STATE OF CONNECTICUT *v.* ROBERT A. PEREZ-LOPEZ (AC 44280)

Alvord, Clark and Seeley, Js.

Syllabus

The defendant was convicted, after a jury trial, of assault in the first degree in connection with a physical altercation outside a restaurant during which he stabbed the victim. At trial, the primary evidence against the defendant were eyewitness identifications by the victim and the victim's friend, V, who was with the victim at the time of the assault. After the assault but prior to the administration of a photo lineup to the victim, a third party sent a photograph of the defendant obtained from Facebook to the victim's wife, who forwarded the photograph to the detective in charge of the investigation. The detective used the photograph to learn the defendant's name and to generate a photo lineup, from which the victim identified the defendant as the perpetrator. V, who had previously worked with the defendant for a period of approximately two years, subsequently identified the defendant as the perpetrator in a separate photo lineup. On appeal, the defendant claimed that the trial court violated his state constitutional right to due process by denying his motion to suppress the victim's out-of-court identification after it failed to apply the burden shifting analysis set forth in *State* v. *Harris* (330

Conn. 91), which provides that, in order to obtain a pretrial hearing, the defendant has the initial burden of offering some evidence that a system variable, a factor within the control of the criminal justice system, undermined the reliability of the eyewitness identification and, if the defendant meets this burden, the state must then offer evidence demonstrating that the identification was reliable in light of all relevant system and estimator variables, factors outside of the control of the criminal justice system that generally arise from the circumstances under which the eyewitness viewed the perpetrator during the commission of the crime. If the state adduces such evidence, the defendant must then prove a very substantial likelihood of misidentification and, if the defendant meets that burden of proof, the identification must be suppressed. The defendant also claimed that the trial court abused its discretion in denying his motion in limine to preclude the victim's identification of him following the administration of the photo lineup and abused its discretion and violated his right to present a defense by denying his specific request to charge the jury on eyewitness identification. *Held*:

1. This court concluded that, although the trial court failed to apply the proper burden shifting analysis set forth in *Harris*, any error in the trial court's analysis was harmless beyond a reasonable doubt:

a. The trial court improperly failed to apply the framework adopted in *Harris* in connection with the defendant's state constitutional due process claim: the court applied the initial step of the *Harris* framework by conducting a hearing and making a statement suggesting that the state, by agreeing to the hearing, had conceded that the defendant had produced sufficient evidence of a system variable undermining the reliability of the identification, and, although the court cited to *Harris* when setting forth the federal framework in its memorandum of decision, it failed to identify the state constitutional framework adopted in *Harris* and did not analyze the identification under that standard but, rather, analyzed the identification under the federal framework by concluding that the identification procedures were not unduly suggestive and that they had been conducted in a manner that substantially reduced the risk of misidentification.

b. Any error in the trial court's analysis of the defendant's constitutional claim was harmless beyond a reasonable doubt because, even if the court had properly applied the *Harris* framework, it was not reasonably possible that it would have reached a different conclusion as to the admissibility of the victim's identification of the defendant: this court reviewed the video recording of the administration of the photo lineup to the victim and concluded that any deviations in conducting the lineup from the statutorily (§ 54-1p) required procedures were minimal in nature; moreover, the state presented ample evidence of both system and estimator variables that supported a determination that the photo identification by the victim was reliable, including that the area where the assault occurred was well lit, this case did not involve a cross-racial

identification, there was no evidence that the victim was aware that the defendant had a weapon, and the victim's description of the assault was substantially similar to that recounted by V, and despite the fact that the defendant appeared to be wearing the same shirt in the lineup photo that he wore in the Facebook photo, the details of the defendant were difficult to discern in the Facebook photo and, therefore, the lineup photo of the defendant did not unduly stand out and the victim was not shown multiple images clearly depicting the defendant during the photo identification process so as to render the victim's identification unconstitutionally unreliable; accordingly, the victim's identification of the defendant did not result in a substantial likelihood of misidentification.

2. The trial court did not abuse its discretion in denying the defendant's motion in limine to preclude the victim's identification of him in the photo lineup because that identification was the product of unduly suggestive conduct by a private actor, namely, the victim's viewing of the Facebook photograph: utilizing the two-pronged inquiry traditionally applied to identifications involving state action to determine the admissibility at trial of an eyewitness' identification, this court determined that the victim's viewing of the Facebook photograph was not unnecessarily suggestive because there is no case law that suggests that a victim's conduct outside of the control of the criminal justice system constitutes unnecessarily suggestive conduct and, based on an examination of the totality of the circumstances, the victim's identification was nonetheless reliable; moreover, even if the trial court had abused its discretion in admitting the victim's out-of-court identification into evidence, any such error would be harmless in light of the other evidence in the present case, particularly the positive identification of the defendant made by V, who already knew the defendant personally.

3. The trial court did not improperly deny the defendant's request to instruct the jury with his proposed language regarding eyewitness identification or deprive him of the right to present a defense by doing so: under Connecticut law, identification instructions are not constitutionally required, and, even if a court's instructions are less informative on the risks of eyewitness misidentification, the issue is at most one of instructional error rather than constitutional error; moreover, a new trial would be warranted only if a defendant could establish that it was reasonably probable that the jury was misled, which the defendant in this case failed to do, as the trial court's instructions to the jury, taken as a whole, fairly and adequately presented the case to the jury in such a way that injustice was not done to the defendant pursuant to the established rules of law; furthermore, the defendant presented expert testimony on the issue of eyewitness identification, including the exact matters that the defendant contended should have been included in the court's instructions, and the expert's testimony fulfilled the purpose of particularized jury instructions, namely, to educate the jury regarding

the science related to the fallibility of eyewitness identifications and the specific factors that may affect their reliability.

Argued May 12, 2022—officially released April 11, 2023

Procedural History

Information charging the defendant with the crime of assault in the first degree, brought to the Superior Court in the judicial district of Fairfield, where the court, *Hernandez*, *J.*, denied the defendant's motion to suppress certain identification evidence; thereafter, the court denied the defendant's motion in limine to preclude certain identification evidence; subsequently, the case was tried to the jury before *Hernandez*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Lisa J. Steele, assigned counsel, for the appellant (defendant).

Melissa L. Streeto, senior assistant state's attorney, with whom, on the brief, were *Joseph T. Corradino*, state's attorney, and *Michael A. DeJoseph*, supervisory assistant state's attorney for the appellee (state).

Opinion

SEELEY, J. The defendant, Robert A. Perez-Lopez, appeals from the judgment of conviction, rendered after a jury trial, of assault in the first degree in violation of General Statutes § 53a-59 (a) (1).[1] On appeal, the defendant claims that the trial court (1) violated his state constitutional right to due process[2] by denying his

[1] General Statutes § 53a-59 provides in relevant part: "(a) A person is guilty of assault in the first degree when: (1) With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument . . . ."

[2] Article first, § 8, of the Connecticut constitution provides in relevant part that "[n]o person shall be . . . deprived of life, liberty or property without due process of law . . . ."

motion to suppress the victim's out-of-court identification after it failed to apply the burden shifting analysis set forth by our Supreme Court in *State* v. *Harris*, 330 Conn. 91, 191 A.3d 119 (2018),[3] (2) abused its discretion in denying his motion in limine to preclude the identification of him following the administration of a photo lineup,[4] and (3) abused its discretion and violated his right to present a defense by denying his specific request to charge the jury on eyewitness identification.[5] We affirm the judgment of conviction.

The jury reasonably could have found the following facts. On November 3, 2017, the victim, Alberto Santos, and his friend, Johnny Veloz, went to the home of an individual known as "Alfred." The victim consumed several beers before the three men went to La Sabrosura, a restaurant in Bridgeport, in Veloz' automobile. Veloz parked on the street near the restaurant in the early morning hours of November 4, 2017.

[3] As we set forth in greater detail later in this opinion, pursuant to *Harris*, "the defendant has the initial burden of offering some evidence that a system variable [a factor within the control of the criminal justice system] undermined the reliability of the eyewitness identification. . . . If the defendant meets this burden, the state must then offer evidence demonstrating that the identification was reliable in light of all relevant system and estimator variables [factors outside of the control of the criminal justice system that generally arise from the circumstances under which the eyewitness viewed the perpetrator during the commission of the crime]. . . . If the state adduces such evidence, the defendant must then prove a very substantial likelihood of misidentification. . . . If the defendant meets that burden of proof, the identification must be suppressed." (Citations omitted.) *State* v. *Harris*, supra, 330 Conn. 131.

[4] General Statutes § 54-1p (a) (2) provides: " 'Photo lineup' means a procedure in which an array of photographs, including a photograph of the person suspected as the perpetrator of an offense and additional photographs of other persons not suspected of the offense, is presented to an eyewitness for the purpose of determining whether the eyewitness is able to identify the suspect as the perpetrator . . . ." Although interchangeable, we will use the term found in § 54a-1p (a) (2), "photo lineup," rather than the terms "photographic lineup" or "photographic array."

[5] For clarity and ease of analysis, we address the defendant's claims in a different order than they are presented in his principal brief.

The victim exited the automobile and walked toward the restaurant. A group of three men approached the victim and blocked his entry into the restaurant. The first individual in this group, later identified as the defendant, confronted the victim, which resulted in a physical altercation between the victim and the three men. The victim was struck in the face, and, at some point, the defendant moved behind the victim and stabbed him in the back with a sharp object. Veloz witnessed the stabbing and observed blood on the defendant's hands. After the defendant and his group departed, Veloz drove the victim to the hospital. The victim sustained various injuries and was hospitalized for five days.[6]

Jeremy Kelly, a Bridgeport police detective, went to the hospital to speak with the victim on November 4, 2017. The victim had tubes inserted into his lungs and he appeared weak, so Kelly spoke to him only briefly. At that time, the victim informed Kelly that he did not know who had stabbed him. Kelly provided his contact information, including his email address, to the victim's wife, Jordy Gonzalez.

At some point after November 4, 2017, a third party sent a photograph[7] obtained from Facebook[8] to Gonza-

[6] Francisco Garrido, a physician who treated the victim in the emergency department at Bridgeport Hospital on November 4, 2017, testified that the victim had been stabbed in the back with a sharp weapon. Garrido further opined that, as a result of the stabbing, the victim suffered a collapsed lung, which created a substantial risk of death, a serious impairment of health, and impairment of the function of a bodily organ.

[7] The photograph depicts two men, each holding a bottle of beer, leaning against a chain-link fence with the side of a house and an awning shaded window in the background. A third individual, the defendant, is positioned in the middle of, and slightly behind, the other two men. The defendant appears to be wearing a black T-shirt with a red collar and a gold chain. The image of the defendant is very dark, and it is difficult to ascertain his features, such as his eyes, his mouth, his ears, and the presence or absence of any facial hair, and the details of his clothing.

