, shape, or form due to the fact that I could be, you know, placed on administrative leave and possibly fired . . . ." He also explained that he was personally afraid of appearing as a defense witness, but that his fear would be alleviated should the victim's conservators sign a release permitting him to testify without violating HIPAA.

Finally, defense counsel called Steven Beaupre, the human resources manager and Director of Labor Relations for the department. Beaupre testified that his office is responsible for investigating and conducting fact-finding for alleged work rule and policy violations, including Lukman's and Hubbard's alleged HIPAA violations. He confirmed that the disciplinary actions taken against Lukman and Hubbard stemmed from the unauthorized disclosure of the victim's confidential medical information during Giantonio's sentencing proceeding.

As to the relationship between the department and law enforcement, Beaupre testified that he had played no role in disciplining the defendant for misconduct or in referring the defendant or any other employee to the state's attorney's office. He could not say, however, whether any other department administrators had played a role in the criminal investigation and prosecution of those individuals. Beaupre clarified that there may be situations, generally, where department investigations may be referred to law enforcement agencies. Additionally, Beaupre confirmed that he had never been contacted by any law enforcement agency regarding Lukman's and Hubbard's appearances at Giantonio's sentencing.

Beaupre also testified that the victim's conservator had signed releases permitting the defendant's witnesses to speak with defense counsel and to testify in court without violating HIPAA. Beaupre asserted that such witnesses would not face administrative action by the department, and that the releases would apply retroactively to Lukman's and Hubbard's statements at Giantonio's sentencing, effectively nullifying their administrative sanctions.

On March 18, 2019, the court heard argument on the defendant's motion. The defendant contended that the department had been acting as an investigatory arm of the state and, therefore, any misconduct on the part of the department in regard to Lukman, Hubbard, or any other potential defense witness, should be imputed to the prosecution. The defendant also modified his request for sanctions, abandoning his request for a one year delay and seeking instead either a complete dismissal of the charges or an order precluding the prosecution from cross-examining its character witnesses on character-related issues. In response, the state contended that the defendant had failed to demonstrate an agency relationship between the department and the prosecution.

The following day, the court issued an oral ruling denying the defendant's motion for sanctions. Relying on *Stevenson* v. *Commissioner of Correction*, 165 Conn. App. 355, 366, 139 A.3d 718, cert. denied, 322 Conn. 903, 138 A.3d 933 (2016), the court held that the department "is not an investigatory agency of the prosecution" and found that, "even if they were for this particular case, any disciplinary action taken by [the department] . . . was a result of . . . violations of HIPAA . . . and not . . . retaliatory claims." The court also noted that each of the defense witnesses who testified indicated that

they would appear as character witnesses at the defendant's trial "if they're subpoenaed to do so and under conditions that would not violate HIPAA requirements."

Having set forth the court's ruling, we turn to the appropriate standard of review and governing legal principles. "A claim that the state has intimidated a defense witness raises serious questions that go to the core of the constitutional right to a fair trial. A defendant's right to offer the testimony of witnesses is protected by the due process clause of the fourteenth amendment. . . . The prosecution violates this important right when it engages in conduct or makes comments aimed at discouraging defense witnesses from testifying freely. . . . Substantial government interference with a defense witness' free and unhampered choice to testify violates due process rights of the defendant." (Citations omitted; internal quotation marks omitted.) *State* v. *O'Brien*, 29 Conn. App. 724, 731–32, 618 A.2d 50 (1992), cert. denied, 225 Conn. 902, 621 A.2d 285 (1993).

"When information comes to a court's attention that suggests that there has been government interference with a defense witness' free and unhampered choice to testify, the due administration of justice may require further inquiry by the trial court. Nonetheless, [a] trial [court] is given great latitude in ensuring that a criminal trial be conducted in a manner that approaches, as nearly as possible, an atmosphere of perfect impartiality which is so much to be desired in a judicial proceeding. . . . Given the fact that the trial [court] is not simply a referee presiding over a forensic contest, but is a minister of justice, [it] is, for that purpose, vested with the authority to exercise a reasonable discretion in the conduct of a trial." (Internal quotation marks omitted.) Id., 733.

"The trial court possesses the inherent power to impose sanctions on litigants in cases before it, including dismissing the case, both to compel observance of

its rules and to bring an end to continuing violations of those rules. . . . This power rests within the discretion of the trial court and will not be disturbed on review unless there is an abuse of discretion." (Citation omitted; internal quotation marks omitted.) *Emerick* v. *Glastonbury*, 177 Conn. App. 701, 702–703, 173 A.3d 28 (2017), cert. denied, 327 Conn. 994, 175 A.3d 1245 (2018). With these principles in mind, we turn to the defendant's arguments on appeal.

A

The defendant's claim contains two interrelated parts. First, he argues that the administrative actions taken against Lukman and Hubbard were intended to "chill" potential witnesses from participating in future prosecutions involving mistreatment of the victim. Second, he argues that an agency relationship existed between the department and the prosecution, such that any misconduct committed by the department is attributable to the state.[20] We are not persuaded.

As an initial matter, the record lacks any evidence indicating that the department sought to intimidate defense witnesses through administrative discipline. The trial court clearly found in its oral decision that any action taken by the department against its employees resulted solely from the employees' HIPAA violations. That factual finding is fully supported by the record.[21]

[20] The defendant argues, at alternative times, that either the department was as an agent of the state, such that its misconduct is attributable to the prosecution, or, more directly, that the prosecution explicitly directed the department to intimidate defense witnesses. We address both arguments together.

[21] It is well established that "the trial court is given great deference in its fact-finding function because it is in the unique [position] to view the evidence presented in a totality of circumstances . . . including its observations of the demeanor and conduct of the witnesses and parties . . . ." (Internal quotation marks omitted.) *State* v. *Lipscomb*, 258 Conn. 68, 74, 779 A.2d 88 (2001). As such, "[a] trial court's findings of fact are not to be overturned on appeal unless they are clearly erroneous," meaning that "there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left

The record also indicates that the victim's conservator had signed releases permitting defense witnesses to testify regarding the victim's health status. With those releases secured, Beaupre confirmed that the department would not take any action against witnesses who testified regarding the victim. Moreover, Lukman and Hubbard were retroactively absolved from administrative penalties resulting from their statements at Giantonio's sentencing. As such, the defendant's witnesses were not under threat of administrative discipline at the time of the evidentiary hearing. Further, as the court noted, Hubbard was not included on the defendant's witness list until March, 2019, well after the department placed her on administrative leave. Accordingly, the argument that the department sought to intimidate witnesses from testifying at the defendant's trial is speculative and unsupported by the evidence in the record.

Additionally, the defendant has failed to demonstrate that an agency relationship existed between the department and the prosecution. It is true that, in the context of *Brady*[22] violations, our Supreme Court has held that prosecutorial misconduct extends to state agencies acting on the prosecution's behalf.[23] *Demers* v. *State*, supra,

with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *State* v. *Krijger*, 313 Conn. 434, 446, 97 A.3d 946 (2014).

Beaupre testified that the department's disciplinary measures were intended to sanction employees for divulging protected, personal health information, and not to discourage witnesses from testifying at future trials. Stated otherwise, Beaupre provided a reasonable explanation as to why the department placed Lukman and Hubbard on administrative leave: the department concluded that both employees violated HIPAA's privacy rule. In fact, the witnesses who feared adverse employment actions testified to understanding that any potential sanctions would result from disclosing confidential health information, and not from merely appearing in support of their colleagues. Indeed, both Hubbard and Hempstead stated that they would testify at the defendant's trial if assured they could do so without breaching confidentiality laws.

[22] *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

[23] Specifically, our Supreme Court has held that the prosecution's duty to disclose favorable evidence to the defense extends to its investigative

209 Conn. 153; *State* v. *Guerrera*, 331 Conn. 628, 647–48, 206 A.3d 160 (2019). Therefore, where an agency works under the prosecution's direction on a given investigation, its conduct is fairly attributable to the state. *State* v. *Guerrera*, supra, 647–48. "Nonetheless, [misconduct] on the part of persons employed by a different office of the government does not in all instances warrant the imputation of [misconduct] to the prosecutor, for the imposition of an unlimited duty on a prosecutor to inquire of other offices not working with the prosecutor's office on the case in question would inappropriately require us to adopt a monolithic view of government that would condemn the prosecution of criminal cases to a state of paralysis." (Internal quotation marks omitted.) *Stevenson* v. *Commissioner of Correction*, supra, 165 Conn. App. 366.

"[O]ur determination of whether to deem an [agency] to be an arm of the prosecution . . . does not follow [a] broad, categorical approach . . . . Instead, the propriety of imputing [misconduct] to the prosecution is determined by examining the specific circumstances of the [agency] alleged to be an arm of the prosecutor. . . . It does not turn on the *status* of the [agency] . . . such as . . . law enforcement . . . prosecut[ion] or other government official[s]. In other words, the relevant inquiry is what the [agency] *did*, not wh[at] the

agencies. *Demers* v. *State*, supra, 209 Conn. 153; *State* v. *Guerrera*, 331 Conn. 628, 647, 206 A.3d 160 (2019). Accordingly, the prosecutor has a duty to learn of exculpatory evidence in possession of an entity that is acting as his agent or arm, and the agent's or arm's knowledge of exculpatory evidence may be imputed to the prosecutor. *State* v. *Guerrera*, supra, 647–48. Neither party has identified, nor have we found, any authority where this doctrine has been applied outside of the *Brady* context. Nevertheless, the defendant contends that the administrative discipline taken against "identifiable and foreseeable defense witnesses" for testifying at Giantonio's sentencing proceeding constituted a violation of due process akin to a *Brady* violation. Therefore, the defendant's claim that alleged witness intimidation on the part of a government agency may be attributed to the prosecution represents a novel theory of vicarious liability.

[agency] *is*." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 367.

In support of his argument, the defendant points to the fact that department employees had given statements to outside law enforcement regarding the victim's alleged abuse. The defendant also notes that Whiting staff had provided law enforcement with the video footage from the victim's room. Our Supreme Court has determined, however, that even when an agency undertakes some actions at the direction of the prosecution, it is not necessarily deemed to be an arm of the prosecution when undertaking other actions. See *State* v. *Guerrera*, supra, 331 Conn. 648–49 (holding that Department of Correction was investigative arm of state for percentage of codefendant's phone recordings reviewed at prosecution's direction, but not for percentage of recordings stored solely for its internal security and administrative purposes).

In order to show that the department acted as an arm of the prosecution, the defendant must demonstrate a relationship between the prosecution and the specific adverse employment actions taken against Hubbard and Lukman. The record does not reflect that Beaupre, who was primarily responsible for the internal investigation against the two employees, had any contact with any law enforcement body during the pendency of the investigation.

The record indicates that the department's administrative investigations serve a function distinct from criminal investigations, namely, to examine and sanction potential work rule violations and other policy violations. Thus, the purpose of internal investigations is to ensure that employees follow workplace regulations, not to be an auxiliary fact finder for law enforcement.[24] See *Stevenson* v. *Commissioner of Corrections*,

[24] Underscoring this point, Beaupre clarified that administrative investigations, unlike criminal investigations, are not constrained by certain constitu-

supra, 165 Conn. App. 368 (holding that Department of Correction was not investigative arm of state where exculpatory documents at issue were produced for internal, administrative purposes, not for assisting prosecutor's investigation). Accordingly, the record does not support the conclusion that the administrative actions taken against Lukman and Hubbard were conducted at the prosecution's direction. As stated previously, the investigation was performed solely to ascertain whether the employees violated HIPAA by disclosing protected medical information at Giantonio's sentencing hearing. The trial court correctly determined that the department was not acting as an arm of the state and, therefore, did not abuse its discretion by denying the defendant's motion for sanctions.

B

Even if we assume that the trial court improperly denied the defendant's motion for sanctions, the defendant is unable to demonstrate that the denial violated his due process right to present witness testimony. "[W]hether a trial court's . . . restriction of a defendant's or defense [witness'] testimony in a criminal trial deprives a defendant of his [due process] right to present a defense is a question that must be resolved on a case by case basis. . . . The primary consideration in determining whether a trial court's ruling violated a defendant's right to present a defense is the centrality of the excluded evidence to the claim or claims raised by the defendant at trial." (Internal quotation marks omitted.) *State* v. *Andrews*, 313 Conn. 266, 276, 96 A.3d 1199 (2014). "The constitutional right to present a defense does not include the right to introduce any and all evidence claimed to support it." *State* v. *Shabazz*, supra, 246 Conn. 752 n.4.

tional safeguards, such as the fifth amendment privilege against self-incrimination.

Our careful review of the record leads us to conclude that the trial court's denial of the defendant's motion for sanctions did not deprive the defendant of the opportunity to offer witness testimony or to present a complete defense. As an initial matter, there is no evidence that any witness testimony was actually excluded. Although Hubbard and Hempstead initially expressed reluctance to serve as defense witnesses, they both appeared and testified at the defendant's trial.[25] The record does not demonstrate that their testimony was curtailed in any way by threat of administrative discipline.

Moreover, Hubbard and Hempstead were only two of several character witnesses who appeared in support of the defendant at trial.[26] Our Supreme Court has held that the exclusion of cumulative evidence does not violate a criminal defendant's constitutional right to present a defense. *State* v. *Dehaney*, 261 Conn. 336, 366–67, 803 A.2d 267 (2002), cert. denied, 537 U.S. 1217, 123 S. Ct. 1318, 154 L. Ed. 2d 1070 (2003). In addition, this court has held that "[a] defendant may not successfully prevail on a claim of a violation of his right to present a defense if . . . he adequately has been permitted to present the defense by different means." (Internal quotation marks omitted.) *State* v. *Papineau*, 182 Conn. App. 756, 781, 190 A.3d 913, cert. denied, 330 Conn. 916, 193 A.3d 1212 (2018). Even assuming that Hubbard and Hempstead were discouraged from testifying freely, their unencumbered testimony would merely have reiterated what was already before the jury. The defendant

[25] As will be explored further in part III of this opinion, defense counsel chose not to recall Lukman at the criminal trial, despite the trial court's express invitation to do so. As such, the defendant has failed to show that the trial court's denial of his motion for sanctions deprived him of a single witness.

[26] In addition to Hubbard and Hempstead, defense counsel called thirteen other witnesses to testify as to Whiting hospital policy as well as the defendant's reputation for peacefulness and nonviolence.

does not argue that his other character witnesses, many of whom are current or former Whiting employees, were intimidated from providing full and complete testimony. Accordingly, the defendant was not denied the ability to offer witness testimony attesting to his reputation for peacefulness and nonviolence. We conclude, therefore, that the trial court's refusal to grant the defendant's motion for sanctions did not give rise to a constitutional violation.

III

The defendant's final claim is that the prosecution engaged in impropriety by informing the trial court of potential fifth amendment concerns regarding a witness' anticipated testimony during a pretrial evidentiary hearing. The defendant argues that raising those concerns intimidated the witness and caused her to invoke her fifth amendment privilege against self-incrimination, effectively precluding her from testifying further on his behalf. The defendant also contends that the trial court ratified the prosecutor's misconduct by granting the witness a "blanket fifth amendment privilege," thereby denying him his right to present a defense and compel witnesses in his favor. We reject both arguments.

The following additional facts and procedural history are relevant to our disposition of this claim. During the March 13, 2019 hearing on the defendant's motion for sanctions, defense counsel called Lukman to testify as to the disciplinary action the department took against her, as well as the defendant's reputation for nonviolence. Before defense counsel began his direct examination, the prosecutor informed the court that there was a possibility that Lukman could incriminate herself if she were to testify at the hearing. Specifically, the prosecutor stated that defense counsel "filed an appendix to his motion, which involves [a Federal Bureau of

Investigation (FBI)] report, 302 report, which indicates an investigator from the FBI who spoke with Ms. Lukman and detailed the discussions he had with Ms. Lukman during [this] investigation. . . . I believe that there are statements in there that could potentially be incriminating against Ms. Lukman, and . . . the court should provide her with an advisement as she should have a right to an attorney prior to making a decision as to whether she testifies."

Defense counsel responded that the state previously had determined not to prosecute Lukman and that the prosecutor's warning was an attempt to procure the unavailability of the witness. Defense counsel then moved for the trial court to grant Lukman use immunity[27] and to sanction the state for attempting to intimidate Lukman with the threat of prosecution. The prosecutor asserted that the state did not intend to prosecute Lukman for simply testifying, but stressed that, because the FBI report could contain potentially incriminating information, she should speak with a lawyer before deciding whether to testify. After reviewing the FBI report, the court agreed with the prosecutor, and provided Lukman with an opportunity to consult counsel before proceeding as a witness.

When the hearing resumed on March 18, 2019, Lukman appeared with her counsel, Jeffrey Kestenband. Attorney Kestenband filed a motion to quash defense counsel's subpoena for his client and stated that Lukman intended to invoke her fifth amendment right against self-incrimination "as to, pretty much, any substantive question" she was asked. Defense counsel objected, claiming that Lukman could not legally assert a "blanket" fifth amendment protection. The trial court sustained the objection, stating, "We can call [Lukman] to testify . . . . We'll listen to the questions and [if

[27] See General Statutes § 54-47a.

there are] questions on the grounds of the fifth amendment privilege . . . then we'll take it up."

Lukman subsequently took the stand and proceeded to answer some of defense counsel's questions. Afterward, Attorney Kestenband objected to a series of defense counsel's questions, effectively invoking Lukman's fifth amendment privilege on her behalf. Defense counsel objected in turn, claiming that the fifth amendment right against self-incrimination is a personal right that cannot be asserted by counsel. The court agreed with defense counsel, stating that if Lukman wished to invoke the right, she would have to do so herself. The court indicated, however, that it would call a recess if and when Attorney Kestenband wished to advise Lukman regarding self-incrimination concerns. Irrespective of the trial court's offer, Attorney Kestenband continued to object to defense counsel's questions on fifth amendment grounds.

After a brief recess, the court ruled that it would allow Lukman to invoke her right not to testify against herself. Citing *State* v. *Ayuso*, 105 Conn. App. 305, 313, 937 A.2d 1211, cert. denied, 286 Conn. 911, 944 A.2d 983 (2008), the court stated that the mere possibility that Lukman could be prosecuted for her testimony rendered her fifth amendment claim valid. The court then asked Lukman explicitly whether she intended to invoke her fifth amendment right as to defense counsel's subsequent question. Lukman answered, "yes. Based on the advice of counsel." Afterward, the court permitted defense counsel to state his remaining questions on the record. The court again asked Lukman whether she would invoke her fifth amendment privilege as to each question defense counsel listed, to which Lukman answered, "yes."

Finally, the court clarified that its ruling explicitly pertained to the pretrial motion for sanctions and that

it was too early to determine whether the ruling would extend to the criminal trial. The court stated that defense counsel should reclaim the issue if he sought to have Lukman testify at trial.

A

The defendant first contends that the prosecutor engaged in impropriety by alerting the court as to the potential fifth amendment concerns with Lukman's testimony, which he claims constituted a veiled threat meant to discourage Lukman from testifying and effectively denied him his due process right to a fair trial. We disagree.

"It is well established that [i]n analyzing claims of prosecutorial [impropriety], we engage in a two step analytical process. The two steps are separate and distinct: (1) whether [impropriety] occurred in the first instance; and (2) whether that [impropriety] deprived a defendant of his due process right to a fair trial. . . . [W]hen a defendant raises on appeal a claim that improper remarks by the prosecutor deprived the defendant of his constitutional right to a fair trial, the burden is on the defendant to show . . . that the remarks were improper. . . . If we conclude that prosecutorial impropriety occurred, we then decide whether the defendant was deprived of his due process right to a fair trial . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Williams*, 200 Conn. App. 427, 432–33, 238 A.3d 797, cert. denied, 335 Conn. 974, 240 A.3d 676 (2020).

After carefully considering the record in this appeal, we conclude that the prosecutor did not engage in impropriety. There is no evidence that the prosecutor undertook his warning with the intention to chill Lukman from testifying. In fact, the prosecutor repeatedly stated that, based on known evidence, the state did not intend to pursue criminal charges against Lukman.

The prosecutor was concerned, however, that any testimony surrounding the FBI report could reveal additional information supporting state or federal charges against Lukman. Although Lukman was only proffered to testify as to the defendant's character, the uncertain nature of cross-examination and direct examination left open the possibility that Lukman could make incriminating statements regarding the contents of the report. Moreover, Lukman originally appeared without counsel, had received no grant of immunity from the state or federal government, and may not have been aware of the report's existence at the time of the pretrial hearing. The prosecutor alerted the court as to these concerns and recommended that Lukman be advised of her rights and given the opportunity to seek counsel before testifying. The defendant cites no relevant authority holding that such actions are improper. We conclude, therefore, that the prosecutor did not engage in impropriety by bringing Lukman's potential for self-incrimination to the attention of the court. Because we conclude that no impropriety occurred, we need not consider whether the prosecutor's warning deprived the defendant of his due process right to a fair trial.

B

The defendant's final argument is that the court denied his right to present a defense and compel witness testimony in his favor by improperly granting Lukman a blanket fifth amendment privilege during the pretrial hearing on the defendant's motion for sanctions. Specifically, the defendant claims that the court's "decision to grant Lukman a blanket fifth amendment privilege against testifying . . . secured Lukman's unavailability" at trial. We disagree.

This court has repeatedly held that "[a] defendant may not successfully prevail on a claim of a violation of his right to present a defense if he has failed to take

steps to exercise the right or if he adequately has been permitted to present the defense by different means." (Internal quotation marks omitted.) *State* v. *Leniart*, 198 Conn. App. 591, 603–604, 233 A.3d 1183, cert. denied, 335 Conn. 971, 240 A.3d 1055 (2020); see also *State* v. *Porfil*, 191 Conn. App. 494, 522, 215 A.3d 161 (2019), appeal dismissed, 338 Conn. 792, 259 A.3d 1127 (2021).

Although the court permitted Lukman to invoke her fifth amendment privilege during the pretrial hearing, it explicitly limited its ruling to the defendant's motion for sanctions. When asked specifically whether its ruling extended to trial, the court clarified that its ruling was limited to the motion for sanctions and did not extend beyond that. In addition, the court informed the defendant that he would have an opportunity to "reclaim the issue" as to whether Lukman could invoke a valid fifth amendment privilege at the start of trial. The defendant made no effort to call Lukman as a witness at trial.[28] It is clear from the record that Lukman's absence at trial was due to the defendant's failure to call her, and not the court's limited ruling at the pretrial hearing. In light of the foregoing, the defendant has " 'failed to take steps to exercise' " his right to present a defense. *State* v. *Leniart*, supra, 198 Conn. App. 603–604. Accordingly, he cannot demonstrate that his right was violated by the trial court's ruling.

The judgment is affirmed.

In this opinion the other judges concurred.

[28] During the pretrial hearing, defense counsel stated that Lukman's testimony would be offered to describe the defendant's "reputation for nonviolence." As we previously have noted, the defendant called several witnesses to testify at trial as to his peacefulness within the community. See footnote 26 of this opinion. We conclude, therefore, that the defendant " 'adequately has been permitted to present [his] defense by different means.' " *State* v. *Leniart*, supra, 198 Conn. App. 604.

JOE BALTAS *v.* COMMISSIONER OF CORRECTION (AC 44259)

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

Syllabus

The petitioner, who previously had been convicted of the crimes of murder and assault in the first degree in connection with his stabbing of three persons, sought a writ of habeas corpus, claiming, inter alia, that his trial counsel had provided ineffective assistance. Following a trial, the habeas court rendered judgment denying the habeas petition, concluding, inter alia, that trial counsel's performance was not deficient and that the petitioner failed to establish prejudice. Thereafter, the habeas court denied the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court did not abuse its discretion in denying the petition for certification to appeal, the petitioner having failed to demonstrate that the resolution of his claims involved issues that were debatable among jurists of reason, that a court could resolve the issues in a different manner, or that the questions raised were adequate to deserve encouragement to proceed further: there was no merit to the petitioner's claim that his right to autonomy was violated when his trial counsel inappropriately conceded his guilt during closing arguments by arguing that the petitioner should not be found guilty because there was evidence that he was not the only potential assailant at the crime scene and the state failed to prove beyond a reasonable doubt that the petitioner, and not the other potential assailant, was responsible for the stabbings, as the record supported the habeas court's conclusion that, in making that argument, trial counsel did not concede the petitioner's guilt, and, therefore, contrary to the petitioner's contention, *McCoy* v. *Louisiana* (138 S. Ct. 1500) was not applicable and the petitioner's right to autonomy was not implicated; moreover, the petitioner's claim of ineffective assistance of counsel, which was premised on the petitioner's assertion that his trial counsel conceded his guilt during closing arguments, was unavailing, this court having concluded that the habeas court properly found that trial counsel did not concede the petitioner's guilt.

Argued November 8, 2021—officially released January 25, 2022

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Newson, J.*; judgment denying the petition; thereafter, the court denied the petition for

certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

James E. Mortimer, assigned counsel, for the appellant (petitioner).

Kathryn W. Bare, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Adrienne Russo*, assistant state's attorney, for the appellee (respondent).

Opinion

BEAR, J. Following the denial of his petition for certification to appeal, the petitioner, Joe Baltas, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court abused its discretion by denying his petition for certification to appeal because his rights to autonomy and to the effective assistance of counsel were violated. We dismiss the petitioner's appeal.

The following facts, as recited by our Supreme Court in the petitioner's direct appeal, and procedural history are relevant to our resolution of the petitioner's appeal. "The [petitioner] was involved in a relationship with [Misty] Rock, one of the complaining witnesses . . . from December, 2005 until October, 2006. At some point during the month of October, the two discussed leaving Meriden, the town in which both of them lived, to start a new life in South Carolina.

"On October 25, 2006, Rock was living with her brother, Christopher Laverty (Christopher), her mother, Linda Laverty (Linda), and her stepfather, Michael Laverty (Michael). At approximately 10 p.m., Linda and Michael were sitting in the living room of their apartment watching a movie, while Christopher and Rock were on the second floor of the home. Christopher came downstairs and opened the door to the basement,

intending to check on the status of a load of laundry. As he opened the basement door, he encountered a masked person who was dressed all in black, wearing a ski mask, and holding at least one knife. The masked person stabbed Christopher in the stomach, and then moved out of the basement and into the living room, where he proceeded to fatally stab Michael. The masked person then turned to Linda, stated 'die, bitch,' and stabbed her in the neck. Linda later testified that she recognized the masked person as the [petitioner] because of his eyes, the sound of his voice, and his body mannerisms. The masked person walked to the staircase leading to the upper floor of the home, and while on the staircase, he ran into Rock, who had heard the commotion from upstairs. In the collision, the masked person's knife went through Rock's sweatshirt and [T]-shirt and inflicted a scratch on her stomach. The masked person then forced Rock in front of him, grabbed her by the hair, and forced her out of the apartment. While this was happening, Christopher grabbed a knife from the kitchen and a telephone and exited the home, running next door to ask a neighbor to call the police. Rock and the masked person then exited the apartment and were walking down the street, away from the apartment. Christopher attempted to stop them, and Rock told him to stop and not come any closer. Christopher then sat down on a bench and called the police himself, identifying the [petitioner] as the masked person who had just assaulted his family.

"The [petitioner] and Rock then walked to an abandoned car and sat in it. Rock testified that, at this point, the [petitioner] told her that he had killed Michael and stabbed Linda and, although Rock could not remember if the [petitioner] was still wearing a mask, Rock recognized his voice. The [petitioner] and Rock waited in the car until Rock informed the [petitioner] that she needed to use the bathroom. The [petitioner] led Rock to the

Pulaski school, at which point the [petitioner]—who at that time was not wearing a ski mask or a dark shirt—and Rock were confronted by police officers. The police observed the [petitioner] holding a butter knife in his hand and told him to drop it. When the [petitioner] did not comply with their command, the police tasered him and he fell to the ground; as he did so, a folding knife later found to be stained with Michael's blood fell out of the [petitioner's] pocket.

"A K-9 officer was also dispatched as a result of Christopher's 911 call, and the officer's dog tracked the path that the [petitioner] and Rock took away from the apartment. The K-9 officer also had his dog perform an 'article recovery . . . .' Between the K-9 officer's search and the actions of other police officers in the area, the following items along the path taken by the [petitioner] and Rock were recovered that evening: (1) a ski mask, the interior of which later tested positive for the [petitioner's] DNA, and the exterior of which tested positive for Michael's blood; (2) a dark, bloody shirt which tested positive for the blood of Linda and Michael; (3) a latex glove stained with the blood of Linda and also possibly of Michael; and (4) a long knife stained with the blood of Michael, which the state medical examiner later concluded was the weapon that caused his fatal wounds. Tests also indicated that Michael and Linda were the sources of various bloodstains found on the [petitioner's] pants, sneaker, and arms when he was arrested. Finally, the police matched a shoe print that was formed in blood at the crime scene to the shoe of the [petitioner]." (Footnotes omitted.) *State* v. *Baltas*, 311 Conn. 786, 790–92, 91 A.3d 384 (2014).

"The [petitioner] . . . was convicted, after a trial by jury, of one count of murder in violation of General Statutes § 53a-54a (a), two counts of assault in the first degree in violation of General Statutes § 53a-59 (a) (1),

one count of burglary in the first degree in violation of General Statutes § 53a-101 (a) (1), one count of burglary in the first degree in violation of § 53a-101 (a) (2), and one count of kidnapping in the second degree in violation of General Statutes § 53a-94 (a)." (Footnotes omitted.) Id., 789. On appeal, the petitioner's convictions of murder and assault in the first degree were affirmed, his convictions of burglary in the first degree and kidnapping in the second degree were vacated, and the case was remanded for a new trial on those charges. Id., 828–29. The state declined to reprosecute those charges, and the petitioner's total effective sentence was reduced from 95 years to 75 years of incarceration.

On September 8, 2015, the petitioner filed an amended petition for a writ of habeas corpus, asserting claims of (1) prosecutorial impropriety, (2) police misconduct, and (3) ineffective assistance of trial counsel. In response, the respondent, the Commissioner of Correction, raised special defenses of procedural default and res judicata. After a trial, the habeas court denied the petitioner's habeas petition, finding, inter alia, that his trial counsel's performance was not deficient and that he had failed to establish prejudice.[1] The petitioner subsequently filed a petition for certification to appeal, which also was denied by the court. The petitioner then appealed to this court from the denial of his petition for certification to appeal. On appeal, the petitioner claims that his trial counsel inappropriately conceded his guilt, thereby violating his rights to autonomy and to the effective assistance of counsel.

We now turn to our familiar standard of review. "Faced with a habeas court's denial of a petition for

[1] With regard to the petitioner's claims of prosecutorial impropriety and police misconduct, the habeas court found that these claims were barred by res judicata and that, even if res judicata did not apply, they were procedurally defaulted. The petitioner does not challenge those rulings on appeal.

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

"To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . . In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. . . .

"In evaluating the merits of the underlying claims on which the petitioner relies . . . we observe that [when] the legal conclusions of the court are challenged, [the reviewing court] must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record. . . . To the extent that factual findings are challenged, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous . . . . [A] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and

firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Henderson* v. *Commissioner of Correction*, 181 Conn. App. 778, 794–95, 189 A.3d 135, cert. denied, 329 Conn. 911, 186 A.3d 707 (2018).

I

The petitioner's first claim is that his right to autonomy was violated when his trial counsel inappropriately conceded his guilt. Specifically, the petitioner argues that the habeas court's conclusion that trial counsel did not concede his guilt was clearly erroneous because it failed to properly analyze the claim under *McCoy* v. *Louisiana*, U.S. , 138 S. Ct. 1500, 200 L. Ed. 2d 821 (2018). In response, the respondent argues, inter alia, that the petitioner's autonomy claim fails because his trial counsel did not concede his guilt, and, thus, *McCoy* is inapplicable. We agree with the respondent.

"The [s]ixth [a]mendment guarantees to each criminal defendant the [a]ssistance of [c]ounsel for his defence." (Internal quotation marks omitted.) Id., 1507. "[A] defendant need not surrender control entirely to counsel. For the [s]ixth [a]mendment, in grant[ing] to the accused personally the right to make his defense, speaks of the assistance of counsel, and an assistant, however expert, is still an assistant. . . . Trial management is the lawyer's province . . . . Some decisions, however, are reserved for the client—notably, whether to plead guilty . . . . Autonomy to decide that the objective of the defense is to assert innocence belongs in this [reserved for the client] category. Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against [him or] her, or reject the assistance of legal counsel despite the defendant's own inexperience and lack of professional qualifications, so may [the defendant] insist on maintaining [his or] her innocence at the guilt phase of a capital trial.

These are not strategic choices about how best to achieve a client's objectives; they are choices about what the client's objectives in fact are." (Citations omitted; emphasis omitted; internal quotation marks omitted.) Id., 1508. "In *McCoy*, the United States Supreme Court held that defense counsel overrode his client's sixth amendment right to autonomy by admitting the client's guilt without the defendant's consent. Violation of a client's autonomy constitutes structural error and is not subject to harmless error analysis." *John B.* v. *Commissioner of Correction*, 194 Conn. App. 767, 784 n.13, 222 A.3d 984 (2019), cert. denied, 334 Conn. 919, 222 A.3d 513 (2020).

In the present case, during closing argument at the petitioner's criminal trial, the petitioner's trial counsel argued that the petitioner should be found not guilty because there was evidence that he was not the only potential assailant at the crime scene, and because the state had failed to prove beyond a reasonable doubt that the petitioner, and not the other potential assailant, was responsible for the stabbings. In making this argument, the petitioner's trial counsel did concede that the petitioner was present at the crime scene.[2] The habeas court concluded, however, that, in making this argument, the petitioner's trial counsel did not go so far as to concede the petitioner's guilt.[3] We conclude that the

[2] The petitioner cites two specific statements in trial counsel's closing argument to the jury: "It's not just [the petitioner] acting alone in this particular case," and "you can't be firmly convinced that [the petitioner] acted alone . . . ."

[3] Specifically, in addressing the petitioner's claim of ineffective assistance of counsel, the habeas court explained: "[T]he petitioner alleges that defense counsel argued to the jury that there were two participants in the crime without his consent. Said another way, the petitioner alleges that defense counsel conceded his guilt to at least some of the charges without consulting with him or obtaining his permission. The petitioner's claim is not supported by the evidence . . . . [T]here was overwhelming identification, physical and circumstantial evidence placing the petitioner at the scene of the crime as the masked person. . . .

evidence in the record supports the habeas court's conclusion. In fact, unlike in *McCoy* and the other cases on which the petitioner relies, in the present case, rather than concede their client's guilt, counsel argued strenuously that the jury should find the petitioner not guilty. Accordingly, because the habeas court properly found that the petitioner's trial counsel did not concede his guilt, we conclude that *McCoy* is inapplicable and that the petitioner's right to autonomy has not been implicated. Therefore, the petitioner has not demonstrated that the habeas court abused its discretion in denying his petition for certification to appeal with respect to this claim.

II

The petitioner's second claim is that his right to the effective assistance of counsel was violated when his trial counsel conceded his guilt during closing arguments. Specifically, the petitioner argues that "[t]he habeas court incorrectly concluded that trial counsel merely conceded the petitioner's presence at the scene, which was a reasonable tactical decision under the circumstances of this case." (Internal quotation marks omitted.) Because we have concluded that the habeas

"Reading the entire closing argument in context, defense counsel did not argue that there were two perpetrators as a concession of the petitioner's guilt. Instead . . . they were trying to use the overwhelming evidence of the [petitioner's] presence at the scene and the fact that the state had charged and tried the case under the theory that the petitioner was the sole perpetrator to their best advantage. . . . To the extent defense counsel conceded the petitioner's presence at the scene, that was a reasonable tactical decision under the circumstances and one that defense counsel ha[d] the authority to make. . . . Viewing the entire closing argument in context, defense counsel provided the petitioner with competent and vigorous advocacy, despite substantial and overwhelming evidence. . . . Given the overwhelming evidence, there is also no reasonable probability the petitioner would have received a more favorable outcome had defense counsel contested his presence at the scene during oral argument, or simply not mentioned it. Therefore, the claim fails because the petitioner has not proven prejudice or deficient performance." (Citations omitted; footnotes omitted.)

court properly found that the petitioner's trial counsel did not concede his guilt; see part I of this opinion; the petitioner's claim of ineffective assistance of counsel, which is premised on that assertion, is unavailing.

We conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal, as the petitioner has failed to demonstrate that the issues raised are debatable among jurists of reason, that a court could have resolved the issues in a different manner, or that the issues raised deserve encouragement to proceed further. See *Henderson* v. *Commissioner of Correction*, supra, 181 Conn. App. 794–95.

The appeal is dismissed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* KRISTOPHER JOSEPH PRUDHOMME (AC 43302)

Moll, Clark and Sheldon, Js.