[8] "Facebook is a social networking website that allows private individuals to upload photographs and enter personal information and commentary on

lez, who then forwarded it to Kelly on November 7, 2017. Kelly used the Facebook photograph to learn the defendant's name and to generate a photo lineup.[9] Kelly interviewed the victim at the police station on November 13, 2017. A police detective who had no knowledge of the case administered the photo lineup to the victim while Kelly observed from a separate room. The victim identified the defendant as his assailant[10] and indicated that he was between 70 and 80 percent certain of his identification. After the photo lineup was administered, Kelly showed the Facebook photograph to the victim. The victim indicated that the three people in the Facebook photograph were involved in the altercation at the restaurant.

Kelly interviewed Veloz at the police station on November 20, 2017. A police sergeant who had no knowledge of the case showed Veloz a photo lineup, with Kelly again observing from a separate room. Veloz identified the defendant as the individual who had

a password protected profile. . . . To create a Facebook profile, a person chooses a name under which the profile will be listed, enters his or her birth date and e-mail address, and selects a password. . . . Thereafter, the profile may be accessed on any computer or mobile device by logging into Facebook's website using the same e-mail address and password combination. . . .

"Users post content to their profiles, which may include written comments, photographs, digital images, videos, and content from other websites. To create a . . . post, users upload data from their computers or mobile devices directly to the Facebook website." (Citations omitted; internal quotation marks omitted.) *State* v. *Buhl*, 321 Conn. 688, 692 n.2, 138 A.3d 868 (2016).

[9] Kelly described a photo lineup as follows: "[A] series of photos, we use eight in Bridgeport, with like—you know, there's a certain parameter, the computer generates it, they're of the same age demographic, and then they don't have markings on them. So, they'll be folded up—not folded up but organized in a fashion where if someone looks at them one at a time and to see if the suspect's in there or not."

[10] The photograph in the lineup shown to the victim depicts the defendant from the top of his head to the bottom of his throat and wearing a black shirt with a red collar.

assaulted the victim and stated that he was 100 percent certain of his identification.[11]

Following a trial, at which the victim and Veloz identified the defendant as the assailant, the jury found the defendant guilty of assault in the first degree in violation of § 53a-59 (a) (1). Thereafter, the court sentenced the defendant to a period of incarceration of ten years, execution suspended after seven years, and three years of probation. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the court violated his state constitutional right to due process by denying his motion to suppress the victim's out-of-court identification after it failed to apply the burden shifting analysis set forth in *State* v. *Harris*, supra, 330 Conn. 91. Specifically, he contends that the court erred by not requiring the state to establish that the victim's identification was reliable based on certain factors present at the time of the assault and following numerous flaws in the identification procedure. The state counters, inter alia, that any error in the court's analysis was harmless beyond a reasonable doubt. We agree with the defendant that the court improperly failed to apply the burden shifting test announced in *Harris*. We nevertheless conclude that this error was harmless because it is not reasonably possible that the court would have reached a different conclusion as to the admissibility of the victim's identification had it applied the *Harris* test.

[11] Veloz had worked with the defendant in 2011 or 2012 for a period of one year and eight months. Veloz saw the defendant four days per week during that time period. At the trial, the defendant's expert witness acknowledged on cross-examination that an eyewitness would be more likely to correctly identify someone with whom he had worked for a period of two years than a stranger.

A

The following additional facts and procedural history are necessary for the resolution of this claim. On January 24, 2018, the defendant moved to suppress, inter alia, identifications resulting from any pretrial identification procedures that were unnecessarily suggestive or in any way violated his federal or state constitutional rights. He further sought to suppress any subsequent identifications that had been tainted by such improper procedures. The defendant filed a supplemental motion to suppress, dated November 4, 2019, repeating his claim that the identifications should be suppressed.[12] Therein, he argued that the victim had not provided a description of his assailant, had stated that he was unsure who assaulted him, had indicated that he was stabbed in the back by someone from behind, had an elevated blood alcohol content, and had been too intoxicated to consent to treatment. The defendant also contended that the police had created a photo lineup that included a picture of the defendant in which he was wearing the same shirt that he had on in the Facebook photograph. On the basis of these facts, the defendant argued that the photo lineup was unnecessarily suggestive and not reliable in violation of his federal and state constitutional rights. He requested that the court suppress the identifications[13] and conduct an evidentiary hearing pursuant to *State* v. *Harris*, supra, 330 Conn. 91.[14]

The court, *Hernandez*, *J.*, conducted an evidentiary hearing on January 8, 2020. At the outset, the court

[12] The defendant also filed a motion in limine, dated November 4, 2019, to preclude both the out-of-court and in-court identifications made by the victim and Veloz. We address this motion in part II of this opinion.

[13] In the trial court, the defendant challenged the identifications made by both the victim and Veloz. On appeal, the defendant limits his state constitutional due process claim to the identification made by the victim.

[14] Our Supreme Court released its opinion in *State* v. *Harris*, supra, 330 Conn. 91, on September 4, 2018, approximately fourteen months before the defendant filed his supplemental motion to suppress.

noted that it had received and reviewed a copy of the police reports and the photo lineups, a package of standard discovery materials, and the video recordings of the police interviews where the victim and Veloz had reviewed the photo lineups prepared by the police and identified the defendant. On the morning of the hearing, defense counsel provided the court with excerpts from the victim's medical records.

At the hearing, Kelly testified that he was assigned to investigate the victim's stabbing at the restaurant. He described the area as a "densely populated [commercial] area" that was "adequately lit up . . . not a dark place, it's pretty bright" from overhead streetlights and the ambient lighting from businesses and residences. Kelly further testified that, after he received the Facebook photograph of the defendant, he showed it to another Bridgeport police officer and learned the defendant's name. Kelly then obtained a photograph of the defendant from a police database and used that to create a photo lineup.[15]

On November 13, 2017, Kelly interviewed the victim at the police station. Juan Serrano, another Bridgeport police detective, participated in this interview and also served as a Spanish translator. Serrano had no knowledge of this criminal investigation. Kelly explained that he did not "want a detective that had any prior knowledge of who the suspect might be to taint the photo lineup."[16] The video recording of the interview reveals

[15] Kelly testified that, "[f]or the photo array in 2017 using the mugshot which is exclusively of the suspect there's a—a way to do a search for like images. And the computer generates I don't know if it's hundreds, maybe 150 possible pictures that look similar to the . . . height and weight, skin tone and facial hair. And then from there as they pop up I'd go through and eliminate any pictures that look like they were super old, where there might be a difference in the backdrop or whatnot, so the people look similar."

[16] Although he did not use the term in his testimony, Kelly described a double-blind administration of the photo lineup. See *State* v. *Outing*, 298 Conn. 34, 42, 3 A.3d 1 (2010) (double-blind identification procedure described as one in which person administering identification procedure does not know identity of suspect), cert. denied, 562 U.S. 1225, 131 S. Ct. 1479, 179

that Kelly briefly left the room to get the photo lineup. During the time period when Kelly was absent, Serrano read instructions from a form[17] relating to the administration of the photo lineup to the victim but omitted the instruction that the victim should take as much time

L. Ed. 2d 316 (2011); see also General Statutes § 54-1p (c) (2) (mandating adoption of procedures that require double-blind identification procedure or, if not practicable, specified alternative procedure); *State* v. *Johnson*, 149 Conn. App. 816, 825, 89 A.3d 983 (administering officer was aware that defendant was suspect, and, therefore, photo lineup was not double-blind), cert. denied, 312 Conn. 915, 93 A.3d 597 (2014).

In *State* v. *Day*, 171 Conn. App. 784, 814, 158 A.3d 323 (2017), cert. denied, 330 Conn. 924, 194 A.3d 776 (2018), we explained why law enforcement should utilize this type of procedure: "The photographic identification procedures used in [*Day*], moreover, were not double blind, because both of the detectives who administered them were aware that the defendant was their chief suspect and knew which photographs in the arrays they showed the victims were of him. Such a procedure is unnecessarily suggestive because it makes possible both the conscious or unconscious cueing of witnesses as to which photograph they should select from an array and, even in the absence of such cueing, the giving of confirmatory postidentification feedback to any witness who selects the chief suspect's photograph. The potential consequences of giving a witness such confirmatory postidentification feedback are to substitute the witness' memory of the person in the selected photograph for his memory of the perpetrator and to bolster his confidence in that and future identifications of the defendant as the true perpetrator of the charged offenses, making it difficult to expose the strength or weakness of the identification on cross-examination." See also *State* v. *Guilbert*, 306 Conn. 218, 238, 49 A.3d 705 (2012) (identifications are likely to be less reliable in absence of double-blind, sequential identification procedure).

[17] Serrano used a form that contained the following instructions:

"1. Please listen carefully as these instructions are read aloud to you. Each one of the instructions is equally important. You have been given a copy of these instructions to read along with the officer if you wish.

"2. You will be asked to view an array of photographs or a group of persons, and each photograph or person will be presented one at a time;

"3. It is just as important to exclude innocent persons as it is to identify the perpetrator;

"4. The person in the photographic lineup or live lineup may not look exactly as they did on the date of the offense because features like facial or head hair can change;

"5. The perpetrator may or may not be among the persons in the photographic lineup or live lineup;

"6. You should not feel that you must make an identification;

as he needed to review the photo lineup. As Serrano neared the end of the instructions, Kelly reentered the room holding a manila folder in his right hand and papers and another manila folder in his left hand. Kelly left one of the manila folders, which contained the photo lineup, with Serrano and, while holding the other folder, stated: "[Serrano] doesn't know anything about the case other than what we talked about. I do know the case, so I have an idea who it is, so I am going to leave the room for a few minutes. Take your time." Kelly then exited the room.

Serrano began the administration of the photo lineup by removing the first photograph from a manila folder and placing it faceup in front of the victim. The victim looked at the photograph and immediately slid it to his left. Serrano inquired, "no?" to which the victim replied, "no." Serrano then turned the first photograph over

"*7. You should take as much time as needed in making a decision*;

"8. If you are able to make an identification of someone, you will be asked to describe in your own words how certain you are of that identification;

"9. Even if you are able to make an identification; you will be asked to finish the procedure by looking at all the photographs or all of the individuals until you have completed looking at each one;

"10. If there are other witnesses, you must not indicate to them that you have or have not made an identification of a person;

"11. The officer administering this procedure either does not know whether any of the people in the photographic array or in the lineup were involved in the crime or does no[t] know the order in which you are viewing the photographs;

"12. If you do select someone, the officer will not be able to provide you any information about the person you have selected;

"13. If you select a person or photograph you will be asked to provide a statement about this process and the results. If you don't recognize anyone in the lineup, please say so;

"14. Whether or not you select someone, the police will continue to conduct an appropriate investigation into this matter." (Emphasis added.)

As discussed elsewhere in this opinion, Serrano failed to read instruction number 7 from the form. See generally General Statutes § 54-1p (requiring development and promulgation of uniform mandatory policies and appropriate guidelines for conducting eyewitness identification procedures based on best practices).

so that it was facedown. Serrano placed the second photograph faceup in front of the victim. The victim quickly identified the defendant in this photograph and slid it to his right without flipping it over. While the photograph of the defendant remained faceup and to the right of the victim, Serrano placed the third photograph faceup in front of the victim. The victim, while looking directly at the third photograph, stated, "no." As Serrano was turning the third photograph facedown and placing it on top of the facedown first photograph, the victim appeared to glance at the second photograph to his right for a brief instant. At no point did the victim directly compare the two photographs. The victim continued looking down at the table as Serrano placed the fourth photograph in front of him faceup. The victim pushed the fourth photograph away from him and toward the pile that was facedown without saying anything. After placing the fourth photograph facedown on the pile with photographs one and three, Serrano noticed that the second photograph had remained faceup. Without comment or drawing undue attention to what he was doing, Serrano turned over the second photograph so that it was facedown. Serrano continued with the administration of the photo lineup, where each of the remaining photographs was shown individually to the victim and then placed facedown on the pile to the left of the victim. Upon the completion of the administration of the photo lineup, Serrano collected the materials and placed them in the manila folder. Kelly then returned to the room and asked the victim to write the name of the individual depicted in the second photograph. Kelly also requested that the victim indicate "how sure is he that's the guy, is he 100 percent . . . ." The victim responded that he was 70 to 80 percent sure of his identification.

Kelly interviewed Veloz one week later, on November 20, 2017. Sergeant Gilberto Valentin, who had no knowledge of the case, presented a different photo lineup to

Veloz. Kelly left the room while Valentin showed that lineup in a sequential manner to Veloz. During the administration of the photo lineup, Veloz identified the defendant as the individual who had assaulted the victim and stated that he was 100 percent certain of his identification.[18]

After the testimony from Kelly, Serrano, and Valentin, the prosecutor and defense counsel stated that there were no further witnesses. The court indicated its intention to take a recess to review the relevant case law and to afford counsel time to prepare their respective arguments. The prosecutor requested that the court consider two decisions from our Supreme Court, *State* v. *Johnson*, 312 Conn. 687, 94 A.3d 1173 (2014), and *State* v. *Holliman*, 214 Conn. 38, 570 A.2d 680 (1990),[19] while defense counsel suggested that the court review *State* v. *Harris*, supra, 330 Conn. 91.

After the recess, the court resumed the hearing. Defense counsel first highlighted the evidence regarding the victim's intoxication on the night of the stabbing to the court. Next, he challenged the makeup of the photo lineup on the basis that some of the filler[20] photographs depicted individuals with long hair.[21] Defense counsel also restated his concern that the defendant appeared to be wearing the same shirt in both the Facebook photograph and the photo lineup. He then identified *State* v. *Harris*, supra, 330 Conn. 91, as the "controlling case" that discussed "the system variables [those

[18] The defendant has not raised any challenge to the manner in which the photo lineup was administered to Veloz.

[19] As detailed in part II of this opinion, the two cases cited by the prosecutor focused on suggestive conduct by a private actor.

[20] "Filler means either a person or a photograph of a person who is not suspected of an offense and is included in an identification procedure. General Statutes § 54-1p (a) (5)." (Internal quotation marks omitted.) *State* v. *Crosby*, 182 Conn. App. 373, 396 n.12, 190 A.3d 1, cert. denied, 330 Conn. 911, 193 A.3d 559 (2018).

[21] In both the Facebook photograph and the photo lineup, the defendant had short hair.

factors within the control of the criminal justice system] that undermine the reliability" of the identification. Defense counsel challenged the manner in which the administering officer, Serrano, permitted the victim to put aside the photograph he chose as the perpetrator while he viewed other photographs in the lineup. Defense counsel then argued that, just prior to the commencement of the administration of the photo lineup, Kelly stated that he had to leave the room because he had "an idea" of who the suspect was. He further argued that Kelly was pointing to or had his hand on the folder containing the photo lineup, implicitly suggesting that Kelly had knowledge of whether the assailant's photograph was included in the lineup. Defense counsel also noted that Serrano had failed to read one of the required instructions to the victim during the administration of the photo lineup; namely, that the victim "should take as much time as needed in making a decision." He also claimed that the victim's confidence statement was not made in his own words. Finally, defense counsel contended that certain estimator variables, those variables outside of the control of the criminal justice system, including the brief duration of this high stress attack, the victim's purported intoxication, the fact that it was night, the victim's exposure to the Facebook photograph, and the fact that the victim was stabbed from behind, all supported the claim that the victim's identification of the defendant was unreliable.

During the prosecutor's argument to the court, he first claimed that defense counsel had not carried his initial burden under *State* v. *Harris*, supra, 330 Conn. 91, to present some evidence that a system variable undermined the reliability of the identification. The prosecutor then stated: "If the court finds that the defendant has put forth some evidence meeting that burden, then the state has to demonstrate that the identification was reliable in light of all the relevant [system]

and estimator variables. The court has reviewed the interviews with [the victim], the interview with Veloz, the court has examined the [photo lineups] of both of those witnesses. The state would submit there's nothing unduly suggestive in any of that and there's certainly no police conduct in those interviews which would warrant suppression. So I would submit the state has met its burden on that prong. And then the defendant would have—the defendant must then prove a very substantial likelihood of misidentification which the defendant has not reached."

The court then asked defense counsel to identify the system variables that supported his claim that the victim's identification was unreliable and therefore should be suppressed. Defense counsel responded: "So one would be the array itself, the photo of [the defendant] wearing the same shirt as the Facebook picture. The fact that there was multiple individuals in the array with long hair. That contrary to the intention and instructions to have a sequential identification the individual was allowed to set [the defendant's] picture to the side and for some period of looking at the other photos had [the defendant's] photo to compare it to . . . .[22] I would also indicate that when . . . Kelly . . . says I have to leave the room because I have an idea of who the suspect is [this is a system variable in support of suppression]. And while he's saying that he's either pointing to or touching the folder with the photos[23]

[22] As we set forth previously, a review of the video recording of the administration of the photo lineup reveals that the victim did not directly or extensively compare the photograph of the defendant to photographs three and four. Furthermore, Serrano turned the photograph of the defendant facedown before the victim looked at photographs five, six, seven and eight of the photo lineup.

[23] The video recording depicts one manila folder, which contained the photo lineup, on the table and Kelly holding the other manila folder in his left hand. Kelly never pointed to the manila folder that contained the photo lineup as he explained to the victim why he was going to leave the room. While telling the victim that he had an "idea who it is," Kelly briefly placed his right hand on the folder on the table containing the photo lineup.

[which] suggests that he knows that the suspect is in that group, undermining the goal of the double-blind procedure.

"And then instruction number 7 is I would submit was not given and that the instructions were in English and not in Spanish. And lastly the confidence statement I would indicate was not in the [victim's] own words, largely not in his own words. So those would be the system variables that I would submit would be violated. . . . And then going on to the estimator variables I would indicate it was . . . very fast, according to their words, events. We know that they had to observe multiple parties. I would blame the intoxication, nighttime, dark. The extrinsic evidence of the Facebook photo I would claim the prior nonidentification. A high stress situation and in his words he was stabbed from behind." (Footnotes added.)

The court orally denied the defendant's motion to suppress. The court initially noted that a hearing had been necessary to address the issues raised by the defendant with respect to the identification. The court then stated: "After a full hearing being submitted to the court, however, the court finds that with respect to both identification procedures the identification procedures employed by . . . Kelly and his fellow officers was not unduly suggestive. The administration of the array was conducted in a manner which substantially reduced the risk of misidentification. The motion to suppress the out-of-court and in-court identifications is denied."

After the defendant was convicted, and in response to his motion for articulation filed on March 18, 2021, the court issued a memorandum of decision on June 30, 2021, explaining its reasoning for denying the motions to suppress. In setting forth the relevant legal principles, the court identified the test for determining whether an identification violated the due process

clause of the federal constitution. Although it cited *State* v. *Harris*, supra, 330 Conn. 91, it did not set forth the new framework for determining whether the identification procedures in the present case violated our state constitution. The court described the issue as follows: "The defendant moves to suppress evidence of the out-of-court identification procedures employed by the Bridgeport Police Department as unduly suggestive in the manner in which they were administered to [the victim and Veloz]. He also challenges [the victim's] identification as unduly suggestive because [the victim's wife] had previously emailed a copy of the defendant's photograph to . . . Kelly." The court again referred generally to *Harris* but not to the framework our Supreme Court adopted for determining whether an identification procedure violated the defendant's state constitutional due process right.

The court found that the incident occurred under lighting conditions sufficient to render the identifications reliable. It then summarized Kelly's November 13, 2017 interview with the victim at the police station and the administration of the photo lineup by Serrano. The court found that, although there was evidence that the victim was intoxicated at the time of the crime, under the totality of the circumstances, this did not render the victim's identification unreliable. The court stated: "Rather, the court finds that the fact that [the victim] was able to recall additional details as mundane and unremarkable as the absence of parking spaces in front of the restaurant and where the driver eventually parked the car, and was able to recall those additional details nine days after the assault, constitute persuasive evidence that the victim's recall and, therefore, his ability to make a reliable identification were not substantially impaired."

Next, the court set forth the details of Kelly's November 20, 2017 police station interview with Veloz and the

administration of the photo lineup by Valentin. At the conclusion of that discussion, the court specifically found that "[the victim], Veloz and the defendant all appear to be of Afro-Latino extraction."

In its analysis, the court stated that Veloz previously had worked with the defendant and, on the night of the incident, had provided the police with an accurate description of the defendant's physical appearance. It also indicated that the victim had identified the defendant in the Facebook photograph, and, thus, "by the time the police conducted the identification procedures at issue, the victim and [Veloz] had already taken substantial steps in identifying the defendant." The court then turned to the video recordings of the administration of the photo lineups to the victim and Veloz, concluding: "[I]n both instances the administering officers scrupulously followed the identification procedures in letter and spirit. The administering officers were not familiar with the investigation, they did not know who the primary suspect was, they allowed the pair to view the photographs one at a time and they did not betray any suggestion that the defendant's photograph was that of the primary suspect. Indeed, because they did not know who he was, they could not."