Syllabus

Convicted of the crimes of assault in the first degree, cruelty to persons and tampering with physical evidence, the defendant appealed to this court. He claimed that the trial court's jury instructions deprived him of his right to due process and a fair trial because they could have misled the jurors into thinking they could not consider inadequacies in the police investigation in evaluating whether the state had proved him guilty beyond a reasonable doubt. The complainant, L, and the defendant shared an apartment. After they returned to the apartment with M, the defendant's girlfriend, in the early morning hours after visiting a club, L told the defendant that he had twice slept with M. In the early evening of that same day, the defendant found L passed out in his room, covered in vomit and urine, with a red ring around his neck. The defendant told the 911 dispatcher that L had attempted suicide. The police found L on the floor of his bedroom. Although the police searched the apartment for anything that could have caused the red marks on L's neck, they did not enter or search the defendant's separate bedroom. One of the police officers who searched the apartment, relying in part on the defendant's statements, believed that L had attempted suicide and sought to

have him seen by a psychologist after L was taken to a hospital. After L's mother reported to the police that, when L had awoken from a coma he was in at the hospital, he told her that the defendant had attempted to strangle him, the police interviewed the defendant, who changed his story and told them for the first time both that he had a form of autism and that L had told him about having had sex with M. The defendant's theory of defense was that the police conducted an inadequate investigation in that, inter alia, they failed to sufficiently document the injuries to L's neck, they failed to interview L or his mother about the allegation that the defendant strangled him, they failed to analyze certain evidentiary inconsistencies, and they never considered that the defendant's autism could explain his behavior or inconsistent statements to paramedics and the police when they responded to his 911 call. The defendant filed a request to charge the jury in which he sought, in part, to have the jury instructed to consider the completeness or incompleteness of the police investigation and whether evidence concerning the adequacy of the investigation affected the reliability of the evidence and the credibility of witnesses. After conducting a charging conference with counsel, the court declined to instruct the jury in accordance with that portion of the defendant's request and instead instructed the jury in accordance with the model investigative inadequacy instruction on the Judicial Branch website at that time. *Held*:

1. The trial court's jury instruction on the adequacy of the police investigation was erroneous, as there was a reasonable possibility that it misled the jury and, thus, prejudiced the defendant:

a. The trial court failed to inform the jury of the defendant's right to have it consider the inadequacy of the police investigation in evaluating whether the state had proved him guilty beyond a reasonable doubt: because the court noted during the charge conference that there was a factual dispute as to the adequacy of the investigation, the defendant was entitled to have the jury consider evidence of any relevant deficiencies or lapses in the investigation as bases for entertaining reasonable doubt as to his guilt; moreover, had language been added to the court's charge of the sort the defendant requested, the jury would have been apprised of his right to present an investigative inadequacy defense and the jury's right to consider it in evaluating the strength of the state's case.

b. Because the trial court's instructional error prejudiced the defendant and was not harmless beyond a reasonable doubt, he was entitled to a new trial, there having been a reasonable possibility that the error affected the verdict: the jury may have ignored key evidence as to the adequacy of the police investigation, as there was a significant risk that it was misled to believe that it could not consider the defendant's arguments as to the investigation, and it was apparent that the instructional error was harmful given the relative weakness of the state's case, which turned almost entirely on the believability of L's allegation that the defendant strangled him, even though L did not see the defendant attempt to do

so; moreover, defense counsel adduced evidence that tended to undermine L's credibility, elicited testimony that there were alternative explanations for L's neck injuries and argued that any inconsistencies in the defendant's statements or mannerisms could be explained by his autism; furthermore, the state did not prove beyond a reasonable doubt that a properly instructed jury would not have entertained a reasonable doubt as to the defendant's guilt and, thus, find him not guilty on the basis of the alleged deficiencies in the police investigation.

2. The trial court improperly admitted into evidence a police disciplinary report in violation of the defendant's state and federal constitutional rights to confront witnesses against him: contrary to the court's determination that the state offered the report to show that the police department had taken action with regard to the performance of an officer during the investigation, the report was introduced to prove the truth of its contents, which were that the officer's investigation and conclusion that L had attempted suicide were inadequate and unsatisfactory; moreover, the report was inadmissible under the business records exception (§ 52-180) to the rule against hearsay, as the state failed to establish that it was made in the regular course of business, and, because the report was made three months after the actions it described, it did not have the indicia of trustworthiness required to fall within the business records exception; furthermore, the report was testimonial in nature, the statements in it having been made under circumstances that would lead an objective witness reasonably to believe that the report would be available for use at a later trial, and the state did not introduce evidence that the officer who prepared the report was unavailable to testify at trial or that the defendant had a prior opportunity to cross-examine him.

Argued October 13, 2021—officially released January 25, 2022

Procedural History

Substitute information charging the defendant with two counts of the crime of assault in the first degree, and with one count each of the crimes of assault in the second degree, strangulation in the first degree, cruelty to persons and tampering with physical evidence, brought to the Superior Court in the judicial district of New London and tried to the jury before *Jongbloed, J.*; thereafter, the court denied the defendant's motions to preclude certain evidence and to strike certain testimony; verdict of guilty of one count of assault in the first degree, and of cruelty to persons and tampering

with physical evidence; subsequently, the court dismissed the charge of assault in the second degree, denied the defendant's motion for a new trial and rendered judgment in accordance with the verdict, from which the defendant appealed to this court. *Reversed*; *new trial*.

Andrew P. O'Shea, assigned counsel, for the appellant (defendant).

Laurie N. Feldman, deputy assistant state's attorney, with whom, on the brief, were *Michael L. Regan*, state's attorney, and *Stephen M. Carney*, senior assistant state's attorney, for the appellee (state).

Opinion

SHELDON, J. The defendant, Kristopher Joseph Prudhomme, appeals from the judgment of conviction, rendered after a jury trial, of charges of assault in the first degree in violation of General Statutes § 53a-59 (a) (3), cruelty to persons in violation of General Statutes § 53-20 (a) (1), and tampering with evidence in violation of General Statutes § 53a-155. On appeal, the defendant claims that the trial court improperly (1) failed to instruct the jury that it properly could consider evidence of inadequacies in the police investigation that led to his arrest and prosecution as a basis for discrediting the state's evidence against him and entertaining reasonable doubt as to his guilt, (2) admitted into evidence, over his objection, a police disciplinary report containing hearsay statements from nontestifying police officers that tended to undermine his theory of defense, and (3) denied his motion for a new trial pursuant to his claim that the jury's verdict was against the manifest weight of the evidence.[1] We agree with the defendant's first claim of error, and accordingly, on that basis,

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

reverse the judgment of conviction of all charges and remand this case for a new trial thereon. We also agree with the defendant's second claim of error, which we have reviewed because it is likely to arise again at retrial. We do not reach the defendant's third claim of error because it is unnecessary for the ultimate disposition of this appeal.

The jury was presented with the following evidence on which to base its verdict. In the autumn of 2016, the complainant, Michael Lovering, moved from Louisiana to Connecticut. On October 1 of that year, on the invitation of the defendant, Lovering became the defendant's roommate in an apartment in Norwich. Having first met the defendant, a fellow participant in the Goth culture, when they worked together as disc jockeys, Lovering had known the defendant for eight years by the time they became roommates in the Norwich apartment.

On the night of October 21, 2016, the defendant, Lovering, and the defendant's girlfriend, Lauren Muskus, went to see a band play at a club in New Haven. Lovering consumed alcohol while at the club, then got into an altercation with the mother of an underage girl. Following the altercation, Lovering left the club, intending to walk home. Shortly thereafter, however, he was picked up by the defendant and Muskus, who drove him back to Norwich.

Upon arriving back at the apartment, sometime after 2:30 a.m. on October 22, 2016, Lovering saw his neighbors, Chandler Gottshall and her boyfriend, outside the apartment and invited them inside. The group initially talked and drank alcohol for a while in the kitchen of the apartment. During that time, Gottshall noticed that Lovering appeared to be intoxicated, as he was slurring his speech, stumbling when he walked, and, at one point, fell over and struck the stove. Later, according to Gottshall, the mood of the gathering changed after

Lovering and the defendant went into the defendant's room and had a short conversation in which Lovering told the defendant that he had slept with Muskus on two separate occasions. Gottshall testified that, when Lovering returned to the kitchen after having that conversation, he pulled her and her boyfriend outside. Lovering told them what he had told the defendant about sleeping with Muskus, then told them that they should leave, which they promptly did. Gottshall testified that, after Lovering spoke with the defendant, Lovering "was very upset about it, just talking about it . . . ."

Later in the day on October 22, at approximately 5:30 p.m., the defendant called 911 and requested that an ambulance be sent to his residence. The defendant told the police dispatcher during the call that he had just found Lovering in his room, passed out and covered in vomit and urine. During the call, the defendant further stated that Lovering was barely conscious, completely incoherent, and continuing to vomit. The defendant also informed the dispatcher that Lovering had "a red ring around his neck." He concluded the call by telling the dispatcher, "[I]t's a suicide attempt."

Officer Jared Homand of the Norwich Police Department was dispatched to the defendant's residence in response to the 911 call. When Homand arrived, he was met by the defendant at the front door. The defendant told the officer that he had found Lovering in his room, incapacitated, after hearing him groaning and going in to check on him. Homand then entered the residence, accompanied by the defendant, and found Lovering lying on the floor of his bedroom with his legs tucked up under his body as if he had knelt down on the floor and lain over backward.

Homand initially attempted to speak with Lovering, but Lovering only groaned in response and gestured

toward his legs. The officer assisted Lovering by straightening out his legs from under his body so that Lovering was lying flat on his back. The officer then noticed "a ligature mark or a red circular mark around the front of his neck." Homand testified that he "didn't see if it went all the way around because he was on his back, but it went at least the three-quarters that were visible around his neck." The officer also observed a dried substance on Lovering's lips and chest, which he believed to be either blood or vomit.

Other emergency personnel arrived at the scene shortly thereafter, including Officer Anthony Marceau and a team of paramedics. Paramedic Mackenzie Kelsey, who first attended to Lovering, found him to be conscious but unable to communicate with her. Kelsey observed that Lovering was very pale—an indication of severe oxygen deprivation. She also observed that Lovering had dried blood and vomit on his chest and "bruising and marks around his neck." According to Kelsey's testimony, the marks on Lovering's neck "were very red" and "were very thin" and appeared to her "to be something that had recently happened" given their color. Kelsey explained that there were "multiple marks across his neck and they went straight across his neck." However, according to paramedic Ashleigh Ridenour's testimony, "[t]here were multiple marks in different stages, so some were older and some were fresh." Ridenour explained that the marks "were different colors. There were some that were red and there were some that were more purple in color." On the basis of these observations, Ridenour believed that some of the marks were fresh but others were old. The paramedics determined that Lovering's blood oxygen was extremely low, his heartbeat was very fast, and his levels of potassium were high. The paramedics provided oxygen to Lovering, put him on a stretcher, and transported him to

William W. Backus Hospital in Norwich in an ambulance.

During trial, Kelsey testified that the defendant was acting in an unusual manner when she and the other paramedics arrived at the apartment. Kelsey explained that the defendant "didn't seem to want to make eye contact with us. He didn't seem to want to really speak with us in detail. When we were taking [Lovering] out of the room, placing him on the stretcher, I did note that he seemed to be blocking another door or walkway into another part of the apartment and wouldn't let anybody through into that area. And then, in the midst of information being communicated to me through [Ridenour], the story in which what had happened to [Lovering] changed multiple times. There was two or three iterations of what had actually happened." On cross-examination, Kelsey conceded that had she known the defendant was autistic, she potentially would have changed her perception of his behavior.[2]

Meanwhile, Homand and Marceau looked around the apartment to determine if there was anything there that could have caused the red marks on Lovering's neck, such as a rope, a belt, or a similar item. Although the officers searched for this purpose throughout the common areas of the apartment and in Lovering's bedroom, they found nothing that, in their opinion, could have caused the marks. The officers, however, never searched, or even entered, the defendant's separate bedroom on that day.

At Backus Hospital, Lovering was placed in the care of Melissa Lin Monte, an emergency department physician. Lin Monte found Lovering's lower legs to be very swollen and his calves to be extremely firm, which she

[2] In 2013, it was determined that the defendant was autistic. At trial, defense counsel argued that any inconsistencies in the defendant's statements and his odd mannerisms could be explained by his autism.

found to be consistent with a lack of blood flow to his lower legs. She also found that Lovering's potassium levels were dangerously high—higher than she had ever seen before—which she understood to be an indicator of muscle breakdown of the sort that can be caused when a person remains immobile for a prolonged period of time.

Because of the severity of Lovering's condition, he was put in a medically induced coma and then transferred to the intensive care unit. After Lovering was transferred, however, the condition of his legs worsened. On the basis of the seriousness of the condition of his legs, Lovering was ultimately transferred by helicopter to Hartford Hospital.

At Hartford Hospital, Parth Shah, a vascular surgeon, examined Lovering's legs and determined that they needed to be amputated below the knee because of the breakdown of his leg muscles. After Lovering's lower legs were amputated, he remained in a coma until the evening of October 27.

Marceau, who had followed the ambulance to Backus Hospital, filled out an emergency evaluation request form to ensure that Lovering would be seen by a psychologist within forty-eight hours of his admission to the hospital. Marceau testified that he had filled out the form because he believed that the cause of Lovering's injuries was an attempted suicide. Marceau based this belief on the defendant's statements to the police, on Lovering's alleged past attempts at suicide, and on Lovering's dire physical condition at the time he was found.

Later, however, on November 2, six days after Lovering emerged from the coma, he told his mother that the defendant had strangled him. Lovering's mother immediately called the police to report her son's allegations. On the basis of Lovering's allegation that the defendant had strangled him, the police went to the

defendant's apartment on November 2 to interview him. After questioning the defendant in his apartment, Detective Kyle Besse asked the defendant to come with him to the police station to answer more questions, and the defendant agreed. At the police station, the defendant was placed in an interview room and the interview was recorded. The defendant also gave Besse access to his cell phone. Besse then asked the defendant to repeat his story from the beginning. Besse testified that the defendant's story changed slightly during this second round of questioning. Specifically, at the police station, the defendant mentioned for the first time that Lovering had told him that he had had sex with Muskus. Besse thought it suspicious that, even though the defendant had said that he "wanted to hit [Lovering]" when he learned of Lovering's sexual activities with Muskus, he admittedly "was trying to think up ahead how this would look [if he did so]. . . . Like, in retrospect now, like, even in the hospital—'cause, like, his mom asked, well, how did he get a black eye; a nurse would have asked me, well, how did he get a black eye; a[nd] police would have asked, how'd he get a black eye. I would have had to say, well, I hit him." Besse responded by telling the defendant that he was "still getting the sense that there's something. Every time I ask you that—you know, what else happened, what else happened—you give me a sign that you're not comfortable enough to be completely honest." The defendant then told the detective that, "[m]entally, the only thing with me is, I have Asperger's syndrome, which is like a form of autism."

The defendant was subsequently arrested and charged with assault in the first degree in violation of § 53a-59 (a) (1), assault in the first degree in violation of § 53a-59 (a) (3), strangulation in the first degree in violation of General Statutes § 53a-64aa (a) (1) (B), cruelty to persons in violation of § 53-20, and tampering with physical evidence in violation of § 53a-155 (a) (1).

After a jury trial, the defendant was found guilty of assault in the first degree in violation of § 53a-59 (a) (3), cruelty to persons in violation of § 53-20, and tampering with physical evidence in violation of § 53a-155 (a) (1). The jury found the defendant not guilty of assault in the first degree under § 53a-59 (a) (1) and strangulation in the first degree under § 53a-64aa (a) (1) (B).[3] Before he was sentenced, the defendant filed a timely motion for a new trial on the ground that the jury's guilty verdict was against the weight of the evidence. The court denied that motion prior to the defendant's sentencing. Thereafter, the court sentenced the defendant to a total effective term of twenty years of incarceration, execution suspended after ten years, and five years of probation. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the trial court violated his constitutional right to due process and a fair trial by failing to instruct the jury on the manner in which it could use evidence of the allegedly incomplete and biased police investigation in determining whether he was guilty of the charged offenses. The defendant argues that the jury charge as given prejudiced him because it could have "misled [the jury] into thinking it could not conclude that the investigation's inadequacies, which were the heart of the defense, could be a reasonable basis to find a lower probative value in the evidence the investigation produced, resulting in reasonable doubt." We agree.

The following well established legal principles guide our analysis of the defendant's first claim of error. "[A] fundamental element of due process of law is the right of a defendant charged with a crime to establish a

[3] The jury did not consider, and the trial court dismissed, a charge of assault in the second degree in violation of General Statutes § 53a-60 (a) (1).

defense. . . . Where . . . the challenged jury instructions involve a constitutional right, the applicable standard of review is whether there is a reasonable possibility that the jury was misled in reaching its verdict. . . . In evaluating the particular charges at issue, we must adhere to the well settled rule that a charge to the jury is to be considered in its entirety, read as a whole, and judged by its total effect rather than by its individual component parts. . . . [T]he test of a court's charge is . . . whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law." (Internal quotation marks omitted.) *State* v. *Collins*, 299 Conn. 567, 598–99, 10 A.3d 1005, cert. denied, 565 U.S. 908, 132 S. Ct. 314, 181 L. Ed. 2d 193 (2011). "If a requested charge is in substance given, the court's failure to give a charge in exact conformance with the words of the request will not constitute a ground for reversal. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper. . . . Additionally, we have noted that [a]n error in instructions in a criminal case is reversible error when it is shown that it is reasonably possible for errors of constitutional dimension or reasonably probable for nonconstitutional errors that the jury [was] misled." (Citations omitted; internal quotation marks omitted.) *State* v. *Aviles*, 277 Conn. 281, 309–10, 891 A.2d 935, cert. denied, 549 U.S. 840, 127 S. Ct. 108, 166 L. Ed. 2d 69 (2006). "A challenge to the validity of jury instructions presents a question of law over which [we have] plenary review." (Internal quotation marks omitted.) *State* v. *Gomes*, 337 Conn. 826, 849–50, 256 A.3d 131 (2021).

A

We first consider whether the trial court committed instructional error when it failed to inform the jury of the defendant's right to rely on the alleged inadequacy

of the police investigation as a possible basis for finding that the state had failed to prove him guilty beyond a reasonable doubt.

"[T]his court has recognized that defendants may use evidence regarding the inadequacy of the investigation into the crime with which they are charged as a legitimate defense strategy. . . . Conducting a thorough, professional investigation is not an element of the government's case. . . . A defendant may, however, rely upon relevant deficiencies or lapses in the police investigation to raise the specter of reasonable doubt, and the trial court violates his right to a fair trial by precluding the jury from considering evidence to that effect." (Citation omitted; internal quotation marks omitted.) *State* v. *Wright*, 322 Conn. 270, 282, 140 A.3d 939 (2016). "[T]he inference that may be drawn from an inadequate police investigation is that the evidence at trial may be inadequate or unreliable because the police failed to conduct the scientific tests or to pursue leads that a reasonable police investigation would have conducted or investigated, and these tests or investigation reasonably may have led to significant evidence of the defendant's guilt or innocence. A jury may find a reasonable doubt if [it] conclude[s] that the investigation was careless, incomplete, or so focused on the defendant that it ignored leads that may have suggested other culprits." (Internal quotation marks omitted.) Id., 283.

The following additional facts are relevant to our resolution of this claim. The main theory advanced by the defendant at trial was that the police had conducted an inadequate investigation of the incident. Specifically, the defense argued that the police had (1) failed to consider and investigate the possibility that Lovering's injuries had been self-inflicted and (2) acted with bias and prejudice against the defendant because he was autistic.

During closing argument, defense counsel argued that "[t]he government's case is fundamentally flawed. The

government wants you to find [the defendant] guilty based solely upon the unreliable, uninvestigated, and uncorroborated allegations of [Lovering]. They want you to ignore the fact that it failed to conduct a complete and unbiased investigation. . . . Proof beyond a reasonable doubt is proof that precludes every reasonable hypothesis except guilt and is inconsistent with any other rational conclusion. The government hasn't even attempted to do that. . . . Detective Besse testified in front of you it never occurred to him that these allegations might not be true. It never occurred to him that [Lovering], what he was saying might be false; that he might be mistaken. . . . You can't rely upon the evidence presented in court based upon this incomplete and biased investigation. . . . These are alternative, innocent explanations that needed to be considered, investigated in an attempt to rule [them] out. They needed to gather evidence specifically on these issues.

"There's an obvious alternative innocent explanation in this case. [Lovering] lost consciousness due to acute alcohol intoxication. . . . Possibly [Lovering] engaged in some sort of suicide gesture at the time when he was highly intoxicated around 3:30 in the morning on October 22, 2016. . . . It's also reported that he has a history of loss of consciousness, especially when he's drinking or— specifically, when he's drinking. . . . [Lovering] had a practice of kneeling, putting his buttocks onto his feet, and even he was so flexible, he could go all the way back. . . . Acute alcohol intoxication alone is sufficient to explain the serious medical injuries. . . . Detective Besse never considered that. . . . There are many alternative, innocent explanations for the red marks on [Lovering's] neck. Possible suicide gesture, scratches by [Lovering] or someone else. There's talk about him engaging in self-harm. . . . They could be explained by falls while he's intoxicated, falling on the stove, and there was evidence of other falls. . . . It could have been nonfatal

autoerotic activities . . . . It could have been caused by the self-flagellation with the flogger or cat-o'-nine-tails whip. . . . Isn't that extraordinary that someone can be arrested and put on trial and that there never is an investigation or serious investigation or even a moment of consideration that the allegations might not be true? It's shocking. That alone is cause for reasonable doubt."

In support of the defense theory of an inadequate police investigation, the defense elicited testimony from numerous witnesses at trial directing the jury's attention to inadequacies and omissions in the investigation. First and foremost, on cross-examination, Besse, the lead detective, testified that he never considered the possibility that Lovering's allegation that the defendant had strangled him was not true. Besse testified that he briefly considered the possibility that Lovering's injuries were caused by autoerotic asphyxiation[4] but quickly ruled it out as a possibility due to the absence of any type of ligature near Lovering when he was found and the fact that his pants were on at that time. Besse simply testified that he had no reason to disbelieve Lovering's allegation that the defendant had strangled him.

Additionally, Lovering's Facebook records were not obtained and reviewed by the police to determine if they were consistent with Lovering's version of events prior to the arrest of the defendant. In fact, according to the testimony of Facebook employee Christine Oliveira, Lovering's Facebook records were not requested by the state until May 23, 2018, more than eighteen months after Lovering suffered his injuries, and no preservation request for those records was ever made, making it possible for messages to have been deleted from the records

[4] Autoerotic asphyxiation is "the practice of limiting the flow of oxygen to the brain during masturbation in an effort to heighten sexual pleasure." *Critchlow* v. *First UNUM Life Ins. Co. of America*, 378 F.3d 246, 250 (2d Cir. 2004).

before they were finally produced. Once the records were obtained in 2018, they revealed a previously undiscovered message suggesting that Lovering was planning to die by suicide, which was sent to Muskus from Lovering's account at 3:30 a.m. on October 22. The message cryptically, but ominously, told Muskus to "[h]ave fun with my death."

Besse also testified that he never made a time line of events on October 22, 2016, although, admittedly, that would have been helpful to the investigation, for it would have revealed inconsistencies in Lovering's version of events. Besse also conceded on cross-examination that he had failed to reconcile the claim made by Lovering's mother—that Lovering had awakened from the coma on November 2, 2016, and immediately told her that the defendant had strangled him—with Lovering's phone records showing that he had first awakened from the coma and begun to make calls from his cell phone more than one week earlier, on the evening of October 27. Besse testified that, if he had realized this inconsistency, he would have interviewed both Lovering and his mother about their claims. He also stated that, if this inconsistency had been discovered earlier, as it should have been, before the defendant was arrested, it would have been brought to the court's attention in the application by the police for a warrant for the defendant's arrest.

Furthermore, Besse testified that he did not interview either Lovering or Lovering's mother on November 2, the day the mother reported her son's belated allegation that the defendant had strangled him. Instead, Besse interviewed only the defendant on that day. In fact, Besse conceded in his testimony that he never interviewed Lovering or his mother about the allegation that the defendant had strangled him.

Last, defense counsel elicited testimony from Besse that he never considered the possibility that the defendant's autism could explain his peculiar behaviors or his inconsistent statements to paramedics and the police when they responded to his 911 call about Lovering's injuries.

Defense counsel also adduced testimony about the small number and poor quality of the photographs that were taken by the police to document Lovering's injuries. Specifically, James R. Gill, the state's chief medical examiner and a forensic pathologist, testified that, although multiple, close-range photographs are typically taken of neck compression injuries in order to document them and assist in determining their cause, the police in this case took just one blurry photograph of Lovering's injured neck. Ljubisa J. Dragovic, a forensic pathologist, also testified that the one blurry photograph taken in this case of the marks on Lovering's neck was insufficient to support any conclusion as to what had caused those marks. According to Dragovic, at least four photographs are required to determine the cause of a neck injury: "The strangulation of any type of neck manipulation calls for [a] photograph from the front of the neck, [a] photograph of the left side, [a] photograph of the right side, and [a] photograph of the back of the neck . . . ." Dragovic further testified that, in this case, with one photograph alone, "you cannot say anything but that—other than there is an obliquely oriented pattern of three lines in the front of the neck. That's all you can conclude on the basis of this photograph."

In connection with his defense of an inadequate police investigation, the defendant filed a written request to charge the jury, which provided in relevant part: "You have heard evidence and argument that the police investigation was inadequate and that the police involved in this case were incompetent. The ultimate

issue for you to decide is not the thoroughness of the investigation or the competence of the police. Rather, the ultimate issue you have to determine is whether the state, in the light of all the evidence before you, has proved beyond a reasonable doubt that the defendant is guilty of the counts with which he is charged.

"You should not acquit the defendant merely because you conclude that the police have conducted an inadequate investigation. *However, you may consider the completeness or incompleteness of the police investigation when deciding whether the state has presented evidence sufficient to preclude every reasonable hypothesis inconsistent with the defendant's guilt. You may also consider whether the evidence concerning the adequacy of the police investigation affects the credibility of any witnesses who testified or the reliability of any evidence before you.*" (Emphasis added.)

On December 4, 2018, the court held a charge conference. The first paragraph of the defendant's requested jury charge was substantially similar to the former model criminal jury instruction on investigative inadequacy then published on the Judicial Branch website.[5]

[5] Connecticut Criminal Jury Instruction 2.6-14, titled "Adequacy of Police Investigation," was approved by the Judicial Branch's Criminal Jury Instruction Committee on November 6, 2014. That instruction, as it existed at the time of the charge conference, provided: "You have heard some arguments that the police investigation was inadequate and that the police involved in this case were incompetent. The issue for you to decide is not the thoroughness of the investigation or the competence of the police. The only issue you have to determine is whether the state, in light of all the evidence before you, has proved beyond a reasonable doubt the defendant is guilty of the count[s] with which (he/she) is charged." See *State* v. *Gomes*, supra, 337 Conn. 834 n.7.

The commentary to instruction 2.6-14 provided: " 'A defendant may . . . rely upon relevant deficiencies or lapses in the police investigation to raise the specter of reasonable doubt, and the trial court violates his right to a fair trial by precluding the jury from considering evidence to that effect.' *State* v. *Collins*, [supra, 299 Conn. 599–600] (finding that such an instruction as this does not preclude the jury from considering the evidence of the police investigation as it might relate to any weaknesses in the state's case). 'Collins does not require a court to instruct the jury on the quality of police

In discussing this paragraph of the defendant's requested jury charge, the court noted that "it's factually disputed that the police investigation was inadequate and the police involved were incompetent . . . this is a charge that should probably be there." The court then stated, however, that, although it was willing to instruct the jury in accordance with the first paragraph of the defendant's request to charge, it was not inclined to instruct it in accordance with the second paragraph of the request to charge, as previously quoted in italics. In response, defense counsel argued that "informing the jury that this isn't the ultimate issue is potentially misleading without informing them how to use the evidence of the police investigation . . . ." The state, however, argued that "the first paragraph . . . fairly puts the issue before the jury . . . ." After considering the arguments from both parties, the court ruled that it would not instruct the jury in accordance with the second, italicized paragraph of the defendant's request to charge, explaining: "Well, I think it's certainly fair commentary for closing argument with regard to whether the adequacy of the investigation affect[s] the credibility of any witnesses, and so I do think that's something that can be addressed that way. It's not part of the pattern instruction. . . . I'm going to deny your request for that second paragraph. I think the jury does have sufficient ability to consider that evidence appropriately under all of the court's instructions when taken as a whole."

Consistent with its foregoing ruling at the charge conference, the court later instructed the jury in relevant part: "You may have heard some argument that the police investigation was inadequate and that one

investigation, but merely holds that a court may not preclude such evidence and argument from being presented to the jury for its consideration.' *State* v. *Wright*, 149 Conn. App. 758, 773–74, [89 A.3d 458] cert. denied, 312 Conn. 917 [94 A.3d 641] (2014)." See *State* v. *Gomes*, supra, 337 Conn. 834–35 n.7.

or more police officers involved in this case were incompetent. The issue for you to decide is not the thoroughness of the investigation or the competence of the police. The only issue you have to determine is whether the state, in the light of all the evidence before you, has proved beyond a reasonable doubt that the defendant is guilty of the counts with which he is charged."

We agree with the defendant that the jury charge given by the court was erroneous because it failed to inform the jury of his right to have it consider the inadequacy of the police investigation in evaluating whether the state had proven him guilty beyond a reasonable doubt.

Our Supreme Court's recent decision in *State* v. *Gomes*, supra, 337 Conn. 826, governs the analysis of this claim on appeal. In *Gomes*, "[t]he main defense advanced by the defendant was that the police had conducted an inadequate investigation of the incident." Id., 832. Defense counsel in *Gomes* argued that the state had not proven its case beyond a reasonable doubt on the basis of inadequacies in the police investigation. Id. At trial, defense counsel elicited testimony that (1) the defendant had left the scene of the crime before the victim was assaulted, (2) another individual was beaten up by a group of club patrons immediately after the victim had sustained her injuries, (3) officers who were dispatched to the scene were informed that another individual was a suspect in the assault but never investigated that other individual as a suspect, (4) the officers did not ask for the names of or contact information for any witnesses at the scene or attempt to interview them as to what they had seen, and, (5) although the victim had selected the defendant's photograph from an array at the police station and stated she was 100 percent confident that he was the person who had attacked her, she testified that she had never met or seen the defendant prior to the night in question and that she

had only a split second to observe her attacker. Id., 831–32, 847–48.

"During closing arguments, defense counsel [in *Gomes*] argued that this case screams reasonable doubt. . . . [T]he police completely failed in this case, and they completely failed [the victim]. They didn't go back to that scene that night. They didn't identify the crime scene. They didn't take any photos so that you, ladies and gentlemen, could see how the scene looked that night. How the lighting looked. They never tried to get any surveillance video. . . . They didn't confirm what happened. Defense counsel also argued that the police spent ninety minutes on this investigation, and that the case boil[ed] down to one witness and what she saw in a split second, and she may very well believe that [the defendant] did this to her." (Internal quotation marks omitted.) Id., 832.

"In connection with his defense of inadequate police investigation, the defendant had filed a written request to charge the jury, which provided in relevant part: [1] You have heard some arguments that the police investigation was inadequate and biased. [2] The issue for you to decide is not the thoroughness of the investigation or the competence of the police. [3] However, you may consider evidence of the police investigation as it might relate to any weaknesses in the state's case. [4] Again, the only issue you have to determine is whether the state, in light of all the evidence before you, has proved beyond a reasonable doubt that the defendant is guilty of the counts with which he is charged." (Internal quotation marks omitted.) Id., 833.

During the charge conference in *Gomes*, "the court told defense counsel that it would be charging on the adequacy of the police investigation, in a form that was somewhat similar to the defendant's requested instruction, but that [its instruction] may be a little bit different." (Internal quotation marks omitted.) Id. At trial,

however, the court instructed the jury, in relevant part, using the then model jury instruction: "You have heard some arguments that the police investigation was inadequate and that the police involved in the case were incompetent or biased. The issue for you to decide is not the thoroughness of the investigation or the competence of the police. The only issue you have to determine is whether the state, in light of all the evidence before you has proved beyond a reasonable doubt that the defendant is guilty of the counts with which he was charged." (Internal quotation marks omitted.) Id. Defense counsel excepted to the jury instructions as given. Id., 833–34.

The jury subsequently found the defendant guilty, and the defendant appealed to this court. Id., 834. The defendant claimed that "the jury instructions, as given, deprived him of his right to present a defense of investigative inadequacy. Specifically, the defendant argue[d] that the [trial] court erred in failing to include point three of his requested jury charge, which [provides]: However, you may consider evidence of the police investigation as it might relate to any weaknesses in the state's case. The defendant argue[d] that without the inclusion of this requested sentence, the jury would not have understood how to use the evidence [defense counsel] was able to elicit about the inadequacies of [the police investigation]." (Internal quotation marks omitted.) Id. This court rejected the defendant's claim, "noting that the instruction given by the trial court was (1) identical to the model criminal jury instruction on investigative inadequacy provided on the Judicial Branch website, and (2) consistent with investigative inadequacy instructions approved by [our Supreme Court in other cases]." (Citations omitted; footnote omitted.) Id., 834–35. A certified appeal to our Supreme Court followed. Id., 837.

In *Gomes*, our Supreme Court reversed, holding that "the model jury instruction utilized by the trial court . . . failed to inform the jury not only of a defendant's right to rely upon relevant deficiencies or lapses in the police investigation to raise the specter of reasonable doubt . . . but also the jury's concomitant right to consider any such deficiencies in evaluating whether the state ha[d] proved its case beyond a reasonable doubt." (Citation omitted; internal quotation marks omitted.) Id., 853.

In explaining its decision, our Supreme Court stated that, "[a]lthough the model instruction is similar to the instructions this court approved in *Williams* and *Collins* because it informs the jury not to consider investigative inadequacy in the abstract . . . the model instruction, unlike the instructions in *Williams* and *Collins*, improperly fails to inform the jury that a defendant may present evidence of investigative inadequacy in his or her *particular* case. Indeed, as the defendant argues, the model instruction omits the very language that the court in *Collins* determined rendered the instruction in that case acceptable because it (1) apprised the jury that the defendant was entitled to make an investigation and put his evidence before [it], and (2) directed the jury to determine, *based on all the evidence* before [it], including evidence presented by the defendant, whether the state had proved the defendant's guilt beyond a reasonable doubt. . . . The language that the defendant requested be added to the model jury instruction—i.e., that the jury may consider evidence of the police investigation as it might relate to any weaknesses in the state's case—would have similarly apprised the jury of the defendant's right to present an investigative inadequacy defense and the jury's right to consider it in evaluating the strength of the state's case." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 853–54 (citing *State* v. *Collins*, supra, 299

Conn. 567; *State* v. *Williams*, 169 Conn. 322, 363 A.2d 72 (1975)).

The court in *Gomes* also stated that the model criminal jury instruction on investigative inadequacy "should be improved on to better convey, as this court recently explained in [*State* v. *Wright*, supra, 322 Conn. 283], that '[t]he inference that may be drawn from an inadequate police investigation is that the evidence at trial may be inadequate or unreliable because the police failed to conduct the scientific tests or to pursue leads that a reasonable police investigation would have conducted or investigated, and these tests or investigation reasonably may have led to significant evidence of the defendant's guilt or innocence. A jury may find a reasonable doubt if [it] conclude[s] that the investigation was careless, incomplete, or so focused on the defendant that it ignored leads that may have suggested other culprits.' " Id., 856 n.20.

"Toward that end, [the court in *Gomes*] encourage[d] our trial courts going forward to utilize the following investigative inadequacy instruction, which bears resemblance to the one utilized by the Massachusetts courts: You have heard some testimony of witnesses and arguments by counsel that the state did not (mention alleged investigative failure: e.g., conduct certain scientific tests, follow standard procedure, perform a thorough and impartial police investigation, etc.) in this case. This is a factor that you may consider in deciding whether the state has met its burden of proof in this case because the defendant may rely on relevant deficiencies or lapses in the police investigation to raise reasonable doubt. Specifically, you may consider whether (relevant police investigative action) would normally be taken under the circumstances, whether, if (that/those) action(s) (was/were) taken, (it/they) could reasonably have been expected to lead to significant evidence of the defendant's guilt or innocence, and

whether there are reasonable explanations for the omission of (that/those) action(s). If you find that any omissions in the investigation were significant and not reasonably explained, you may consider whether the omissions tend to affect the quality, reliability, or credibility of the evidence presented by the state to prove beyond a reasonable doubt that the defendant is guilty of the count(s) with which (he/she) is charged. The ultimate issue for you to decide, however, is whether the state, in light of all of the evidence before you, has proved beyond a reasonable doubt that the defendant is guilty of the count(s) with which (he/she) is charged."[6] Id.

Here, as in *Gomes*, the main defense theory advanced by the defendant was that the police had conducted an inadequate investigation of the incident. The state attempts to distinguish the facts here from *Gomes*, arguing that *Gomes* is not controlling because the defendant here attacked the *conclusions* the police drew from their investigation rather than the actual police *investigation* itself. We disagree. As previously detailed, defense counsel elicited testimony from numerous witnesses regarding deficiencies or lapses in the police investigation. Specifically, he presented evidence that the police failed (1) to consider the possibility that Lovering's allegation that the defendant strangled him was not true or that Lovering's injuries were caused by autoerotic asphyxiation, (2) to obtain and preserve Lovering's Facebook records, (3) to make a time line of events on October 21 and 22, (4) to interview Lovering or his mother about Lovering's alleged statement to her that the defendant had strangled him, (5)

[6] This instruction was subsequently approved by the Judicial Branch's Criminal Jury Instruction Committee as 2.6-14, titled "Adequacy of Police Investigation." Connecticut Criminal Jury Instructions 2.6-14, available at https://www.jud.ct.gov/JI/Criminal/Criminal.pdf (last visited January 19, 2022).

to reconcile the inconsistency between the statement of Lovering's mother that Lovering had first awakened from his coma and begun to talk to her on November 2 with his phone records, which indicated he had first awakened from the coma and begun to use his cell phone on October 27, (6) to consider that the defendant's autism was a possible explanation for his unusual behavior after he reported Lovering's injuries to the police, and (7) to sufficiently document, either descriptively or photographically, the injuries to Lovering's neck. Contrary to the state's argument, this evidence certainly highlights shortcomings in the police *investigation* itself, not simply in the *conclusions* the police drew from their investigation. Moreover, the court noted during the charge conference that "it's factually disputed that the police investigation was inadequate and the police involved were incompetent." As a result, the defendant was entitled to have the jury consider evidence of any relevant deficiencies or lapses it might find in the police investigation as bases for entertaining reasonable doubt as to the defendant's guilt. See *State* v. *Wright*, supra, 322 Conn. 282 ("[a] defendant may . . . rely upon relevant deficiencies or lapses in the police investigation to raise the specter of reasonable doubt, and the trial court violates his right to a fair trial by precluding the jury from considering evidence to that effect" (internal quotation marks omitted)).