After setting forth the details of the photo lineup administered to the victim, the court found that "the individuals depicted in the [photo lineup] are sufficiently similar to one another so as not to render the procedure unduly suggestive." The court also found that, although Serrano failed to read instruction number 7 to the victim,[24] which provided that "[y]ou should take as much time as needed in making a decision," during the administration of the photo lineup, this omission "[did] not render the overall fairness of the identification procedure suspect from . . . a constitutional due

[24] See footnote 17 of this opinion.

process standpoint . . . .'' The court determined that ''under the totality of the circumstances, the manner in which the [photo lineup] was conducted was not unduly suggestive. Moreover, the general thrust of instruction number 7—take your time—is conveyed and suggested in other instructions.'' In addition to the instructions, the court also pointed to the overall demeanors of Serrano, who did not impart an air of urgency, and the victim, who did not appear to be under pressure to hurry.

The defendant's argument that the identification procedure was unduly suggestive due to the Facebook photograph depicting the defendant that had been emailed to the police by the victim's wife also failed to persuade the court. In response to this contention, the court cited our Supreme Court's decision in *State* v. *Johnson*, supra, 312 Conn. 702–705, which rejected the view that unduly suggestive conduct by a private actor automatically implicates due process principles. For these reasons, the court denied the defendant's motions to suppress.

B

We next set forth the relevant legal principles. It is well established that the admission into evidence of an out-of-court identification that is both unreliable and based on unduly suggestive police procedures violates a defendant's federal right to due process. See *State* v. *Waters*, 214 Conn. App. 294, 315 n.13, 280 A.3d 601, cert. denied, 345 Conn. 914, 284 A.3d 25 (2022); see also *Perry* v. *New Hampshire*, 565 U.S. 228, 232, 132 S. Ct. 716, 181 L. Ed. 2d 694 (2012). ''The test for determining whether the state's use of an [allegedly] unnecessarily suggestive identification procedure violates a defendant's federal due process rights derives from the decisions of the United States Supreme Court in *Neil* v. *Biggers*, 409 U.S. 188, 196–97, 93 S. Ct. 375, 34 L. Ed.

2d 401 (1972), and *Manson* v. *Brathwaite*, 432 U.S. 98, 113–14, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). As the court explained in *Brathwaite*, fundamental fairness is the standard underlying due process, and consequently, reliability is the linchpin in determining the admissibility of identification testimony . . . . Thus, the required inquiry is made on an ad hoc basis and is two-pronged: first, it must be determined whether the identification procedure was unnecessarily suggestive; and second, if it is found to have been so, it must be determined whether the identification was nevertheless reliable based on examination of the totality of the circumstances." (Citation omitted; internal quotation marks omitted.) *State* v. *Ruiz*, 337 Conn. 612, 621–22, 254 A.3d 905 (2020).

Pursuant to this test under the federal constitution, if the trial court determines that no unduly suggestive identification procedure occurred,[25] then no further analysis is required, and the identification is admissible into evidence. *State* v. *Dickson*, 322 Conn. 410, 421, 141 A.3d 810 (2016), cert. denied, U.S. , 137 S. Ct. 2263, 198 L. Ed. 2d 713 (2017); see also *State* v. *Marquez*, 291 Conn. 122, 141–42, 967 A.2d 56 (summarizing and

[25] Under the federal test, two factors are used to determine whether an identification procedure was too suggestive and necessitated proceeding to the reliability prong. *State* v. *Outing*, 298 Conn. 34, 49, 3 A.3d 1 (2010), cert. denied, 562 U.S. 1225, 131 S. Ct. 1479, 179 L. Ed. 2d 316 (2011). "The first factor concerns the composition of the photographic array itself. In this regard, courts have analyzed whether the photographs used were selected or displayed in such a manner as to emphasize or highlight the individual whom the police believe is the suspect." *State* v. *Marquez*, 291 Conn. 122, 142–43, 967 A.2d 56, cert. denied, 558 U.S. 895, 130 S. Ct. 237, 175 L. Ed. 2d 163 (2009). The second factor, related to but conceptually broader than the first, requires the court to consider the actions of law enforcement to determine whether the attention of the witness was directed to a suspect, through either the construction of the photographic array or verbal or physical cues. See id., 143–44; see also *State* v. *Moore*, 169 Conn. App. 470, 495, 151 A.3d 412 (2016), appeal dismissed, 334 Conn. 275, 221 A.3d 40 (2019). Thus, "[t]he suggestiveness prong should be less stringent and more focused on the mechanics of the [photo lineup] itself as well as the behavior of the administering officers." *State* v. *Marquez*, supra, 145.

endorsing two-pronged inquiry), cert. denied, 558 U.S. 895, 130 S. Ct. 237, 175 L. Ed. 2d 163 (2009); *State* v. *Outing*, 298 Conn. 34, 55, 3 A.3d 1 (2010) (no need to reach second part of two-pronged inquiry once defendant has failed to meet first prong), cert. denied, 562 U.S. 1225, 131 S. Ct. 1479, 179 L. Ed. 2d 316 (2011). An identification resulting from an unnecessarily suggestive identification procedure nevertheless will be admissible so long as it is reliable in light of all of the relevant circumstances. See *State* v. *Harris*, supra, 330 Conn. 108. For the purposes of the federal constitution, "we determine whether an identification resulting from an unnecessarily suggestive procedure is reliable under the totality of the circumstances by comparing the corrupting effect of the suggestive identification against factors including the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the [identification], and the time between the crime and the [identification] [hereinafter *Biggers* factors]." (Internal quotation marks omitted.) Id.; see also *State* v. *Outing*, supra, 61–62. Stated differently, "[a]n out-of-court eyewitness identification should be excluded on the basis of the procedure used to elicit that identification . . . if the court is convinced that the procedure was so suggestive and otherwise unreliable as to give rise to a very substantial likelihood of irreparable misidentification." (Internal quotation marks omitted.) *State* v. *Dickson*, supra, 422.

In recent years, our Supreme Court has made substantial changes to our eyewitness identification jurisprudence,[26] including permitting expert testimony on

[26] "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These

the reliability of eyewitness identification and recognizing that focused and informative jury instructions may be needed to guide the jury with respect to this issue. See *State* v. *Guilbert*, 306 Conn. 218, 220–21, 257–58, 49 A.3d 705 (2012). In *State* v. *Harris*, supra, 330 Conn. 96, our Supreme Court held that the due process clause of article first, § 8, of the Connecticut constitution affords greater protection than the federal due process clause with respect to the admissibility of an eyewitness identification.[27] The court explained that "the *Biggers* framework is insufficiently protective of the defendant's due process rights under the state constitution." Id., 131.

Our Supreme Court then identified the analytical framework required by our state constitution "for evaluating the reliability of an identification that is the result of an unnecessarily suggestive identification procedure." Id. The court stated: "Having reviewed the various approaches used by courts around the country, we conclude that the most appropriate framework is that adopted by the New Jersey Supreme Court in *State* v. *Henderson*, [208 N.J. 208, 288–89, 27 A.3d 872 (2011)]. Pursuant to that framework, to obtain a pretrial hearing,

instances are recent—not due to the brutalities of ancient criminal procedure. . . . This reinforces the idea that the appellate courts of this state must remain vigilant to developments in this field of inquiry by engaging in careful study of the scientific literature." (Citation omitted; internal quotation marks omitted.) *State* v. *Marquez*, supra, 291 Conn. 213 (*Schaller*, *J.*, concurring); see also *Watkins* v. *Sowders*, 449 U.S. 341, 352, 101 S. Ct. 654, 66 L. Ed. 2d 549 (1981) (*Brennan*, *J.*, dissenting) ("[D]espite its inherent unreliability, much eyewitness identification evidence has a powerful impact on juries. Juries seem most receptive to, and not inclined to discredit, testimony of a witness who states that he saw the defendant commit the crime. . . . All the evidence points rather strikingly to the conclusion that there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says That's the one!" (Emphasis omitted; footnote omitted; internal quotation marks omitted.)).

[27] "It is well settled that the federal constitution sets the floor, not the ceiling, on individual rights." *State* v. *Purcell*, 331 Conn. 318, 341, 203 A.3d 542 (2019); see also *State* v. *Geisler*, 222 Conn. 672, 684, 610 A.2d 1225 (1992).

the defendant has the initial burden of offering some evidence that a system variable undermined the reliability of the eyewitness identification. . . . If the defendant meets this burden, the state must then offer evidence demonstrating that the identification was reliable in light of all relevant system and estimator variables. . . .[28] *If the state adduces such evidence, the defendant must then prove a very substantial likelihood of misidentification. . . .* If the defendant meets that burden of proof, the identification must be suppressed. . . . It bears emphasis that this framework does not differ significantly from our current approach . . . ." (Citations omitted; emphasis added; footnote added.) *State* v. *Harris*, supra, 330 Conn. 131; see also *State* v. *White*, 334 Conn. 742, 770, 224 A.3d 855 (2020).

To determine if a defendant has met his or her initial burden of offering "some evidence" that the reliability of an identification has been undermined by a system variable, we consider *State* v. *Henderson*, supra, 208 N.J. 289–91, which our Supreme Court relied on in *Harris*. In *Henderson*, the New Jersey Supreme Court set forth the following nonexhaustive list of system variables to consider in determining whether evidence of suggestiveness existed: (1) was the procedure performed in a double-blind manner; (2) was the witness provided with neutral pre-identification instructions warning that the suspect may not be present in the array or lineup and that the witness should not feel compelled to make an identification; (3) was the lineup or array constructed so that the suspect did not stand out and contained only one suspect and at least five

[28] System variables are those factors that are within the control of the criminal justice system, such as lineup procedures, whereas estimator variables are factors that stem from conditions outside of the control of the criminal justice system, such as distance, lighting, or the presence of a weapon. See *State* v. *Harris*, supra, 330 Conn. 124 nn.24 and 25; *State* v. *Guilbert*, supra, 306 Conn. 236 n.11.

fillers; (4) was the witness provided any feedback information before, during or after the identification procedure; (5) was the confidence statement of the witness recorded immediately, before the possibility of any confirmatory feedback; (6) was the witness permitted to view the suspect more than once as part of multiple identification procedures without the use of repeat fillers; (7) was a showup conducted more than two hours after an event, and, if so, did the police notify the witness that the suspect may not be the perpetrator and that the witness should not feel compelled to make an identification; (8) was the witness asked by law enforcement if he or she spoke with anyone about the identification, and, if so, what was discussed; and (9) was the witness' initial choice the suspect or did he or she make no choice or choose a different suspect or filler. See id., 289–90.

The court in *Henderson* further explained that a hearing was required so long as the defendant offered some evidence of suggestiveness. "If, however, at any time during the hearing the trial court concludes from the testimony that [the] defendant's initial claim of suggestiveness is baseless, and if no other evidence of suggestiveness has been demonstrated by the evidence, the court may exercise its discretion to end the hearing. Under those circumstances, the court need not permit the defendant or require the [s]tate to elicit more evidence about estimator variables; that evidence would be reserved for the jury." Id., 290–91.