Additionally, here, as in *Gomes*, by instructing the jury that "[t]he issue for [it] to decide [was] not the thoroughness of the investigation or the competence of the police" and that "[t]he only issue [it had] to determine is whether the state, in the light of all the evidence . . . has proved beyond a reasonable doubt that the defendant is guilty of the counts with which he is charged," the court failed to inform the jury of the defendant's right to rely on relevant deficiencies or lapses in the police investigation as possible bases for

raising reasonable doubt as to his guilt.[7] The jury instruction failed to inform the jury of its "concomitant right to consider any such deficiencies in evaluating whether the state has proved its case beyond a reasonable doubt." *State* v. *Gomes*, supra, 337 Conn. 853. Had language of the sort requested by the defendant in the second paragraph of his request to charge been added, it would, as the current model jury instruction does, have "apprised the jury of the defendant's right to present an investigative inadequacy defense and the jury's right to consider it in evaluating the strength of the state's case." Id., 854.

Because the court failed to inform the jury of the defendant's right to rely on the inadequacy of the police investigation and the jury's right to rely on such inadequacies in evaluating whether the state has proved its case beyond a reasonable doubt, we conclude that the trial court committed instructional error in charging the jury as it did.

B

Having determined that the trial court improperly instructed the jury as to how it might consider evidence of the inadequacy of the police investigation in conducting its deliberations, we next consider whether the jury charge resulted in prejudice to the defendant. In so doing, we first note that "the state bears the burden of proving that the constitutional impropriety was harmless beyond a reasonable doubt." *State* v. *Brown*, 279 Conn. 493, 511, 903 A.2d 169 (2006).

[7] In *Gomes*, the court made clear that "[t]he language used in the model jury instructions, although instructive in considering the adequacy of a jury instruction . . . is not binding on this court. . . . [W]e previously have cautioned that the . . . jury instructions found on the Judicial Branch website are intended as a guide only, and that their publication is no guarantee of their adequacy." (Citation omitted; internal quotation marks omitted.) *State* v. *Gomes*, supra, 337 Conn. 853 n.19.

The defendant claims that the court's instructional error was harmful because "there is at the very least a reasonable possibility that the jury was misled by the [trial] court's instructions" given the overall weakness of the state's case. We agree.

"When a defendant challenges the trial court's failure to provide a requested charge, or some other impropriety in the jury instructions, one of two separate and distinct legal standards of review is used. If the claimed omission or impropriety is of constitutional dimension, we must be convinced that there is no reasonable possibility that it affected the verdict. . . . When the error is merely of an evidentiary nature, then the defendant must prove that it was reasonably probable that the jury was misled." (Citation omitted.) *State* v. *Ali*, 233 Conn. 403, 422–23, 660 A.2d 337 (1995); see also *State* v. *Gomes*, supra, 337 Conn. 849 ("[a]n error in instructions in a criminal case is reversible error when it is shown that it is reasonably possible for errors of constitutional dimension or reasonably probable for nonconstitutional errors that the jury [was] misled" (internal quotation marks omitted)).

The challenged jury instructions here involve a constitutional right. See *State* v. *Collins*, supra, 299 Conn. 598 ("[a] fundamental element of due process of law is the right of a defendant charged with a crime to establish a defense" (internal quotation marks omitted)). "A defendant may . . . rely upon relevant deficiencies or lapses in the police investigation to raise the specter of reasonable doubt, and the trial court violates his right to a fair trial by precluding the jury from considering evidence to that effect." (Internal quotation marks omitted.) *State* v. *Wright*, supra, 322 Conn. 282. Because the defendant's claim is of constitutional magnitude, we review his claim by the " 'reasonable possibility' " standard. See *State* v. *Collins*, supra, 598–99 (applying "reasonable possibility" standard

where defendant claimed trial court violated his constitutional right to present defense by improperly instructingjury that adequacy of police investigation was not issue in case).

"[T]he United States Supreme Court has repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Brown*, supra, 279 Conn. 504. "[I]t is well established that a defect in a jury charge which raises a constitutional question is reversible error if it is reasonably possible that, considering the charge as a whole, the jury was misled. . . . [T]he test for determining whether a constitutional error is harmless . . . is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (Internal quotation marks omitted.) *Bell* v. *Commissioner of Correction*, 184 Conn. App. 150, 162, 194 A.3d 809 (2018), aff'd, 339 Conn. 79, 259 A.3d 1073 (2021).

In *Gomes*, the court held that it was apparent that the instructional error complained of was harmful to the defendant, "[g]iven the relative weakness of the state's case . . . ." *State* v. *Gomes*, supra, 337 Conn. 855. The court determined that the state's case was relatively weak because it "turned almost entirely on the believability of the victim's testimony that, although she had never seen the defendant before the night in question and could not describe him to [a police officer] when they spoke at the hospital following the assault, and although the attack occurred in 'a split second' from behind a six foot fence, she was able to identify the defendant as her assailant from a photographic array conducted more than two weeks later. Defense counsel sought to exploit and amplify the weaknesses in the

state's evidence by directing the jury's attention to inadequacies and omissions in the investigation, in particular [the officers'] failure to consider [another individual] as a potential suspect, even though he was identified as such by the police dispatcher, as well as their failure to interview any of the witnesses who approached them on the night in question outside the club, claiming to have information about the assault. Defense counsel asked the jury to find the defendant not guilty on the basis of these investigative lapses because they raised a reasonable doubt as to the trustworthiness of the victim's identification of him as the person who attacked her. We cannot conclude that a properly instructed jury would not have done so." Id., 855–56.

Our Supreme Court in *Gomes* reasoned that there was "a significant risk that the instruction given by the trial court misled the jury to believe that it could *not* consider the defendant's arguments concerning the adequacy of the police investigation. Although the first sentence of the instruction acknowledged that the defendant made arguments that the police had failed to investigate adequately the crime in question, in the very next sentence, the jury was instructed that the adequacy of the police investigation was *not* for it to decide. This admonishment was reinforced by the third and final sentence that the *only* issue for the jury to decide was whether the state had proven the defendant's guilt beyond a reasonable doubt. . . . Thus, rather than apprising the jury that reasonable doubt could be found to exist if the jury conclude[d] that the investigation was careless, incomplete, or so focused on the defendant that it ignored leads that may have suggested other culprits . . . there is a reasonable possibility that the instruction had the opposite effect and caused the jury to believe that it was *prohibited* from considering any such evidence." (Citation omitted;

emphasis in original; internal quotation marks omitted.) Id., 854–55.

Considered in light of the decision in *Gomes*, the following additional facts are relevant to our resolution of the state's claim of harmlessness with respect to the improper instruction challenged in this appeal. During the trial, it became apparent that there were weaknesses in the state's case against the defendant. Importantly, no one—not even Lovering—claimed to have seen the defendant strangle Lovering. According to Lovering's testimony at trial, when he was allegedly being strangled, he was sitting with his back to the door, on his knees with his lower legs tucked beneath him, and his buttocks resting on his legs. Lovering testified that this was a common position for him to sit in. At the time, Lovering claimed, he was talking to Muskus, who was sitting on an air mattress in front of him. Lovering testified that, while he and Muskus were talking, he felt pressure around his neck from either rope or a string and then everything went black. However, Lovering testified that he did not see the person who allegedly strangled him. According to Lovering, the next thing he remembered was waking up in the hospital. Muskus, however, did not corroborate Lovering's version of events at trial. According to Muskus' testimony, in the early hours of October 22, after the neighbors had left the apartment, she and the defendant were in the defendant's room when Lovering came into the room. According to Muskus, the defendant told Lovering that he could no longer stay in the apartment. Muskus testified that Lovering began crying. Muskus testified that she remained in the defendant's room for the remainder of the night.

Although Lovering suggested that the only possible explanation for his injuries was that the defendant had attempted to strangle him, testimony from other witnesses supported several alternative explanations for

the red marks on his neck. Lin Monte testified that there were three possible explanations for those marks, including (1) an attempted suicide, (2) strangulation, or (3) autoerotic asphyxiation. Dragovic testified that, because of the single, blurry photograph of Lovering's neck injury, "[t]here [were] endless possibilities for [the pattern on Lovering's neck], based on how it appear[ed]" and the "extent of documentation present[ed] to us." Paramedic Kelsey testified that it was possible Lovering's condition had been caused by autoerotic asphyxiation. Paramedic Ridenour testified that the marks on Lovering's neck were of various colors, indicating that some of the marks were fresh but others were old.

Multiple witnesses also testified about possible causes of the injuries to Lovering's legs. Shah testified that the lack of blood flow to Lovering's legs could have been the result of alcohol intoxication. Shah explained that alcohol intoxication can cause a person to lose consciousness and remain immobile for a prolonged period of time, cutting off blood flow to parts of his body. Shah testified that Lovering could have sustained the observed injuries to his legs if he had fallen over backward while kneeling with his lower legs on the floor and his buttocks resting on his heels. Dragovic also testified that the observed injuries to Lovering's legs could have been caused by acute alcohol intoxication alone, stating: "You can't rule it out because, if there is alcohol intoxication, that is the most logical explanation of these complications . . . because of the position one takes being intoxicated, being under the influence of alcohol, and being in [a] prolonged position in such a way so that it undercuts the circulation, the blood supply to the large bulk of skeletal muscle and skeletal muscle, after [a] few hours, has the tendency to start necrosis and it undergoes necrosis and it shuts

down [the] kidneys and there is maybe irreparable damage."

Inconsistencies in Lovering's recollection of events were also revealed at trial. Lovering testified that he has had issues with his memory since suffering a head injury in 2014. Inconsistencies existed between Lovering's written statement to the police on November 11, 2016, and his testimony at trial. Lovering gave a signed, written statement to the police, which did not mention the neighbors coming to the apartment. At trial, however, Lovering testified that he had invited his neighbors into the apartment for a drink.

When Lovering initially woke up from the coma in the hospital, he told his doctors that he had no recollection of what had happened to him on October 22. It was not until several days later, on November 2, that he first told his mother that the defendant had strangled him. When questioned about this inconsistency at trial, Lovering testified that he did in fact remember what had happened to him when he first spoke to his doctors but he had lied to the doctors about it. Lovering testified that he lied to his doctors about the cause of his injuries because he did not want to deal with the situation.

Furthermore, a message suggesting that Lovering was planning to die by suicide was sent from Lovering's Facebook account to Muskus' Facebook account at 3:30 a.m. on October 22, 2016. The message stated: "Have fun with my death." Lovering claimed that he never sent that message. On cross-examination, Lovering testified that he did not have any recollection of what happened during the time period when the message was sent. Lovering testified that he did not believe he sent the message because he "would never put anybody through that turmoil" of thinking that he was going to kill himself. During trial, however, substantial challenges were

made to Lovering's memory and general credibility. Lovering admitted, for example, to having had problems with drugs and alcohol in the past but firmly denied that he was intoxicated in the early morning hours of October 22. This claim was flatly contradicted by Gottshall, who testified that she had seen Lovering at about 2:30 a.m. on that date when she and her boyfriend at the time, who then lived next door to Lovering, returned to the boyfriend's apartment. According to Gottshall, Lovering appeared to be intoxicated at that time, for his speech was slurred, he was stumbling when he walked, and at one point he fell over in the kitchen, striking the stove.

The defense also argued that any alleged inconsistencies in the defendant's recollection of events and his behavior could be explained by his autism. Psychiatrist Alexander Westphal testified that the defendant was autistic, a diagnosis having been made in 2013. According to Westphal, people with autism may have difficulty telling stories in a coherent manner, may have memory deficits, and may attempt to fill in gaps in their memories with events that may not have actually occurred.

Here, as in *Gomes*, there is a "significant risk that the instruction given by the trial court misled the jury to believe that it could *not* consider the defendant's arguments concerning the adequacy of the police investigation." (Emphasis in original.) *State* v. *Gomes*, supra, Conn. 854. As the court explained in *Gomes*, "[a]lthough the first sentence of the instruction acknowledged that the defendant made arguments that the police had failed to investigate adequately the crime in question, in the very next sentence, the jury was instructed that the adequacy of the police investigation was *not* for it to decide. This admonishment was reinforced by the third and final sentence that the *only* issue for the jury to

decide was whether the state had proven the defendant's guilt beyond a reasonable doubt. . . . Thus, rather than apprising the jury that reasonable doubt could be found to exist if the jury conclude[d] that the investigation was careless, incomplete, or so focused on the defendant that it ignored leads that may have suggested other culprits . . . there is a reasonable possibility that the instruction had the opposite effect and caused the jury to believe that it was *prohibited* from considering any such evidence." (Citation omitted; emphasis in original; internal quotation marks omitted.) Id., 854–55. Because there is a reasonable possibility that the instruction caused the jury to believe that it was prohibited from considering evidence of the inadequacy of the police investigation, the jury may have ignored key evidence introduced by the defendant at trial, as previously described, concerning the inadequacy of the investigation.

Furthermore, "[g]iven the relative weakness of the state's case, it also is apparent that the instructional error was harmful to the defendant." Id., 855. As previously noted, the state's case against the defendant turned almost entirely on the believability of Lovering's allegation that the defendant had strangled him, although Lovering did not actually see the defendant attempt to strangle him. Defense counsel also adduced evidence tending to undermine Lovering's credibility, particularly as to inconsistencies in his claimed recollection of events on the evening of October 22, lies he admittedly told his doctors after he awakened from his coma, and the message sent from his Facebook account to Muskus' Facebook account that stated: "Have fun with my death," which suggested that he was then contemplating his own imminent death, and thus possibly planning to die by suicide.

At trial, defense counsel sought to exploit and amplify the weaknesses in the state's case by directing the jury's

attention to testimony from various witnesses concerning these weaknesses. In particular, defense counsel elicited testimony that there were alternative explanations for Lovering's neck injuries, including attempted suicide or autoerotic asphyxiation and that the marks on Lovering's neck were of various colors, indicating that some of them may have been made on a previous occasion. Testimony also revealed that Lovering's leg injuries could have been caused by prolonged immobility of his legs during a period of unconsciousness resulting from acute alcohol intoxication. Defense counsel also argued that any inconsistencies in the defendant's statements and his odd mannerisms could be explained by his autism.

During closing argument, defense counsel asked the jury to find the defendant not guilty on the basis of reasonable doubt arising both from the many alleged inadequacies of the police investigation that led to his arrest and prosecution, and from the overall weakness of the state's case. Here, as in *Gomes*, we conclude that the defendant's conviction must be reversed because the state has not proved beyond a reasonable doubt that a properly instructed jury would not have entertained a reasonable doubt as to the defendant's guilt on the basis of the alleged deficiencies in the police investigation and thus found the defendant not guilty of all charges in this case.

As a result, we conclude that there was a reasonable possibility that the trial court's instructional error misled the jury, that it affected the verdict, and, thus, that it was not harmless beyond a reasonable doubt, resulting in prejudice to the defendant. See *Bell* v. *Commissioner of Correction*, supra, 184 Conn. App. 162 ("[I]t is well established that a defect in a jury charge which raises a constitutional question is reversible error if it is reasonably possible that, considering the charge as a whole, the jury was misled. . . . [T]he test for

determining whether a constitutional error is harmless . . . is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (Internal quotation marks omitted.)). Accordingly, the proper remedy is to reverse the judgment of conviction and remand this case for a new trial.

II

The defendant also claims that the trial court improperly admitted into evidence a police disciplinary report in violation of his state and federal constitutional rights to confront the witnesses against him.[8] Specifically, the defendant argues that the report (1) constituted hearsay that was not admissible under the business record exception to the hearsay rule and (2) was testimonial. We agree.

"The standard under which we review evidentiary claims depends on the specific nature of the claim presented. . . . To the extent a trial court's admission of evidence is based on an interpretation of [law], our standardof review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. . . . As a general matter, hearsay statements may not be admitted into evidence unless they fall within a recognized exception to the hearsay rule. . . . In the context of a criminal trial, however, the admission of a hearsay statement against a defendant is further limited by the confrontation clause of the sixth amendment. Under *Crawford* v. *Washington*, [541 U.S. 36, 124 S. Ct. 1354,

[8] Although our conclusion in part I of this opinion is dispositive of the present appeal, we address the defendant's claim that the trial court improperly admitted the police disciplinary report because it has been raised and fully briefed, and it is likely to arise on remand. See, e.g., *State* v. *Chyung*, 325 Conn. 236, 260 n.21, 157 A.3d 628 (2017) (addressing claim that court abused its discretion in admitting evidence of uncharged misconduct because issue was likely to arise on remand).

158 L. Ed. 2d 177 (2004)], hearsay statements of an unavailable witness that are testimonial in nature may be admitted in accordance with the confrontation clause only if the defendant previously has had the opportunity to cross-examine the unavailable witness. Nontestimonial statements, however, are not subject to the confrontation clause and may be admitted under state rules of evidence. . . . Thus, the threshold inquiries that determine the nature of the claim are whether the statement was hearsay, and if so, whether the statement was testimonial in nature, questions of law over which our review is plenary." (Citations omitted; internal quotation marks omitted.) *State* v. *Smith*, 289 Conn. 598, 617–19, 960 A.2d 993 (2008).

The following additional facts and procedural history are relevant to our resolution of this claim on appeal. During trial, the prosecution sought to introduce into evidence a police observation report (report) written by Sergeant Thomas Lazzaro on January 7, 2017, concerning Marceau's performance during the investigation of this case, in order to show the actions taken by the police department in response to that performance. The first page of the report indicated that Marceau's work on this case was "unsatisfactory" as to his (1) techniques of assignment, (2) judgment and decision-making, (3) quality of work, and (4) initiative. The second page, with the subsequently redacted material italicized, read: "On 10/22/2016 at approximately 1733 hours Officer Marceau and Officer Homand responded to a residence for a medical call . . . . The caller stated *that the victim* had red marks around his neck and stated he believed *the victim* tried to hang himself. While at the scene *the victim* was not conscious and could not provide any information. Officer Marceau stated there were ligature marks present on the *victim's* neck. As a result Officer Marceau investigated the incident as a suicide attempt [and] *the victim* was transported to Backus

Hospital. *It was later determined, when the victim regained consciousness, that the incident was not a suicide attempt. The victim* later provided information that suggested the reporting person caused *the victim's* injuries. The case was later turned over to the Detective Division as a serious assault investigation.

"In light of the facts provided following Officer Marceau's investigation, it was determined that the information which suggested the incident was an assault could have been discovered during the initial report. Some inconsistencies in the information provided by the reporting person and the scene itself clearly required further investigation by the officers who initially responded to the scene. As a result, valuable evidence and on scene interview opportunities may have been lost which adversely affected the investigation.

"More specifically, Officer Marceau failed to look for, ask and identify any object in the area that could have been used to make the victim's ligature marks which he clearly observed. Officer Marceau failed to recognize the statements from the witnesses and information did not correspond to what he was observing in the area and around the victim. No photographs were taken of the scene. Furthermore, the on duty road supervisor was not contacted as a resource.

"As a result of this incident it is apparent that Officer Marceau can improve his performance in similar circumstances by probing further in on scene interviews with principal parties involved. Officer Marceau can improve by not taking information provided to him at face value. *Officer Marceau should spend more time asking more questions when his observations do not match information he gathers from evidence at the scene, witnesses and the statements of medical personnel on scene or anyone else involved.* Officer Marceau should be clearly aware that if he has a question at any

time for any incident, he can contact the road supervisor and should that supervisor not be available, he may contact the shift supervisor."

The defense objected to the admission of the report, arguing that it included the state's opinion about the strength of its case. Defense counsel argued that "there are things in [the report] that are clearly just bolstering of the prosecution's case. Where whoever it is that wrote this report, Sergeant Lazzaro is claiming that, in light of the facts provided following Officer Marceau's investigation, it was determined that the information, which suggests the incident was an assault and could have been discovered during the initial report. That's just plainly bolstering. It's an opinion that—it shouldn't be admitted into evidence." Defense counsel also stated that he planned to question Marceau about the report but that he "certainly wouldn't be offering it for the truth of this was clearly an assault. That's highly inappropriate." Defense counsel also added that, "[t]his is not a disciplinary report, Your Honor. It's made to appear as if he's being disciplined to bolster their case, but they shouldn't be allowed to, in the process, express their opinions to the jury about the strength of their case."

In response to defense counsel's objection, the prosecutor argued that the state was "claiming all of it now because this was the action that they took. And it doesn't say clearly assaulted. It says suggested, I think, but this is the action that the police department took against him, and that's not exactly phrased properly. But this is the police response to this. That the objection that this bolsters the state's case—well, all of our evidence is intended to bolster the state's case. I mean, there's nothing particularly wrong with the state trying to move its case forward. There's no question that's what I'm doing." The prosecutor argued that the report

should "go into evidence with the possibility of redactions in the future."

The court stated, "I haven't heard any testimony about [the report] yet, so I don't know if you're asking me to rule on it at this point, but, based on what I understand or anticipate the state would be establishing, I would think that some of this would be admissible, and I would entertain a request that some parts of it be redacted." The court then overruled defense counsel's objection, and the report was admitted into evidence as a full exhibit subject to redaction.

The following day, the defendant filed a motion for reconsideration regarding the admission of the police report. In his motion, the defendant argued that the report was inadmissible hearsay and that the state had not laid an adequate foundation to meet the requirements of the business record exception to the rule against hearsay. The defendant further argued that the admission of the report violated his right to confront the witnesses against him pursuant to the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution.

The court heard argument on the motion, and defense counsel iterated his assertion that the report constituted inadmissible hearsay and that the state had not laid an adequate foundation to meet the requirements of the business record exception because "there's no evidence that it was the regular course of business to make these observation reports or that this one, in particular, was made in a regular course of business. In fact, it seems as though this was a special, rare occurrence that's outside the usual course of business for the police department. Next, in order for something to be a business record, it needs to be created within a reasonable amount of time after the incident that's being described.

Here, this was made close to three months after the investigation was initiated, and the events described took place almost three months before the report was prepared. Finally, it was prepared by Sergeant [Lazzaro], who has no role in the investigation of this case. It's not based, in any way, on his personal knowledge, and so, given that, there's no reason to think that it has the requisite reliability to qualify as a business record. The second related issue is that it violates the defendant's right to confrontation. The person who produced this record has not been a witness. . . . The defendant has a right to be able to present evidence before the jury through cross-examination of any witness who testifies against him."

The prosecutor, in response, argued that, "we did move pursuant to the business record exception, [§ 8-4 of the Connecticut Code of Evidence], and I think we did lay a proper foundation under those rules, and I don't think it's fair, at this juncture, after it's already been admitted, to claim a lack of proper foundation. . . . In regard to [the argument] that the record is required to be done or created close in time to the event to which [it] purports to be about, we're not saying that that record is, in and of itself, about the events of October 22, 2016. We're saying it's about the police officer's conduct, and there was what is referred to in the police department as an observation—an observation report was made, and this document is contemporaneous with that event. I'm using the word disciplined, but it's not exactly the accurate word, as I understand the rules of the police department, but it is an accurate account of what the police department did in regard to this police officer that the higher-ups felt had done a job that could have been done better. And that's what that report is about, directly. It's not directly about the incident of October the 22nd, 2016, nor do we claim it. [Defense counsel] says that the individual who prepared

the report wasn't here or available for cross-examination. Of course, this is the exact reason for the business record exception. That's [sub]section B [of § 8-4 of the Connecticut Code of Evidence] entitled witness need not be available. . . . And the point of the document was that the police officer was held accountable in some sort of way by the authorities for what they considered to be an inadequate performance on or about October 22, 2016. That's what the report is meant to address. That the police department looked at this conduct of the police officer and found it to be an inadequate response." The prosecutor also argued, in the alternative: "I would assert that it's introduced [as nonhearsay], and it is not for the truth of what's purported in the document. The purpose of the entry was to show this is the action the police department took in regard to this investigation by this particular police officer."

In rebuttal, defense counsel argued that "we need to be able to cross-examine the person who made [the report] in order to adequately present the case. Second, almost the entire second page describes the investigation of this case. Now, if this document is admitted for the purpose of simply showing that someone was unhappy with his work, I think virtually the entirety of the second page needs to be redacted because none of that would come in under, through the business record exception. . . . And I would point out, even though the business record exception does allow for documents that were not produced—or it doesn't require the maker of the document to come in—the confrontation clause does, and, in this instance, a criminal proceeding, that trumps the rule of evidence."

The court subsequently granted the defendant's motion for reconsideration, but after reconsideration, it ruled that its "prior decision to allow [the report] to be a full exhibit with redactions stands." From the bench, the court stated: "[U]nder the circumstances,

since the document is being offered by the state only to show that this was action that the Norwich Police Department took, I am going to permit it to continue to be marked as a full exhibit. However, I do understand the defendant's concern, and I am going to permit substantial redactions, particularly with respect to the narrative on page two, which, I think, could fairly be viewed as bolstering the state's case improperly. So, I am going to permit anything that could be viewed that way to be redacted from this document. But because the state is offering it really only to show that this was the action that the Norwich Police Department took and not for the truth of those matters that are contained, particularly on page two, I am going to permit it to continue to be marked as a full exhibit." Redactions, as detailed previously, were subsequently made to the report, and the report was published to the jury as a full exhibit.

We agree with the defendant that the report constitutes inadmissible hearsay and that the state failed to lay an adequate foundation to satisfy the business record exception to the hearsay rule. We further agree that the report was testimonial, and therefore, its admission into evidence in this case violated the defendant's state and federal constitutional rights to confront the witnesses against him.

We first consider, as a threshold inquiry, whether the report constituted hearsay. "An out-of-court statement offered to establish the truth of the matter asserted is hearsay. . . . The hearsay rule forbids evidence of out-of-court assertions to prove the facts asserted in them. If the statement is not an assertion or is not offered to prove the facts asserted, it is not hearsay." (Internal quotation marks omitted.) *State* v. *Gordon*, 206 Conn. App. 70, 82, 259 A.3d 676, cert. granted, 339 Conn. 913, 262 A.3d 135 (2021). The report is inarguably an out-of-court statement. The report constitutes a statement

because it is a written assertion. See id., 83 ("[a] statement is defined as an oral or written assertion" (internal quotation marks omitted)). The statement was also made out of court. Therefore, we must consider the purpose for which the report was admitted.

We conclude that the report was admitted for the truth of the matter asserted. "It is settled law that out-of-court statements that are not offered to establish the truth of the matter asserted are not hearsay. [A]n out-of-court statement offered to prove the truth of the matter asserted is hearsay. . . . If such a statement is offered for a purpose other than establishing the truth of the matters contained in the statement, it is not hearsay." (Internal quotation marks omitted.) *State* v. *Willoughby*, 153 Conn. App. 611, 617–18, 102 A.3d 1118 (2014). In determining whether an out-of-court statement is offered for the truth of the matter asserted, and thus is hearsay, "the matter asserted [is] the matter asserted by the writing or speech, not the matter asserted by the proponent of the evidence." (Internal quotation marks omitted.) *State* v. *Esposito*, 223 Conn. 299, 315, 613 A.2d 242 (1992); see also *State* v. *Williams*, 48 Conn. App. 361, 368–69, 709 A.2d 43 ("[t]he matter asserted [in an out-of-court statement is] the matter asserted by the writing or speech, not the matter asserted by the proponent of the evidence" (internal quotation marks omitted)), cert. denied, 245 Conn. 907, 718 A.2d 16 (1998).

Although the trial court determined that the report was offered by the state only to show that the Norwich Police Department took action with regard to Marceau's performance during the investigation of the case, the matter asserted in the report relates to the investigation of this case and the quality of Marceau's work on the case. The first page of the report asserts that Marceau's work on the case was unsatisfactory. Although the second page of the report was subject to redactions, the

matter asserted on the second page is that Marceau's initial determination that the incident was a suicide attempt was incorrect and that Marceau's actions leading him to that conclusion were inadequate. Thus, the report was introduced to prove that Marceau's investigation and conclusion that the incident was a suicide attempt were inadequate and unsatisfactory. For these reasons, we conclude that the report was introduced to prove the truth of its contents.

Having determined that the report constituted hearsay, we next determine whether the report was admissible under a hearsay exception. As detailed previously, the state argued at trial that the report was admissible under the business record exception. Because the trial court concluded that the report was not hearsay, it did not make an explicit finding concerning whether the report fell under the business record exception. "[H]earsay may be admitted if there is a sufficient probability that the statement is reliable and trustworthy, if the evidence contained in the statement is necessary to resolution of the case, and if the trial court concludes that admitting the statement is in the interests of justice. . . . Some types of admissible hearsay occur frequently enough that certain defined exceptions to the general rule of inadmissibility have come to be recognized." (Citation omitted; internal quotation marks omitted.) *State* v. *Sharpe*, 195 Conn. 651, 664, 491 A.2d 345 (1985). One such exception is the business record exception set forth in General Statutes § 52-180.[9]

[9] General Statutes § 52-180 (a) provides: "Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of the act, transaction, occurrence or event, if the trial judge finds that it was made in the regular course of any business, and that it was the regular course of the business to make the writing or record at the time of the act, transaction, occurrence or event or within a reasonable time thereafter."

"To admit evidence under the business record exception to the hearsay rule, a trial court judge must find that the record satisfies each of the three conditions set forth in . . . § 52-180. The court must determine, before concluding that it is admissible, that the record was made in the regular course of business, that it was the regular course of such business to make such a record, and that it was made at the time of the act described in the report, or within a reasonable time thereafter." (Internal quotation marks omitted.) *River Dock & Pile, Inc.* v. *O & G Industries, Inc.*, 219 Conn. 787, 793–94, 595 A.2d 839 (1991).

The state failed to establish that the report in this case was made in the regular course of business, instead of in anticipation of litigation. "The business record exception recognizes that documents used for business are trustworthy. Those prepared for litigation, however, lack the presumption of trustworthiness." *Connecticut Bank & Trust Co., N.A.* v. *Reckert*, 33 Conn. App. 702, 710, 638 A.2d 44 (1994). "[D]ocuments prepared for litigation are excluded, not on a per se basis, but rather upon an inquiry into whether such documents bear circumstantial indicia of lack of trustworthiness. In the exercise of appropriate discretion, courts may exclude such records where they are self-serving and a motive for falsification can be demonstrated." (Internal quotation marks omitted.) *Webster Bank* v. *Flanagan*, 51 Conn. App. 733, 749, 725 A.2d 975 (1999). We conclude that the report here lacks trustworthiness. The report was made on January 7, 2017, after the defendant had been arrested, but before the commencement of his trial. The report was also made three months after the actions described in it. Because the report was made after the defendant's arrest and three months after the events it describes, it does not have the indicia of trustworthiness required to fall within the business record exception. We therefore conclude that the report constitutes

inadmissible hearsay and does not fall under the business record exception.

The defendant also claims that the admission of the report violated his right to confront the witnesses against him. "[T]he state's use of hearsay evidence against an accused in a criminal trial is limited by the confrontation clause of the sixth amendment. . . . The sixth amendment to the constitution of the United States guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him. This right is secured for defendants in state criminal proceedings. . . . [T]he primary interest secured by confrontation is the right of cross-examination." (Citations omitted; internal quotation marks omitted.) *State* v. *Carpenter*, 275 Conn. 785, 816, 882 A.2d 604 (2005), cert. denied, 547 U.S. 1025, 126 S. Ct. 1578, 164 L. Ed. 2d 309 (2006). "The confrontation clause of the sixth amendment is made applicable to the states through the due process clause of the fourteenth amendment." (Internal quotation marks omitted.) *State* v. *Simpson*, 286 Conn. 634, 636 n.4, 945 A.2d 449 (2008). Article first, § 8, of the Connecticut constitution also provides that a defendant has the right "to be confronted by the witnesses against him . . . ." Conn. Const., art. I, § 8. "[O]ur Supreme Court has interpreted Connecticut's confrontation clause to provide the same protections as its federal counterpart. . . . [W]ith respect to the right to confrontation within article first, § 8, of our state constitution, its language is nearly identical to the confrontation clause in the United States constitution. The provisions have a shared genesis in the common law. . . . [T]he principles of interpretation for applying these clauses are identical." (Internal quotation marks omitted.) *State* v. *Hutton*, 188 Conn. App. 481, 500 n.8, 205 A.3d 637 (2019).

The initial inquiry to determine whether the defendant's right to confrontation was violated is whether

the hearsay statement is testimonial in nature. See *State* v. *Lahai*, 128 Conn. App. 448, 468, 18 A.3d 630 ("the threshold inquiry for purposes of the admissibility of such statements under the confrontation clause is whether they are testimonial in nature" (internal quotation marks omitted)), cert. denied, 301 Conn. 934, 23 A.3d 727 (2011). "A police report is a quintessential example of an extrajudicial statement contained in a formalized testimonial material. It is signed by the attesting officer under penalty of law. It is prepared with an eye toward prosecution . . . and it is inherently accusatory. . . . The primary purpose of a police report is to establish or prove past events potentially relevant to later criminal prosecution." (Citations omitted; internal quotation marks omitted.) Id., 469. Here, we find that the report was testimonial in nature because its purpose was to establish that Marceau's work on the present case and conclusion that the incident under investigation was a suicide attempt rather than a criminal assault was inadequate and unsatisfactory. The report suggests that Lovering was assaulted—a fact relevant to the defendant's prosecution. The statements in the report were "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial . . . ." (Internal quotation marks omitted.) Id., 470–71.

In *Crawford* v. *Washington*, supra, 541 U.S. 68, the United States Supreme Court held that "*testimonial* hearsay statements may be admitted as evidence against an accused at a criminal trial only when (1) the declarant is unavailable to testify, and (2) the defendant had a prior opportunity to cross-examine the declarant." (Emphasis in original; internal quotation marks omitted.) *State* v. *Carpenter*, supra, 275 Conn. 817. Here, the state did not introduce any evidence that (1) Lazzaro, who prepared the report, was unavailable to testify

at trial, and (2) the defendant had a prior opportunity to cross-examine Lazzaro. Therefore, we conclude that the trial court improperly admitted the report into evidence in violation of the defendant's right to confront witnesses against him.

We do not determine whether admission of the report into evidence was harmless error. See *State* v. *Raynor*, 337 Conn. 527, 561 n.20, 254 A.3d 874 (2020) ("The state also 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 [with respect to this claim] in the present appeal.").

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

In this opinion the other judges concurred.

TOWN OF AVON ET AL. *v.* FREEDOM OF INFORMATION COMMISSION ET AL.
(AC 44255)

Bright, C. J., and Prescott and Vertefeuille, Js.

Syllabus

The defendant G appealed from the judgment of the trial court sustaining in part the administrative appeal filed by the municipal plaintiffs from the final decision of the defendant Freedom of Information Commission. The commission found that the plaintiffs violated the Freedom of Information Act (§ 1-200 et seq.) by requiring G to sign an acknowledgement form before releasing copies of public records he had requested, and ordered that the plaintiffs shall not require the signing of such a form as a condition precedent to the inspection or receipt of copies of public records. The trial court affirmed the commission's decision as to the provision of copies, but reversed the commission's order to the extent that it applied to the inspection of original public records. On G's appeal to this court, *held* that this court lacked subject matter jurisdiction over the appeal, as G was not aggrieved by the judgment of the trial court as he failed to demonstrate a specific, personal, and legal interest in the subject matter of the challenged decision; G claimed that the court

abused its discretion by holding that an agency may require requestors to sign an acknowledgement form as a condition precedent to the inspection of original public records, but, based on the administrative record and the representations of the parties, it was clear the only issue decided by the commission involved the right to receive and inspect copies of public records, and the only public records sought by G in this matter were copies, such that the court's statements regarding original public records were merely dicta, and its judgment did not diminish any right that the commission's final decision afforded G.

Argued September 15, 2021—officially released January 25, 2022

Procedural History

Appeal from the decision of the named defendant finding the plaintiffs in violation of the Freedom of Information Act, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Cordani, J.*; judgment reversing in part the decision, from which the defendant João Godoy appealed to this court. *Appeal dismissed.*

João Godoy, self-represented, the appellant (defendant).

Matthew D. Reed, commission counsel, for the appellee (named defendant).

Michael C. Harrington, for the appellees (plaintiffs).

Opinion

BRIGHT, C. J. The self-represented defendant, João Godoy, appeals from the judgment of the trial court, which he claims sustained in part the administrative appeal filed by the plaintiffs, the town of Avon (town), the Avon Police Department (department), and the Avon Police Chief, from the final decision of the defendant Freedom of Information Commission (commission). The commission found that the plaintiffs violated the Freedom of Information Act (act), General Statutes § 1-200 et seq., by requiring Godoy to sign an acknowledgment form before releasing copies of the public records he had requested and ordered that the plaintiffs

shall not require the signing of such a form as a condition precedent to the inspection or receipt of copies of public records. The court affirmed the commission's decision as to the provision of *copies* but reversed the commission's order "to the extent that" it applied to the inspection of *original* public records. We conclude that, because the only public records sought by Godoy in the present case were *copies*, the court's statements regarding original public records are merely dicta, and, consequently, Godoy is not aggrieved by the judgment. Accordingly, we dismiss the appeal for lack of jurisdiction.[1]

The following undisputed facts and procedural history are relevant to our resolution of this appeal. In November, 2018, Godoy submitted three requests to the plaintiffs under the act. On November 16, 2018, he requested "copies of the police report from the investigation" into "concerns about unregistered vehicles at 11 Columbus Circle." On November 26, 2018, Godoy requested to inspect "any and all documents regarding employee [Lieutenant] Kelly [Walsh's] application for the position of police officer . . . ." Last, on November 29, 2018, Godoy requested to inspect "any and all documents regarding police matters . . . including but not limited to police reports, or audio recording[s] of matters related to residents of 3 Columbus Circle . . . ."