During the second step of the *Harris* framework, "the state must then offer evidence demonstrating that the identification was reliable in light of all relevant system and estimator variables." *State* v. *Harris*, supra, 330 Conn. 131. A trial court should consider the following variables, which our Supreme Court has noted are neither exclusive nor frozen in time. See id., 132–34. "(1) [T]here is at best a weak correlation between a

witness' confidence in his or her identification and the identification's accuracy; (2) the reliability of an identification can be diminished by a witness' focus on a weapon; (3) high stress at the time of observation may render a witness less able to retain an accurate perception and memory of the observed events; (4) cross-racial identifications are considerably less accurate than identifications involving the same race; (5) memory diminishes most rapidly in the hours immediately following an event and less dramatically in the days and weeks thereafter; (6) an identification may be less reliable in the absence of a double-blind, sequential identification procedure; (7) witnesses may develop unwarranted confidence in their identifications if they are privy to postevent or postidentification information about the event or the identification; and (8) the accuracy of an eyewitness identification may be undermined by unconscious transference, which occurs when a person seen in one context is confused with a person seen in another." *State* v. *Guilbert*, supra, 306 Conn. 253–54; see also *State* v. *Harris*, supra, 133.

If the state satisfies its burden by producing evidence of reliability in light of the relevant system and estimator variables, then the burden shifts back to the defendant to "prove a very substantial likelihood of misidentification," the third and final step in the analysis. *State* v. *Harris*, supra, 330 Conn. 131. The New Jersey Supreme Court explained that this third step is done by cross-examination of witnesses and police officers and the presentation of witnesses and other relevant evidence linked to both system and estimator variables. *State* v. *Henderson*, supra, 208 N.J. 289. In a subsequent case, the court emphasized that the "threshold for suppression remains high" and that unless "a defendant can show a very substantial likelihood of irreparable misidentification . . . it is for the jury to decide whether to credit a witness' account . . . ." (Citations omitted;

internal quotation marks omitted.) *State* v. *Anthony*, 237 N.J. 213, 239, 204 A.3d 229 (2019).

C

With this background and these legal principles in mind, we turn to the defendant's claim on appeal that the court failed to apply the burden shifting test identified in *State* v. *Harris*, supra, 330 Conn. 91, and instead used the analytical framework applicable to a due process claim made pursuant to the federal constitution. Specifically, he argues that the court "did not put the burden on the state to show that [the victim's] identification was reliable in light of the flaws in the identification procedure. The state offered no evidence about why [the victim's] identification was nonetheless reliable. Having failed its burden of proof, [the victim's] identification should have been suppressed." On the basis of our careful review of the motions to suppress filed by the defendant, the hearing on those motions, the court's oral decision, and the court's memorandum of decision, we conclude that the court did not apply the *Harris* framework.

The first stage in the *Harris* framework provides that, in order to obtain a pretrial hearing, the defendant has the initial burden of offering "some evidence"[29] that a system variable undermined the reliability of the eyewitness identification. *State* v. *Harris*, supra, 330 Conn. 131. The trial court appears to have, in effect, applied this initial step of the *Harris* framework. Specifically, it conducted a hearing and, during that proceeding, made a statement suggesting that the state, by

[29] In *Harris*, the court specifically noted: "[W]e recognize that the requirement that the defendant provide 'some evidence' of suggestiveness may necessitate somewhat less evidence to trigger the admissibility inquiry than is required under the *Biggers* framework." *State* v. *Harris*, supra, 330 Conn. 132. Additionally, the court recognized that "this lower threshold is appropriate both because it will provide more meaningful deterrence and because more extensive hearings will address reliability with greater care and better reflect how memory works." (Internal quotation marks omitted.) Id.

agreeing to the hearing, had conceded that the defendant had produced sufficient evidence of a system variable undermining the reliability of the identification. Although the state expressly disavowed making any such concession, the court's statement indicated its awareness of the first part of the *Harris* framework. As further support for this observation, we note the court's statement in its oral decision that it was "satisfied that counsel has made a threshold showing that there are issues regarding the identification which would require a hearing."

The court's adherence to *Harris* ended there, however. Instead of applying the second and third steps of the *Harris* framework to evaluate the reliability of the victim's identification, it is evident from the court's memorandum of decision that the court analyzed the identification under the federal framework by concluding that the identification procedures were not unduly suggestive and that they had been conducted in a manner that substantially reduced the risk of misidentification. Although the court cited to *Harris* in setting forth the federal framework, it failed to identify the state constitutional framework adopted in *Harris* and did not analyze the identification under that standard.

Although the court asked questions and engaged with counsel at the motion to suppress hearing regarding various system and estimator variables, there is no indication that it determined whether the state had met its burden of demonstrating reliability. Nor is there any indication that the court considered whether the defendant had proved a very substantial likelihood of misidentification, the final step in the *Harris* analysis. We agree, therefore, with the defendant that the court improperly failed to apply the framework adopted in *State* v. *Harris*, supra, 330 Conn. 123–24, in connection

with the defendant's state constitutional due process claim.[30]

[30] The state argues that the test announced in *Harris* applies only after the defendant had established that the identification procedure was unduly suggestive. Specifically, it contends that "trial courts must still determine, in the first instance, under the traditional analyses . . . whether an identification was the result of an unnecessarily suggestive procedure before turning, if at all, to the question of whether, despite the unduly suggestive identification procedure, the identification was nevertheless reliable enough to be admitted under the new framework set forth in *Harris*." It further points out that, in the present case, the trial court properly determined that the identification procedures were not unduly suggestive, and, therefore, there was no need for the court to continue to a *Harris* analysis. The defendant, in his appellate brief, challenged the court's determination that the identification procedures were not unduly suggestive. In his reply brief, the defendant disagreed with the state's claim that the unduly suggestive prong remains under the *Harris* analysis.

We acknowledge that some of the language in *Harris* supports the state's contention that there must be an initial determination that the identification procedure was unduly suggestive before applying the analytical framework. For example, the court stated: "Accordingly, as we explain in part II B of this opinion, we endorse the factors for determining the reliability of an identification that we identified as a matter of state evidentiary law in *State* v. *Guilbert*, supra, 306 Conn. 253, and we adopt the burden shifting framework embraced by the New Jersey Supreme Court in *Henderson for purposes of allocating the burden of proof with respect to the admissibility of an identification that was the product of an unnecessarily suggestive procedure.*" (Emphasis added.) *State* v. *Harris*, supra, 330 Conn. 115; see also id., 124 (*Henderson* identified twelve nonexclusive and nonstatic estimator variables that courts should consider *in determining reliability of identification that resulted from unnecessarily suggestive procedure*); id., 131 ("[i]n light of the foregoing conclusion, we next must determine the proper framework, for state constitutional purposes, *for evaluating the reliability of an identification that is the result of an unnecessarily suggestive procedure*" (emphasis added)). Finally, we recognize that in both *State* v. *Harris*, supra, 108, and *State* v. *Scott*, 191 Conn. App. 315, 330, 214 A.3d 871, cert. denied, 333 Conn. 917, 216 A.3d 651 (2019), the reviewing court either determined that the identification procedure had been unduly suggestive or assumed that to be the case.

After carefully reviewing *Harris*, and informed by the opinion of the New Jersey Supreme Court in *Henderson*, we conclude that an initial determination of undue suggestiveness is not required for a claim that an identification procedure violated a defendant's due process right under our state constitution. Under the *Henderson* framework, which our Supreme Court adopted in *Harris*, there is no mention of a threshold requirement, or opportunity, for the defendant to establish an unduly suggestive procedure. The court in *Harris* recognized that "the requirement that the defendant provide 'some evidence' of suggestiveness may necessitate somewhat less evidence to trigger the admissibility inquiry than is required under the *Biggers* frame-

D

Although we agree with the defendant that the court improperly failed to apply the *Harris* framework, we nevertheless conclude that the state has established that any error was harmless beyond a reasonable doubt. Initially, we note that our Supreme Court utilized a harmless error analysis in *Harris*. Specifically, it recognized "the defendant's claim that, if the trial court had applied the proper standard in the present case, it would have concluded that [the] identification of him should be excluded as insufficiently reliable." Id., 135. The court considered the facts in light of the new burden shifting framework, the related principles that the parties may present expert testimony regarding the relevant factors, and that the court should provide appropriate instructions to the jury regarding the fallibility of eyewitness identification. See id., 131–35. Ultimately, the court concluded that "the trial court's application of the *Biggers* framework instead of the reliability standard that we have adopted in the present case was

work. *State* v. *Henderson*, supra, 208 N.J. 288; see id., 293 ('estimator variables [will] no longer be ignored in the court's analysis until it [finds] that an identification procedure was impermissibly suggestive'). We agree with the court in *Henderson* that this lower threshold is appropriate both because it 'will provide more meaningful deterrence' and because 'more extensive hearings will address reliability with greater care and better reflect how memory works.' " *State* v. *Harris*, supra, 330 Conn. 132. Additionally, it explained that "*Henderson* . . . required a new framework that allows judges to consider all relevant factors that affect reliability in deciding whether an identification is admissible; that is not heavily weighted by factors that can be corrupted by suggestiveness; that promotes deterrence in a meaningful way; and that focuses on helping jurors both [to] understand and evaluate the effects that various factors have on memory . . . ." (Internal quotation marks omitted.) Id., 123. Further, our Supreme Court noted that only in the absence of *evidence* of suggestiveness, rather than a determination by the trial court, would evidence of the identification procedure affect the weight and not the admissibility of the identification. Id., 132; see also *State* v. *White*, supra, 334 Conn. 770 (where there is *evidence* of suggestive procedure, trial court should consider eight *Guilbert* estimator variables in determining whether identification is reliable). For these reasons, we are not persuaded that the defendant must establish that an identification procedure was unduly suggestive as a prerequisite to the burden shifting test set forth in *State* v. *Harris*, supra, 91.

harmless because *it is not reasonably possible that the court would have reached a different conclusion as to the admissibility of* [*the*] *identification under our new framework*. See, e.g., *State* v. *Montgomery*, 254 Conn. 694, 718, 759 A.2d 995 (2000) ('[t]he state bears the burden of demonstrating that the constitutional error was harmless beyond a reasonable doubt' . . .)." (Emphasis added.) *State* v. *Harris*, supra, 330 Conn. 137–38; see generally *State* v. *Alexander*, 343 Conn. 495, 506, 275 A.3d 199 (2022) (state bears burden of proving that error of constitutional dimension was harmless beyond reasonable doubt). We believe the same to be true in this case. That is, if the court properly had applied the *Harris* framework, it was not reasonably possible that it would have reached a different conclusion as to the admissibility of the victim's identification.