[1] In their appellees' brief, the plaintiffs claim that the court's decision should be reversed with respect to their alleged right to require that the requesting party sign a receipt as a condition precedent to the inspection or receipt of copies of public records. We decline to address this claim because the plaintiffs failed to file an appeal or a cross appeal challenging the court's judgment affirming the decision of the commission that a signature cannot be required for the inspection or receipt of copies of public records. See Practice Book § 61-8 (appellees aggrieved by judgment from which appellant has appealed may file cross appeal within ten days after filing of appeal); see also *Gagne* v. *Vaccaro*, 311 Conn. 649, 661, 90 A.3d 196 (2014) (declining to address defendant's claims attacking judgment because defendant failed to file cross appeal pursuant to Practice Book § 61-8).

On November 20, 2018, the plaintiffs denied the November 16, 2018 request on the ground that the case was under investigation. On December 4, 2018, after not receiving responses to his November 26 and 29 requests, Godoy filed an appeal to the commission, alleging that the plaintiffs had violated the act by denying and failing to respond to his requests for records. In a letter dated December 5, 2018, the plaintiffs responded to Godoy's November 16 and 29 requests. The plaintiffs notified Godoy that the investigation concerning 11 Columbus Circle was an open investigation that would be closed in approximately sixty days and told him to call Lieutenant Walsh after February 5, 2019, to schedule a time to inspect those records. As to the November 29, 2018 request, the plaintiffs informed him that there were two case reports concerning 3 Columbus Circle, one from 2015, which was available for inspection, and one from 2018, which remained an open investigation. As with the 11 Columbus Circle report, the plaintiffs told Godoy that the 2018 investigation would be closed in approximately sixty days and that he should call Lieutenant Walsh after February 5, 2019, to schedule a time to inspect the 2018 report.

On January 17, 2019, Godoy went to the department to inspect Lieutenant Walsh's personnel file, which he had requested on November 26, 2018. While there, Godoy signed an acknowledgment form at the department's request and inspected a redacted copy of the file. Godoy noted on the acknowledgment form that he reviewed only a few pages of the file due to the extensive redactions. On March 4, 2019, Godoy returned to the department to receive copies of the records concerning 11 Columbus Circle, which he requested on November 16, 2018. When Godoy arrived, Lieutenant John Schmalberger asked him to sign an acknowledgment form, but Godoy refused to do so. As a result,

Lieutenant Schmalberger refused to release the copies to Godoy.

On March 6, 2019, the matter was heard by a hearing officer. At the hearing, Godoy testified regarding the March 4, 2019 incident at the department. He explained that "when I got to the . . . [d]epartment, they requested me to sign some kind of statement, and I refused to sign that statement, and right after I refused to sign the statement, the lieutenant who was taking care of me for the inspection then said that the [department] wasn't ready to release those documents at the time, and then I just [left] . . . . I think that . . . it is clear to persons here . . . that you cannot put conditions prior to the release of these public documents." Lieutenant Schmalberger also testified regarding his interaction with Godoy on March 4, explaining that "Godoy . . . asked if he could come view the documents . . . number 3—excuse me, number 11 Columbus. . . . I did not know if he was just going to inspect, or take a copy of, so I had prepared *copies* of the [records] for his inspection, and for him to take, if he wished to pay for them." (Emphasis added.) After the hearing, the plaintiffs submitted an affidavit from Lieutenant Schmalberger dated June 10, 2019, stating that all requested documents regarding 3 and 11 Columbus Circle had been provided to Godoy on March 22, 2019 (11 Columbus Circle), and April 18, 2019 (3 Columbus Circle).

The hearing officer issued a proposed final decision on October 10, 2019. The hearing officer concluded, in relevant part, that "there is no statutory provision within the . . . [a]ct requiring a requester to sign an acknowledgement form as a condition precedent to inspecting or receiving *copies* of public records. It is found that it was improper for the [plaintiffs] to require [Godoy] to sign such form as a condition precedent to inspecting or receiving *copies* of the requested records.

It is concluded therefore that the [plaintiffs] violated [General Statutes] §§ 1-210 (a) and 1-212 (a) by failing to provide the complainant with prompt access to all requested records pertaining to 3 Columbus Circle and 11 Columbus Circle. Nevertheless, it is found that as of April 18, 2019, all requested records regarding 3 Columbus Circle and 11 Columbus Circle . . . ha[ve] been provided to [Godoy]."[2] (Emphasis added.)

On October 10, 2019, the commission held a meeting to consider the proposed final decision pursuant to General Statutes § 4-179.[3] In their brief to the commission, the plaintiffs represented that, "[in] an effort to maintain a record of what the [department] provides to individuals who request *copies* of documents, the department asks the individual to sign a receipt for the documents provided. This practice ensures that there is

[2] General Statutes § 1-210 provides in relevant part: "(a) Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or business hours, (2) copy such records in accordance with subsection (g) of section 1-212, or (3) receive a copy of such records in accordance with section 1-212. Any agency rule or regulation, or part thereof, that conflicts with the provisions of this subsection or diminishes or curtails in any way the rights granted by this subsection shall be void. . . ."

General Statutes § 1-212 provides in relevant part: "(a) Any person applying in writing shall receive, promptly upon request, a plain, facsimile, electronic or certified copy of any public record. The type of copy provided shall be within the discretion of the public agency, except (1) the agency shall provide a certified copy whenever requested, and (2) if the applicant does not have access to a computer or facsimile machine, the public agency shall not send the applicant an electronic or facsimile copy. . . ."

[3] General Statutes § 4-179 provides in relevant part: "(a) When, in an agency proceeding, a majority of the members of the agency who are to render the final decision have not heard the matter or read the record, the decision, if adverse to a party, shall not be rendered until a proposed final decision is served upon the parties, and an opportunity is afforded to each party adversely affected to file exceptions and present briefs and oral argument to the members of the agency who are to render the final decision. . . ."

no dispute about what documents a person was given." (Emphasis added.) At the meeting, the plaintiffs' counsel explained that the plaintiffs "had a practice of asking individuals who received documents to sign a receipt . . . so that there's no further dispute of what is being provided." The plaintiffs asserted that the commission should not deem this practice illegal or a violation of the act simply because the act does not explicitly provide for such a practice.

One of the commissioners noted that the practice of requiring requesters to sign an acknowledgment form as a condition precedent to receiving documents "has a chilling effect on getting documents" and suggested that the commission add an order to the hearing officer's report prohibiting such a practice. At the conclusion of the meeting, the commission accepted the hearing officer's findings and agreed to amend the decision to order that the plaintiffs "shall not require requesters to sign a form as a condition precedent to the receipt of public records."

The plaintiffs filed an administrative appeal in the Superior Court pursuant to General Statutes § 4-183,[4] challenging the commission's final decision. In their complaint, the plaintiffs alleged, inter alia, that the commission erred in finding that they violated the act by requiring Godoy to sign a receipt, and they requested that the trial court modify the commission's decision by holding that the "plaintiffs did not violate [the] act by requiring [Godoy] sign a receipt for the documents being provided to him." The plaintiffs claimed that "Godoy had previously signed for documents he had requested from the department, but refused to do so when asked to do so with respect to the 11 Columbus

[4] 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. . . ."

Circle documents. As such, the documents were not provided to him at that time."

Godoy did not participate in the appeal in the trial court, but the commission filed an answer and a brief in opposition to the plaintiffs' appeal. In its brief, the commission argued that "[t]he plaintiffs' policy requiring a requestor to sign an acknowledgment as a condition to the receipt of public records is a clear example of a rule that is prohibited under [the act]. [Godoy's] rights under the . . . act were diminished when the plaintiffs refused to release public records solely because Godoy did not provide his signature on an acknowledgment form." Notably, in their briefs to the court, neither the plaintiffs nor the commission raised an argument regarding access to original public records.

On August 6, 2020, after a hearing, the court issued a memorandum of decision sustaining in part the plaintiffs' appeal. The court noted that "Godoy requested copies of the records concerning 11 Columbus Circle but only to inspect the records concerning Lieutenant Walsh and 3 Columbus Circle. . . . The plaintiffs here required Godoy to sign a receipt both for the inspection of records and for the receipt of copies thereof." (Citation omitted.) The court held that "the commission's order as it applies to prohibiting the signing of a receipt as a precondition to receiving copies is appropriate, however to the extent that the commission's order prohibits the signing of a receipt as a precondition to the inspection of original public records, the court finds that the order was clear error."

On August 18, 2020, Godoy filed a motion for reconsideration, claiming that the court's decision regarding the inspection of original records conflicts with the act. In the motion, Godoy noted that there was no concern

regarding the safeguarding of public records in the present case, noting that "the chances that Godoy was walking away alive carrying stolen redacted COPIES of public documents worth about twenty bucks without paying, or even destroying, losing, or misplacing said copies were simply: NONEXISTENT. However, when Godoy refused to sign a 'simple receipt,' the plaintiffs refused to allow Godoy to have access to redacted COPIES of public documents . . . ." (Emphasis in original.) The court denied the motion, and Godoy filed the present appeal.

On appeal, Godoy claims that the court abused its discretion by holding that an agency may require requestors to sign an acknowledgment form as a condition precedent to the inspection of original public records. In his principal brief, Godoy represented that he went to the department on January 17, 2019, to inspect copies of Lieutenant Walsh's personnel file and signed an acknowledgment form. He emphasized that the department provided him "an opportunity to inspect not the original, but redacted **copies** of said public documents." (Emphasis in original.) Godoy also stated that, on March 4, 2019, he "went to the [department] . . . not to inspect, but to receive **copies** of public records regarding 11 Columbus Circle . . . ."[5] (Emphasis in original.)

Notably, at oral argument before this court, the parties appeared to agree that the issue before the commission involved only the right to obtain copies of public records. Indeed, counsel for the commission argued to this court that the commission's order related to copies of public records only and that the issue regarding the right to inspect original public records never was presented to or considered by the commission. When this

[5] Godoy's briefs do not discuss either inspecting or receiving the records related to 3 Columbus Circle, but the hearing officer found that those records had been provided to Godoy.

court asked Godoy if he wanted to respond to the arguments of the plaintiffs and the commission, he stated that he had nothing to add.

Given the representations of the parties at oral argument, we ordered the parties to file supplemental briefs addressing whether this appeal should be dismissed for lack of aggrievement in light of Godoy's statement in his principal brief that he was seeking only copies of public records when he refused to sign an acknowledgment form, and because the court affirmed the commission's order prohibiting the plaintiffs from requiring requestors to sign a receipt before releasing copies of requested documents.

We begin with the relevant legal principles regarding standing and aggrievement. In an administrative appeal, "[a]n aggrieved party may obtain a review of any final judgment of the Superior Court . . . ." General Statutes § 4-184; see also *In re Allison G.*, 276 Conn. 146, 157, 883 A.2d 1226 (2005) ("a requisite element of appealability is that the party claiming error be aggrieved by the decision of the trial court" (internal quotation marks omitted)).

"Aggrievement, in essence, is appellate standing. . . . It is axiomatic that aggrievement is a basic requirement of standing, just as standing is a fundamental requirement of jurisdiction. . . . There are two general types of aggrievement, namely, classical and statutory; either type will establish standing, and each has its own unique features. . . . The test for determining [classical] aggrievement encompasses a well settled twofold determination: first, the party claiming aggrievement must demonstrate a specific personal and legal interest in the subject matter of the decision, as distinguished from a general interest shared by the community as a whole; second, the party claiming aggrievement must establish that this specific personal and legal interest

has been specially and injuriously affected by the decision." (Citations omitted; internal quotation marks omitted.) *In re Ava W.*, 336 Conn. 545, 554–55, 248 A.3d 675 (2020).

"Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected." (Internal quotation marks omitted.) *Wilcox* v. *Webster Ins., Inc.*, 294 Conn. 206, 215, 982 A.2d 1053 (2009).

In his supplemental brief, Godoy claims that his "specific, personal and legal interest in the subject matter of the [court's] decision is related to his own interest in obtaining unconditional access to 'public documents,' as demanding Godoy . . . sign a receipt as a condition precedent to the release of 'public documents' diminished and curtailed Godoy's rights under the [act]." (Emphasis in original.) He further argues that he is aggrieved because the court "formulated a rule that encompassed [fewer] rights than what the . . . [commission's] final decision granted, specially and injuriously affecting Godoy's interest in obtaining unconditional access to 'public documents.' " (Emphasis in original.) The plaintiffs also claim that Godoy is aggrieved, arguing that, because "the trial court's decision will impact future requests to inspect documents, [Godoy] was aggrieved for purposes of his appeal."

The commission, however, argues that, "[w]hile one could argue that the language of the trial court could possibly diminish or curtail rights granted under the act in the future, such speculation is not enough to constitute aggrievement. . . . Since the commission's order did not specifically address the signing of a receipt as a precondition to the inspection of original records, the court's order does not have a bearing on [Godoy's] rights in this regard. Should such a situation . . . occur

in the future, the requesting party will be free to appeal that action to the commission. The commission will then have the opportunity to hear testimony and accept evidence on the record with regard to the inspection of original public records." (Citation omitted; footnote omitted; internal quotation marks omitted.) We agree with the commission.

Based on the administrative record and the representations of the parties, it is clear that the only issue decided by the commission involved the right to receive and inspect copies of public records. As previously noted, Godoy represents that he was required to sign an acknowledgment form on two different occasions. First, on January 17, 2019, when he sought "to inspect not the original, but redacted copies" of Lieutenant Walsh's personnel file, and then again, on March 4, 2019, when he sought "not to inspect, but to receive copies of public records regarding 11 Columbus Circle . . . ." (Emphasis in original.) In its final decision, the commission found "that it was improper for the [plaintiffs] to require [Godoy] to sign [an acknowledgment] form as a condition precedent to *inspecting or receiving copies of the requested records*." (Emphasis added.) Although the commission's prospective order prohibiting the plaintiffs from requiring "requesters to sign a form as a condition precedent to the receipt of public records" does not include the word "copies," the commission's finding that prompted the order explicitly referred to "*copies of the requested records*." (Emphasis added.) Moreover, at oral argument before this court, counsel for the commission emphasized that the commission's "order had nothing to do with the inspection of original records. . . . It was never an issue before the commission."

Because Godoy sought only copies of public records in the present case, the commission did not address the issue regarding inspection of original public records

in its final decision, and, therefore, the court's discussion and conclusion regarding that issue is merely dicta. See *Laurel Beach Assn.* v. *Zoning Board of Appeals*, 66 Conn. App. 640, 648, 785 A.2d 1169 (2001) ("If an issue has been determined, but the judgment is not dependent upon the determination of the issue, the parties may relitigate the issue in a subsequent action. . . . Thus, statements by a court regarding a nonessential issue are treated as merely dicta." (Internal quotation marks omitted.)); see also *Dortenzio* v. *Freedom of Information Commission*, 42 Conn. App. 402, 409, 679 A.2d 978 (1996) (noting that review of commission's decision is limited to issues raised and findings in administrative record).

Godoy's right to inspect original public records was not at issue in the administrative appeal because he sought only copies of public records, which was the only issue addressed by the commission in its final decision. Thus, because the court affirmed the commission's order regarding the inspection or receipt of copies of public records, the court's judgment did not diminish any right that the commission's final decision afforded Godoy. See, e.g., *In re Allison G.*, supra, 276 Conn. 158 ("As a general rule, a party that prevails in the trial court is not aggrieved. . . . Moreover, [a] party cannot be aggrieved by a decision that grants the very relief sought. . . . Such a party cannot establish that a specific personal and legal interest has been specially and injuriously affected by the decision. . . . [A] prevailing party . . . can be aggrieved [however] if the relief awarded to that party falls short of the relief sought." (Citations omitted; internal quotation marks omitted.)). In fact, the language used by the court in its memorandum of decision reflects that the court was uncertain if it needed to reach any issue regarding the inspection of original documents. After reviewing the different policy concerns between producing original

documents and producing copies, the court concluded that the commission's order prohibiting the signing of a receipt to receive copies was "appropriate." The court further concluded, however, that "the commission's order *to the extent* it prohibits requiring the signing of a receipt as a precondition to the inspection of original public records was clear error . . . ." (Emphasis added.) Because we conclude that the commission's order did not extend to original public records, the court's conditional holding as to such documents is dictum. In other words, Godoy's interest in unconditional access to the public records he sought was unaffected by the court's decision because the court affirmed the commission's decision regarding the only documents at issue before the commission—copies of public records. Consequently, we conclude that Godoy has failed to demonstrate a specific, personal, and legal interest in the subject matter of the challenged decision.

Finally, the plaintiffs and Godoy suggest that Godoy is aggrieved by the judgment because, at some point in the future, he may be required to sign an acknowledgment form as a condition precedent to inspecting original public records. In light of our conclusion that the court's discussion and conclusion regarding the inspection of original public records is dicta, if the plaintiffs require Godoy to sign an acknowledgment form at some point in the future, the source of his aggrievement would not be the court's decision in this administrative appeal. Instead, Godoy would be aggrieved by having to sign such a form in connection with that possible future request. At that point, if Godoy appealed, the commission would have the opportunity to consider the distinct issue regarding the inspection of *original* public records, and, if he is aggrieved by the commission's final decision, Godoy would have standing to

appeal to the Superior Court. In the present case, however, Godoy sought to inspect and receive only *copies* of the public records at issue and, therefore, he is not aggrieved by the court's dicta regarding the inspection of *original* public records. Accordingly, we lack subject matter jurisdiction over the appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

STEVEN K. STANLEY *v.* KRISTINE BARONE ET AL. (AC 43889)

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

Syllabus

The incarcerated plaintiff, who owed portions of filing fees for several cases he had initiated in federal court, appealed to this court from the judgment of the trial court dismissing his complaint against the defendants, employees of the Department of Correction, in which he alleged that they had improperly removed funds from his inmate account to pay the federal filing fees. The plaintiff's complaint alleged that the defendants were permitted to withdraw, in monthly installments, only 20 percent of the relevant balance of his inmate account for filing fees for a single federal case, not 20 percent of that balance for outstanding filing fees for each federal action he filed. The plaintiff claimed that the decision of the United States Supreme Court in *Bruce* v. *Samuels* (577 U.S. 82), which held that the governing federal statute (28 U.S.C. § 1915 (b) (2)) requires the simultaneous recoupment of multiple filing fees from prisoners with at least $10 in their accounts, did not apply to him, as he had filed his federal actions before that case was decided. The defendants claimed that the trial court lacked subject matter jurisdiction over the action because each defendant was entitled to statutory (§ 4-165 (a)) immunity and, with respect to any federal claims the plaintiff alleged, qualified immunity. *Held* that the trial court properly granted the defendants' motion to dismiss, that court having properly determined that the defendants were entitled to both statutory and qualified immunity: the plaintiff's allegations established that the defendants were acting within the scope of their employment and in accordance with federal law when they withdrew funds from his account, and, even if the plaintiff were correct that the holding in *Bruce* did not apply to him, he did not allege that the defendants' conduct was wanton, reckless or malicious;

moreover, the plaintiff failed to allege facts establishing that the defendants violated his clearly established constitutional rights, as his complaint made no reference to any purported constitutional violation, nor did he argue to this court that the defendants violated any of his constitutional rights but, rather, he argued that the defendants misapplied the law in deducting the funds for fees that he acknowledged he owed and must pay.

Argued October 18, 2021—officially released January 25, 2022

Procedural History

Action to recover damages for, inter alia, the alleged violation of the plaintiff's federal constitutional rights, brought to the Superior Court in the judicial district of Hartford, where the court, *Moukawsher*, *J.*, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Steven K. Stanley, self-represented, the appellant (plaintiff).

James W. Donohue, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellees (defendants).

Opinion

PER CURIAM. The self-represented plaintiff, Steven K. Stanley, appeals from the judgment of the trial court granting the motion to dismiss filed by the defendants,[1] employees of the Department of Correction (department), on the basis of statutory and qualified immunity.

[1] We note that the trial case caption misidentifies the named defendant as "Warden Borone." The summons named the following individuals as defendants: "Warden Borone," "Joyce Cosselin," and "C.O. Bennertt." The state marshal's return of service identified the defendants as "Warden Borone," "C.O. Bennertt (aka Counselor Bennett)," and "Joyce Gosselin." In their memorandum of law in support of their motion to dismiss, however, the defendants were identified as Warden Kristine Barone, Gosselin Joyce, and Correction Officer Bennett. Although the parties have been identified differently in the various filings in the trial court, it appears that their correct names are Kristine Barone, Joyce Gosselin, and Correction Officer Bennett.

The plaintiff claims that the court improperly dismissed his complaint because the immunities relied on by the court do not bar his claims brought against the defendants in their individual capacities. We affirm the judgment of the court.

The following factual, legal, and procedural history is relevant to our analysis. In 2013, the plaintiff was convicted of, inter alia, 100 counts of criminal violation of a protective order, and the court sentenced him to 18 years of imprisonment with 12 years of special parole. See *State* v. *Stanley*, 161 Conn. App. 10, 14, 125 A.3d 1078 (2015), cert. denied, 320 Conn. 918, 131 A.3d 1154 (2016). While incarcerated, the plaintiff initiated several actions in federal court, and he owes portions of the filing fees for those actions to the federal court.

"In the Prison Litigation Reform Act of 1995 (PLRA), 110 Stat. 1321–66, Congress placed several limitations on prisoner litigation in federal courts. Among those limitations, Congress required prisoners qualified to proceed in forma pauperis nevertheless to pay an initial partial filing fee. That fee is statutorily set as '20 percent of the greater of' the average monthly deposits in the prisoner's account or the average monthly balance of the account over the preceding six months. . . . Thereafter, to complete payment of the filing fee, prisoners must pay, in monthly installments, '20 percent of the preceding month's income credited to the prisoner's account.' . . . The initial partial filing fee may not be exacted if the prisoner has no means to pay it . . . and no monthly installments are required unless the prisoner has more than $10 in his account . . . ." (Citations omitted.) *Bruce* v. *Samuels*, 577 U.S. 82, 84, 136 S. Ct. 627, 193 L. Ed. 2d 496 (2016). Under title 28 of the United States Code, § 1915 (b) (2), "[t]he agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court

each time the amount in the account exceeds $10 until the filing fees are paid."

In *Bruce* v. *Samuels*, supra, 577 U.S. 86–87, a federal inmate who owed filing fees for multiple cases claimed that the monthly installments for his most recent case would not become due until his prior obligations were satisfied. The United States Supreme Court rejected his claim and held "that § 1915 (b) (2) calls for simultaneous, not sequential, recoupment of multiple filing fees." Id., 87.

In the present case, the plaintiff brought an action against the defendants in their individual capacities by way of a one page complaint, which is difficult to understand. The complaint, titled "Civil Tort Claims Act," provides: "I Steven K. Stanley . . . filed a (1983) civil suit in the federal court[2] and was granted to proceed in a PLRA account to deduct (only) 20 percent from my account on all money being on this account to each time money is put on this account the federal court granted and stated (only) 20 percent will be deducted and (only) one case at a time on April of 2019, [the department] has overcharged this account to take . . . 40 percent from my account I have [repeatedly] filed to Macdougal, inmate account and even filed grievances to this fact [the department] inmate account cites a Connecticut case law trying to overrule the federal rules of practice and at no time did I give an[y] permission to take any more than the . . . 20 percent I was granted to file on a [§] 1983 PLRA account [the department] cites *Bruce* v. *Samuels*, [supra, 577 U.S. 82] case law that does not [apply] to this case being filed prior to this case law [the department repeatedly] denied to

[2] Title 42 of the United States Code, § 1983, provides a cause of action against "[e]very person who, under color of any statute, ordinance, [or] regulation . . . of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . . ."

return this extra money there this civil tort claims act is being generated in a claim to relief Connecticut General Statutes § 52-91." (Emphasis omitted; footnote added.) Reasonably construed, the plaintiff alleged that the defendants improperly exacted more than 20 percent of available funds from his inmate account to pay for filing fees owed to the federal court.

The defendants moved to dismiss the complaint, claiming that the court lacked subject matter jurisdiction over the action because each defendant was entitled to statutory immunity under General Statutes § 4-165 and, with respect to any federal claims raised in the plaintiff's complaint, qualified immunity. The defendants argued that "[t]he plaintiff fails to allege any facts which would indicate the defendants were acting outside the scope of their work or with the required mental state of recklessness or malice. In fact the allegations show the defendants were specifically following federal law per the instructions from the [United States] Supreme Court. As such the defendants are entitled to statutory immunity . . . ." They further argued that, insofar as the plaintiff asserted any federal law claims, those claims were barred by qualified immunity because the facts alleged by the plaintiff failed to allege that the defendants violated a clearly established constitutional right.

After hearing argument on the motion, the court granted the motion to dismiss. The court stated, "[t]he motion is granted for the reasons cited in the state's brief. [The] plaintiff's claim that withdrawals from his account may be taken at a rate of only 20 percent at a time is plainly no longer true. The law has changed and has been ruled on by the United States Supreme Court." This appeal followed.

After oral argument before this court, we ordered the trial court to articulate whether, in granting the

motion to dismiss, it relied on the defendants' claims of statutory and/or qualified immunity and to state the factual and legal bases for its order. The court issued an articulation on October 19, 2021, stating the following:

"[The plaintiff's] claim in this court was about prison officials taking money from his prison account to pay federal court filing fees related to lawsuits [the plaintiff] had filed. [The plaintiff] alleged that the law permitted [the defendants] to take only 20 percent of the relevant monthly balance in his prison account for filing fees regardless how many lawsuits he filed. He claimed that by taking more the defendants were violating his rights.

"This court dismissed [the plaintiff's] claims because this legal premise was false. As the United States Supreme Court held in . . . *Bruce* v. *Samuels*, [supra, 577 U.S. 82], with some nuances not relevant here, prison officials may take 20 percent of a prisoner's relevant account balance *for each lawsuit* the prisoner files. . . .

"Under [the plaintiff's] own allegations, the [defendants] were only doing their jobs. They were allowed by law to take from his relevant account balance money for fees in excess of a cumulative total of just 20 percent per month, and this is all he claims they did.

"Because [the plaintiff's] own claims show this to be so, the defendants are immune from suit under . . . § 4-165, which protects the defendants from liability unless they caused 'damage or injury' by being 'wanton, reckless or malicious.' By alleging facts that show only that the defendants were following the law, [the plaintiff] claims no damage or injury nor wanton, reckless or malicious conduct. . . .

"Courts must dismiss complaints against state officers or employees when the [factual] allegations show the defendants are immune from suit. . . .

"This means the court was obliged to dismiss [the plaintiff's] state law claims. It also means that the court was obliged to dismiss any federal claims [the plaintiff] may have had. As the United States Supreme Court held . . . in *Taylor* v. *Barkes*, [575 U.S. 822, 824, 135 S. Ct. 2042, 192 L. Ed. 2d 78 (2015)], government officials are immune from civil damages under federal law unless they violated a statutory or constitutional right clearly established at the time of the challenged conduct. [The plaintiff's] own complaint alleges facts that, if true, mean the defendants violated none of [his] statutory or constitutional rights. Therefore, the court was obliged to dismiss any federal claims for the same reasons it dismissed the state claims." (Citation omitted; emphasis in original; footnotes omitted.) After the court issued its articulation, this court ordered the parties to file supplemental memoranda responding to the court's articulation.[3]

We begin with the applicable standard of review. "A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . As we must in reviewing a motion to dismiss, we take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." (Internal quotation marks omitted.) *Braham* v. *Newbould*, 160 Conn. App. 294, 300–301, 124 A.3d 977 (2015).

[3] The plaintiff filed a supplemental memorandum on November 19, 2021, and the defendants filed their supplemental memorandum on November 29, 2021. On December 14, 2021, the plaintiff filed a "counter brief to defendants' November 29, 2021 filing, supplemental memoranda." Although this court's order did not provide for a responsive filing from the plaintiff, we nevertheless considered the plaintiff's submission in deciding this appeal.

In his principal brief to this court, the plaintiff claims that the trial court improperly determined that the holding of *Bruce* v. *Samuels*, supra, 577 U.S. 82, applies to him because he filed his federal cases before *Bruce* was decided. In the plaintiff's supplemental memorandum, which is not a model of clarity, he also claims that "facts remain the trial court [failed] to address the [petitioner's] 1983 civil tort claims act to color of state law to [filing] in all [defendants'] individual capacity going outside [their] job [authority]." (Emphasis omitted.) For their part, the defendants argue that the court properly dismissed the plaintiff's complaint on the basis of statutory immunity under § 4-165 and qualified immunity. We agree with the defendants.

"[T]he doctrine of [statutory] immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss. . . . When a [trial] court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . Because this case comes to us on a threshold [statutory] immunity issue, pursuant to a motion to dismiss . . . we do not pass on whether the complaint was legally sufficient to state a cause of action. . . . In the posture of this case, we examine the pleadings to decide if the plaintiff has alleged sufficient facts . . . with respect to personal immunity under § 4-165, to support a conclusion that the defendant[s] [were] acting outside the scope of [their] employment or wilfully or maliciously." (Internal quotation marks omitted.) *Martin* v. *Brady*, 261 Conn. 372, 376, 802 A.2d 814 (2002).

Section 4-165 provides in relevant part: "(a) No state officer or employee shall be personally liable for damage or injury, not wanton, reckless or malicious, caused in the discharge of his or her duties or within the scope of his or her employment. Any person having a complaint for such damage or injury shall present it as a

claim against the state under the provisions of this chapter. . . ." Thus, "[s]tate employees do not . . . have statutory immunity for wanton, reckless or malicious actions, or for actions not performed within the scope of their employment. For those actions, they may be held personally liable, and a plaintiff who has been injured by such actions is free to bring an action against the individual employee." *Miller* v. *Egan*, 265 Conn. 301, 319, 828 A.2d 549 (2003).

Accordingly, to overcome the defendants' statutory immunity in the present case, the plaintiff was required to allege facts that would support a conclusion that the defendants were acting outside the scope of their employment or that their conduct was wanton, reckless, or malicious with regard to the withdrawal of money from his inmate account. See *Jan G.* v. *Semple*, 202 Conn. App. 202, 210–11, 244 A.3d 644, cert. denied, 336 Conn. 937, 249 A.3d 38, cert. denied, U.S. , 142 S. Ct. 205, 211 L. Ed. 2d 88 (2021).

The gravamen of the plaintiff's complaint is that, each month, the defendants are allowed to withdraw only 20 percent of the balance of his inmate account for filing fees for a single federal case, not 20 percent for each of his federal cases. As the court correctly noted, however, the United States Supreme Court rejected a similar claim in *Bruce* v. *Samuels*, supra, 577 U.S. 82, and, therefore, the plaintiff's allegations establish only that the defendants were acting within the scope of their employment and in accordance with federal law when they withdrew funds from the plaintiff's inmate account. Even accepting the plaintiff's argument that the holding in *Bruce* does not apply to him because he filed his federal actions before *Bruce* was decided, the plaintiff's complaint is devoid of any allegations that the defendants' conduct was wanton, reckless, or malicious. Indeed, the plaintiff alleges that the defendants acted in reliance on *Bruce*. Accordingly, because the

facts alleged by the plaintiff do not establish that the defendants either were acting outside the scope of their employment or engaging in wanton, reckless, or malicious conduct, we conclude that the court properly determined that the defendants are entitled to statutory immunity under § 4-165.

The plaintiff's complaint fares no better with respect to his purported federal claims pursuant to 42 U.S.C. § 1983. "Under federal law, the doctrine of qualified immunity shields officials from civil damages liability for their discretionary actions as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated. . . . Qualified immunity is an immunity from suit rather than a mere defense to liability and, therefore, protects officials from the burdens of litigation for the choices that they make in the course of their duties. . . . Whether an official is entitled to qualified immunity presents a question of law that must be resolved de novo on appeal. . . .

"A court required to rule [on] the qualified immunity issue must consider . . . this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry. . . . If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." (Citations omitted; internal quotation marks omitted.) *Brooks* v. *Sweeney*, 299 Conn. 196, 216–17, 9 A.3d 347 (2010).

Thus, in order to overcome the defendants' qualified immunity in the present case, the plaintiff was required

to allege facts that would establish that the defendants violated a clearly established constitutional right. We agree with the court that the plaintiff has failed to do so. The plaintiff's complaint makes no reference to any purported constitutional violation. Similarly, in his briefs to this court, the plaintiff has not argued that the defendants have violated any of his constitutional rights. Instead, the plaintiff alleges that the defendants simply have misapplied the law in deducting funds from his prison account to pay federal court filing fees. Furthermore, the defendant acknowledged during oral argument before this court that he owes those filing fees and that he must pay them. His only issue is with the timing of the payments he owes. Accordingly, because the plaintiff has not alleged a violation of any constitutional right, the court properly determined that the defendants were entitled to qualified immunity and, therefore, properly dismissed any federal law claims against the defendants. See *Braham* v. *Newbould*, supra, 160 Conn. App. 306 ("[b]ecause the facts alleged by the plaintiff do not state a violation of the eighth amendment, we conclude that the trial court properly determined that the defendants are entitled to qualified immunity").

The judgment is affirmed.

STATE OF CONNECTICUT *v.* THEODORE JONES
(AC 42674)

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

Syllabus

Convicted, following a jury trial, of the crimes of possession of narcotics with intent to sell, criminal possession of a pistol, and carrying a pistol without a permit, the defendant appealed to this court. At 5 p.m. on the date of his arrest, Shot Spotter, a system of microphones around the city of New Haven that uses sound to triangulate the location of gunshots, detected a gunshot in the area of 17 Vernon Street. Approximately four

minutes later, an individual called the police and reported seeing the defendant in the area with a handgun. Shortly thereafter, the police arrived at the scene, encountered the defendant in an area that was approximately three houses down from the location identified by Shot Spotter, and detained him. Although the defendant did not have any weapons on him, the police recovered a firearm from a snowbank on the property located directly behind where the defendant was discovered. The defendant was arrested and was found to have multiple packets of heroin in his possession. Additionally, the defendant's DNA and fingerprints were found on the recovered handgun. After a jury found the defendant guilty of all charges, he filed a motion for a judgment of acquittal, which the trial court denied, and the defendant appealed to this court. *Held*:

1. The evidence was sufficient to support the defendant's conviction of criminal possession of a pistol, and, accordingly, the trial court properly denied the defendant's motion for a judgment of acquittal with respect to that charge: the state's arguments on appeal were consistent with the theory that it pursued at trial, namely, that the defendant had actual possession of the pistol on the date in question; moreover, the state was not compelled to prove constructive possession of the pistol because there was substantial circumstantial evidence from which the jury could have concluded beyond a reasonable doubt that, on the date of his arrest, the defendant actually possessed the handgun, fired it, and attempted to dispose of it, as Shot Spotter established that a gun was fired near 17 Vernon Street, less than five minutes later an officer arrived at the scene and found the defendant in an area only three houses down from the location registered by Shot Spotter, no other individuals were in the immediate area, the defendant exhibited evasive conduct by misleading the police regarding where he had been and where he was going, and, shortly after he was detained, the police found a handgun containing the defendant's DNA and fingerprints in a snowbank just over a fence from the location where he was apprehended.
2. There was sufficient evidence to support the jury's finding that the defendant was guilty of carrying a pistol without a permit, and, accordingly, the trial court properly denied the defendant's motion for a judgment of acquittal with respect to that charge: the jury reasonably could have found that the defendant carried a pistol on his person on the day in question by holding it in his hand and firing it at 5 p.m. in the area of Vernon Street and by carrying it and tossing it over a nearby fence in an effort to dispose of it on the basis of the same evidence that was sufficient for a jury to conclude that the defendant criminally possessed a handgun on the date of his arrest.
3. Contrary to the defendant's claim, the trial court did not commit plain error in charging the jury on criminal possession of a pistol by omitting from its charge that the state was required to prove that the defendant intended to exercise control over the handgun because the error, if any,

was not so clear and so harmful that a failure to reverse the judgment would result in manifest injustice: the defendant's claim rested on an incorrect premise, as the state was not required to prove constructive possession, rather, it was sufficient to demonstrate that the defendant actually possessed the firearm; moreover, the trial court's charge discussing constructive possession was substantially similar to those examined in *State* v. *Fasano* (88 Conn. App. 17) and *State* v. *Elijah* (42 Conn. App. 687), which this court found had sufficiently explained the elements of the crimes charged to the jury.

4. This court declined to review the defendant's claim that the trial court erred by permitting two police officers to testify as to the ultimate issue of whether the defendant had intent to sell the narcotics found on his person because that claim was not properly preserved at trial: at trial, the defendant objected to the officers' testimony on the bases of relevance and lack of foundation, which the court overruled, but failed to object on the ground that the officers were testifying to an ultimate issue of fact, and, accordingly, the defendant could not challenge on appeal the proffered testimony as constituting improper opinion testimony on an ultimate issue; moreover, the defendant's alternative basis for consideration of his unpreserved claim, that this court consider it as a matter of plain error, was unavailing, as any error of the trial court in not ruling on an objection that was not made did not rise to the level required for plain error review, which is reserved for extraordinary situations in which the existence of the error was so obvious that it affected the fairness and integrity of and public confidence in the judicial proceedings.

Argued October 7, 2021—officially released January 25, 2022

Procedural History

Substitute information charging the defendant with the crimes of possession of narcotics with intent to sell, criminal possession of a pistol, and carrying a pistol without a permit, brought to the Superior Court in the judicial district of New Haven, geographical area number twenty-three, and tried to the jury before *Alander*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Julia K. Conlin, assigned counsel, with whom was *Emily Graner Sexton*, assigned counsel, for the appellant (defendant).

Brett R. Aiello, deputy assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's

attorney, and *Devant Joiner*, senior assistant state's attorney, for the appellee (state).

Opinion

LAVINE, J. The defendant, Theodore Jones, appeals from the judgment of conviction, rendered after a jury trial, of possession of narcotics with intent to sell in violation of General Statutes § 21a-278 (b), criminal possession of a pistol in violation of General Statutes § 53a-217c (a) (1), and carrying a pistol without a permit in violation of General Statutes § 29-35. On appeal, the defendant claims that (1) there was insufficient evidence to support his conviction of criminal possession of a pistol (handgun or firearm), (2) there was insufficient evidence to support his conviction of carrying a pistol without a permit, (3) the court committed plain error with respect to its jury instructions concerning criminal possession of a pistol, and (4) the court erred by allowing impermissible opinion testimony regarding his intent to sell narcotics. We affirm the judgment of the trial court.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. On December 28, 2016, at 5 p.m., New Haven's "Shot Spotter" system was activated because a gunshot was detected in the area of 17 Vernon Street in New Haven. Shot Spotter is a system of microphones around a city that uses sound to triangulate the location of gunshots and relays the information back to patrol officers. Approximately four minutes after the Shot Spotter was activated, Officer James Marcum received a dispatch call that a woman had reported that there was a man with a handgun near the intersection of Davenport Avenue and Vernon Street, that the male was wearing a black hat and black jacket, and that his name was Theodore Jones.[1]

[1] The dispatch was admitted only for its effect on the listener and not for the truth of the matter asserted.

Within thirty seconds of receiving the dispatch call, Marcum arrived at the Vernon Street location in his police cruiser and immediately saw a black male wearing a black hat and a black jacket in the driveway of a parking lot. The individual saw Marcum and proceeded to walk toward the rear of the driveway. Marcum then exited his police cruiser and yelled to the individual to show him his hands and asked the individual for his name. The individual complied and informed Marcum that his name was Theodore Jones. Marcum subsequently handcuffed the defendant and patted him down. No firearm was found on him.

When asked where he was going, the defendant indicated that he was heading to his girlfriend's house north on Vernon Street, which Marcum testified was inconsistent with him walking toward the rear of the parking lot at 9 Vernon Street. The rear portion of the parking lot at 9 Vernon Street abuts the Howard Avenue Parking Garage, which is owned by Yale University. The 9 Vernon Street property and the Howard Avenue Parking Garage property are separated by a tall chain link fence.

Officer Brendan Canning, Jr., also received the weapons complaint and soon learned that Marcum had detained the defendant. Canning arrived at the scene, conducted an investigation of the area, and spoke with the defendant. According to Canning, the defendant told him that he had been coming from the area of 27 Bond Street, which was near Water Street, but the officer testified that Bond Street was about six blocks away and that Water Street was about two miles from Vernon Street.

Officer Otilio Green, a Yale University police officer, also was working on the night in question and heard the weapons complaint and Shot Spotter activation through the New Haven Police Department scanner. When he learned that an individual was detained in a parking lot

on Vernon Street and that no firearm was found, Green proceeded to the Howard Avenue Parking Garage property, which is located directly behind the property where the defendant was discovered, to see if he could locate a firearm. During the search of the fence line separating the two properties, which was captured on Green's body camera, he discovered a handgun sticking out of a snowbank. The handgun was a .40 caliber Ruger pistol with a barrel length between three and four inches long. In addition to recovering the firearm, the police located a bullet fragment in the vicinity of 17 Vernon Street.

The defendant was arrested and brought to the New Haven Police Department detention facility. Officer Andre Lyew searched the defendant and found a plastic bag tied to the defendant's genitals that contained 139 individual packets of heroin and 2 additional bags of it, weighing a total of 111 grams. The defendant also was found with approximately $199 in small bills and white plastic spoons.

Angela Przech, a forensic science examiner, later compared a sample of the defendant's DNA to two DNA swabs from the handgun, one of which included a sample from the trigger. With respect to the trigger DNA sample, Przech determined through testing that there was a DNA mixture of four contributors, with at least two contributors being male, and that it was at least 100 billion times more likely for this profile to occur if it originated from the defendant and the three unknown individuals than if it had originated from four unknown individuals. In regard to the second swab of the handgun, Przech concluded that there was a mixture of three contributors, with at least two being male, and that it was 100 billion times more likely for this profile to occur if it originated from the defendant and two unknown individuals than if it had originated from three unknown individuals.

Finally, George Shelton, a latent print examiner, examined fingerprints lifted from the handgun's magazine. On the basis of his examination, Shelton opined that the latent print lifted from the magazine and the known print from the defendant matched.

The defendant was charged with possession of narcotics with intent to sell in violation of § 21a-278 (b), criminal possession of a pistol in violation of § 53a-217c (a) (1), and carrying a pistol without a permit in violation of § 29-35. Following a trial, the jury found the defendant guilty of all charges. Prior to sentencing, the court considered and denied the defendant's written motion for judgment of acquittal on each of the charges. The court thereafter sentenced the defendant to six years of imprisonment, five years being a mandatory minimum, on the conviction of possession of narcotics with intent to sell; three years of imprisonment, two years being a mandatory minimum, on the conviction of criminal possession of a pistol; and a mandatory minimum sentence of one year of imprisonment on the conviction of carrying a pistol without a permit to be served concurrently with the other sentences, for a total effective sentence of nine years. The defendant appealed.

I

The defendant first claims that there was insufficient evidence to convict him of criminal possession of a pistol. More specifically, the defendant argues that the state was required, and failed, to establish that he constructively possessed the firearm at issue. For the reasons set forth herein, we disagree with the defendant's argument.

The standard of review for this type of claim is well known. "A defendant who asserts an insufficiency of the evidence claim bears an arduous burden." *State* v. *Hopkins*, 62 Conn. App. 665, 669–70, 772 A.2d 657

(2001). In examining a sufficiency of the evidence claim, we apply a two part test. "First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt . . . . This court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict." (Internal quotation marks omitted.) *State* v. *Grasso*, 189 Conn. App. 186, 200–201, 207 A.3d 33, cert. denied, 331 Conn. 928, 207 A.3d 519 (2019).

As our Supreme Court has often noted, "proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the trier, would have resulted in an acquittal." (Internal quotation marks omitted.) *State* v. *Robert S.*, 179 Conn. App. 831, 835, 181 A.3d 568, cert. denied, 328 Conn. 933, 183 A.3d 1174 (2018), quoting *State* v. *Fagan*, 280 Conn. 69, 80, 905 A.2d 1101 (2006), cert. denied, 549 U.S. 1269, 127 S. Ct. 1491, 167 L. Ed. 2d 236 (2007). Furthermore, "[i]n [our] process of review, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact . . . but the cumulative impact of a multitude of facts [that] establishes guilt in a case involving substantial circumstantial evidence." (Internal quotation marks omitted.) *State* v. *Seeley*, 326 Conn. 65, 73, 161 A.3d 1278 (2017).

"It is within the province of the jury to draw reasonable and logical inferences from the facts proven. . . . The jury may draw reasonable inferences based on other inferences drawn from the evidence presented.

. . . Our review is a fact based inquiry limited to determining whether the inferences drawn by the jury are so unreasonable as to be unjustifiable." (Internal quotation marks omitted.) *State* v. *Bradley*, 60 Conn. App. 534, 540, 760 A.2d 520, cert. denied, 255 Conn. 921, 763 A.2d 1042 (2000). "The trier [of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Internal quotation marks omitted.) *State* v. *Fagan*, supra, 280 Conn. 80.

In the present case, the defendant was charged, in part, with violation of § 53a-217c, which provides in relevant part: "(a) A person is guilty of criminal possession of a pistol or revolver when such person possesses a pistol or revolver . . . and (1) has been convicted of a felony . . . ."[2] General Statutes § 53a-3 (2) defines " 'possess' " as "to have physical possession or otherwise to exercise dominion or control over tangible property . . . ."

Possession of a firearm may be proved through either actual or constructive possession. See *State* v. *Rhodes*, 335 Conn. 226, 233, 249 A.3d 683 (2020). Both actual possession and constructive possession may be established by direct or circumstantial evidence. See, e.g., *State* v. *Coleman*, 114 Conn. App. 722, 730, 971 A.2d 46, cert. denied, 293 Conn. 907, 978 A.2d 1112 (2009). Indeed, "there is no legal distinction between direct and circumstantial evidence so far as probative force is concerned . . . ." (Citations omitted.) *State* v. *Wilson*, 178 Conn. 427, 434, 423 A.2d 72 (1979). Actual possession, on the one hand, "requires the defendant to have had direct physical contact with the [contraband]." (Internal quotation marks omitted.) *State* v. *Johnson*, 137 Conn. App. 733, 740, 49 A.3d 1046 (2012), rev'd in part on other grounds, 316 Conn. 34, 111 A.3d 447

[2] The parties stipulated that the defendant had a prior felony conviction.

(2015), and aff'd, 316 Conn. 45, 111 A.3d 436 (2015). Alternatively, "constructive possession is possession without direct physical contact. . . . It can mean an appreciable ability to guide the destiny of the [contraband] . . . and contemplates a continuing relationship between the controlling entity and the object being controlled." (Citations omitted; internal quotation marks omitted.) *State* v. *Rhodes*, supra, 233–34. "To establish constructive possession, the control must be exercised intentionally and with knowledge of the character of the controlled object." (Internal quotation marks omitted.) *State* v. *Dawson*, 340 Conn. 136, 148, 263 A.3d 779 (2021). "A person acts 'intentionally' with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct . . . ." General Statutes § 53a-3 (11). "A person acts 'knowingly' with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists . . . ." General Statutes § 53a-3 (12).

Before we turn to the merits of the defendant's claim, we must first clarify a fundamental issue: upon what theory did the state proceed in proving the element of possession? The defendant argues that because he did not have actual, physical possession of the firearm at the time of arrest, the state's theory at trial necessarily must have been one of constructive possession. Citing to *State* v. *Robert H.*, 273 Conn. 56, 82–83, 866 A.2d 1255 (2005), the defendant argues that the state should not be permitted to press an actual possession argument on appeal because it did not pursue that theory at trial. When questioned at oral argument before this court on whether the state proceeded solely on a theory of constructive possession at trial, however, the defendant's counsel conceded that "there really was no discussion of one versus the other . . . ." Defense counsel

argued that the trial court instructed on constructive possession but acknowledged, after questioning, that the court explained to the jury the difference between actual physical possession and constructive possession. On the basis of our review of the record, we conclude that the state's arguments on appeal are consistent with the theory pursued at trial—that the defendant possessed the Ruger firearm on the date in question by firing it and tossing it over a nearby fence in an attempt to dispose of it.[3]

[3] The court's instruction provided in relevant part: "In count two of the information, the state accuses the defendant of the crime of criminal possession of a pistol, in violation of . . . § 53a-217c (a) (1) and alleges that on or about December 28, 2016, in the city of New Haven, in the area of 17 Vernon Street, the defendant possessed a pistol and has been convicted of a felony. . . .

"Section 53a-217c (a) (1) states in relevant part that a person is guilty of criminal possession of a pistol when such person possesses a pistol or revolver and has been convicted of a felony.

"To convict the defendant of criminal possession of a pistol, the state must prove two essential elements beyond a reasonable doubt: (1) the defendant possessed a pistol; and (2) the defendant had been convicted of a felony.

"The first essential element is that the defendant possessed a pistol. A pistol is defined by statute to mean any firearm having a barrel less than twelve inches in length. Possession means either actual possession or constructive possession. Actual possession means actual physical possession, such as having the object on one's person.

"Constructive possession means having control over the object. As long as the object is in a place where it is subject to the defendant's dominion and control, where the defendant can, if he wishes, go and get it is, it is in his possession. Mere presence of the defendant in the vicinity is not sufficient by itself to establish constructive possession. However, presence is a factor you may consider along with all the other evidence in determining possession. Where the defendant was not the only person who had access to the area where the handgun was found, you may not infer that he knew of its presence and that he had control of it, unless he made some incriminating statement or unless there are some other circumstances which tend to support such an inference.

"Possession also requires knowledge. The defendant must have knowingly possessed the pistol. I defined the terms knowledge and knowingly for you in my instruction to you in count one. You should apply those same instructions here.

"The second essential element is that at the time the defendant possessed the pistol, if you find that he did so, he was prohibited from possessing a pistol because he had been convicted of a felony. Convicted means having

Nevertheless, the defendant argues that, because he was not observed or found with the firearm at the time of arrest, the state was required (and failed) to prove that the defendant constructively possessed the firearm. The state disagrees that it was compelled to prove constructive possession and claims that the jury, on the basis of circumstantial evidence, could conclude beyond a reasonable doubt that the defendant actually possessed the handgun. We agree with the state.

a judgment of conviction entered by a court of competent jurisdiction. This conviction must have occurred prior to the date it is alleged the defendant possessed the pistol. A felony is a crime for which a person may be sentenced to prison for more than one year. In this case, the state and the defendant have stipulated that, prior to December 28, 2016, the defendant had been convicted of a felony. A stipulation is an agreement between the parties concerning the existence of a fact. You will treat this fact as true. This stipulation, however, has been admitted for a limited purpose, that purpose being to establish the second essential element of this offense. The stipulation may not be used for any other purpose. The fact that the defendant was previously convicted of a felony cannot—cannot be used by—cannot be used to show or prove any element of any other crime that the defendant is presently charged with. It also may not be used as evidence to show the defendant had a bad character or criminal tendencies.

"The state asserts that on or about December 28, 2016, the defendant had constructive possession of a pistol in the area of 17 Vernon Street in New Haven. The state further asserts that the parties have stipulated that the defendant had been previously convicted of a felony.

"The defendant, by pleading not guilty to this charge, has placed all of the essential elements of the crime at issue, but has assumed no burden whatsoever of disproving them by any standard. The burden remains on the state to prove beyond a reasonable doubt each of the essential elements of the offense charged."

Although the court made one isolated statement during its instruction that the state was proceeding on a constructive possession theory, we find such statement of no moment. A simple review of the court's instruction discloses that the court accurately instructed on both actual and constructive possession, so such statement was inconsequential. Neither the charging conference nor the record suggests that the state exclusively pursued a constructive possession theory. In fact, during the charging conference, the court and the prosecutor acknowledged that the state was required to prove that he had physical possession of the firearm for purposes of the charge of carrying a pistol without a permit in violation of § 29-35. It would thus be anomalous for the state to have proceeded on a constructive possession theory for the criminal possession charge while it was required to prove that the defendant actually carried the weapon on his person for the carrying a pistol without a permit charge.

In support of his contention that the state was required to prove constructive possession, the defendant relies on our Supreme Court's decision in *State* v. *Winfrey*, 302 Conn. 195, 24 A.3d 1218 (2011). In *Winfrey*, the court explained that, "[b]ecause there was no direct evidence that the drugs found in the center console belonged to the defendant, the state argued the case under a theory of nonexclusive possession." Id., 210. In setting forth the standard of proving illegal possession, the court stated, inter alia, that, "[w]here . . . the [controlled substances were] not found on the defendant's person, the state *must* proceed on the theory of constructive possession, that is, possession without direct physical contact." (Emphasis added; internal quotation marks omitted.) Id. Citing to this proposition, the defendant argues in this appeal that the state was required to proceed on a theory of constructive possession.

The defendant is correct that *Winfrey* (and other similar cases) states that "[w]here . . . the [contraband was] not found on the defendant's person, the state *must* proceed on the theory of constructive possession, that is, possession without direct physical contact." (Emphasis added; internal quotation marks omitted.) Id. We disagree with the defendant, however, that this pronouncement requires the state prove constructive possession in each and every case in which a defendant is not seen or found by the police at the time of arrest with the contraband on his person. Rather, we read this language to mean that when there is insufficient evidence—direct *or* circumstantial—to establish that the defendant actually possessed (i.e., had direct physical contact with) the contraband, the state *necessarily* is required to proceed on a theory of constructive possession in order to satisfy its burden of proof.

There is little question that the state will, in many, perhaps most, cases, pursue a constructive possession

theory when the defendant was not found or seen with the contraband at the time of arrest or when there is no evidence that the defendant actually possessed the contraband. See, e.g., *State* v. *Bowens*, 118 Conn. App. 112, 121, 982 A.2d 1089 (2009) ("[t]ypically, the state will proceed under a theory of constructive possession when the [contraband is] not found on the defendant's person at the time of arrest, but the accused still exercises dominion [or] control" (internal quotation marks omitted)), cert. denied, 295 Conn. 902, 988 A.2d 878 (2010). There are times, however, when there is sufficient evidence—direct or circumstantial—to establish that the defendant *actually* possessed the contraband on the day and at the time in question, despite not being seen or found physically possessing the contraband on his person at the exact time of arrest. See, e.g., *State* v. *Coleman*, supra, 114 Conn. App. 728 ("[t]he state may in some circumstances proceed on a theory of actual possession, however, even if the defendant did not physically possess narcotics at the exact time of arrest"); see also *State* v. *Ellis T.*, 92 Conn. App. 247, 251 n.3, 884 A.2d 437 (2005) (although defendant did not physically possess narcotics at time of arrest, facts were sufficient to support actual possession theory); *State* v. *Thomas*, 56 Conn. App. 573, 577, 745 A.2d 199 ("The state presented a strong circumstantial case. While it is true that the state presented no witness who saw the defendant in possession of the pistol, such lack of direct evidence is not fatal to the state's burden of proof."), cert. denied, 252 Conn. 953, 749 A.2d 1204 (2000).

Our case law has explained that constructive possession is "possession without direct physical contact." (Internal quotation marks omitted.) *State* v. *Johnson*, 316 Conn. 45, 58, 111 A.3d 436 (2015). It can mean "an appreciable ability to guide the destiny of the [contraband]" and "contemplates a continuing relationship between the controlling entity and the object being

controlled." (Internal quotation marks omitted.) *State* v. *Rhodes*, supra, 335 Conn. 233–34. There will be cases like this one, however, in which there is substantial circumstantial evidence to show that the defendant actually possessed the contraband and attempted to dispose of it. See, e.g., *State* v. *Thomas*, supra, 56 Conn. App. 575–77 (gun found in alleyway shortly after defendant's arrest). It would be peculiar to require the state to prove constructive possession—a legal fiction whereby a person is deemed to possess contraband even when he does not actually have immediate, physical control of the contraband—when the facts indicate that the defendant had physical, actual contact with and control of the firearm on the day and at the time in question and then purposefully relinquished control over it so as not to be caught with it. See *State* v. *Rhodes*, supra, 268 (*Ecker, J.*, concurring) ("[c]onstructive possession is a 'legal fiction' "); see also *State* v. *Buhl*, 321 Conn. 688, 713, 138 A.3d 868 (2016) ("it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct" (internal quotation marks omitted)).

Furthermore, in the present case, the state proceeded on a theory that the defendant possessed the Ruger firearm on the date in question by firing it and tossing it over a nearby fence in an attempt to dispose of it. After there is an act of disposal, like the one here, there may not always be a "continuing relationship between the controlling entity and the object being controlled." (Internal quotation marks omitted.) *State* v. *Rhodes*, supra, 335 Conn. 234. Put differently, after an attempt to dispose of contraband, a defendant may no longer intend to exercise dominion or control over it. See *State* v. *Hill*, 201 Conn. 505, 516, 523 A.2d 1252 (1986) ("this control must be exercised intentionally and with knowledge of the character of the controlled object"). It would

thus be illogical in those circumstances to require the state to prove constructive possession when the evidence is sufficient to support a conviction based on actual possession.

We recognize that the case law in this area has not been crystal clear. Our review of it, however, leads us to conclude that, although certain cases will require the state to pursue a constructive possession theory in order for it to sustain its burden of proof, there are occasions when the evidence better supports the theory of actual possession. We accordingly agree with the state that it was not required in this case to prove constructive possession as opposed to actual possession.

We turn now to the merits of the claim to determine whether there was sufficient evidence, including circumstantial evidence, to establish beyond a reasonable doubt that the defendant *actually* possessed the firearm on the day and at the time in question. The state's information charged the defendant, in part, with criminal possession of a pistol "in the [c]ity of New Haven on or about December 28, 2016 in the area of 17 Vernon Street . . . ." We thus review whether the evidence supports a finding beyond a reasonable doubt that on or about the day of his arrest, the defendant possessed a pistol in the city of New Haven in the area of 17 Vernon Street. We conclude that it does.

When, as here, the evidence is largely circumstantial, the relevant inquiry asks whether the cumulative force of the evidence, along with plausible inferences favorable to sustaining the verdict, warrants a reasonable jury in concluding that the state has proved the elements of the offense beyond a reasonable doubt. See, e.g., *State* v. *Shawn G.*, 208 Conn. App. 154, 158, 262 A.3d 835, cert. denied, 340 Conn. 907, 263 A.3d 822 (2021).

Viewed through this prism, we conclude that a reasonable jury could find—as this jury did—that the state proved beyond a reasonable doubt that the defendant possessed the firearm on the date and at the time in question.

In considering these facts in the light most favorable to upholding the verdict, the totality of the evidence supports an inference that the defendant *actually* possessed the handgun on or about December 28, 2016, in the area of 17 Vernon Street. The jury heard testimony that the Shot Spotter activated at 5 p.m. on December 28, 2016, which established that a gun was fired near 17 Vernon Street in New Haven. Marcum, who received a dispatch call at 5:04 p.m., arrived on scene only thirty seconds later to find the defendant in the driveway of 9 Vernon Street, walking toward the rear of the property to the fence line that separated that property and the Howard Avenue Parking Garage property. 17 Vernon Street, where the Shot Spotter registered, was merely three houses down from this location. No other individuals were in the immediate area. Although the defendant complied with Marcum's directives, he exhibited evasive conduct by offering an implausible explanation about where he had been coming from and where he was going. Soon thereafter, Green found a .40 caliber Ruger handgun, which contained the defendant's DNA and fingerprints, in a snowbank just over the fence from where the defendant was stopped and near the location where the Shot Spotter had activated. After being arrested and brought to the detention center, the defendant later was found with 139 individual packets of heroin and 2 additional bags of it on him.[4]

[4] Connecticut courts repeatedly have recognized that "[t]here is a well established correlation between drug dealing and firearms." *State* v. *Cooper*, 227 Conn. 417, 426 n.5, 630 A.2d 1043 (1993). Although this correlation cannot by itself establish an element of a crime, it may "support the reasonableness of the inferences drawn by the jury." *State* v. *Gonzalez*, 311 Conn. 408, 426, 87 A.3d 1101 (2014); see also *United States* v. *White*, 356 F.3d 865, 870 (8th Cir. 2004) ("[w]e allow a [fact finder] to infer a connection between drugs and firearms when a defendant distributes quantities of illegal drugs

On the basis of our review of the record, we conclude that there was sufficient circumstantial evidence by which the jury reasonably could conclude that the defendant actually possessed the .40 caliber Ruger firearm on the day in question, fired it, and tossed it over a nearby fence in an effort to dispose of it just before Marcum arrived at the scene.[5] Accordingly, the evidence was sufficient to support the defendant's conviction of criminal possession of a pistol, and the court, therefore, properly denied the defendant's motion for a judgment of acquittal.[6]

because firearms are viewed as a tool of the trade for drug dealers"). Thus, the fact that 139 individual packets of heroin and 2 additional bags of it were found on the defendant bears some relevance to the issue of whether the defendant was in possession of the firearm.

[5] We conclude that, even if the state had exclusively pursued a constructive possession theory at trial, there was still sufficient evidence to establish beyond a reasonable doubt that the defendant constructively possessed the firearm on the day in question. First, there was evidence that the defendant had a temporal and spatial connection to the handgun, having been detained by the police near the weapon with no other individuals around, only minutes after the Shot Spotter had registered a gunshot in the immediate area in which he was located. Second, the defendant's DNA and fingerprints were on the firearm, further linking him to the weapon. See *State* v. *Martin*, 285 Conn. 135, 150, 939 A.2d 524, cert. denied, 555 U.S. 859, 129 S. Ct. 133, 172 L. Ed. 2d 101 (2008) ("mere presence is not enough to support an inference of dominion or control, [when] there are other pieces of evidence tying the defendant to dominion [or] control, the [finder of fact is] entitled to consider the fact of [the defendant's] presence and to draw inferences from that presence and the other circumstances linking [the defendant] to the crime" (internal quotation marks omitted)). Third, the defendant exhibited evasive conduct by misleading the police about where he had been coming from and where he was going when he was stopped. Fourth, on his arrival, Marcum discovered the defendant walking back toward the area where the handgun was discarded.

On the basis of the foregoing, we conclude that the defendant's location in close proximity to the handgun, with no other individuals in the immediate area, after the Shot Spotter activated only four minutes earlier, along with his DNA and fingerprints on the handgun, and his decision to remain in the vicinity of where the handgun was discarded, would allow the jury reasonably to infer that that he possessed the weapon.

[6] On August 13, 2021, our Supreme Court released its decision in *State* v. *Dawson*, supra, 340 Conn. 138. This decision came after the parties in the present case had submitted their briefs but before oral arguments. In *Dawson*, our Supreme Court reversed this court's decision affirming the defendant's conviction of criminal possession of a pistol in violation of § 53a-217c.

II

The defendant next claims that this court should vacate his conviction of carrying a pistol without a permit because the evidence was insufficient to support his conviction for that offense. We disagree.

We again review the principles that guide us when we consider claims of insufficient evidence. "In reviewing the sufficiency of the evidence to support a criminal conviction we apply a [two part] test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"We note that the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider

Id., 139. Our Supreme Court concluded that the evidence was insufficient to convict the defendant on the basis of constructive possession because, among other reasons, the gun the defendant was accused of having control over was found by the police in a public place, within reach of several individuals who were with the defendant, and, although the defendant's DNA profile was on the gun, it was mixed with the DNA of others who were not identified. Id., 156–57, 162. At oral argument before us in the present case, the defendant argued that this case is controlled by *Dawson* and that his conviction should be reversed for the same reasons that supported reversal in *Dawson*. The defendant's reliance on *Dawson* is misplaced. First, as discussed in this opinion, we view the state's theory in the present case as being based on actual possession, not exclusively on constructive possession, as was the case in *Dawson*. See id., 152. Second, the circumstantial evidence connecting the defendant to the gun in the present case is much stronger than was the circumstantial evidence in *Dawson*. See footnote 5 of this opinion.

it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . In evaluating evidence, the [finder] of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [finder of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . .

"Finally, [a]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [finder of fact], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty." (Citations omitted; internal quotation marks omitted.) *State* v. *Campbell*, 328 Conn. 444, 503–505, 180 A.3d 882 (2018).

We turn now to the essential elements of the offense. Section 29-35 (a) provides in relevant part: "No person shall carry any pistol or revolver upon his or her person, except when such person is within the dwelling house or place of business of such person, without a permit to carry the same issued as provided in section 29-28. . . ." "[T]o obtain a conviction for carrying a pistol without a permit, the state was required to prove beyond a reasonable doubt that the defendant (1) carried a pistol, (2) for which he lacked a permit, (3)

while outside his dwelling house or place of business."[7] (Internal quotation marks omitted.) *State* v. *Covington*, 184 Conn. App. 332, 339, 194 A.3d 1224 (2018), aff'd, 335 Conn. 212, 229 A.3d 1036 (2020).

This court has explained that carrying a pistol and possession of a pistol are different concepts. See id. Although "a person can possess an item without carrying it on his person, § 29-35 is designed to prohibit the carrying of a pistol without a permit and not the [mere] possession of one." (Internal quotation marks omitted.) *State* v. *Crespo*, 145 Conn. App. 547, 573, 76 A.3d 664 (2013), aff'd, 317 Conn. 1, 115 A.3d 447 (2015). Thus, "constructive possession of a pistol or revolver will not suffice to support a conviction under § 29-35." Id.; see also *State* v. *L'Minggio*, 71 Conn. App. 656, 672, 803 A.2d 408, cert. denied, 262 Conn. 902, 810 A.2d 270 (2002). Rather, "[t]o establish that a defendant carried a pistol or revolver, the state must prove beyond a reasonable doubt that he bore a pistol or revolver upon his person . . . while exercising control or dominion of it." (Internal quotation marks omitted.) *State* v. *Bradbury*, 196 Conn. App. 510, 517, 230 A.3d 877, cert. denied, 335 Conn. 925, 234 A.3d 980 (2020). "Because there is no temporal requirement in § 29-35 . . . and no requirement that the pistol or revolver be moved from one place to another to prove that it was carried . . . a defendant can be shown to have carried a pistol or revolver upon his person, within the meaning of the statute, by evidence proving, inter alia, that he grasped or held it in his hands, arms or clothing or otherwise bore it upon his body for any period of time while maintaining dominion or control over it." (Internal quotation marks omitted.) *State* v. *Covington*, supra, 184 Conn. App. 339–40.

[7] The parties stipulated that the defendant did not have a valid Connecticut pistol permit on December 28, 2016, as required by General Statutes § 29-28, which satisfied that element of carrying a pistol without a permit.

The state's information charged the defendant, in part, with carrying a pistol without a permit "in the [c]ity of New Haven on or about December 28, 2016 in the area of 17 Vernon Street . . . ." We thus review whether the evidence supports a finding beyond a reasonable doubt that on or about the day of his arrest, the defendant bore a pistol on his person in the city of New Haven in the area of 17 Vernon Street.

For largely the same reasons set forth in part I of this opinion, we conclude that the jury reasonably could have found that the defendant *carried* the pistol in violation of § 29-35. As discussed previously, the jury heard testimony that the Shot Spotter activated at 5 p.m. on December 28, 2016, which established that a gun was fired near 17 Vernon Street in New Haven. Marcum, who received a dispatch call at 5:04 p.m., arrived on scene only thirty seconds later to find the defendant in the driveway of 9 Vernon Street walking toward the fence line at the rear of the property that separated it from the Howard Avenue Parking Garage property. No other individuals were in the immediate area. Although the defendant was compliant with Marcum's directives, he exhibited evasive conduct by misleading Marcum and another officer about where he had been coming from and where he was going. Soon thereafter, Green found a .40 caliber Ruger handgun, which contained the defendant's DNA and fingerprints, in a snowbank just over the fence from where the defendant was stopped and near the location where the Shot Spotter had activated.

On the basis of the previously described evidence and the inferences to be drawn therefrom, the jury reasonably could have found that the defendant carried a pistol on his person on the day in question by holding it in his hand and firing it at 5 p.m. in the area of Vernon Street, and further carrying it and tossing it over a nearby fence in an effort to dispose of it. See *State* v.

Covington, supra, 184 Conn. App. 339–40 ("a defendant can be shown to have carried a pistol or revolver upon his person . . . by evidence proving, inter alia, that he grasped or held it in his hands, arms or clothing or otherwise bore it upon his body for any period of time while maintaining dominion or control over it" (internal quotation marks omitted)). We accordingly conclude that there was sufficient evidence to support the jury's finding that the defendant was guilty of carrying a pistol without a permit and that the court properly denied the defendant's motion for judgment of acquittal with respect to that charge.

III

The defendant next claims that that the court committed plain error in charging the jury on criminal possession of a pistol.[8] We disagree.

We begin our analysis of the defendant's claim by setting forth the legal principles that govern our review of the claim. It is well known that "the plain error doctrine, codified at Practice Book § 60-5, is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved [and nonconstitutional in nature], are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. [T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial

[8] The defendant recognizes that he did not distinctly raise an objection to the jury instruction before the trial court. Citing to *State* v. *McClain*, 324 Conn. 802, 815, 155 A.3d 209 (2017), which held that an implicit waiver of the constitutional right to challenge jury instructions on direct appeal in accordance with *State* v. *Kitchens*, 299 Conn. 447, 482–83, 10 A.3d 942 (2011), does not preclude appellate relief under the plain error doctrine, the defendant seeks review solely under the plain error doctrine.

court, nonetheless requires reversal of the trial court's judgment . . . for reasons of policy. . . . In addition, the plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly. . . . Implicit in this very demanding standard is the notion . . . that invocation of the plain error doctrine is reserved for occasions requiring the reversal of the judgment under review. . . .

"An appellate court addressing a claim of plain error first must determine if the error is indeed plain in the sense that it is patent [or] readily [discernible] on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . This determination clearly requires a review of the plain error claim presented in light of the record." (Footnote omitted; internal quotation marks omitted.) *State* v. *Jamison*, 320 Conn. 589, 595–96, 134 A.3d 560 (2016).

"Although a complete record and an obvious error are prerequisites for plain error review, they are not, of themselves, sufficient for its application. . . . [I]n addition to examining the patent nature of the error, the reviewing court must examine that error for the grievousness of its consequences in order to determine whether reversal under the plain error doctrine is appropriate. A party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice." (Internal quotation marks omitted.) *State* v. *Sanchez*, 308 Conn. 64, 77, 60 A.3d 271 (2013). Accordingly, a defendant "cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is both so clear and so harmful that a failure to reverse the judgment would result in manifest injustice." (Internal quotation marks omitted.) *State* v. *Fagan*, supra, 280 Conn. 87.

The defendant argues that the court committed plain error when it omitted from its charge that the state was required to prove that the defendant *intended* to exercise control over the handgun to establish constructive possession. After reviewing the defendant's claim against the plain error standard, we discern no error, plain or otherwise.

First, the defendant's plain error claim fails for the fundamental reason that it rests on an incorrect premise. As we discussed in part I of this opinion, the state was not required to prove constructive possession in this instance. It was sufficient for the state to demonstrate that the defendant *actually* possessed the firearm in question. To that end, the court instructed the jury in relevant part: "Possession means either actual possession or constructive possession. Actual possession means actual physical possession, such as having the object on one's person." See footnote 3 of this opinion.

Second, on our examination of the court's charge discussing constructive possession; see footnote 3 of this opinion; we find it substantially similar to those examined in *State* v. *Fasano*, 88 Conn. App. 17, 22–24 n.7, 868 A.2d 79, cert. denied, 274 Conn. 904, 876 A.2d 15 (2005), cert. denied, 546 U.S. 1101, 126 S. Ct. 1037, 163 L. Ed. 2d 873 (2006), and *State* v. *Elijah*, 42 Conn. App. 687, 691–92, 682 A.2d 506, cert. denied, 239 Conn. 936, 684 A.2d 709 (1996). In both cases, this court concluded that those instructions sufficiently explained to the jury the elements of the crimes charged. *State* v. *Fasano*, supra, 33; *State* v. *Elijah*, supra, 694; see also *State* v. *Jarrett*, 82 Conn. App. 489, 496, 845 A.2d 476 ("hold[ing] that a separate instruction on the requirement of intentional control need not be provided in every instance"), cert. denied, 269 Conn. 911, 852 A.2d 741 (2004). Accordingly, we cannot conclude that the court plainly erred in the present case because the error,

if any, was not so clear and so harmful that a failure to reverse the judgment would result in manifest injustice.

IV

The defendant's final claim is that the court erred by permitting two police officers to testify to the ultimate issue of whether the defendant had intent to sell the narcotics found on him. This claim was not properly preserved at trial and we therefore decline to review it on appeal.

"[T]he standard for the preservation of a claim alleging an improper evidentiary ruling at trial is well settled. This court is not bound to consider claims of law not made at the trial. . . . In order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . In objecting to evidence, counsel must properly articulate the basis of the objection so as to apprise the trial court of the precise nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling. . . . Once counsel states the authority and ground of [the] objection, any appeal will be limited to the ground asserted." (Internal quotation marks omitted.) *State* v. *Jorge P.*, 308 Conn. 740, 753, 66 A.3d 869 (2013).

The defendant takes exception to certain testimony of Marcum and Canning about the heroin found on the defendant's person. He argues that the court erred by permitting them to testify as to the ultimate issue of whether the defendant had the intent to sell the narcotics found on him. The state argues that this claim is unpreserved because the defendant failed to object to the evidence on this basis before the trial court. We agree with the state.

We first begin with testimony of Marcum. During direct examination, the prosecutor asked him: "[B]ased on your training and experience, did you come to any

conclusions based on the way these items were packaged?" Marcum responded, "[y]es," and defense counsel objected. Following this objection, the court excused the jury and the following colloquy occurred:

"[Defense Counsel]: There's been no foundation laid, he's going make a conclusion that this is sale of drugs.

"The Court: Well, let me—let me hear an offer of proof. What is the answer going to be?

"[The Prosecutor]: That based on the packaging and the way it was secreted, that it was—his indication that it was packaged in a way that was for sale and not personal use.

"The Court: Okay; and your objection is foundation?

"[Defense Counsel]: Yeah, there's no foundation that he can make that conclusion.

"The Court: Okay. You want to—do you want to make—lay that foundation?

"[The Prosecutor]: Well, Your Honor, it's my understanding that any officer can testify to what his training and experience tells him—

"The Court: Yeah, but—correct, but you haven't laid any foundation that he has either training or experience as it relates to how drugs are packaged for sale.

"[The Prosecutor]: Well—

"The Court: Okay, so you would need to lay that foundation.

"[The Prosecutor]: We can lay that foundation with this—

"The Court: Okay. I mean, for all I know, he was in the evidence for the last seven years; what do I know?

"[The Prosecutor]: Okay.

"The Court: So if we could have—or he did crime scenes, I don't know. There's lots of things he could've done. So if we could have the jury back."

On the jury's return, the court indicated that the defendant's objection was sustained. The prosecutor then elicited from Marcum details of his training and experience and, in response to further questioning, he testified that the manner in which the drugs were hidden on the defendant's body, the quantity of wax paper folds found, and the presence of $199 in small bills, were all indicative of narcotics being sold.

We turn next to the testimony of Canning, who testified that he was the arresting officer in this case and that Lyew was the officer who actually physically located the narcotics on the defendant. The following colloquy then occurred:

"[The Prosecutor]: Based on your experience, Officer Canning, what would you say the way the drugs were packaged, what their intent was for this?

"[Defense Counsel]: Your Honor, I'm going to have to—there's been no foundation. I don't even know if he even saw the drugs. He just said he got information that they—

"The Court: Yeah, fair enough."

The prosecutor then elicited from Canning testimony that, although he never reviewed the narcotics that were found on the defendant, he was informed that the defendant was found with 139 individual packets of heroin, which were located in his crotch area. The prosecutor later asked Canning what he charged the defendant with. Defense counsel objected on the basis of relevance, but the court overruled that objection. The prosecutor then asked Canning why he charged the defendant with possession of narcotics with intent to sell. Defense counsel objected again, this time on the basis of lack of foundation. The court overruled that objection, con-

cluding that the state laid the requisite foundation with respect to Canning's training and experience. Canning then testified that he charged the defendant as he did because street level narcotics sales are typically handled in the same manner.