In *Harris*, the defendant argued that, had the trial court applied the proper standard, the court would have been precluded from considering the witness' level of confidence and would have been compelled to consider (1) the tendency of an eyewitness to overestimate the duration and quality of their opportunity to view a perpetrator, (2) the tendency of fear and stress to impair perception and recall, (3) the effect of a two week interval between the crime and the identification, (4) the witness' lack of sleep, (5) the poor lighting conditions, (6) the witness' nonspecific description of the perpetrator's facial features, and (7) the issue of cross-racial identification. See *State* v. *Harris*, supra, 330 Conn. 135. Our Supreme Court determined, however, that the testimony of the expert witness addressed many of these considerations. Id., 135–36. Additionally, the court explained that, although the *Biggers* factors did not specifically identify these topics, they generally directed the court to consider the opportunity of the witness to view the perpetrator at the time of the crime, the degree of attention of the witness, and the witness'

level of certainty. See id., 136. It further explained that "[t]hese general factors [from *Biggers*] encompass the more specific reliability factors we have identified in the present case and that were addressed by [the expert witness during her testimony]." Id. The court also noted that there was nothing to suggest that the trial court had failed to consider aspects of the expert's testimony because it considered them irrelevant under the *Biggers* factors. See id., 137. Under these facts and circumstances, the court concluded that the application of the *Biggers* framework was harmless. See id., 137–38.

Our decision in *State* v. *Scott*, 191 Conn. App. 315, 214 A.3d 871, cert. denied, 333 Conn. 917, 216 A.3d 651 (2019), also is instructive. In that case, the defendant claimed, inter alia, that the trial court had deprived him of his right to due process under the federal and state constitutions when it denied his motion to suppress out-of-court and in-court identifications. Id., 319. We rejected his claim under the federal constitution, concluding that, even if the out-of-court identification procedure had been unnecessarily suggestive, it nonetheless was reliable under all of the relevant circumstances. Id., 340. With respect to his state constitutional claim, we explained "that the trial court's failure to apply the state constitutional standard set forth in *State* v. *Harris*, supra, 330 Conn. 91 . . . *was harmless because the court reasonably could not have reached a different conclusion under that more demanding standard*." (Emphasis added.) *State* v. *Scott*, supra, 326. Specifically, we considered the defendant's claim regarding the variable of unconscious transference.[31] Id., 343. In addition to noting that the more specific reliability factors served as a means to define the focus

[31] The defendant's expert witness in *Scott* described unconscious transference as "a phenomenon where people can lose track of the context in which they had seen a face and mistakenly [identify] a face that they'd seen in one context as a face they've seen in another context . . . ." (Internal quotation marks omitted.) *State* v. *Scott*, supra, 191 Conn. App. 338.

of the relevant inquiry more precisely, and that there was no evidence that the court declined to consider any portion of the expert's testimony on the basis that it was not relevant under the *Biggers* factors, we also stated that the defendant had failed to identify any evidence that he was prevented from presenting at the suppression hearing or at trial on the basis that it was not relevant under *Biggers*. Id., 344–45. For these reasons, we concluded that it was not reasonably possible that the court would have reached a different conclusion regarding the admissibility of the identification under the *Harris* framework. See id., 345; see also *State* v. *Anthony*, supra, 237 N.J. 226 (New Jersey Supreme Court observed that it did not create bright-line rules requiring suppression of reliable evidence any time law enforcement makes mistake); *State* v. *Henderson*, supra, 208 N.J. 288 (court noted that new framework permitted trial courts to consider all relevant evidence affecting reliability but also recognized that most identifications will be admitted into evidence).

On the basis of the foregoing, we conclude that the defendant's claim is subject to the harmless error analysis used in both *State* v. *Harris*, supra, 330 Conn. 137–38, and *State* v. *Scott*, supra, 191 Conn. App. 345. After a scrupulous examination of the record; see *State* v. *Harris*, supra, 101–102; we are persuaded that it is not reasonably possible that the court would have reached a different conclusion regarding the admissibility of the challenged identification had it applied the *Harris* framework. We conclude that the state presented evidence establishing the reliability of the identification in light of the applicable system and estimator variables and ultimately met its burden on appeal of demonstrating that it was not reasonably possible that the result would have been different had the trial court applied the test established in *Harris*.

We first address the system variables and aspects of the administration of the photo lineup challenged by the defendant in his appellate brief. He specifically contends that Kelly and Serrano did not comply with sections of General Statutes § 54-1p.[32] Implicit in his argument is the contention that these deviations from the

[32] General Statutes § 54-1p (c) provides in relevant part: "(1) Whenever a specific person is suspected as the perpetrator of an offense, the photographs included in a photo lineup . . . shall be presented sequentially so that the eyewitness views one photograph . . . at a time in accordance with the policies and guidelines developed and promulgated by the Police Officer Standards and Training Council and the Division of State Police within the Department of Emergency Services and Public Protection pursuant to subsection (b) of this section;

"(2) The identification procedure shall be conducted in such a manner that the person conducting the procedure does not know which person in the photo lineup . . . is suspected as the perpetrator of the offense, except that, if it is not practicable to conduct a photo lineup in such a manner, the photo lineup shall be conducted by the use of a folder shuffle method, computer program or other comparable method so that the person conducting the procedure does not know which photograph the eyewitness is viewing during the procedure;

"(3) The eyewitness shall be instructed prior to the identification procedure: (A) That the eyewitness will be asked to view an array of photographs . . . and that each photograph . . . will be presented one at a time; (B) That it is as important to exclude innocent persons as it is to identify the perpetrator; (C) That the persons in a photo lineup . . . may not look exactly as they did on the date of the offense because features like facial or head hair can change; (D) That the perpetrator may or may not be among the persons in the photo lineup . . . (E) That the eyewitness should not feel compelled to make an identification; (F) That the eyewitness should take as much time as needed in making a decision; and (G) That the police will continue to investigate the offense regardless of whether the eyewitness makes an identification;

"(4) In addition to the instructions required by subdivision (3) of this subsection, the eyewitness shall be given such instructions as may be developed and promulgated by the Police Officer Standards and Training Council and the Division of State Police within the Department of Emergency Services and Public Protection pursuant to subsection (b) of this section;

"(5) The photo lineup . . . shall be composed so that the fillers generally fit the description of the person suspected as the perpetrator and . . . so that the photograph of the person suspected as the perpetrator resembles his or her appearance at the time of the offense and does not unduly stand out;

"(6) If the eyewitness has previously viewed a photo lineup . . . in connection with the identification of another person suspected of involvement in the offense, the fillers in the lineup in which . . . the photograph of the

statutory requirements violated his state constitutional right to due process. We disagree with the defendant. See, e.g., *State* v. *Anthony*, supra, 237 N.J. 239 (not every deviation by law enforcement in administration of photo lineup warrants suppression of identification evidence).

The defendant first asserts that Serrano's failure to read one of the instructions to the victim during the administration of the photo lineup resulted in an unreliable identification. A review of the administration of the photo lineup confirms that Serrano did not read the instruction that provides: "You should take as much time as needed in making a decision . . . ." In addressing this issue, the trial court reasoned: "Serrano's failure to read and translate instruction number 7 . . . does not render the overall fairness of the identification procedure suspect from either a constitutional due process standpoint or from an evidentiary standpoint. Rather, the court finds that under the totality of the circumstances, the manner in which the [photo lineup] was conducted was not unduly suggestive. Moreover, the general thrust of instruction number 7—take your time—is conveyed and suggested in other

person suspected as the perpetrator is included shall be different from the fillers used in any prior lineups;

"(7) At least five fillers shall be included in the photo lineup . . . in addition to the person suspected as the perpetrator;

"(8) In a photo lineup, no writings or information concerning any previous arrest of the person suspected as the perpetrator shall be visible to the eyewitness . . .

"(11) The person suspected as the perpetrator shall be the only suspected perpetrator included in the identification procedure;

"(12) Nothing shall be said to the eyewitness regarding the position in the photo lineup . . . of the person suspected as the perpetrator;

"(13) Nothing shall be said to the eyewitness that might influence the eyewitness's selection of the person suspected as the perpetrator;

"(14) If the eyewitness identifies a person as the perpetrator, the eyewitness shall not be provided any information concerning such person prior to obtaining the eyewitness's statement regarding how certain he or she is of the selection . . . ."

instructions. For example, number 6, 'You should not feel that you must make an identification,' serves to allay any sense of urgency or pressure which the witness may feel. Likewise, number 9, 'Even if you are able to make an identification you will be asked to finish the procedure by looking at all the photographs . . . until you have completed looking at each one,' imparts the message that the procedure must be undertaken with seriousness, care and deliberation. Finally, the overall demeanor of Serrano and [the victim] during the identification procedure reveals both that Serrano did not impart an air of urgency and [the victim] did not appear to be under pressure to hurry." We agree with the court's analysis. Furthermore, we note that, after Serrano had read the instructions to the victim, Kelly stated that he was going to leave the room and directed the victim to "take his time" in reviewing the photo lineup.

The defendant next contends that Serrano permitted the victim to put aside the photograph he identified as depicting his assailant while he viewed two other photographs in violation of § 54-1p (c) (1), which directs that the photographs in the lineup be viewed one at a time.[33] As previously noted in this opinion, the victim identified the defendant in the second photograph. While he looked at photographs three and four of the array, photograph two was located off to the victim's right side and remained faceup for approximately seventeen seconds. Although the victim at one point appears to glance briefly at the photograph of the defendant, he did so after saying "no" and as Serrano was turning over the third photograph. The victim then

[33] "A sequential photographic identification procedure involve[s] showing the witness the suspect and other fillers on the identification procedure one at a time, rather than the [outdated] practice of simultaneous presentation." (Internal quotation marks omitted.) *State* v. *Patterson*, 170 Conn. App. 768, 772 n.2, 156 A.3d 66, cert. denied, 325 Conn. 910, 158 A.3d 320 (2017).

quickly rejected the fourth photograph by pushing it away without comment. Most importantly, the victim never conducted an extensive side-by-side comparison of the photograph of the defendant with photographs three or four during the momentary interval when he had the two photographs in his field of vision. Before showing the victim photograph five of the lineup, Serrano discreetly turned the photograph of the defendant facedown. The victim then completed looking at the remainder of the photographs in a sequential manner. We conclude that this minor deviation, involving a fleeting glance in the direction of the defendant's photograph after the victim already had rejected a different photograph during the administration of the photo lineup, did not render the identification unreliable.