On the basis of our review of the record, we conclude that the defendant failed to object on the ground that the two police officers were testifying to an ultimate issue of fact, the applicable objection. We agree with the state that the defendant cannot now challenge the proffered testimony as constituting improper opinion testimony on an ultimate issue where the only objections raised before the trial court were on the bases of relevance and foundation. See *State* v. *Stenner*, 281 Conn. 742, 755, 917 A.2d 28 ("[t]o permit a party to raise a different ground on appeal than [that] raised during trial would amount to trial by ambuscade, unfair both to the trial court and to the opposing party" (internal quotation marks omitted)), cert. denied, 552 U.S. 883, 128 S. Ct. 290, 169 L. Ed. 2d 139 (2007).

As an alternative basis for our consideration of this unpreserved claim, the defendant asks that we consider it as a matter of plain error pursuant to Practice Book § 60-5. Although we fail to see how the court could have erred by not ruling on an objection never made, suffice it to say that such an error, if any, does not rise to the level required for plain error review. See, e.g., *State* v. *Smith*, 209 Conn. 423, 425, 427, 551 A.2d 742 (1988) (finding no plain error where police officer gave opinion testimony concerning defendant's intent to sell narcotics). "Such review is reserved for truly extraordinary situations where the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings." *State* v. *Hinckley*, 198 Conn. 77, 87–88, 502 A.2d 388 (1985). This clearly is not such a case.

The judgment is affirmed.

In this opinion the other judges concurred.

PATRICK RIDER *v.* BRIAN RIDER, CONSERVATOR (ESTATE OF LEIGH RIDER), ET AL.
(AC 44067)

Alvord, Suarez and Lavine, Js.

Syllabus

The plaintiff appealed to the Superior Court from the decree of the Probate Court approving the final account filed by the defendant. The Probate Court had mailed notice of its decree on December 22, 2017. Prior to filing his appeal with the Superior Court on March 2, 2018, the plaintiff filed a motion for revocation with the Probate Court on December 26, 2017, which the Probate Court denied on February 8, 2018. Thereafter, the Superior Court rendered judgment dismissing the appeal for lack of subject matter jurisdiction on the ground that it was untimely pursuant to the applicable statute ((Rev. to 2017) § 45a-186 (a)) that requires an appeal from a Probate Court decree to be filed in the Superior Court within forty-five days of when the decree was mailed to the parties. On appeal to this court, the plaintiff claimed that his motion for revocation tolled the appeal period. *Held* that the Superior Court properly dismissed the probate appeal for lack of subject matter jurisdiction on the ground that it was untimely: the plaintiff did not file his appeal with the Superior Court within forty-five days of when the Probate Court mailed its decree, and his motion for revocation, filed pursuant to statute (§ 45a-128), did not toll the appeal period for the Probate Court's underlying decision approving the final account, as the legislature clearly addressed tolling the appeal period in its statutory scheme governing appeals in probate cases and did not include the filing of a motion pursuant to § 45a-128 as an action that tolls the appeal period.

Argued December 2, 2021—officially released January 25, 2022

Procedural History

Appeal from the decree of the Probate Court for the district of North Central Connecticut approving the final account filed by the defendant, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Cobb, J.*; judgment dismissing the appeal, from which the plaintiff appealed to this court. *Affirmed.*

Matthew S. Carlone, for the appellant (plaintiff).

Charles D. Houlihan, Jr., for the appellee (defendants).

Opinion

ALVORD, J. The plaintiff, Patrick Rider, appeals from the judgment of the Superior Court dismissing his probate appeal for lack of subject matter jurisdiction. On appeal, he claims that the court incorrectly concluded that it lacked jurisdiction over his appeal on the basis that it was untimely.[1] We affirm the judgment.

The following procedural history is relevant to our resolution of this appeal. In July, 2017, Leigh Rider (Rider)[2] filed a petition with the Probate Court requesting a voluntary conservatorship with the defendant Brian Rider appointed as conservator of his person and estate. The Probate Court granted the petition. One month later, in August, 2017, Rider requested that the court "revoke his voluntary conservatorship," and the Probate Court granted this request. On October 31, 2017, the defendant filed a final account with the Probate Court. The Probate Court then noticed and assigned a hearing on allowance of the final account. Before the hearing was held, on December 2, 2017, Rider died.

The hearing on allowance of the final account was held on December 13, 2017.[3] During the hearing, the

[1] The plaintiff also claims on appeal that (1) his rights were prejudiced by the Probate Court's approval of the proposed final account without completing the hearing and (2) the hearing was statutorily deficient. Because we conclude that the Superior Court correctly determined that it lacked subject matter jurisdiction over the plaintiff's appeal, we need not consider these claims.

[2] Patrick Rider, the plaintiff, and Brian Rider, the defendant, are both sons of Leigh Rider. Brian Rider was named as a defendant in the complaint in the Superior Court in both his individual capacity and as conservator of the estate of Leigh Rider. Leigh Rider will be referred to as Rider throughout this opinion.

[3] Prior to this hearing, the plaintiff's attorney requested a continuance "for the reason that he could not attend the hearing in person and had just been retained by the plaintiff, and needed more time to consider the petition for final account." The motion was denied and the plaintiff's counsel attended the hearing via telephone.

plaintiff objected to the account, challenging the attorney's fees expended because "the amount of time and itemization . . . was not provided to the court" or to the plaintiff and arguing that assets that should have been included in the account were not included. At the conclusion of the hearing, the court asked: "All right. Is that it, [plaintiff]? You done?" The plaintiff responded: "Yes, Your Honor. I am done." The court closed the hearing by saying: "Okay. I'm going to have to spend some time on this myself so I'm going to have to continue this hearing."

On December 22, 2017, the court issued a "Decree: Final Account," allowing and approving the final account without scheduling another hearing. On December 26, 2017, the plaintiff, acting in a self-represented capacity,[4] filed a "Motion for Revocation of Probate Decree Allowing the Approval of the Accounting of the Conservator, [General Statutes § 45a-128 (a) and (b)]" (motion for revocation).[5] The plaintiff was concerned that records of attorney's fees were not provided, an explanation of claimed irregularities in the account had yet to be discussed, and there had not been a continued hearing on the account.[6] The plaintiff

[4] Although the plaintiff was represented by counsel at this point in the proceedings, at oral argument before this court, the plaintiff's counsel represented that the plaintiff had filed this motion himself on the mistaken belief that he was no longer represented by counsel.

[5] The plaintiff, as well as the Probate Court and the Superior Court, at times refer to this motion as a motion for reconsideration. For the sake of consistency and clarity, we refer to the motion as a motion for revocation throughout this opinion.

We also note that whether the plaintiff's motion is referred to as a motion for reconsideration or a motion for revocation is inconsequential to our analysis because the governing statute applies to both motions. See General Statutes § 45a-128 ("[t]he court may *reconsider and modify or revoke* any such order or decree for any of the following reasons . . . ." (emphasis added)).

[6] On the basis of these contentions, the plaintiff asserted that the decree approving the account was "an ex parte [§] 45[a]-128 (a) decision . . . ." Section 45a-128 (a), which governs ex parte orders and decrees, provides in relevant part that "an ex parte order or decree is an order or decree entered in a proceeding of which no notice is required to be given to any

then requested "a hearing as per [§ 45a-128] and an order that [the attorney for the conservatorship] send out his time slips for all pre-conservatorship fees and fees during the conservatorship . . . ."

On February 8, 2018, the Probate Court denied the motion for revocation pursuant to § 45a-128 (b),[7] stating that "the request . . . does not meet the requirements outlined in . . . [§] 45a-128 as all parties in interest have not filed a consent to reconsider, all parties in interest did receive notice of hearing . . . no scrivener or clerical error has been identified, and no discovery or identification of parties unknown to the court was made."

Subsequently, the plaintiff filed a complaint, appealing from the Probate Court's decree accepting the final account, with the Superior Court. The complaint was not filed until March 2, 2018. In both the original complaint and the amended complaint, filed March 14, 2018, the plaintiff asserted that he "filed a written motion for reconsideration with the Probate Court reasserting the plaintiff's objections described herein. However, as of the date hereof, no action has been taken on said motion." The plaintiff requested a de novo review of the final account and listed several objections to the account,[8] arguing that the Probate Court never considered those objections despite stating that it would continue the hearing on the final account in order to do so.

party and no notice is given" and that "[r]econsideration may be made on the court's own motion or, for cause shown satisfactory to the court . . . ."

[7] General Statutes § 45a-128 (b) provides in relevant part that "[t]he court may reconsider and modify or revoke any such order or decree for any of the following reasons: (1) For any reason, if all parties in interest consent to reconsideration, modification or revocation, or (2) for failure to provide legal notice to a party entitled to notice under law, or (3) to correct a scrivener's or clerical error, or (4) upon discovery or identification of parties in interest unknown to the court at the time of the order or decree."

[8] The plaintiff included assertions that "the accounting was materially incomplete . . . materially inaccurate . . . sought approval of attorney's fees that were not sufficiently substantiated by the accounting itself . . . sought approval of attorney's fees that had no nexus to the conservatorship

On March 16, 2018, the defendant filed a motion to dismiss the plaintiff's appeal. The defendant argued that, inter alia, General Statutes (Rev. to 2017) § 45a-186 (a) "requires the filing of an appeal in a conservatorship matter by filing a complaint in the Superior Court no later than forty-five (45) days after the mailing of the order. The underlying order was mailed on December 22, 2017. The complaint must therefore be filed in Superior Court by no later than February 5, 2018. This case was filed in Superior Court on March 2, 2018, seventy (70) days after the order, and was therefore untimely."

On April 30, 2018, after a hearing, the Superior Court, *Cobb, J.*, denied the motion to dismiss, concluding that "the plaintiff has timely appealed from an order denying a motion entitled 'motion for revocation,' which the plaintiff indicates is [a] motion for reconsideration. As this act of the Probate Court constitutes 'any order, denial or decree of' a court of probate, it is an appealable order, and from this order the parties agree the appeal is timely. Accordingly, the motion to dismiss is denied."[9] (Quoting in part General Statutes (Rev. to 2017) § 45a-186 (a)).

On April 30, 2019, the plaintiff filed his brief in support of his appeal to the Superior Court wherein he argued that (1) his rights were prejudiced when the court issued the decree approving the proposed final account without completing the hearing and by not providing notice that the hearing would not be completed and (2) the probate hearing on the final account was "statutorily deficient." Aside from the procedural statement that there was a motion for revocation which was denied, the plaintiff did not raise issues related to the Probate Court's denial of that motion. In response, the defendant made several arguments in support of affirmance of the

and therefore not reasonable; and/or . . . the conservator negligently and/or intentionally failed to perform the duties required by law."

[9] The plaintiff did not appeal from the Probate Court's denial of his motion for revocation. See footnote 10 of this opinion.

decree approving the final account and reasserted his contention that the Superior Court lacked subject matter jurisdiction because the appeal was untimely as it was not filed within the appeal period set forth in General Statutes (Rev. to 2017) § 45a-186 (a).

On January 29, 2020, the Superior Court issued a memorandum of decision. The court first determined that it lacked subject matter jurisdiction over the plaintiff's appeal insofar as it related to the Probate Court's decree accepting the final account. Specifically, the Superior Court stated: "In denying the defendant's motion to dismiss, this court found that the plaintiff's appeal from the order denying the motion for revocation was timely.[10] Implicit in that ruling, and to clarify, the plaintiff's appeal from the Probate Court's December 22, 2017 order approving the final account was not timely commenced because it was not filed until March 2, [2018], well beyond the thirty or forty-five day limitations in General Statutes § 45a-186. Thus, the only Probate Court order that the court has jurisdiction to consider in this appeal is the Probate Court's order denying

[10] Each party, as well as the Superior Court, suggested at various points that the plaintiff appealed from the court's denial of his motion for revocation. Our careful review of the record reveals that the plaintiff never appealed from the Probate Court's denial of his motion for revocation and does not raise claims on appeal to this court with respect to the denial of his motion. In fact, the plaintiff's complaint to commence his appeal in the Superior Court was dated prior to the Probate Court's ruling on the motion for revocation, and he did not make arguments before the Superior Court related to the Probate Court's ruling on that motion. Therefore, despite the Superior Court's comments to the contrary in both the decision on the motion to dismiss and in its memorandum of decision, the plaintiff only appealed from the court's decision to accept the final account and not from the court's denial of his motion for revocation. See *Silverstein* v. *Laschever*, 113 Conn. App. 404, 414, 970 A.2d 123 (2009) ("[a]n appeal [brings] before the Superior Court for review only the order appealed from" (internal quotation marks omitted)); see also *In re Probate Appeal of McIntyre*, 207 Conn. App. 433, 440, 263 A.3d 925 (2021) ("The Superior Court may not consider or adjudicate issues beyond the scope of those proper for determination by the order or decree attacked. . . . The Superior Court, therefore, cannot enlarge the scope of the appeal." (Internal quotation marks omitted.)).

the motion for revocation: it is jurisdictionally barred from considering claims related to the Probate Court's decision approving the defendant's final account." (Footnote added; footnote omitted.) The court continued, "[t]he plaintiff contends that the Probate Court acted in violation of the General Statutes and that it abused its discretion in denying [his] motion [for] revocation. The plaintiff's argument, however, focuses almost exclusively on the procedural deficiencies of the December 13, 2017 hearing on the final account and the Probate Court's order approving the final account. As stated previously, the court lacks jurisdiction to consider these matters because the plaintiff's appeal from the December 22, 2017 decree was untimely." The plaintiff now appeals to this court.

On appeal, the plaintiff argues that the Superior Court incorrectly concluded that it lacked subject matter jurisdiction over the plaintiff's appeal from the Probate Court's decree approving the final account because his motion for revocation tolled the appeal period applicable to that Probate Court decision.[11] The defendant

[11] The plaintiff also argues that, "[i]irrespective of the tolling effect of the motion for reconsideration, the decision's flawed analysis is evidenced by which date it considers the appeal period began in this matter. . . . The Court's holding misapplies the 'final judgment doctrine' by measuring the commencement of the appeal period as December 13, 2017 [the date of the hearing on the account]; in contrast the court correctly measured the appeal period from December 22, 2017 [the date of the court's ruling on the account] when the court denied the defendant's motion to dismiss. . . . The trial court in this case ruled that the appeal period commenced on December 13, 2017 even though there was no, 'order, denial or decree of a Probate Court' to appeal from until December 22, 2017. This simple fact negates the whole of the trial court's flawed reasoning . . . ."

With respect to this argument, it appears that the plaintiff has misread the Superior Court's memorandum of decision. Although the court referenced the date of the hearing with respect to its review of the Probate Court's denial of the motion for revocation, the court did not use that date in determining that it lacked subject matter jurisdiction. The Superior Court clearly measured the appeal period as beginning on the date of the Probate Court's approval, concluding that "the plaintiff's appeal from the Probate Court's December 22, 2017 order approving the final account was not timely

asserts that the Superior Court properly dismissed the appeal because it was not filed within forty-five days of the Probate Court's December 22, 2017 decree accepting the final account. We agree with the defendant that the Superior Court correctly determined that it lacked subject matter jurisdiction over the plaintiff's appeal from the Probate Court's decree approving the final account.

We first set forth our standard of review and relevant principles of law. "Our Supreme Court has long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . Moreover, [i]t is a fundamental rule that a court may raise and review the issue of subject matter jurisdiction at any time. . . . Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . . The subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal. . . .

"[W]e are . . . mindful of the familiar principle that a court [that] exercises a limited and statutory jurisdiction is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation. . . . Our courts of probate have a limited jurisdiction and can exercise only such powers as are conferred on them by statute. . . . They have jurisdiction only when the facts exist on which the legislature has conditioned the exercise of their power. . . . The Superior Court, in

commenced because it was not filed until March 2, [2018], well beyond the thirty or forty-five day limitations in General Statutes § 45a-186." Accordingly, we reject the plaintiff's argument.

turn, in passing on an appeal, acts as a court of probate with the same powers and subject to the same limitations. . . . It is also well established that [t]he right to appeal from a decree of the Probate Court is purely statutory and the rights fixed by statute for taking and prosecuting the appeal must be met. . . . Thus, only [w]hen the right to appeal . . . exists and the right has been duly exercised in the manner prescribed by law [does] the Superior Court [have] full jurisdiction over [it] . . . . Failure to comply with the relevant time limit set forth in [General Statutes (Rev. to 2017)] § 45a-186 (a) deprives the Superior Court of subject matter jurisdiction and renders such an untimely appeal subject to dismissal." (Citations omitted; internal quotation marks omitted.) *In re Probate Appeal of Knott*, 190 Conn. App. 56, 61–62, 209 A.3d 690 (2019).

We next set forth the statute governing appeals of Probate Court orders. General Statutes (Rev. to 2017) § 45a-186 (a) provides in relevant part that "any person aggrieved by any order, denial or decree of a Probate Court in any matter, unless otherwise specially provided by law, may, not later than forty-five days after the mailing of an order, denial or decree for a matter heard under any provision of," inter alia, General Statutes § 45a-660,[12] "appeal therefrom to the Superior Court. Such an appeal shall be commenced by filing a complaint in the superior court . . . ."

The plaintiff argues that his motion for revocation tolled the appeal period relating to the Probate Court's decree accepting the final account, which the parties agree began to run on December 22, 2017. Specifically,

[12] General Statutes § 45a-660 provides in relevant part: "(a) (1) A conserved person may, at any time, petition the Probate Court having jurisdiction for the termination of a conservatorship. . . .

(b) (1) In any case under subsection (a) of this section, the conservator shall file in the court the conservator's final account, and the court shall audit the account and allow the account if it is found to be correct. . . ."

the plaintiff argues that "when a party files a motion for reconsideration pursuant to . . . § 45a-128, the time for filing an appeal does not start running until the Probate Court either rules on the motion for reconsideration or provides notice that it does not intend to act on the motion for reconsideration."[13] Therefore, he asserts, the appeal period did not begin to run until February 8, 2018, when the Probate Court denied his motion for revocation, providing him with forty-five days from that date to file his appeal of the decree accepting the final account with the Superior Court, and, therefore, his March 2, 2018 filing of the appeal was timely.

Because "[t]he right to appeal from a decree of the Probate Court is purely statutory and the rights fixed by statute for taking and prosecuting an appeal must be met"; *In re Probate Appeal of Knott*, supra, 190 Conn. App. 61; we turn to the language of the statute governing probate appeals. As noted previously, General Statutes (Rev. to 2017) § 45a-186 (a) creates a forty-five day period within which to file an appeal. The statutory scheme that governs appeals in probate cases provides the sole circumstance that tolls the appeal period. General Statutes § 45a-186c provides that the appeal period is tolled when an application for a waiver of costs is filed. Our legislature clearly addressed tolling the appeal period and did not include the filing of a motion pursuant to § 45a-128 as an action that tolls the appeal period. See General Statutes § 45a-186c.

In addition, § 45a-128, which governs motions for reconsideration, modification and revocation in probate matters, addresses the appeal procedure for such

[13] In making this argument, the plaintiff relies solely on Superior Court decisions that are not binding on this court. See *Towbin* v. *Board of Examiners of Psychologists*, 71 Conn. App. 153, 177, 801 A.2d 851, cert. denied, 262 Conn. 908, 810 A.2d 277 (2002).

motions[14] and does not provide that such motions toll the appeal period with respect to the underlying decision. See General Statutes § 45a-128 (c); see also *Burnell* v. *Chorches*, 173 Conn. App. 788, 792 n.2, 164 A.3d 806 (2017) (noting that plaintiffs had provided no legal support for claim that motion for reconsideration tolled thirty day time period and noting that court similarly was not aware of any such authority). We find persuasive that the legislature expressly addressed appellate procedure in § 45a-128 and did not provide that such a motion would toll the appeal period for the underlying court action. See General Statutes § 45a-128 (c); cf. *Ierardi* v. *Commission on Human Rights & Opportunities*, 15 Conn. App. 569, 575–76, 546 A.2d 870 (appeal period in administrative case tolled because governing statute provided that "[a] request for reconsideration postpones the running of the appeal period . . . until 'the decision thereon' "), cert. denied, 209 Conn. 813, 550 A.2d 1082 (1988).

For this court to agree with the plaintiff's argument would require us to graft on to the relevant statutes discussed herein an exception that does not exist. "We are not in the business of writing statutes; that is the province of the legislature. Our role is to interpret statutes as they are written. . . . [We] cannot, by [judicial] construction, read into statutes provisions [that] are not clearly stated." (Internal quotation marks omitted.) *Thomas* v. *Dept. of Developmental Services*, 297 Conn. 391, 412, 999 A.2d 682 (2010). Reading the relevant statutory scheme with the well established principles regarding the statutory right of appeal in probate cases, we conclude that a motion pursuant to § 45a-128 does not toll the appeal period for the underlying decision. Thus, the plaintiff's appeal from the decree approving

[14] General Statutes § 45a-128 (c) provides that "[u]pon any modification or revocation there shall be the same right of and time for appeal as in the case of any other order or decree."

the final account was untimely, and the Superior Court correctly determined that it lacked subject matter jurisdiction over the appeal.

The judgment is affirmed.

In this opinion the other judges concurred.

CINDY L. KAREN *v.* WILLIAM P. LOFTUS
(AC 43488)

Elgo, Suarez and Palmer, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgment of the trial court denying her motion to open the judgment of dissolution. At the time that the plaintiff commenced the dissolution action, she sought to enforce the terms of the parties' prenuptial agreement. The parties disagreed as to the defendant's obligations pursuant to the agreement and agreed to an arbitration of the dispute. The arbitrator concluded in favor of the defendant, and the court incorporated the arbitrator's decision into the judgment of dissolution. More than four months later, the plaintiff filed a postjudgment motion to open, asserting that the defendant made false representations during the arbitration and that the arbitrator had relied on the purportedly false testimony in reaching his conclusion. The court denied the motion, finding that the plaintiff was seeking to obtain a new trial but had failed to demonstrate that the evidence on which she based her claims could not have been produced at the former trial through the exercise of due diligence. On the plaintiff's appeal, *held* that the trial court applied an incorrect legal standard in denying her motion to open: although the plaintiff's motion did not use the word fraud, the motion clearly addressed the elements of a fraud action, and her reply memorandum unambiguously asserted that her motion was based on fraud related to the defendant's testimony during the arbitration proceeding; moreover, the court adjudicated the plaintiff's motion pursuant to the standard for adjudicating a motion for a new proceeding on the basis of newly discovered evidence rather than pursuant to the standard for a motion to open on the basis of fraud, as the court's decision analyzed several of the factors required to adjudicate a motion for a new proceeding on the basis of newly discovered evidence, including an imposition on the plaintiff of an obligation of due diligence, which has been eliminated from the standard for adjudicating a motion to open on the basis of fraud; accordingly, the plaintiff was entitled to a

preliminary hearing on a determination of whether there was probable cause to believe the judgment had been obtained by fraud.

Argued September 20, 2021—officially released January 25, 2022

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Hon. Gerard I. Adelman*, judge trial referee, approved the stipulation of the parties to enter into binding arbitration as to certain disputed matters; thereafter, the arbitrator issued a decision and the court, *Sommer, J.*, incorporated the arbitrator's decision into its judgment dissolving the marriage and granted certain other relief in accordance with the parties' separation agreement; subsequently, the court, *Hon. Eddie Rodriguez, Jr.*, judge trial referee, denied the plaintiff's motion to open the judgment, and the plaintiff appealed to this court. *Reversed*; *further proceedings*.

Thomas J. Rechen, with whom were *Charles D. Ray*, and, on the brief, *Brittany A. Killian*, for the appellant (plaintiff).

Logan A. Carducci, for the appellee (defendant).

Opinion

SUAREZ, J. The plaintiff, Cindy L. Karen, appeals from the judgment of the trial court denying her motion to open the judgment dissolving her marriage to the defendant, William P. Loftus. On appeal, the plaintiff claims that the court utilized the incorrect legal standard in adjudicating her motion to open.[1] We agree, and, accordingly, we reverse the judgment of the court

[1] The plaintiff also claims in this appeal that, in adjudicating her motion to open, the court improperly concluded that a different result would not be had at another trial. Because we conclude that the court utilized the incorrect standard in denying the plaintiff's motion to open, it is unnecessary for us to reach the merits of this claim.

and remand for further proceedings in accordance with this opinion.

The following facts and procedural history are relevant to this appeal. The plaintiff and the defendant were married in June, 2007. Prior to the marriage, on May 14, 2007, the parties entered into a prenuptial agreement (agreement). Paragraph 6 (B) of the agreement provides: "If, at the time that an action for dissolution of marriage, annulment or legal separation is commenced, [the defendant] has left his employment with Merrill Lynch under an arrangement that is in any fashion tantamount to a 'sale' of his interest in Merrill Lynch, i.e. a transaction under which [the defendant] receives any property, real or personal, including but not limited to a sum of money, by way of a 'sign-on' bonus or otherwise, a premium bonus, and/or restricted stock or other ownership interest ('Sale Proceeds'), to work for another entity for any reason whatsoever, including his bringing a book of business and/or a clientele and/or a book of other assets to a prospective employer, then [the defendant] shall first be entitled to set aside the value of $75,000, or $75,000 from the Sale Proceeds, and the balance of such Sale Proceeds, whenever received or receivable by [the defendant], shall be divided between [the defendant] and [the plaintiff] according to the Allocation. . . . If the Sale Proceeds have been invested in other assets, the Parties shall maintain a record of all such investments, and each Party shall be entitled to the value of such Sale Proceeds so invested and any proportional gain or loss that is associated with such investment according to the Allocation. Again, each Party shall be responsible for the taxable gain on any sale of such interest in such investment in proportion to the Allocation."

In December, 2014, the plaintiff commenced a dissolution action against the defendant, seeking to enforce the terms of the agreement. The parties disagreed as

to whether the defendant's obligation to pay the plaintiff pursuant to paragraph 6 (B) was triggered by the specific circumstances surrounding the defendant's departure from his employment at Merrill Lynch. Under this paragraph of the agreement, if the defendant's departure from Merrill Lynch was determined to be "tantamount to a 'sale' of his interest in Merrill Lynch," the plaintiff would be entitled to one half of the sale proceeds after the defendant set aside $75,000. If the defendant's departure from Merrill Lynch was not "tantamount to a 'sale,' " however, the plaintiff would not receive any of the proceeds. On August 1, 2016, the parties entered into a stipulated judgment consistent with their agreement, excepting paragraph 6 (B) of the agreement. Instead, the stipulation required the court to refer the case to an arbitrator for resolution of the issue of whether the defendant's departure from Merrill Lynch was a "sale of his interest in Merrill Lynch." On that same day, the court, *Hon. Gerard I. Adelman*, judge trial referee, accepted the parties' stipulation and referred the issue of the defendant's departure from Merrill Lynch to an arbitrator.

The parties agreed to have C. Ian McLachlan, a retired justice of the Connecticut Supreme Court, act as the arbitrator of their dispute. Beginning on February 16, 2017, McLachlan held a two day hearing wherein both parties testified. On April 27, 2017, McLachlan issued a decision in which he concluded that the defendant's departure from Merrill Lynch was not "tantamount to a sale" under the agreement. In his memorandum of decision, McLachlan found that, in October, 2008, sixteen months after the parties were married, the defendant and three colleagues left Merrill Lynch and formed a business known as " 'LLBH.' " Each partner invested between $10,000 and $15,000 to start LLBH. Shortly after the business was formed, Focus Financial (Focus) purchased an option to buy an interest in LLBH for $2

million, which was shared equally among the partners. Focus subsequently exercised its option, there was a corporate reorganization, and Partners Wealth Management was created. When Focus exercised its option, the defendant received $1,665,000 and 90,000 shares of Focus stock, as well as some options.

McLachlan further found that, at the time of the agreement, the defendant had certain benefits incident to his employment with Merrill Lynch, including restricted stock units, which he forfeited by leaving Merrill Lynch. This practice of forfeiture was "very common in the financial services industry and was one of the reasons that brokers were generally paid a 'sign-on' bonus when changing jobs by the new employer." Additionally, "brokers were being paid [by their new employers] for their 'book of business' which, in effect, represented their customers." The plaintiff and the defendant negotiated the agreement, specifically paragraph 6 (B), to account for this possibility.

Additionally, McLachlan concluded that the evidence did not support the plaintiff's claim that the defendant contemplated leaving Merrill Lynch at the time the agreement was made. The defendant did not leave Merrill Lynch until sixteen months after the date of the marriage, and there was no mention of the defendant starting his own business in the agreement. Ultimately, McLachlan determined that paragraph 6 (B) was drafted in contemplation of the defendant leaving Merrill Lynch and going to a competitor that would compensate him for both the employment benefits that he was forfeiting from Merrill Lynch and the contracts and business that he would bring to the new company. Instead, the defendant left Merrill Lynch to start his own company and invested his own money into the venture. An option to invest in that new venture was sold, and more than one year later, the business created by the venture itself

was sold. According to McLachlan, this scenario is "substantially different than the situation where an employee leaves a brokerage house and is compensated by the new employer." On June 16, 2017, the trial court, *Sommer*, *J.*, incorporated McLachlan's decision into a final judgment of dissolution.

On April 3, 2018, the plaintiff filed a pleading titled, "Motion to Open—Post Judgment." In her motion, the plaintiff asserted that subsequent legal proceedings between the defendant and his partners at LLBH "clearly indicate" that several of the representations that the defendant had made during the arbitration were false. According to the plaintiff, the defendant falsely represented that (1) his leaving Merrill Lynch did not contemplate taking his contacts and clients with him; (2) he and his partners did not contemplate the option agreement or transaction with Focus until after the execution of the agreement between the plaintiff and the defendant; and (3) the option agreement and transaction with Focus were not a "sale." The plaintiff claimed that the defendant "wholly mischaracterized the nature of his departure from Merrill Lynch, in that he knew prior to the departure that he was selling the LLBH business, including their clients, to [Focus], and that the sale took place pursuant to a scheme which was contemplated by the parties when drafting [paragraph 6 (B)] of the prenuptial agreement." The plaintiff further claimed that the defendant's testimony during the arbitration proceeding regarding the Focus transaction was "a statement of fact known to be false, was intended to persuade the arbitrator to conclude that the Focus transaction was not a sale," and "the arbitrator relied upon this false testimony in denying [the plaintiff's] prayer for the application of [paragraph 6 (B)] of the parties' prenuptial agreement."

The essence of the plaintiff's argument in her motion to open is that the defendant testified falsely during the

arbitration and that McLachlan relied on the purportedly false testimony in concluding that paragraph 6 (B) did not apply to the defendant's departure from Merrill Lynch to form LLBH.

On December 11, 2018, the defendant filed a memorandum in opposition to the plaintiff's motion to open. The defendant opposed the motion on two separate grounds. First, the defendant argued that the plaintiff's motion was an attempt to get a "second bite at the apple." Specifically, the defendant argued that the plaintiff was merely seeking to relitigate the same argument that she had made before McLachlan in the arbitration proceeding, namely, that the defendant's decision to leave Merrill Lynch, to form LLBH, and to sell an option to purchase LLBH to Focus was "tantamount to a sale" under paragraph 6 (B) of the agreement. Second, the defendant argued that the plaintiff failed to meet the necessary elements to prevail in her motion, which, despite its title, he characterized as a motion for a new proceeding on the basis of newly discovered evidence.

On January 11, 2019, the plaintiff filed a reply to the defendant's December 11, 2018 memorandum in opposition to the motion to open. In her reply, the plaintiff argued that the defendant "lied under oath and therefore committed fraud concerning whether [Focus] was involved in the decision by [the defendant] and his fellow partners to leave Merrill Lynch and open a new business." The plaintiff asserted that, with the motion to open, she "seeks to unveil new evidence" that "makes clear that [1] [the defendant] committed perjury in the arbitration proceedings, [2] his perjury was material, [3] the arbitrator relied on his perjury, [4] the resulting judgment is polluted by his perjury, and [5] it is likely that a new trial will produce a different result."

On March 7, 2019, the defendant filed a surreply in further opposition to the plaintiff's motion to open.

The defendant argued that the court should deny the plaintiff's motion because she failed to allege, let alone prove, the essential elements of fraud. Specifically, the defendant argued that the plaintiff failed to allege that she relied on the defendant's purportedly false statements to her detriment.

On May 6, 2019, a hearing was held before the court, *Hon. Eddie Rodriguez, Jr.*, judge trial referee, on the plaintiff's motion to open. On September 25, 2019, the court issued an order denying the plaintiff's motion to open the judgment. The order stated in relevant part: "[T]he plaintiff is mistakenly claiming a second bite at the apple. She is attempting to open a judgment by filing a motion which is well beyond [the] permissible four [month] window to open civil judgments and she is claiming fraud. The exception to opening judgments outside of the initial four months does not apply to cases where a party wants to [relitigate] issues already litigated and decided. She seeks to reopen the judgment and obtain a new trial based on what she attempts to characterize as newly discovered evidence. However the evidence she references as newly discovered is evidence which was available during the arbitration and it would have been cumulative of the evidence offered at the arbitration. The plaintiff's claim fails because the evidence relied upon was not in fact newly discovered evidence and the plaintiff has failed to demonstrate that the evidence could not have been discovered and produced at the former trial by the exercise of due diligence. Also, it does not appear to this court that a different result would be had at another trial."

On appeal, the plaintiff claims that the court utilized an incorrect legal standard in adjudicating her motion to open the judgment of dissolution. Specifically, the plaintiff argues that the court applied the standard for a motion for a new proceeding on the basis of newly

discovered evidence, rather than the standard for a motion to open on the basis of fraud. We agree.

We begin by setting forth the standard of review that governs the plaintiff's claim. The consideration of whether a court has applied an incorrect legal test is a question of law, which requires our plenary review. See *In re Jacob W.*, 330 Conn. 744, 754, 200 A.3d 1091 (2019). Because our review is plenary, "we must decide whether [the trial court's] conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Barber* v. *Barber*, 193 Conn. App. 190, 196, 219 A.3d 378 (2019).

We next set forth the legal principles relevant to this claim. General Statutes § 52-212a provides, in relevant part: "Unless otherwise provided by law and except in such cases in which the court has continuing jurisdiction, a civil judgment or decree rendered in the Superior Court may not be opened or set aside unless a motion to open or set aside is filed within four months following the date on which it was rendered or passed. . . ." This statute, however, "does not abrogate the court's common-law authority to open a judgment beyond the four month limitation upon a showing that the judgment was obtained by fraud, duress, or mutual mistake." *Bruno* v. *Bruno*, 146 Conn. App. 214, 230, 76 A.3d 725 (2013).

In *Oneglia* v. *Oneglia*, 14 Conn. App. 267, 269–70, 540 A.2d 713 (1988), this court held that, in considering a motion to open on the basis of fraud, a court must first make a preliminary determination of whether there is probable cause to believe that the judgment was obtained by fraud.[2] "*Oneglia* and its progeny are

[2] It is well settled that fraud is a "deception practiced in order to induce another to part with property or surrender some legal right, and which accomplishes the end designed. . . . The elements of a fraud action are: (1) a false representation was made as a statement of fact; (2) the statement was untrue and known to be so by its maker; (3) the statement was made

grounded in the principle of the finality of judgments. . . . [T]he finality of judgments principle recognizes the interest of the public as well as that of the parties [that] there be fixed a time after the expiration of which the controversy is to be regarded as settled and the parties freed of obligations to act further by virtue of having been summoned into or having appeared in the case. . . . Without such a rule, no judgment could be relied on. . . . *Oneglia* carefully balanced that interest in finality with the reality that in some situations, the principle of protection of the finality of judgments must give way to the principle of fairness and equity. . . . The court in *Oneglia* thus ratified the gatekeeping mechanism employed by the trial court, whereby a court presented with a motion to open by a party alleging fraud in a postjudgment dissolution proceeding conducts a preliminary hearing to determine whether the allegations are substantiated. . . . [I]f the plaintiff was able to substantiate her allegations of fraud beyond mere suspicion, then the court [properly] would open the judgment for the limited purpose of discovery, and would later issue an ultimate decision on the motion to open after discovery had been completed and another hearing held." (Internal quotation marks omitted.) *Veneziano* v. *Veneziano*, 205 Conn. App. 718, 726–27, 259 A.3d 28 (2021). "This preliminary hearing is not intended to be a full scale trial on the merits of the [moving party's] claim. The [moving party] does not have to establish that he [or she] will prevail, only that there is probable cause to sustain the validity of the claim." (Internal quotation marks omitted.) *Bruno* v. *Bruno*, supra, 146 Conn. App. 231.

A motion for a new proceeding on the basis of newly discovered evidence, on the other hand, requires the

with the intent of inducing reliance thereon; and (4) the other party relied on the statement to his detriment." (Internal quotation marks omitted.) *Weinstein* v. *Weinstein*, 275 Conn. 671, 685, 882 A.2d 53 (2005).

application of a different standard from the one applied to a motion to open on the basis of fraud. "A court may grant a motion for a new proceeding based on newly discovered evidence if the movant establishes by a preponderance of the evidence, that: (1) the proffered evidence is newly discovered, such that it could not have been discovered earlier by the exercise of due diligence; (2) it would be material on a new [proceeding]; (3) it is not merely cumulative; and (4) it is likely to produce a different result in a new [proceeding]." (Internal quotation marks omitted.) *Grasso* v. *Grasso*, 153 Conn. App. 252, 265, 100 A.3d 996 (2014).

In order to resolve the plaintiff's claim that the court applied the incorrect legal standard in the present case, we must first determine the nature of the plaintiff's motion. The plaintiff contends that her motion was a motion to open on the basis of fraud. The defendant argues, however, that the plaintiff's motion is a motion for a new proceeding on the basis of newly discovered evidence. In support of his argument, the defendant contends that the plaintiff "did not even reference 'fraud' in her motion to open and did not use this buzzword until she hired new counsel to draft her reply memorandum." It is well settled, however, that "courts do not interpret pleadings so to require the use of talismanic words and phrases. . . . In Connecticut, we long have eschewed the notion that pleadings should be read in a hypertechnical manner. Rather, [t]he modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . [T]he complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties." (Citation omitted; internal quotation marks omitted.) *Antonio A.* v. *Commissioner of Correction*, 205 Conn.

App. 46, 90, 256 A.3d 684, cert. denied, 339 Conn. 909, 261 A.3d 744 (2021).

Our independent review of the plaintiff's motion to open leads us to conclude that it is based on fraud. As noted previously in this opinion, "[t]he elements of a fraud action are: (1) a false representation was made as a statement of fact; (2) the statement was untrue and known to be so by its maker; (3) the statement was made with the intent of inducing reliance thereon; and (4) the other party relied on the statement to his detriment." (Internal quotation marks omitted.) *Weinstein* v. *Weinstein*, 275 Conn. 671, 685, 882 A.2d 53 (2005). Although the plaintiff did not use the word "fraud" in her motion, the motion clearly addressed the elements of a fraud action. The plaintiff asserted therein that "[s]ubsequent legal proceedings between [the defendant] . . . and his partners . . . clearly indicate that the *representations made by* [*the defendant*] *during the arbitration . . . were false* . . . ." (Emphasis added.) Further, the plaintiff argued that the defendant's "testimony regarding the Focus transaction [w]as a statement of fact *known to be false*, was *intended to persuade the arbitrator* to conclude that the Focus transaction was not a sale for reasons that conflict with subsequent testimony, and that the *arbitrator relied upon this false testimony* in denying [the plaintiff's] prayer for the application of [paragraph 6 (B)] of the parties' prenuptial agreement." (Emphasis added.)

Moreover, the plaintiff's January 11, 2019 reply memorandum unambiguously asserts that the motion to open is based on fraud related to the defendant's testimony during the arbitration proceeding. The plaintiff plainly argues that the defendant committed perjury in the arbitration proceedings, the perjury was material, the arbitrator relied on the perjury, the resulting judgment was tainted by the perjury, and it is likely that a new trial will produce a different result. On the basis

of these allegations, the plaintiff asked the court to "open and set aside [the] judgment *in light of the fraud*." (Emphasis added.) Therefore, we conclude that, despite the fact that the plaintiff did not use the word "fraud" in her motion, it is apparent upon reading the motion in its entirety that the general theory upon which it was predicated is one of fraud.

Having determined that the plaintiff's motion is a motion to open on the basis of fraud, we next must consider the legal standard applied by the court in denying the plaintiff's motion. The court stated in its memorandum of decision that the plaintiff was trying to "obtain a new trial based on what she attempts to characterize as newly discovered evidence." The court then analyzed several of the factors required to adjudicate a motion for a new proceeding on the basis of newly discovered evidence. The court concluded that the plaintiff's claim failed because "the evidence relied upon was not in fact newly discovered evidence . . . ." Further, the court reasoned that the plaintiff "failed to demonstrate that the evidence could not have been discovered and produced at the former trial by the exercise of due diligence." Finally, the court concluded that "it does not appear to this court that a different result would be had at another trial."

Further indication that the court applied the newly discovered evidence standard is the fact that the court imposed on the plaintiff an obligation of due diligence, an obligation that has been eliminated from the standard for adjudicating a motion to open on the basis of fraud. Prior to our Supreme Court's ruling in *Billington* v. *Billington*, 220 Conn. 212, 595 A.2d 1377 (1991), there was a due diligence limitation on the court's ability to grant relief from a dissolution judgment procured by fraud. See *Varley* v. *Varley*, 180 Conn. 1, 4, 428 A.2d 317 (1980). A party to a marital dissolution judgment was required to establish diligence in attempting to

discover the fraud in order subsequently to open the judgment on the basis of a claim of fraud. See *Billington* v. *Billington*, supra, 214. In *Billington*, however, our Supreme Court eliminated this requirement. See id., 219.

In the present case, the court concluded that the plaintiff "failed to demonstrate that the evidence could not have been discovered and produced at the former trial by the exercise of due diligence." Although our Supreme Court has removed the due diligence obligation from the adjudication of a motion to open on the basis of fraud; see *Billington* v. *Billington*, supra, 220 Conn. 214; the due diligence requirement *is* an element of the standard for adjudicating a motion for a new proceeding on the basis of newly discovered evidence. See *Grasso* v. *Grasso*, supra, 153 Conn. App. 265. Because the court imposed on the plaintiff the due diligence requirement, it appears that the court adjudicated the plaintiff's motion pursuant to the standard for adjudicating a motion for a new proceeding on the basis of newly discovered evidence and *not* pursuant to the standard for adjudicating a motion to open on the basis of fraud.

Pursuant to the applicable standard for a motion to open on the basis of fraud, the court was required to make a preliminary determination of whether there was probable cause to believe that the judgment was obtained by fraud before it could consider the merits of the claim. If the court found probable cause to believe that the judgment was obtained by fraud, then the court was required to conduct an evidentiary hearing to determine whether, in fact, there was fraud. In the present case, however, the court did not make a preliminary finding of probable cause. Instead, the court determined that the plaintiff failed to show that there was newly discovered evidence and that the newly discovered evidence "could not have been discovered and produced

at the former trial by the exercise of due diligence." Accordingly, we conclude that the court undertook an incorrect legal analysis in denying the plaintiff's motion to open. In light of the fact that the court did not hold a hearing to make a preliminary determination regarding probable cause, the proper remedy is to reverse the judgment denying the motion to open and remand the case for such a hearing and for further proceedings that may be necessary depending on any findings that the court makes in connection with that preliminary hearing.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

MARILYN WOODEN, EXECUTOR (ESTATE OF LONNIE THOMAS, SR.) *v.* DINANYELLY E. PEREZ (AC 44301)

Bright, C. J., and Prescott and Alexander, Js.

Syllabus

The plaintiff, the executor of the estate of the decedent T, sought a right to title by adverse possession of a strip of the defendant's property located adjacent to certain real property that T owned at the time of his death. A was thereafter substituted as the plaintiff after he was appointed the successor administrator of T's estate. The trial court subsequently granted the defendant's motion to dismiss the action and rendered judgment thereon on the basis that A lacked standing to pursue an action on behalf of the estate, because the estate had no interest in T's property. On A's appeal to this court, *held* that the trial court correctly determined that A lacked standing because T devised the property to a trust for the benefit of his children, and, therefore, only the trustees of that trust, and not the executor or administrator of T's estate, had standing to prosecute the action: it was the owner of the property that stood to benefit from a resolution of the action, and, thus, that had the necessary personal stake in the outcome of the controversy, it was undisputed that T devised the property to a trust, and, accordingly, on

T's death, title to that property immediately passed to that trust; moreover, A's attempt to assert standing on a theory of statutory aggrievement arising out of language in the applicable statute (§ 45a-321) was likewise unavailing, because there was no allegation that the property was needed to satisfy the debts of the estate, and, therefore, A failed to allege the necessary factual predicate to demonstrate that he was the proper party to invoke judicial resolution of any adverse possession claim.

Argued October 20, 2021—officially released January 25, 2022

Procedural History

Action seeking to quiet title to certain real property, and for other relief, brought to the Superior Court in the judicial district of Ansonia-Milford, where the defendant filed a counterclaim; thereafter, the defendant filed a third-party complaint against First American Title Insurance Company; subsequently, the court granted the plaintiff's motion to substitute Anthony E. Monelli, administrator of the estate of Lonnie Thomas, Sr., as the plaintiff; thereafter, the court, *Pierson, J.*, granted the defendant's motion to dismiss and rendered judgment thereon, from which the substitute plaintiff appealed to this court. *Affirmed.*

Steven P. Kulas, for the appellant (substitute plaintiff).

Ian Cole, for the appellee (defendant).

Opinion

PER CURIAM. In this adverse possession action, the substitute plaintiff, Anthony E. Monelli, as administrator of the estate of the decedent, Lonnie Thomas, Sr., appeals from the judgment of the trial court granting the motion to dismiss filed by the defendant, Dinanyelly E. Perez, on the ground that the substitute plaintiff lacked standing to maintain the action.[1] The substitute

[1] The underlying action originally was commenced by Marilyn Wooden solely in her capacity as the purported executor of the decedent's estate. The trial court later granted Wooden's motion to substitute Monelli as the plaintiff after the Probate Court appointed him as the successor administrator of the estate.

We note that Perez filed a third-party complaint against her title insurance company, First American Title Insurance Company. The third-party defen-

plaintiff claims that the court incorrectly determined that he lacked standing to pursue the adverse possession claim because the decedent had devised the property at issue to a trust for the benefit of his children and, therefore, only the trustees of that testamentary trust, and not the executor or administrator of the decedent's estate, had standing to prosecute the present action. We disagree with the substitute plaintiff and, accordingly, affirm the judgment of the court.

The record reveals the following relevant procedural history and undisputed facts. In the underlying action, the substitute plaintiff claimed, on behalf of the decedent's estate, a right to title by adverse possession of a strip of the defendant's property that was adjacent to property at 116 North Prospect Street Extension in Ansonia, which the decedent had owned at the time of his death in 1989. According to the complaint, the decedent and his successors in interest had used that portion of the defendant's property as a driveway and for other purposes for more than fifteen years. The decedent died testate, and his will, which was admitted to probate, provided in relevant part: "As to my property known as 116 North Prospect Street Extension, Ansonia, Connecticut, the family homestead, I hereby devise and bequeath to Larry Thomas and Marilyn Wooden, in trust for all my following [named] children . . . share and share alike. That said Trustees shall maintain said family homestead until, in their judgment, they determine it can be liquidated or purchased by one or more of my children." (Emphasis omitted.)

On March 11, 2020, the defendant filed a motion to dismiss the adverse possession action, asserting that the substitute plaintiff lacked standing to pursue such an action on behalf of the estate with respect to the

dant, however, did not participate in the present appeal, and all references to the defendant in this opinion are to Perez only.

116 North Prospect Street Extension property because the estate has no interest in that property due to the express devise in the decedent's will, which passed legal title to the property to Marilyn Wooden and Larry Thomas as cotrustees of a trust benefiting the decedent's children. The substitute plaintiff filed a memorandum of law in opposition to the motion to dismiss. Although he did not dispute any of the relevant factual allegations in the defendant's motion to dismiss, he asserted by way of legal argument that, until the estate finally was administered, the estate continued to have an interest in the property, and, therefore, he, in his capacity as administrator of the estate, had standing to pursue the adverse possession claim. The defendant filed a reply memorandum responding to the substitute plaintiff's objection.

On September 18, 2020, the court, *Pierson, J.*, issued an order granting the motion to dismiss. The court held that the substitute plaintiff was the substituted executor of the decedent's estate, not a trustee of the testamentary trust that owns the subject property. Moreover, the court stated that "the [substitute] plaintiff has not demonstrated, and the court does not find, that he has a direct and personal interest in the subject property or the claims asserted in this action." The court concluded that the principal case relied on by the substitute plaintiff in support of his position that he had standing, *O'Connor* v. *Chiascione*, 130 Conn. 304, 33 A.2d 336 (1943), was readily distinguishable because "that case does not involve a testamentary trust, nor does it stand for the proposition that an administrator or executor has standing to pursue a legal action affecting land owned or claimed by a testamentary trust. Moreover, and as correctly pointed out by the defendant, [although] General Statutes § 45a-321 (a) provides that the fiduciary of an estate 'shall, *during settlement*, have the possession, care and control of the decedent's [real]

property', it also contains the relevant qualification, '*unless such real property has been specifically devised* . . . .' " (Emphasis altered.) In light of that qualifying language, and because the 116 North Prospect Street Extension property was specifically devised in the decedent's will to a trust, the court concluded that the substitute plaintiff's reliance on § 45a-321 was misplaced and that he had demonstrated no other interest in the property as executor that was sufficient to confer standing. This appeal followed.

"The issue of standing implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss. Practice Book § 10-31 (a). [I]t is the burden of the party who seeks the exercise of jurisdiction in his favor . . . clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute. . . . Because a determination regarding the trial court's subject matter jurisdiction raises a question of law, our review is plenary." (Internal quotation marks omitted.) *McWeeny* v. *Hartford*, 287 Conn. 56, 63–64, 946 A.2d 862 (2008); see also *Johnson* v. *Rell*, 119 Conn. App. 730, 734, 990 A.2d 354 (2010) ("[i]n an appeal from the granting of a motion to dismiss on the ground of subject matter jurisdiction, this court's review is plenary" (internal quotation marks omitted)).

Our Supreme Court repeatedly has stated "that [s]tanding is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights. Rather it is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented. . . . These two objectives are ordinarily held to have been met when a complainant makes a colorable claim of direct injury he has suffered or is likely to suffer, in an individual or representative

capacity. Such a personal stake in the outcome of the controversy . . . provides the requisite assurance of concrete adverseness and diligent advocacy. . . .

"Two broad yet distinct categories of aggrievement exist, classical and statutory. . . . Classical aggrievement requires a two part showing. First, a party must demonstrate a specific, personal and legal interest in the subject matter of the [controversy], as opposed to a general interest that all members of the community share. . . . Second, the party must also show that the [alleged conduct] has specially and injuriously affected that specific personal or legal interest. . . .

"Statutory aggrievement [however] exists by legislative fiat, not by judicial analysis of the particular facts of the case. In other words, in cases of statutory aggrievement, particular legislation grants standing to those who claim injury to an interest protected by that legislation." (Internal quotation marks omitted.) *McWeeny* v. *Hartford*, supra, 287 Conn. 64–65.

On the basis of our review of the record and briefs, and consideration of the parties' legal arguments, we conclude that the substitute plaintiff lacks standing to pursue the adverse possession action and, therefore, the court properly granted the motion to dismiss. The present action was brought on a theory of adverse possession and sought essentially to quiet title to a strip of land adjacent to 116 North Prospect Street Extension. Accordingly, it is the owner of the 116 North Prospect Street Extension property that stands to benefit from a favorable resolution of the action and, thus, has the necessary personal stake in the outcome of the controversy to confer standing under a theory of classical aggrievement. It is undisputed in the record that the decedent devised all of his title in 116 North Prospect Street Extension to a testamentary trust with Marilyn Wooden and Larry Thomas named as cotrustees. Thus,

upon the decedent's death in 1989, legal title to 116 North Prospect Street Extension immediately passed to that trust. See *Zanoni* v. *Lynch*, 79 Conn. App. 309, 321, 830 A.2d 304 (explaining that fiduciary of decedent's estate possesses only limited statutory right regarding property devised in will, legal title to which vests in devisees upon death of testator), cert. denied, 266 Conn. 929, 837 A.2d 804 (2003). Accordingly, the trust, not the estate, was the owner of the property and the party with the specific legal interest in any adverse possession claim benefitting the property.

As stated by the court, the substitute plaintiff's attempt to assert standing on a theory of statutory aggrievement arising out of language in § 45a-321 likewise is entirely unavailing. Section 45a-321, by its express terms, has limited applicability with respect to real property that has been specifically devised. Further, the substitute plaintiff's reliance on the statute's "possession, care and control" language is misplaced. In *Brill* v. *Ulrey*, 159 Conn. 371, 377, 269 A.2d 262 (1970), our Supreme Court held that an executor of an estate lacked standing to institute and to maintain an action to quiet title to real estate if the complaint contained no allegation that the property at issue was needed to satisfy claims of the estate. The court explained that, in *O'Connor* v. *Chiascione*, supra, 130 Conn. 306–308, it had described the interest that an executor or administrator of an estate had in real estate that was owned by a decedent at the time of his death as follows: "On the death of an owner, title to real estate at once passes to his heirs, subject to being defeated should it be necessary for the administration of the estate that it be sold by order of the court, and subject to the right of the administrator to have possession, care and control of it during the settlement of the estate, unless the [P]robate [C]ourt shall otherwise order. . . . The administrator does not have title to the real estate [and] his rights in

it cease at the settlement of the estate . . . ." (Internal quotation marks omitted.) *Brill* v. *Ulrey*, supra, 159 Conn. 375. The court in *Brill* continued: "The *O'Connor* decision makes it clear that the power of 'possession, care and control' granted to an executor under General Statutes § 45-252 [now § 45a-321] over real estate during the settlement of an estate is given *only to protect the rights of creditors*. . . . The executor's power is in derogation of the rights of the heirs, and since it is so limited in purpose, it is properly exercised only when the exigencies of the estate so require. [If] . . . no allegation is made that the property is needed to meet claims against the estate, *there can be no occasion to permit the exercise of the executor's power*." (Citation omitted; emphasis added.) Id., 375–76; see also *Zanoni* v. *Lynch*, supra, 79 Conn. App. 321 ("the fiduciary of a decedent's estate possesses a limited statutory right to interfere with the passage of title to a devisee").

In the present case, in addition to the fact that the estate has no legal title as a consequence of the specific devise of the subject property to the trust, the complaint contains no allegations that the 116 North Prospect Street Extension property is needed to satisfy the debts of the estate. Any claim of adverse possession to the adjacent property, therefore, should have been brought by the trustees. Because the substitute plaintiff, as the administrator of the estate, failed to allege in the pleadings the necessary factual predicate to demonstrate that he is the proper party to invoke judicial resolution of any adverse possession claim pertaining to 116 North Prospect Street Extension, the court properly granted the defendant's motion to dismiss on the ground that the substitute plaintiff lacked standing.

The judgment is affirmed.

MICHAEL KIYAK *v.* DEPARTMENT OF AGRICULTURE ET AL.
(AC 43314)

Cradle, Alexander and Harper, Js.

Syllabus

The plaintiff appealed to the Superior Court from the final decision of the defendant Department of Agriculture upholding disposal orders to euthanize the plaintiff's dog, which had bitten several people. An animal control officer for the defendant town of Fairfield issued the orders pursuant to the statute (§ 22-358) pertaining to biting animals. A department hearing officer had upheld the disposal orders in a proposed final decision that the department then adopted as its final decision. The Superior Court dismissed the plaintiff's appeal from the department's decision, concluding, inter alia, that he failed to prove that the department acted unreasonably, arbitrarily, illegally or in abuse of its discretion in upholding the disposal orders. On appeal to this court, the plaintiff claimed, inter alia, that the Superior Court erred in dismissing his appeal because § 22-358 (c) was unconstitutionally vague as applied in that the word "necessary" in the statute, concerning the issuance of a disposal order, authorizes arbitrary enforcement of the statute, and that his right to procedural due process was violated because the hearing officer adhered to no known rules, standards or procedures in determining that the disposal orders were necessary. *Held*:

1. The plaintiff's claim that § 22-358 (c) was unconstitutionally vague as applied was unavailing; the statute's lack of an explicit definition of "necessary" did not render it void for vagueness, as § 22-358 gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited and provides sufficient notice that animal control officers are granted the discretion to decide what enforcement is necessary to protect the public in the case of a biting dog.
2. The plaintiff could not prevail on his claim that his right to procedural due process was violated because the hearing officer used inadequate procedures in upholding the decision of the animal control officer; the Superior Court's procedural due process analysis pursuant to the factors enunciated in *Mathews* v. *Eldridge* (424 U.S. 319) showed that the plaintiff's private interest in the possession of his dog was outweighed by the long-standing recognition that dogs that cause harm are subject to the police power of the state, the appeal procedures provided to the plaintiff pursuant to the Uniform Administrative Procedure Act (§ 4-166 et seq.) afforded him an adequate opportunity to challenge the disposal orders, and the imposition on the department of an obligation to provide a probable cause hearing in addition to the hearing before the hearing

officer would be unduly burdensome, as it would require essentially duplicate proceedings.

3. The hearing officer did not abuse his discretion by admitting and considering the animal control officer's expert testimony in light of the officer's knowledge, education and extensive experience and training in his position as an animal control officer.

Argued September 22, 2021—officially released January 25, 2022

Procedural History

Appeal from the decision of the named defendant affirming disposal orders for the plaintiff's dog, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Huddleston, J.*; judgment dismissing the appeal, from which the plaintiff appealed to this court. *Affirmed.*

Thompson G. Page, for the appellant (plaintiff).

Gail S. Shane, assistant attorney general, with whom, on the brief was *William Tong*, attorney general, for the appellee (named defendant).

Catherine L. Creager, for the appellee (defendant town of Fairfield).

Opinion

ALEXANDER, J. The plaintiff, Michael Kiyak, appeals from the judgment of the Superior Court dismissing his administrative appeal from the final decision of the defendant Department of Agriculture (department) to uphold two disposal orders issued by an animal control officer for the defendant town of Fairfield (town)[1] to euthanize the plaintiff's German shepherd dog pursuant to General Statutes § 22-358. On appeal, the plaintiff claims that the court erred in dismissing his appeal because (1) § 22-358 (c) is unconstitutionally vague as applied in that the word "necessary," concerning the issuance of a disposal order, authorizes arbitrary enforcement of the statute, (2) the department's hearing officer

[1] The town has adopted in full the department's brief to this court.

violated the plaintiff's right to procedural due process by using inadequate procedures in upholding the disposal orders, and (3) the hearing officer erred in designating Animal Control Officer Paul Miller as an expert. We affirm the judgment of the Superior Court dismissing the plaintiff's appeal.

The department found the following facts that are relevant to this appeal. "The plaintiff is the owner of a German shepherd dog named Jack. At the time of the hearing, the [plaintiff] was eighty-three years old and resided with his eighty-one year old wife, Nancy Kiyak, at 61 Lind Street in Fairfield . . . . Nancy Kiyak has Alzheimer's disease, and the plaintiff is her caregiver.

"The plaintiff obtained Jack in 2014 or 2015. Jack had previously been living in Florida and was named 'Semper' while living there.

"On May 3, 2016, Lucy Meehan was jogging on Lind Street, a public road, when Jack attacked and bit her on her right leg, her arm, and her chest. . . . The bite wounds required medical attention.

"Meehan's testimony was corroborated by the plaintiff, who testified that, when Jack attacked Meehan, the plaintiff ran over to shield her from Jack because he 'didn't know if [Jack] was going to attack again.' At the time of this incident, Jack was a 100 pound dog. Meehan did not provoke Jack. . . .

"On May 27, 2016, the town issued a restraint order on Jack and provided the plaintiff with the opportunity to take Jack out of state. After the restraint order was issued, some area residents expressed concern about their safety, and Fairfield Animal Control reopened the investigation to determine whether there were prior incidents involving Jack.

"One such incident had occurred in about December, 2015, when Jack bit the plaintiff's wife, Nancy Kiyak,

in their home. At the hearing, the plaintiff confirmed that incident, testifying that he had told his wife that the dog was in the garage and that she should not go into the garage. Because of her Alzheimer's disease and lack of memory, Nancy Kiyak went into the garage, where Jack attacked and bit her. The plaintiff took his wife to a walk-in clinic for treatment of the bite wound, but he did not report the bite incident to an animal control officer.

"The animal control officer, Miller, traced Jack's origins through his rabies tags to Florida and learned that Jack . . . was involved in a biting incident in Florida. The plaintiff confirmed the dog's origin in Florida and his name in Florida. According to a town exhibit, while in Florida, Jack bit an eleven year old boy on his arm while the boy was walking home from school, and the wound required stitches.

"Based on his continuing investigation, on July 15, 2016, Miller issued a disposal order on the dog . . . citing three biting incidents: the bite incident involving Meehan, the bite incident involving Nancy Kiyak, and the bite incident in Florida. The plaintiff, who has been unable to relocate Jack out of state, voluntarily took Jack to the animal control facility on the same date to address the impending disposal order. The plaintiff appealed the disposal order to the department.

"Jack was held at the Fairfield Animal Control facility while the plaintiff's appeal of the disposal order was pending. The plaintiff was allowed to come in and feed Jack. The plaintiff asked Miller not to allow anybody near the dog . . . . On or about December 12, 2016, the plaintiff was visiting Jack. The plaintiff did not have Jack on a leash but was holding his choke collar while preparing to take him out into an enclosed run for exercise. Jack broke loose from the plaintiff and

attacked Emily Quintiliano, a kennel worker at the facility. Quintiliano, who has interacted with hundreds of animals, testified that she did not provoke the attack and that she had believed Jack was under the plaintiff's control. She testified that Jack approached her quickly, barking and continuously growling, and backed her down an aisle and against a wall before biting her. . . . The bite caused scarring.

"On December 24, 2016, Miller issued a second disposal order on Jack. This order cited the biting incident involving Quintiliano . . . in addition to the three previous bite incidents involving Jack. The plaintiff appealed the second disposal order.

"Miller has been an animal control officer for twenty-nine years and has come in contact with thousands of animals. He testified that he has not been involved in many biting incidents where disposal orders have been issued, and he does not issue them lightly. In this case, he assessed the seriousness of the bites, the number of bites, and past history. He testified that Jack is 'mean and aggressive' and 'one of the most dangerous dogs' he has ever seen. . . .

"Miller testified that Jack should stay in the custody of animal control for the pendency of this case and that it would be dangerous to release him. He testified that the plaintiff has difficulty controlling Jack and that 'Jack is a clear and present risk and threat to public safety.' . . .

"The town introduced a written statement by veterinarian John T. Kristy, who stated that Jack was 'too dangerous to handle for a reasonable physical examination.' In examining Jack, Kristy feared for his own safety. He stated that Jack is 'large, strong and aggressive, and should be handled with extreme caution due to the potential for extreme physical injury.'

"The plaintiff testified, to the contrary, that Jack 'is not very dangerous.'

"The hearing officer found all four witnesses to be honest and credible, but, in light of the evidence in the record, he disagreed with the plaintiff's opinion that Jack 'is not very dangerous.' He found Miller's testimony and his assessment of Jack's temperament to be credible and reliable. He found that Miller has expertise in the assessment of aggressive or dangerous dogs, given his twenty-nine years as an animal control officer, training received in the course of his employment, and training with the National Animal Control Officers. The hearing officer also found Quintiliano's testimony to be credible and reliable in light of her considerable experience in handling dogs during her ten years as a kennel keeper.

"During the hearing, the plaintiff's counsel argued that 'public safety' was not an adequate justification for issuing a disposal order or for holding Jack during the pendency of the appeal. The hearing officer rejected those arguments, noting that § 22-358 authorizes the killing of dogs under several circumstances . . . and allows for the issuance of restraint or disposal orders as to dogs that bite. The hearing officer found that the evidence in the record established that the plaintiff is unable to control Jack because Jack bit Nancy Kiyak, Meehan, and Quintiliano in the plaintiff's presence, and Jack actually broke free of the plaintiff in two of those incidents.

"The plaintiff's counsel indicated during the proceedings that he had filed suit in [the United States District Court for the District of Connecticut] on behalf of the Kiyaks. His arguments concerned alleged procedural and constitutional violations. At no time did he argue or offer evidence that Jack was not the dog that bit Nancy Kiyak, Meehan, or Quintiliano, that Jack was not

aggressive or dangerous, that the bites were not serious, or that Nancy Kiyak or other residents would not be in danger if Jack was returned home. The plaintiff did not present an alternative to a disposal order that could have been considered.

"The hearing officer concluded that the town had proved, by a preponderance of the evidence, that Jack is a dog of dangerous propensity and that the statutory elements for issuance of a disposal order had been satisfied. After review of the proposed decision, and after hearing argument both from the plaintiff's counsel and from the plaintiff himself, the [C]ommissioner [of Agriculture (commissioner)] adopted the proposed decision as the final decision of the department." (Internal quotation marks omitted.)

Thereafter, the plaintiff appealed to the Superior Court and claimed that (1) § 22-358 (c) is unconstitutionally vague and that its enforcement violated his constitutional rights, (2) the hearing officer admitted irrelevant and prejudicial information concerning the dog and improper expert testimony by Miller, (3) the town's retention of the dog was an illegal taking without due process, (4) the town's decision to continue to hold the dog because of Nancy Kiyak's medical condition violated the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. (2018), and the fourth, fifth and fourteenth amendments to the United States constitution, and (5) the town's continued retention of the dog constitutes a forfeiture and is criminal in nature, invoking constitutional protections that were denied to the plaintiff. The court concluded that the plaintiff failed to meet his burden of proving that the department acted unreasonably, arbitrarily, illegally, or in abuse of its discretion in upholding the disposal orders concerning Jack. In addition, concerning the plaintiff's claim that he was deprived of procedural due process because the department failed to provide him with a probable

cause hearing separate from the proceeding before its hearing officer, the court concluded that, "[t]o impose on the department an obligation to provide a probable cause hearing . . . would be unduly burdensome because it would require essentially duplicate proceedings." Accordingly, the Superior Court dismissed the plaintiff's administrative appeal. This appeal followed. Additional facts will be set forth as necessary.

We begin our analysis by setting forth the applicable standard of review. "It is well established that [j]udicial review of [an administrative agency's] action is governed by the Uniform Administrative Procedure Act [(UAPA) General Statutes § 4-166 et seq.] . . . and the scope of that review is very restricted. . . . With regard to questions of fact, it is neither the function of the trial court nor of this court to retry the case or to substitute its judgment for that of the administrative agency. . . . Even for conclusions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. . . . [Thus] [c]onclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts." (Citation omitted; internal quotation marks omitted.) *Commission on Human Rights & Opportunities* v. *Cantillon*, 207 Conn. App. 668, 672, 263 A.3d 887, cert. granted, 340 Conn. 909, 264 A.3d 94 (2021).

"It is fundamental that a plaintiff has the burden of proving that the [agency], on the facts before [it], acted contrary to law and in abuse of [its] discretion . . . . In addition, although we have noted that [a]n agency's factual and discretionary determinations are to be accorded considerable weight by the courts . . . we have maintained that [c]ases that present pure questions of law . . . invoke a broader standard of review

than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . The plaintiff's constitutional claims are therefore entitled to plenary review." (Citations omitted; internal quotation marks omitted.) *Miller* v. *Dept. of Agriculture*, 168 Conn. App. 255, 266, 145 A.3d 393, cert. denied, 323 Conn. 936, 151 A.3d 386 (2016). With these principles in mind, we address the plaintiff's claims in turn.

On appeal to this court, the plaintiff advances three claims that properly were preserved for our review.[2] First, he argues that § 22-358 (c) is unconstitutionally vague as applied. Second, he claims that the hearing officer violated his right to procedural due process by using inadequate procedures in upholding the disposal orders. Finally, he contends that the hearing officer erred in designating Miller as an expert witness during the hearing. We are not persuaded by these claims.

I

The plaintiff asserts that § 22-358 (c), which provides in relevant part that "any animal control officer . . . may make any order concerning the restraint or disposal of any biting dog, cat or other animal as the

[2] On appeal, the plaintiff raises a number of claims for the first time. First, the plaintiff asserts that the hearing officer's decision to uphold the disposal order was arbitrary, capricious, and unreasonable. Second, the plaintiff claims that the animal control officer's failure to weigh alternatives in issuing the disposal orders violated his right to procedural due process. Finally, the plaintiff contends that § 22-358 (c) is an unconstitutionally overbroad delegation of legislative authority.

"We have repeatedly held that this court will not consider claimed errors . . . unless it appears on the record that the question was distinctly raised at trial and was ruled upon and decided by the court adversely to the appellant's claim." (Internal quotation marks omitted.) *Robinson* v. *Tindill*, 208 Conn. App. 255, 269, A.3d , cert. denied, 340 Conn. 917, A.3d (2021). On the basis of our review of the record, we conclude that each of these claims were not properly preserved before the hearing officer or the Superior Court, and we decline to review them.

commissioner or such officer deems necessary," is unconstitutionally vague as applied because the term "necessary" in the statute authorizes arbitrary enforcement. We disagree.

"Laws must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. . . . A statute is not void for vagueness unless it clearly and unequivocally is unconstitutional, making every presumption in favor of its validity. . . . To demonstrate that [a statute] is unconstitutionally vague as applied to [him], the [plaintiff] therefore must . . . demonstrate beyond a reasonable doubt that [he] had inadequate notice of what was prohibited or that [he was] the victim of arbitrary and discriminatory enforcement. . . . If the meaning of a statute can be fairly ascertained a statute will not be void for vagueness since [m]any statutes will have some inherent vagueness . . . ." (Internal quotation marks omitted.) *State ex rel. Gregan* v. *Koczur*, 287 Conn. 145, 156, 947 A.2d 282 (2008).

Although the plaintiff concedes that § 22-358 (c) has been found to be clear and unambiguous,[3] the plaintiff makes a strained attempt to attack the word "necessary" contained within the statute. The plaintiff argues that the statute "provides no guidance on the meaning of *necessary*." (Emphasis added.) We are not persuaded.

As the Superior Court acknowledged, "[t]he plaintiff asserted similar constitutional claims in an action

[3] See *Lagnese* v. *Waterbury*, Docket No. 3:15-cv-975 (AWT), 2018 WL 1582546, *3 (D. Conn. March 30, 2018). The plaintiff's appellate counsel previously has brought a number of cases making claims that attack the validity of § 22-358 (c), including *Speer* v. *Dept. of Agriculture*, 183 Conn. App. 298, 192 A.3d 489 (2019), *Kiyak* v. *Fairfield*, United States District Court, Docket No. 3:17-cv-01426 (D. Conn. June 28, 2019), *Lagnese* v. *Waterbury*, supra, 2018 WL 1582546, and *Wanzer* v. *Plainville*, United States District Court, Docket No. 3:15-cv-16 (AWT) (D. Conn. March 28, 2018). In *Kiyak*, *Lagnese* and *Wanzer*, the plaintiffs' claims failed on the merits.

brought pursuant to 42 U.S.C. § 1983 in the federal district court. The District Court dismissed the plaintiff's claims." In *Kiyak* v. *Fairfield*, United States District Court, Docket No. 3:17-cv-01426 (AWT) (D. Conn. June 28, 2019), the plaintiff in the present case and his wife, Nancy Kiyak, brought an action against the town and the commissioner. The case concerned the same German shepherd, Jack, and the same disposal orders issued by Animal Control Officer Miller. The plaintiffs asserted a number of claims, including a constitutional challenge to the validity of § 22-358 (c). In the District Court's ruling on the commissioner's motion to dismiss, the court thoroughly addressed the constitutionality of § 22-358 (c): "Here, with respect to assessing the severity of the bite or attack to determine the type of enforcement, § 22-358 (c) explicitly states that the [animal control officer] may make any order concerning the restraint or disposal of any biting dog, cat or other animal as the commissioner or such officer deems necessary. . . . Even assuming arguendo that . . . § 22-358 (c) provides for the exercise of unconstitutionally broad discretion when scrutinized pursuant to a facial challenge, the conduct at issue here falls within the core of the prohibition under § 22-358 (c). [Animal Control Officer] Miller issued a restraining order against Jack after he received a complaint that Jack bit the leg of a jogger . . . . Issuing a restraining order against a dog who bit someone is indicative of that dog's potential danger to the public . . . ." (Citation omitted; internal quotation marks omitted.) Id.

In *Miller* v. *Dept. of Agriculture*, supra, 168 Conn. App. 266 n.12, this court determined that, "by promulgating § 22-358, [the legislature] vested the animal control officer with broad discretion to make orders that such officer deems necessary with respect to the restraint or disposal of any biting dog . . . ." (Internal quotation marks omitted.) The inherent discretion

afforded to animal control officers in the statute explicitly has been adjudicated and recognized by this court in *Miller*. The discretion granted to the commissioner and the animal control officers to determine whether an order of restraint or disposal is necessary is informed by the purpose of the statute, which is to protect the public from biting dogs. This reflects the long-standing history that use of the state's police power is appropriate to protect the public from biting dogs. See, e.g., *Sentell* v. *New Orleans & Carrollton Railroad Co.*, 166 U.S. 698, 704–705, 17 S. Ct. 693, 41 L. Ed. 1169 (1897).

Furthermore, in *Lagnese* v. *Waterbury*,, Docket No. 3:15-cv-975 (AWT), 2018 WL 1582546 (D. Conn. March 30, 2018), the plaintiff claimed that § 22-358 (c) was unconstitutional both on its face and as applied because, in part, "the [c]ommissioner . . . has never promulgated any rules, policies, procedures, guidelines, practices or regulations regarding the enforcement" of the statute. Id., *1. In dismissing the plaintiff's claims, the United States District Court for the District of Connecticut determined that "the statute provides clear guidance to animal control officers that orders concerning restraint or disposal of a dog can only be made with respect to a biting dog, and it is clear from the statute that the animal control officers must exercise their discretion in determining whether no enforcement, a restraint order, or a disposal order is most appropriate. It should be noted that the exercise of discretion contemplated in [§] 22-358 (c) should not be viewed in isolation but in the context of the entire statute. . . . The plaintiffs have not shown how requiring animal control officers . . . to exercise their discretion and judgment in making a decision as to what type of enforcement, if any, is appropriate does more to authorize or encourage arbitrary or discriminatory enforcement than various other laws that must be enforced by individuals performing a discretionary function . . . ."

(Citation omitted; internal quotation marks omitted.) Id., *3–4.

The plaintiff makes much of the word "necessary" in the statute. We are not persuaded that the lack of an explicit definition of the word renders the statute void for vagueness.[4] See, e.g., *State ex rel. Gregan* v. *Koczur*, supra, 287 Conn. 157 (concluding that General Statutes § 22-329a is not void for vagueness despite its failure to define "neglect"). This statute gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited and provides sufficient notice that animal control officers are granted the discretion to decide what enforcement is necessary to protect the public in the case of a biting dog. Furthermore, the statute uniformly and consistently has been adjudicated to be clear and constitutional, including under the same facts in the present appeal. See *Kiyak* v. *Fairfield*, supra, United States District Court, Docket No. 3:17-cv-01426 (AWT). We conclude, therefore, that the statute is not unconstitutionally vague.