Additionally, the defendant maintains that Kelly returned to the room before the administration of the photo lineup to the victim was completed, looked at the photograph that the victim had selected, and asked the victim to sign it and to write his certainty statement regarding this selection. The defendant argues that "Kelly's presence, and the potential that his reaction to [the victim's] choice subconsciously affected [the victim's] confidence" undermined the reliability of the certainty statement, thereby violating § 54-1p (c) (2) and (14). We disagree with the defendant's contention. The video recording reveals that when Kelly returned to the room, Serrano had completed showing the photographs to the victim. Additionally, the victim already had identified the defendant as the perpetrator. The effect, if any, of Kelly's return to the room on the reliability of the identification process is not clear based on the record before us.

The defendant further claims that Kelly's statement, made prior to the administration of the photo lineup, that he had to leave the room so that another officer could administer the lineup because he knew who the

suspect was undermined the intent of § 54-1p (c) (3) (D). That provision of the statute directs that the witness must be instructed that the perpetrator may or may not be included in the array. See General Statutes § 54-1p (c) (3) (D). We disagree that Kelly's statement that he knew the identity of the suspect had any correlation to whether the defendant's photograph was included in the photo lineup. Additionally, we note that Serrano specifically had instructed the victim that "[t]he perpetrator may or may not be among the persons" in the photo lineup.

We carefully have reviewed the video recording of the administration of the photo lineup to the victim and conclude that any deviations from § 54-1p were minimal in nature. Serrano adhered to the spirit of the statutorily mandated identification procedures. Moreover, the defendant fails to support his § 54-1p arguments beyond reference to general principles of law. Instead, he appears to equate any deviation from the requirements of § 54-1p, no matter how slight, as automatically resulting in an unreliable identification. Such a conclusion is not supported by our case law. For example, in *State* v. *Grant*, 154 Conn. App. 293, 312 n.10, 112 A.3d 175 (2014), cert. denied, 315 Conn. 928, 109 A.3d 923 (2015), we stated: "This court has made clear that it views the procedures in § 54-1p as reflecting 'best practices' that are not constitutionally mandated. . . . It is noteworthy that the statute does not include any remedy for noncompliance, such as imposing a presumption of suggestiveness if the recommended procedures are not followed." (Citation omitted; internal quotation marks omitted.) See also *State* v. *Johnson*, 149 Conn. App. 816, 827 n.9, 89 A.3d 983, cert. denied, 312 Conn. 915, 93 A.3d 597 (2014); see generally *State* v. *Harris*, supra, 330 Conn. 134 n.32 (Supreme Court not persuaded by contention that any material violation of identification procedures required by § 54-1p should

render identification inadmissible per se); *State* v. *Henderson*, supra, 208 N.J. 303 ("[t]he framework avoids bright-line rules that would lead to suppression of reliable evidence any time a law enforcement officer makes a mistake").

The defendant also argues that Kelly's use of a photograph of the defendant in the lineup wherein he was wearing the same shirt as the one in the Facebook photograph violated § 54-1p (c) (5), which provides that "[t]he photo lineup . . . shall be composed so that the fillers generally fit the description of the person suspected as the perpetrator and . . . so that the photograph of the person suspected as the perpetrator resembles his or her appearance at the time of the offense and does not unduly stand out . . . ." This argument challenges both a system and an estimator variable. Regarding the former, the defendant contends that Kelly used a photograph of the defendant wearing a shirt with a red collar in the photo lineup that was the same as the one he wore in the Facebook photograph. As to the latter, he claims that the witness viewed multiple photographs of the defendant, i.e., the Facebook photograph and his photograph in the lineup, which was suggestive because that procedure emphasized the defendant, thereby increasing the risk of misidentification.

We are not persuaded by either of these arguments. In the lineup photograph shown to the victim, the defendant is in front of a grey background and wearing a black shirt with a red collar. Kelly selected this photograph from a database. This image clearly depicts the defendant's facial features, including his eyes, mouth, nose, and facial hair, and ends at the base of his throat. In contrast, the Facebook photograph is dark, and it is difficult to discern the defendant's face and clothing. This image shows the defendant from the top of his head to his knees, and he is partially obscured by the

men positioned on either side of him. The red collar is difficult to visualize due to the darkness of the image and the fact that it is partially blocked by a gold chain.[34] For these reasons, we are convinced that § 54-1p (c) (5) was not violated, in that the defendant did not unduly stand out due to his shirt and that the victim was not shown multiple images clearly depicting the defendant during the photo identification process so as to render the victim's identification unconstitutionally unreliable.

As for the other relevant estimator variables, the state presented evidence that the area where the stabbing had occurred was "pretty bright" from the "frequent overhead streetlights" and "ambient lighting from the businesses and residences." See *State* v. *Harris*, supra, 330 Conn. 124 n.25 (circumstances under which eyewitness viewed perpetrator during commission of crime, such as lighting, are considered estimator variables). The court credited and relied on this evidence in its memorandum of decision. The court determined that this case did not involve a cross-racial identification. See id., 124 n.26. There was no evidence that the victim was aware that his attacker had a weapon. See id. Additionally, the victim provided a certainty statement of between 70 and 80 percent. See id.[35] During his November 13, 2017 interview with Kelly, the victim recalled details including where Veloz parked. The court also observed that the victim's description of the stabbing incident was "substantially similar" to that recounted by Veloz. On the basis of these facts, the court found

[34] At trial, the victim stated that the defendant "could be" wearing the same shirt in the two photographs.

[35] We acknowledge that other estimator variables weigh in favor of the defendant. For example, the victim likely experienced stress during the sudden and brief physical altercation. See *State* v. *Harris*, supra, 330 Conn. 124 n.26.

"that to the extent [the victim] may have been intoxicated, it did not render his identification of the defendant unreliable." See *State* v. *Harris*, supra, 124 n.26 (witness characteristics, such as use of alcohol, are *Henderson* estimator variables). The defendant does not challenge these findings on appeal, all of which support the reliability of the victim's identification.

The state presented ample evidence of both system and estimator variables that support a determination that the photo identification by the victim was reliable, as required by *Harris*. Further, on the basis of our review of the record, we are satisfied that the victim's identification of the defendant did not result in a "substantial likelihood of misidentification." Id., 131.[36] We emphasize that, in most cases, a witness identification will be presented to a jury because the threshold for suppression remains high, as a defendant ultimately must demonstrate a "very substantial likelihood of irreparable misidentification." (Internal quotation marks omitted.) *State* v. *Anthony*, supra, 237 N.J. 226. Accordingly, we conclude that the application of the *Biggers* framework by the trial court was harmless because it is not reasonably possible that the court would have reached a different conclusion as to the admissibility of the identification under the framework required for state constitutional due process claims as set forth in *State* v. *Harris*, supra, 330 Conn. 91.[37]

[36] At the suppression hearing, the defendant cross-examined the state's witnesses, Kelly, Serrano and Valentin, but chose not to present any additional witnesses or present other relevant evidence regarding system and estimator variables. As recognized in *Harris*, "both the defendant and the state may adduce expert testimony regarding recent scientific developments that cast light on particular factors, or that establish the existence of additional relevant factors . . . ." *State* v. *Harris*, supra, 330 Conn. 134.

[37] We also note that Veloz' identification supports the conviction of the defendant in the present case and would support an appellate conclusion of harmless error. "The harmless error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence . . . and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather

II

The defendant next claims that the court abused its discretion in denying his motion in limine to preclude his identification in the photo lineup administered to the victim. Specifically, he argues that the court should have precluded the victim's identification[38] pursuant to the rule set forth in *State* v. *Holliman*, supra, 214 Conn. 38, and that the prejudicial impact of this evidence outweighed its probative value. We disagree.

The following additional facts are necessary for the resolution of this claim. As mentioned previously in this opinion, defense counsel filed a motion in limine, dated November 4, 2019, to preclude the in-court and out-of-court identifications of the defendant.[39] See footnote

than on the virtually inevitable presence of immaterial error." (Internal quotation marks omitted.) *State* v. *Ayala*, 324 Conn. 571, 591, 153 A.3d 588 (2017); see also *State* v. *Braswell*, 318 Conn. 815, 837, 123 A.3d 835 (2015).

In *State* v. *Artis*, 314 Conn. 131, 145–56, 101 A.3d 915 (2014), our Supreme Court reconsidered its prior holding in *State* v. *Gordon*, 185 Conn. 402, 441 A.2d 119 (1981), and concluded that harmless error review applies to the admission of unreliable eyewitness identifications that are the product of unnecessarily suggestive procedures. It emphasized that, "because of the constitutional magnitude of the error, the burden falls on the state to prove that the admission of the tainted identification was harmless beyond a reasonable doubt." *State* v. *Artis*, supra, 154.

In the present case, Veloz provided the police with a "highly detailed and specific description" of the defendant on the night of the incident. Veloz was not aware of a weapon during the incident. Veloz had provided a detailed description of the defendant, both his physical appearance and his clothing, to the police shortly after the stabbing. Veloz also knew the defendant due to their shared employment history. Veloz did not see the Facebook photograph of the defendant. Finally, the defendant does not challenge the manner in which the photo lineup was administered to Veloz. For these reasons, even if we were to conclude that the court improperly permitted the identifications of the defendant by the victim, we would determine that any such error was harmless as a result of the identifications made by Veloz.

[38] Although the motion in limine addressed the identifications made by the victim and Veloz, on appeal the defendant challenges only the identification made by the victim.

[39] The defendant argued in his motion, inter alia, that "as an evidentiary matter said [out-of-court] identification is not relevant or the probative value of said evidence is outweighed by the prejudice" and, therefore, it should

12 of this opinion. The motion relied on, inter alia, evidentiary principles in accordance with *State* v. *Holliman*, supra, 214 Conn. 46–49. Defense counsel contended that, in *Holliman*, "the court held that as an evidentiary matter when a defendant has claimed an eyewitness identification was the product of unduly suggestive conduct by a private actor, the court must determine first whether that conduct was unnecessarily [suggestive], and second, [if] it is found to be, whether the [identification] is nevertheless reliable based upon examination of the totality [of the] circumstances." Defense counsel further argued that the evidence was neither relevant nor probative and that its prejudicial impact outweighed the probative value. The court orally denied the motion in limine.[40]

In addressing the defendant's evidentiary claim in its June 30, 2021 memorandum of decision, the court stated that there was no risk of misidentification due to cross-racial identification, the lighting conditions were conducive to making an accurate identification, and Veloz was not affected by the presence of a weapon. The court also noted that the victim's description of the attack was substantially similar to that of Veloz, "which renders each of their observations and identifications all the more reliable. In short, under the totality of the

be excluded. In support of this argument, the defendant cited to *State* v. *Johnson*, supra, 312 Conn. 687; *State* v. *Holliman*, supra, 214 Conn. 46; and §§ 4-1 and 4-3 of the Connecticut Code of Evidence.