II

The plaintiff next claims that the hearing officer violated his right to procedural due process by using inadequate procedures in upholding the disposal orders. Specifically, the plaintiff claims that "[i]nadequate procedures were used in issuing and upholding the disposal order" because "the hearing officer adhered to no known rules, regulations, standards, or procedures

[4] See *State* v. *Legrand*, 129 Conn. App. 239, 269–70, 20 A.3d 52 ("[W]e are mindful that [a] statute is not void for vagueness unless it clearly and unequivocally is unconstitutional, making every presumption in favor of its validity. . . . [T]he void for vagueness doctrine embodies two central precepts: the right to fair warning of the effect of a governing statute . . . and the guarantee against standardless law enforcement. . . . If the meaning of a statute can be fairly ascertained a statute will not be void for vagueness . . . ." (Internal quotation marks omitted.)), cert. denied, 302 Conn. 912, 27 A.3d 371 (2011).

in determining that the order was necessary." (Internal quotation marks omitted.) Thus, the plaintiff contends that this court must decide what process is due by applying the three balancing factors outlined in *Mathews* v. *Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), which are: (1) the private interests at stake, (2) the risk of erroneous deprivation of that interest through the procedures used and the probable value, if any, of alternative procedures, and (3) the government's interest, including the possible burdens of alternative procedures. The Superior Court concluded, however, that "[a]pplying the *Mathews* factors to the evidence in this case[5] . . . the plaintiff's procedural due process claim fails." (Footnote added.) We agree with the Superior Court.

"We resolve due process claims pursuant to *Mathews* v. *Eldridge*, [supra, 424 U.S. 334–35] . . . . Due process . . . is not a technical conception with a fixed content unrelated to time, place and circumstances. . . . Rather, the [s]pecific dictates of due process generally require consideration of three distinct factors . . . the private interest . . . the risk of erroneous deprivation . . . and . . . the [state's] interest . . . [in] the additional or substitute procedural requirement[s] . . . ." (Internal quotation marks omitted.) *State* v. *Michael F.*, 208 Conn. App. 663, 674–75, A.3d (2021).

First, the plaintiff's private interest in the possession of his dog is outweighed by the long-standing recognition that dogs that cause harm are subject to the police power of the state. See *Sentell* v. *New Orleans & Carrollton Railroad Co.*, supra, 166 U.S. 704–705. Our legislature has granted animal control officers the discretion

[5] The plaintiff neither cited nor analyzed the *Mathews* factors in his brief to the Superior Court. In response to the defendants' arguments, however, the Superior Court succinctly addressed the *Mathews* factors in its memorandum of decision.

to make orders with respect to the restraint or disposal of a biting dog. It is undisputed in the present case that the plaintiff's dog has bitten several people. Second, the administrative appeal procedures provided to the plaintiff pursuant to the UAPA afforded him an adequate opportunity to challenge the animal control officer's orders.[6] Finally, we agree with the court that "[t]o impose on the department an obligation to provide a probable cause hearing . . . would be unduly burdensome because it would require essentially duplicate proceedings." On the basis of our review of the record, we agree with the court's analysis of the *Mathews* factors and conclude that there is no due process violation.

III

Finally, the plaintiff claims that the hearing officer erred in designating Miller as an expert witness. Specifically, the plaintiff claims that "it is unclear whether the facts of Miller's experience, employment and education[al] history support his designation as an expert." With respect to this claim, the court ruled that the hearing officer did not abuse his discretion in admitting and considering Miller's expert opinion as to Jack's temperament. We agree with the court.

Administrative hearing officers have the same discretion as any other trier of fact to determine the admissibility and credibility of expert testimony. See *Goldstar Medical Services, Inc.* v. *Dept. of Social Services*, 288 Conn. 790, 830, 955 A.2d 15 (2008). "[I]t is axiomatic that the determination of whether a witness is qualified to testify as an expert is an evidentiary matter . . . which rests in the discretion of the trial court." *Glaser*

[6] Our Supreme Court has held that "the procedures required by the UAPA exceed the minimal procedural safeguards mandated by the due process clause." (Internal quotation marks omitted.) *Pet* v. *Dept. of Health Services*, 228 Conn. 651, 661, 638 A.2d 6 (1994).

v. *Pullman & Comley, LLC*, 88 Conn. App. 615, 621, 871 A.2d 392 (2005).

"[Our Supreme Court has] previously stated that administrative tribunals are not strictly bound by the rules of evidence . . . . It is axiomatic . . . that it is within the province of the administrative hearing officer to determine whether evidence is reliable . . . and, on appeal, the plaintiff bears the burden of proving that the commissioner, on the facts before him, acted contrary to law and in abuse of his discretion . . . ." (Citations omitted; internal quotation marks omitted.) *Do* v. *Commissioner of Motor Vehicles*, 330 Conn. 651, 667–68, 200 A.3d 681 (2019).

"In order to reverse an agency decision on the basis of an erroneous evidentiary ruling, it is necessary that the appellant demonstrate that substantial rights of [his] have been prejudiced because the administrative findings, inferences, conclusions, or decisions are . . . clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record. . . . [T]he plaintiff bears the burden of demonstrating that a hearing officer's evidentiary ruling is arbitrary, illegal or an abuse of discretion." (Citation omitted; internal quotation marks omitted.) *Recycling, Inc.* v. *Commissioner of Energy & Environmental Protection*, 179 Conn. App. 127, 153–54, 178 A.3d 1043 (2018).

A witness may be qualified as an expert on the basis of knowledge, skill, experience, training, education, or otherwise. Conn. Code Evid. § 7-2. The legislature has established training requirements for animal control officers that include eighty or more hours of instruction. See General Statutes § 22-328. Miller has been a certified animal control officer since 1998, and his extensive experience and training support the hearing officer's decision to "[admit] and [consider] Miller's expert opinion as to Jack's temperament." Given Miller's knowledge, education, and experience in his position as an

animal control officer, we conclude that the hearing officer did not abuse his discretion by admitting and considering Miller's expert testimony.

The judgment is affirmed.

In this opinion the other judges concurred.

R. S. *v.* E. S.*
(AC 43630)

Alvord, Moll and Alexander, Js.

Syllabus

The defendant appealed to this court from the judgment of the trial court dissolving his marriage to the plaintiff and from certain orders, including, inter alia, a pendente lite order related to certain travel restrictions. *Held*:

1. The defendant's claim that the trial court erred when it entered a pendente lite order related to travel restrictions was moot; because a pendente lite order ceases to exist once a final judgment has been rendered, there was no practical relief that could be afforded to the defendant, and this court lacked subject matter jurisdiction to consider the defendant's claim.
2. The defendant could not prevail on his claims that the trial court erred when it entered orders including, inter alia, vacating by stipulation a temporary restraining order, granting the plaintiff's motion in limine, denying the defendant's oral request for a continuance, requiring the defendant to make a payment to the plaintiff's counsel to be held in escrow, sealing certain documents, appointing a guardian ad litem, and prohibiting the parties from filing pleadings without permission from the court, and could not prevail on his claims of judicial bias as the defendant's claims were unfounded and did not merit substantive discussion.

Argued December 6, 2021—officially released January 25, 2022

Procedural History

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

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

relief, from which the defendant appealed; thereafter, the court, *Grossman*, *J.*, ordered the defendant to make a certain payment to the plaintiff's counsel, and the defendant amended his appeal. *Appeal dismissed in part; affirmed.*

E. S., self-represented, the appellant (defendant).

Kieran J. Costello and *Sean R. Plumb*, for the appellee (plaintiff).

Opinion

PER CURIAM. The self-represented defendant, E. S., appeals following the trial court's judgment dissolving the marriage of the defendant and the plaintiff, R. S. We dismiss as moot the defendant's appeal with respect to the court's pendente lite order imposing certain travel restrictions. We conclude that the remainder of the defendant's claims are meritless and do not warrant substantive discussion. We affirm the judgment.

The record reveals the following relevant facts and procedural history. The parties were married on August 15, 2010, and they have one minor child still living. The child's twin died shortly after birth. The plaintiff commenced this dissolution action in September, 2017. On September 20, 2017, a temporary restraining order was vacated by way of a stipulation approved by the court, *Wenzel*, *J.* On September 17, 2018, the court entered pendente lite orders with respect to certain travel restrictions and an order that the plaintiff's counsel hold the defendant's passport. On March 20, 2019, the court, *Rodriguez*, *J.*, granted the plaintiff's motion for appointment of a guardian ad litem for the minor child. On May 23, 2019, the court granted the plaintiff's motion to seal a specific document and further ordered that neither party may "file proceedings without permission of the court." Additional documents also were sealed by the court on February 14, 2019, July 11, 2019,

and October 21, 2019. On October 18, 2019, the plaintiff filed a motion in limine, seeking to preclude the defendant from presenting evidence at trial on the basis that he had not complied with the court's standing order for trial management. The court, *Diana, J.*, granted the motion in limine.[1] On October 21, 2019, the first day of trial, the defendant orally requested a continuance, which was denied. Following trial, wherein both the defendant and the plaintiff testified, the court issued its memorandum of decision dissolving the parties' marriage on November 19, 2019. This appeal followed.[2] On January 9, 2020, the court, *Grossman, J.*, granted the plaintiff's motion for an order that the defendant pay $52,531.25 to the plaintiff's counsel to be held in escrow pending the resolution of this appeal. On January 15, 2020, the defendant amended his appeal to challenge this order.

On appeal, the defendant challenges numerous decisions of the trial court, including the court's order imposing travel restrictions rendered pendente lite. "Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [this] court's subject matter jurisdiction . . . . Because courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable." (Internal quotation marks omitted.) *Altraide* v. *Altraide*, 153 Conn. App. 327, 332, 101 A.3d 317, cert. denied, 315

[1] Prior to the commencement of the trial, a discussion on the motion in limine was held. The plaintiff's counsel represented that the defendant had not provided any updated discovery since March, 2019, and had not complied with the trial management order. The court's ruling on the motion precluded the defendant "from presenting any witnesses and/or evidence during trial for his failure to comply with the Standing Orders."

[2] On November 29, 2019, the defendant filed an appeal with our Supreme Court challenging the dissolution judgment. That appeal was transferred to this court and treated as an amended appeal. The defendant further amended his appeal on January 6, 2020, January 15, 2020, and February 13, 2020.

Conn. 905, 104 A.3d 759 (2014). "[T]he nature of a pendente lite order, entered in the course of dissolution proceedings, is such that its duration is inherently limited because, once the final judgment of dissolution is rendered, the order ceases to exist." *Sweeney* v. *Sweeney*, 271 Conn. 193, 202, 856 A.2d 997 (2004). "Once a final judgment has been rendered, an issue with respect to a pendente lite order is moot because an appellate court can provide no practical relief. . . . As a result, an appellate court lacks subject matter jurisdiction over a pendente lite order after the trial court has rendered a final judgment." (Citation omitted.) *Altraide* v. *Altraide*, supra, 332. Because the court's order imposing travel restrictions was rendered pendente lite, the defendant's appeal with respect to that order is moot.

The defendant's remaining claims on appeal attack, inter alia, the orders: vacating by stipulation a temporary restraining order, granting the plaintiff's motion in limine, denying the defendant's oral request for a continuance, requiring the defendant to pay $52,531.25 to the plaintiff's counsel to be held in escrow, sealing certain documents, appointing a guardian ad litem, and prohibiting the parties from filing pleadings without permission from the court. He also claims judicial bias and challenges orders rendered in the dissolution judgment. We carefully have considered each of the defendant's claims and conclude that they are unfounded and do not merit substantive discussion.

The appeal as to the pendente lite order imposing certain travel restrictions is dismissed as moot; the judgment is affirmed.

STACY TABER *v.* MICHAEL TABER (AC 44272)

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

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from an order of the trial court issued on August 10, 2020, modifying his custody of the parties' minor child and amended his appeal to challenge the court's October 28, 2020 order concerning the payment of arrearage fees to the guardian ad litem. On October 13, 2020, the court issued an order suspending entirely the defendant's access to the minor child until certain conditions were met. *Held*:

1. The defendant could not prevail on his claim that the trial court failed to apply the correct legal standard and failed to make the requisite findings in its consideration of the plaintiff's application for an emergency ex parte order of custody, as the appeal from the court's August 10, 2020 order on the application was dismissed as moot; subsequent to the trial court's order regarding the defendant's custody of his minor child, the court issued an order on October 13, 2020, further restricting his access to the child and superseding the first order, and, because the defendant did not appeal from the October 13, 2020 order, this court could not afford the defendant any practical relief and lacked subject matter jurisdiction.
2. The trial court did not abuse its discretion in ordering the defendant to begin making weekly payments on the total arrearage of guardian ad litem fees; the court ordered the defendant to submit a current, completed financial affidavit and a recent paystub showing his year to date earnings and held a hearing to address the issue of the fees, and testimony was presented concerning the defendant's current financial circumstances and ability to pay various other bills, thus, the record indicated that the court considered the financial circumstances of the parties in issuing its order.

Argued November 18, 2021—officially released January 25, 2022

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Abery-Wetstone, J.*; judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Caron, J.*,

granted the plaintiff's application for an emergency ex parte order of custody of the parties' minor child, and the defendant appealed to this court; subsequently, the court, *Abery-Wetstone, J.*, granted the plaintiff's motion for contempt and issued orders suspending the defendant's access to the minor child; thereafter, the court, *Abery-Wetstone, J.*, ordered the defendant to pay the arrearage of guardian ad litem fees, and the defendant filed an amended appeal. *Appeal dismissed in part; affirmed.*

Michael Taber, self-represented, the appellant (defendant).

Opinion

SUAREZ, J. In this amended appeal, the self-represented defendant, Michael Taber, appeals from the order of the trial court granting the application for an emergency ex parte order of custody filed by the plaintiff, Stacy Taber. The order, in part, limited the defendant's right to visitation with the parties' minor child. The defendant also appeals from another order of the court ordering him to pay $100 per week on a total arrearage of guardian ad litem (GAL) fees incurred in this dissolution matter and related proceedings. The defendant claims that the court (1) failed to apply the correct legal standard and failed to make requisite findings in its consideration of the application for an emergency ex parte order of custody, and (2) improperly ordered him to make payments of $100 per week on the total arrearage of GAL fees. We dismiss as moot the portion of the appeal related to the defendant's first claim. With respect to the defendant's second claim, we affirm the order of the court finding an arrearage of GAL fees and ordering him to make weekly payments on the total arrearage.[1]

[1] The plaintiff has not participated in this appeal and, thus, we consider the appeal solely on the basis of the arguments set forth in the defendant's appellate briefs, his oral argument, and our review of the record.

The following undisputed facts and procedural history are relevant to our resolution of the defendant's claims. The plaintiff and the defendant were married in 2009, and had a child together in 2010. In May, 2017, the plaintiff commenced an action seeking a judgment of dissolution. In August, 2017, the plaintiff and the defendant entered into a pendente lite agreement, which was subsequently approved and entered as an order of the court, establishing joint custody of the minor child and setting forth a parenting plan.

The August, 2017 agreement also provided for the appointment of a GAL to represent the minor child. Attorney Kathleen Nevins was appointed as the GAL in the marital dissolution and custody proceedings. Nevins was reappointed several times throughout the proceedings, most recently on January 30, 2020. The order of duties and fees related to Nevins' January 30 appointment indicated that the parties were each responsible to pay 50 percent of the GAL fees, which were billed at an hourly rate of $150.

Although the litigation between the plaintiff and the defendant has been ongoing for several years, this appeal focuses on two specific orders of the court. The first order from which the defendant appeals was entered on August 10, 2020. Relevant to that order, on July 30, 2020, the plaintiff filed an application for an emergency ex parte order of custody requesting that the defendant's "vacation time with the child be terminated immediately." On August 10, 2020, the court, *Caron*, *J.*, held a hearing on the plaintiff's application. Following the hearing, the court entered the August 10, 2020 order, which established a new parenting plan suspending the defendant's overnight access with the minor child and ordering that the defendant "shall have parenting time every other Saturday from 10 a.m. to 7 p.m." The August 10, 2020 order further provided that the defendant was

to have telephone access with the minor child "whenever [the child] wants for as long as he wants."

Thereafter, on September 14, 2020, the plaintiff filed a motion for contempt postjudgment, alleging that the defendant did not adhere to the parenting plan established by the August 10, 2020 order. On September 24, 2020, the court, *Abery-Wetstone, J.*, held a hearing on the motion for contempt. On the same day, the court issued a written order finding the defendant in contempt of the August 10, 2020 order. On October 1, 2020, the plaintiff filed a motion to correct in which she requested that the court correct the written September 24, 2020 order to correspond with the court's oral decision. The court granted the motion and issued a corrected order, dated October 13, 2020. The October 13, 2020 order suspended the defendant's access to the child until the defendant "attends therapy with Dr. Bruce Freedman, Ph.D., bi-weekly for a period of three months without a gap." Additionally, the court ordered that the defendant was "responsible for GAL attorney's fees in accordance with the attorney's fees affidavits filed with the court." It further ordered that the defendant begin making payments on the "total arrearage [of GAL fees] no more than thirty days from the date of [the] order." The court found that such GAL fees were reasonable and necessary.

On October 13, 2020, the GAL filed a request for a status conference regarding fees. In response to this request, the court scheduled a hearing for October 28, 2020, to address the issue of GAL fees. The court further ordered that the defendant bring to the hearing a "current and completed financial affidavit and a recent [pay stub] showing year to date earnings."

The defendant did not attend the October 28, 2020 hearing, but he did file a financial affidavit prior to the hearing. At the hearing, the GAL testified that she

reviewed the financial affidavit that the defendant had submitted to the court. The GAL further testified, based on the financial affidavit, that the defendant was "making $120,000 [per year] now, as compared to January, 2020, [when the defendant] was claiming he made zero." She also testified that "since January . . . [the defendant] elected to pay [various other bills] instead of the guardian ad litem [fees]." The GAL asserted that the defendant "keeps choosing not to pay the guardian ad litem fees." She ultimately asked the court to order the defendant to pay the full arrearage of the fees within fourteen days of the hearing. At the conclusion of the hearing, the court, *Abery-Wetstone, J.*, found, on the record, that the defendant had accrued a total arrearage of $6263.87 in GAL fees.

On October 28, 2020, the court issued a written decision in which it ordered the defendant to pay the "fee arrearage until paid in full at the rate of $100/week." The court noted at the hearing that the total fee arrearage was $6263.87 and that, at the rate of $100 per week, it would be fully paid in approximately sixty-three weeks.

On September 17, 2020, the defendant filed an appeal from the August 10, 2020 order. The defendant did not appeal from the October 13, 2020 order, nor did he amend his appeal from the August 10, 2020 order to include the subsequent October 13, 2020 order. On December 1, 2020, the defendant filed an appeal from the October 28, 2020 order. Under our rules of appellate procedure; see Practice Book § 61-9; we consider this subsequent appeal to have amended his initial appeal from the judgment rendered with respect to the August 10, 2020 order to include a challenge to the judgment rendered with respect to the October 28, 2020 order.[2]

[2] Practice Book § 61-9 provides in relevant part: "If the appellant files a subsequent appeal from a trial court decision in a case where there is a pending appeal, the subsequent appeal may be treated as an amended appeal . . . ."

I

First, with respect to the August 10, 2020 order, the defendant claims that the court failed to apply the correct legal standard and failed to make requisite findings in its consideration of the application for an emergency ex parte order of custody. We dismiss this portion of the appeal as moot.[3]

"When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of

[3] This court heard oral argument in the present case on November 18, 2021. Following oral argument and on our further review of the trial court's file, we became concerned that this portion of the appeal was moot. On November 22, 2021, we issued an order for the defendant to file a supplemental brief addressing whether the portion of this appeal challenging the August 10, 2020 order of the court, *Caron J.*, entered in response to the plaintiff's application for an emergency ex parte order of custody of the parties' minor child, should be dismissed as moot in light of the October 13, 2020 order of the court, *Abery-Wetstone, J.*, which subsequently altered the defendant's right to visitation with the child and from which the defendant has not appealed. On December 21, 2021, the defendant filed a supplemental brief in response to the order. In his brief, the defendant does not argue that the portion of the appeal challenging the August 10, 2020 order is not moot. Instead, the defendant argues that the challenged action falls under a recognized exception to the mootness doctrine because it is capable of repetition, yet evading review.

"The mootness doctrine does not preclude a court from addressing an issue that is capable of repetition, yet evading review. . . . [F]or an otherwise moot question to qualify for review under the capable of repetition, yet evading review exception, it must meet three requirements. First, the challenged action, or the effect of the challenged action, by its very nature must be of a limited duration so that there is a strong likelihood that the substantial majority of cases raising a question about its validity will become moot before appellate litigation can be concluded. Second, there must be a reasonable likelihood that the question presented in the pending case will arise again in the future, and that it will affect either the same complaining party or a reasonably identifiable group for whom that party can be said to act as surrogate. Third, the question must have some public importance. Unless all three requirements are met, the appeal must be dismissed as moot." (Internal quotation marks omitted.) *Burbank* v. *Board of Education*, 299 Conn. 833, 839–40, 11 A.3d 658 (2011). The defendant has not persuaded us that any of the three requirements have been met in the present case.

the merits, a case has become moot. . . . It is axiomatic that if the issues on appeal become moot, the reviewing court loses subject matter jurisdiction to hear the appeal. . . . It is a [well settled] general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of the appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal." (Citation omitted; internal quotation marks omitted.) *Kennedy* v. *Kennedy*, 109 Conn. App. 591, 599, 952 A.2d 115 (2008).

"Even though the issue of mootness was not raised in the briefs or at oral argument, this court has a duty to consider it sua sponte because mootness implicates the court's subject matter jurisdiction. It is, therefore, a threshold matter to resolve. . . . Subject matter jurisdiction [implicates] the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . . The objection of want of jurisdiction may be made at any time . . . [a]nd the court or tribunal may act on its own motion, and should do so when the lack of jurisdiction is called to its attention. . . . The requirement of subject matter jurisdiction cannot be waived by any party and can be raised at any stage in the proceedings." (Citation omitted; internal quotation marks omitted.) Id., 598–99.

As we discussed previously in this opinion, subsequent to the August 10, 2020 order establishing the defendant's right to scheduled visitation with his child, the court, on October 13, 2020, issued another order which suspended the defendant's access to the child, including both visitation and telephonic access. Given

that the August 10, 2020 order has been superseded by the October 13, 2020 order, and that order has not been appealed from, this court cannot afford the defendant any practical relief. Therefore, this portion of the appeal is moot, and this court lacks subject matter jurisdiction over it. See id., 599. Accordingly, we dismiss this portion of the defendant's appeal.

II

Second, with respect to the October 28, 2020 order, the defendant claims that the court improperly ordered him to make payments of $100 per week on the total arrearage of GAL fees. Specifically, the defendant claims that the court erred by not considering the respective financial circumstances of the parties. We disagree.

General Statutes § 46b-62 governs, inter alia, payments of GAL fees. Section 46b-62 (a) provides in relevant part: "In any proceeding seeking relief under the provisions of this chapter . . . the court may order either spouse or, if such proceeding concerns the custody, care, education, visitation or support of a minor child, either parent to pay the reasonable attorney's fees of the other in accordance with their respective financial abilities and the criteria set forth in section 46b-82. If, in any proceeding under this chapter . . . the court appoints counsel or a guardian ad litem for a minor child, the court may order the father, mother or an intervening party, individually or in any combination, to pay the reasonable fees of such counsel or guardian ad litem or may order the payment of such counsel's or guardian ad litem's fees in whole or in part from the estate of the child. . . ." Under § 46b-62, the court must consider the financial resources of the parties when awarding attorney's fees. See, e.g., *Ruggiero* v. *Ruggiero*, 76 Conn. App. 338, 347–48, 819 A.2d 864 (2003). How such expenses will be paid is, however,

within the court's discretion. See, e.g., id., 348. "An abuse of discretion in granting [guardian ad litem] fees will be found only if [an appellate court] determines that the trial court could not reasonably have concluded as it did." (Internal quotation marks omitted.) *Rubenstein* v. *Rubenstein*, 107 Conn. App. 488, 500, 945 A.2d 1043, cert. denied, 289 Conn. 948, 960 A.2d 1037 (2008).

In the present case, the defendant claims that the court abused its discretion because it did not consider the respective financial circumstances of the parties when it ordered him to begin making the weekly payments. For the reasons that follow, we conclude that the record does not support the defendant's contention.

To begin, the court held a hearing to address the issue of GAL fees. Prior to the hearing, the court ordered that the defendant submit a current, completed financial affidavit and a recent pay stub showing his year to date earnings. During the hearing, the court heard testimony concerning the defendant's financial circumstances from the GAL. The court also heard testimony that the defendant was able to pay various other bills, although he was not paying the GAL fees. The GAL requested that the total arrearage of fees be paid within fourteen days of the hearing. The court instead ordered the defendant to make payments in the amount of only $100 per week. The record indicates that the court did, in fact, consider the financial circumstances of the parties. We therefore conclude that the court did not abuse its discretion when it ordered the defendant to begin making weekly payments on the total arrearage of GAL fees.

The portion of the amended appeal from the August 10, 2020 order of the trial court establishing the defendant's right to scheduled parental visitation time is dismissed as moot; the appeal from the order of the trial

court ordering the defendant to make weekly payments on the total arrearage of guardian ad litem fees is affirmed.

In this opinion the other judges concurred.

CHRISTOPHER J. TAYLOR *v.* LISA POLLNER (AC 44517)

Alvord, Moll and Alexander, Js.

Syllabus

The plaintiff sought to acquire title to a certain parcel of the defendant's real property through adverse possession, and the defendant filed a counterclaim seeking to quiet title. The trial court ordered the parties to respond to discovery and appear for depositions by a certain date, stating that the failure to comply with its order could result in sanctions, including, inter alia, fines. Thereafter, the plaintiff moved for an extension of time for his deposition, which the court denied. The defendant, represented by two law firms, filed two motions for order pursuant to the rule of practice (§ 1-21A), requesting that the plaintiff pay her attorney's fees and claiming that the plaintiff failed to respond to discovery in a timely manner, had failed to appear substantively at his deposition, and had executed documents under oath after previously indicating his inability to do so, and her counsel attached affidavits thereto. The plaintiff did not object or respond to the defendant's motions for order. The plaintiff thereafter withdrew his complaint. The matter was tried to the court, which rendered judgment for the defendant as to her counterclaim, quieting title to the property. The court granted the motions for order and ordered monetary sanctions against the plaintiff comprised of attorney's fees in the amounts of $4859.55 and $5800, reasoning that the plaintiff failed to comply with the court's scheduling order and his discovery obligations and failed to respond to several of the defendant's motions. The plaintiff appealed to this court, claiming, inter alia, that the trial court abused its discretion in awarding monetary sanctions to compensate the defendant for attorney's fees. *Held* that this court declined to review the plaintiff's claims that the trial court's award of attorney's fees to the defendant was improper and that those fees were excessive, unreasonable, and clearly erroneous: in accordance with *Smith* v. *Snyder* (267 Conn. 456), which indicates that the other party must oppose or otherwise take action in response to a request for attorney's fees, the plaintiff's failure to oppose or to present any challenge regarding the attorney's fees to the trial court prior to its granting

of the motions for order, precluded this court's review of his complaints regarding those fees at this juncture.

Submitted on briefs December 6, 2021—officially released January 25, 2022

Procedural History

Action seeking a judgment determining the rights of the parties to certain real property, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the defendant filed a counterclaim; thereafter, the plaintiff withdrew his complaint; subsequently, the matter was tried to the court, *Cordani, J.*; judgment for the defendant, from which the plaintiff appealed to this court; thereafter, the court, *Cordani, J.*, granted the defendant's motions for sanctions, and the plaintiff amended his appeal. *Affirmed.*

Hale C. Sargent filed a brief for the appellant (plaintiff).

Stephen G. Walko and *Andrea C. Sisca* filed a brief for the appellee (defendant).

Opinion

PER CURIAM. In this quiet title action, the plaintiff, Christopher J. Taylor, appeals from the judgment of the trial court to the extent that the court awarded attorney's fees to the defendant, Lisa Pollner, pursuant to Practice Book § 1-21A. On appeal, the plaintiff claims that the court abused its discretion in awarding monetary sanctions to compensate the defendant for her attorney's fees and that those fees were excessive, unreasonable, and clearly erroneous. We affirm the judgment of the trial court awarding attorney's fees to the defendant.

The following facts and procedural history are relevant for our resolution of this appeal. On June 12, 2020, the plaintiff initiated the underlying action for adverse

possession of a three-quarter acre portion of the property known as 365 Cross Highway in Fairfield. On August 27, 2020, the defendant responded by filing an answer, special defenses, and counterclaim. In her pleading, the defendant alleged that the property was under a contract for sale with a closing scheduled for August 21, 2020. She further claimed that the plaintiff had placed a lis pendens on the property with malice and knowledge in order to disrupt the pending sale. In the defendant's counterclaim, she set forth counts of trespass in tort, private nuisance, tortious interference with a contract, statutory slander of title, common law slander of title, an action to quiet title, and unjust enrichment.

On September 29, 2020, the court, *Stevens*, *J.*, issued an expedited scheduling order. The court noted that the failure to comply with the scheduling order could result in sanctions, including fines, the exclusion of evidence at trial, dismissal, default, or nonsuit. The court set a deadline of November 6, 2020, for the parties to object to or file responses to written discovery requests. The court ordered all depositions to be completed by November 25, 2020.

On November 9, 2020, the court, *Cordani*, *J.*, denied the plaintiff's October 16, 2020 motion for an extension of time for his deposition. The court determined that the plaintiff had failed to present any evidence of a medical condition that inhibited his ability to sit for a deposition, and that, given that the pending sale of the property had been delayed by the plaintiff's filings, his "unsupported motion and uncertain position is insufficient to allow a deviation from the pending scheduling order." The court, however, offered the plaintiff the opportunity to present "compelling evidence of certain unavailability" at the next status conference. Following the November 16, 2020 status conference, the court

issued an order confirming that the scheduling order remained unchanged and "in full force and effect."

On December 16, 2020, the defendant withdrew all of the counts of her counterclaim except for the action to quiet title. On that same day, one of the law firms representing the defendant filed a motion for order pursuant to Practice Book § 1-21A (motion for order),[1] requesting the plaintiff pay the defendant's attorney's fees totaling $4859.55 as a result of his "blatant disregard for multiple orders of this court." Specifically, the defendant alleged that the plaintiff had failed to respond to discovery in a timely fashion, had failed to appear "substantively" at his November 20, 2020 deposition, and had executed documents under oath after previously indicating his inability to do so due to the ingestion of medications. On the same day, the second law firm representing the defendant filed a similar motion, captioned as a supplemental motion for order of attorney's fees, seeking the amount of $5800 (supplemental motion for order). Each of the defendant's counsel attached an affidavit to the respective motion for order and the supplemental motion for order in support of the claimed attorney's fees. The plaintiff did not file an objection or response to either motion.

On January 7, 2021, the plaintiff withdrew his complaint. The next day, the court conducted a brief trial where only the defendant testified. The court found in favor of the defendant on the sole remaining count, her claim to quiet title.

[1] Practice Book § 1-21A provides: "The violation of any court order qualifies for criminal contempt sanctions. Where, however, the dispute is between private litigants and the purpose for judicial intervention is remedial, then the contempt is civil, and any sanctions imposed by the judicial authority shall be coercive and nonpunitive, including fines, to ensure compliance and compensate the complainant for losses. Where the violation of a court order renders the order unenforceable, the judicial authority should consider referral for nonsummary criminal contempt proceedings."

The same day, the court issued an order granting the December 16, 2020 motion for order and awarded the defendant $4859.55 in attorney's fees. The court found that when the plaintiff appeared for his November 20, 2020 remote deposition, he "engaged in an unprovoked profanity laden, insulting tirade against the defendant's counsel, and refused to proceed with the deposition." It further noted that the plaintiff failed to respond to the defendant's motion for nonsuit or order of compliance, motion in limine and motion for judgment, or to comply with the court's scheduling order and his discovery obligations. The court concluded by finding that "the plaintiff's conduct during this litigation has been unreasonable and egregious. The plaintiff's conduct has caused the defendant to incur attorney's fees that she should not have been forced to incur." Finally, the court noted that the request for attorney's fees and the amount of said fees, were reasonable. The court issued a second order on January 8, 2021, granting the supplemental motion for order and awarded the defendant an additional $5800 in attorney's fees.

On January 11, 2021, the plaintiff filed a motion to reargue pursuant to Practice Book § 11-11. The court denied that motion eight days later. On January 21, 2021, the court rendered judgment in favor of the defendant with respect to her quiet title claim, discharged the lis pendens filed by the plaintiff on the property, and noted that the judgment included an award of $10,659.55 against the plaintiff. This appeal followed.[2]

In his appeal, the plaintiff challenges the attorney's fees awarded to the defendant. Specifically, he claims

[2] On January 28, 2021, the plaintiff filed his appeal challenging the court's judgment in favor of the defendant on her quiet title claim. On February 8, 2021, the plaintiff amended his appeal to include attorney's fees awarded to the defendant and the denial of his motion for reargument. The plaintiff, however, has not advanced any argument in his appellate brief regarding the judgment rendered in favor of the defendant with respect to her quiet title claim or the denial of the motion for reargument.

that the court abused its discretion in awarding attorney's fees to the defendant and that the amount awarded was excessive, unreasonable, and clearly erroneous. The defendant counters, inter alia, that we should not review the plaintiff's appellate claims because he failed to raise them before the trial court. We agree with the defendant.

This court has often stated that "[w]e will not decide an appeal on an issue that was not raised before the trial court. . . . To review claims articulated for the first time on appeal and not raised before the trial court would be nothing more than a trial by ambuscade of the trial judge." (Internal quotation marks omitted.) *Kirwan* v. *Kirwan*, 187 Conn. App. 375, 391 n.13, 202 A.3d 458 (2019); see also *Hirschfeld* v. *Machinist*, 181 Conn. App. 309, 329 n.4, 186 A.3d 771 ("[w]e will not promote a Kafkaesque academic test by which [a trial judge] may be determined on appeal to have failed because of questions never asked of [him] or issues never clearly presented to [him]" (internal quotation marks omitted)), cert. denied, 329 Conn. 913, 186 A.3d 1170 (2018).

Our Supreme Court's decision in *Smith* v. *Snyder*, 267 Conn. 456, 839 A.2d 589 (2004), controls the resolution of this appeal. The defendants in that case claimed that the trial court had abused its discretion in awarding $20,000 in attorney's fees to the plaintiff. Id., 470. At the outset of its analysis, our Supreme Court noted that, even though the plaintiff statutorily was entitled to attorney's fees, "it was incumbent upon [the plaintiff] to prove the amount of fees to which it was entitled . . . ." Id., 471. Additionally, the court explained that the reasonableness of an award of attorney's fees must be proved by an appropriate evidentiary showing and not based solely on the trial court's general knowledge of attorney's fees. Id., 471–72. Ultimately, it concluded

that "when a court is presented with a claim for attorney's fees, the proponent must present to the court . . . a statement of the fees requested and a description of [the] services rendered. . . . Such a rule leaves no doubt about the burden on the party claiming attorney's fees and affords the opposing party an opportunity to challenge the amount requested at the appropriate time." (Footnote omitted.) Id., 479.

Our Supreme Court further indicated that the other party must oppose or otherwise take action in response to a request for attorney's fees. Id., 480–81. "Although the proponent bears the burden of furnishing evidence of attorney's fees at the appropriate time, once the plaintiffs in this case did make such a request, the defendants should have objected or at least responded to that request. Had the defendants demonstrated any interest in objecting to the plaintiffs' request for attorney's fees, the trial court would have been obligated to grant the defendants an opportunity to be heard. . . . Accordingly . . . we conclude that a reversal of the award in the present case is not justified in light of the defendants' failure, prior to this appeal, to interpose *any objection whatsoever* to the plaintiffs' request for attorney's fees. In other words, the defendants, in failing to object to the plaintiffs' request for attorney's fees, effectively acquiesced in that request, and, consequently, they now will not be heard to complain about that request." (Citations omitted; emphasis in original.) Id.; see also *William Raveis Real Estate, Inc.* v. *Zajaczkowski*, 172 Conn. App. 405, 425–26, 160 A.3d 363, cert. denied, 326 Conn. 906, 163 A.3d 1205 (2017).

In the present case, the court explained that it had awarded the defendant attorney's fees as a sanction to compensate her losses, namely, "attorney's fees [that] she should not have been compelled to incur." See Practice Book § 1-21A. The plaintiff failed to file a response to either of the December 16, 2020 motions

for order and did not present any challenge regarding the attorney's fees to the trial court prior to its granting of the motions for order.[3] In other words, the plaintiff did not object to the requests for attorney's fees before the trial court, and, therefore, in accordance with our precedent, we decline to hear his complaints about the awarding of those fees at this juncture.[4] See *Smith* v. *Snyder*, supra, 267 Conn. 481.

The judgment of the trial court awarding attorney's fees to the defendant is affirmed.

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[3] In his January 11, 2021 motion to reargue, the plaintiff offered the bald, unsupported assertion that the defendant had failed to present evidence to support her claim, and, therefore waived her claim for attorney's fees. We note that, in both motions for order, the attorneys submitted an affidavit of fees.

[4] The plaintiff briefly claims that his right to due process was violated when the court awarded the defendant attorney's fees without a hearing. On appeal, the plaintiff neither requested *Golding* review nor addressed its four prongs. "We consider unpreserved claims of constitutional magnitude according to the requirements of [*State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 780–81, 120 A.3d 1188 (2015)] . . . . [A party's] failure to address the four prongs of *Golding* amounts to an inadequate briefing of the issue and results in the unpreserved claim being abandoned. . . . We will not engage in *Golding* . . . review on the basis of . . . an inadequate brief." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Guiliano* v. *Jefferson Radiology, P.C.*, 206 Conn. App. 603, 624, 261 A.3d 140 (2021).