[40] Specifically, the court stated: "Well, this morning before coming out on the bench, I was reviewing my draft of the jury charge, particularly the charge with respect to identification. I think that all of the factors . . . that you address in your motion in limine are addressed in my draft charge and will be addressed in the final charge to the jury such that [a] reasonable trier of fact will be in a position to assess all of these factors that you're raising. The witnesses will be subject to cross-examination and I . . . do not believe that the . . . nonstate action was so unduly . . . suggestive that it should preclude the state from offering identification testimony . . . at trial. Accordingly, the motion in limine to preclude in- and out-of-court identification of the defendant is denied."

circumstances, [the victim] . . . had an opportunity to make an accurate identification of the defendant such that [his] identification testimony is admissible as relevant and probative."[41]

We begin our analysis with a discussion of the relevant case law. In *State* v. *Holliman*, supra, 214 Conn. 39–40, J was sexually assaulted and robbed outside of a convenience store. Earlier that day, A, a friend of J's sister, had multiple unsettling interactions with the defendant, one of which had occurred at the convenience store. Id., 40–41. After learning of J's assault, A suspected the defendant as the perpetrator. Id., 41. Approximately three weeks later, A observed the defendant at the convenience store. Id. A and members of J's family followed the defendant to a supermarket in another town and then decided to return with J. Id. In the supermarket parking lot, A pointed to the defendant and repeatedly asked J if this was the person who had assaulted and robbed her. Id., 41–42. J responded in the affirmative. Id., 42. A then called the police, who arrested the defendant. Id.

[41] We disagree with the defendant's assertion that the court failed to balance the probative value of the victim's identification with its prejudicial impact. The court stated in its oral denial of the defendant's motion that the private actor's actions were not "so unduly . . . suggestive" so as to preclude the prosecutor from presenting this evidence at trial. Furthermore, in its memorandum of decision, the court described the victim's identification as being "admissible as relevant and probative." Given the record in this case, we agree with the following statement from the state's brief: "Our courts do not . . . require a trial court to use some talismanic phraseology in order to satisfy this balancing process. Rather . . . in order for this test to be satisfied, a reviewing court must be able to infer from the entire record that the trial court considered the prejudicial effect of the evidence against its probative nature before making a ruling. *State* v. *James G.*, 268 Conn. 382, 395 [844 A.2d 810] (2004). Because the court held a full evidentiary hearing and issued a twenty-one page memorandum of decision addressing the defendant's constitutional and evidentiary arguments, at the end of which it specifically found the identification to be reliable, relevant and probative, this court may infer that the trial court conducted the requisite balancing test." (Emphasis omitted; internal quotation marks omitted.)

The defendant moved to suppress J's pretrial identification of him in the supermarket parking lot. Id. On appeal, the defendant claimed that this identification constituted a violation of his federal right to due process. Id., 42–43. Our Supreme Court explained that "[t]he most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the [d]ue [p]rocess [c]lause." (Internal quotation marks omitted.) Id., 43. In rejecting the defendant's constitutional claim, the court stated: "[I]t is well established that conduct that may fairly be characterized as state action is a necessary predicate to a challenge under the due process clause of the fourteenth amendment to the United States constitution. The defendant has failed to identify any state action in the pretrial confrontation between J and the defendant. Accordingly, the trial court's denial of the defendant's motion to suppress J's identification and the subsequent admission into evidence at trial of that identification did not violate the defendant's right to due process of law." Id., 45–46.

The court in *Holliman* next agreed with the parties that, "even if the defendant's claim has no constitutional underpinning, the criteria established for determining the admissibility of identifications in the due process context are appropriate guidelines by which to determine the admissibility of identifications that result from procedures conducted by civilians. . . . Accordingly, we will engage in the two-pronged inquiry traditionally applied to identifications involving state action to determine the admissibility at trial of J's identification. [F]irst, it must be determined whether the identification procedure was unnecessarily suggestive, and second, if it is found to be so, it must be determined whether the identification was nevertheless reliable based on an examination of the totality of the circumstances." (Footnote omitted; internal quotation marks omitted.)

Id., 46; see also *State* v. *Berthiaume*, 171 Conn. App. 436, 453, 157 A.3d 681, cert. denied, 325 Conn. 926, 169 A.3d 231, cert. denied, U.S. , 138 S. Ct. 403, 199 L. Ed. 2d 296 (2017). The court reasoned that the identification procedure was not unnecessarily suggestive, and, therefore, the trial court properly denied the defendant's motion to suppress. *State* v. *Holliman*, supra, 214 Conn. 49; see also *State* v. *Johnson*, supra, 312 Conn. 700 (admissibility of eyewitness identification that defendant claimed to be result of unduly suggestive conduct by private actor governed by *State* v. *Holliman*, supra, 45–46, and, in such scenario, trial court must apply *Biggers* framework and determine whether conduct by private actor was unnecessarily suggestive and, if so, whether identification was nevertheless reliable based on examination of totality of circumstances in determining whether to admit identification into evidence).[42]

[42] Former Chief Justice Rogers authored a concurring opinion to express her "disagreement with the necessity for the special evidentiary rule of *Holliman* and to suggest that, when the issue squarely presents itself in a future appeal, this court abandon that rule and instead hold, as did the United States Supreme Court in *Perry* v. *New Hampshire*, [supra, 565 U.S. 228], that potentially unreliable eyewitness identifications resulting from suggestive procedures undertaken by private actors should be evaluated like any other potentially unreliable evidence—namely, by a fully informed, properly instructed jury within the confines of a trial employing the usual array of constitutional safeguards." *State* v. *Johnson*, supra, 312 Conn. 706–707 (*Rogers*, *C. J.*, concurring); see generally *State* v. *Patterson*, 170 Conn. App. 768, 783 n.15, 156 A.3d 66, cert. denied, 325 Conn. 910, 158 A.3d 320 (2017). Stated differently, in her view, "no rule of admissibility should apply other than §§ 4-2 and 4-3 of the Connecticut Code of Evidence, which together provide, in short, that relevant evidence presumptively is admissible, unless the potential harm resulting from its admission outweighs its probative value." *State* v. *Johnson*, supra, 707 (*Rogers*, *C. J.*, concurring). The majority in *Johnson* also questioned the need for the *Holliman* rule, given that the rationale for excluding an unreliable identification involving suggestive conduct by a state actor is to punish and deter such improper government action, and that rationale is absent in cases involving a private actor. See *State* v. *Johnson*, supra, 704 n.18.

Although recognizing that, as an intermediate appellate court, we cannot alter or deviate from the binding precedent from our Supreme Court, the

Next, we set forth our standard of review. "When we review an evidentiary claim, our standard of review is clear. Unless an evidentiary ruling involves a clear misconception of the law, the [t]rial court has broad discretion in ruling on the admissibility . . . of evidence. . . . The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling . . . ." (Internal quotation marks omitted.) *State* v. *Qayyum*, 344 Conn. 302, 315, 279 A.3d 172 (2022); see also *State* v. *Hazard*, 201 Conn. App. 46, 70–71, 240 A.3d 749, cert. denied, 336 Conn. 901, 242 A.3d 711 (2020).

The state contends that *State* v. *Patterson*, 170 Conn. App. 768, 156 A.3d 66, cert. denied, 325 Conn. 910, 158 A.3d 320 (2017), presented a similar situation to the facts of the present case. In *Patterson*, the defendant entered the victim's residence without permission and

state nonetheless argues in its brief that the rule of *Holliman* should be abandoned. See, e.g., *State* v. *Siler*, 204 Conn. App. 171, 178, 253 A.3d 995, cert. denied, 343 Conn. 912, 273 A.3d 694 (2021); *State* v. *Madera*, 160 Conn. App. 851, 862, 125 A.3d 1071 (2015). The sole purpose of the state's inclusion of this matter in its brief is to preserve it for further review.

We also are mindful that, because our Supreme Court has determined that the *Biggers* framework has been undermined by recent scientific research and does not sufficiently protect the state constitutional due process rights of the citizens of this state, *Holliman*'s reliance on those factors may be revisited at some point. See, e.g., *State* v. *Johnson*, supra, 312 Conn. 702–703 n.17. In his appellate brief, the defendant mentions, in passing and without extensive discussion or analysis, that the trial court should have applied the *Harris* factors in deciding this evidentiary issue rather than the *Biggers* framework. He failed to raise this claim to the trial court, leaving us with an unpreserved, and thus unreviewable, evidentiary claim. See, e.g., *State* v. *Waters*, supra, 214 Conn. App. 314. Furthermore, the defendant failed to brief this claim adequately. See, e.g., *State* v. *McKinney*, 209 Conn. App. 363, 376 n.18, 268 A.3d 134 (2021), cert. denied, 341 Conn. 903, 268 A.3d 77 (2022). Finally, as previously noted, we are not at liberty to reconsider the holdings of our Supreme Court. For these reasons, we decline to address whether the *Harris* test should replace the *Biggers* framework in the context of the *Holliman* rule.

attempted to steal certain items. Id., 771. The victim, who was in his bedroom at the time of this incursion, recalled having seen the defendant on the local news. Id. The victim checked the website of a television station and saw a photograph of the defendant in an article relating to a recent burglary. Id., 771–72. On appeal, the defendant claimed, inter alia, that the victim's conduct in searching for the photograph on the Internet in order to identify the defendant was unnecessarily suggestive. Id., 781. In rejecting this claim, we stated: "We agree with the court's finding that [the victim's] conduct was not unnecessarily suggestive. The defendant cites to no case law, and we are aware of none, which suggests that searching for an individual's photograph online after observing that individual in person constitutes unnecessarily suggestive conduct." (Internal quotation marks omitted.) Id., 783.

Similarly, we conclude that the court in the present case did not abuse its discretion in determining that the victim's viewing of the Facebook photograph was not *unnecessarily* suggestive. We further conclude, for the reasons previously set forth in this opinion, that the victim's identification was nonetheless reliable. Finally, even if we were to conclude that the court had abused its discretion in admitting the out-of-court identification into evidence, any such error would be harmless in light of the other evidence, particularly the positive identification of the defendant made by Veloz. For these reasons, this claim fails.

III

The defendant finally claims that the court abused its discretion and violated his constitutional right to present a defense by refusing to instruct the jury in accordance with his request to charge on the subject of eyewitness identification testimony. He argues that the court improperly declined to charge the jury in accordance with his proposed instructions, based on

Massachusetts Model Eyewitness Identification Instruction 9.160,[43] and that the charge given by the

[43] The defendant's request to charge the jury on the issue of identification testimony stated in relevant part: "Where a witness has identified the defendant as the person who committed (or participated in) the alleged crime(s), you should examine the identification with care. As with any witness, you must determine the witness's credibility, that is, do you believe the witness is being honest? Even if you are convinced that the witness believes his or her identification is correct, you still must consider the possibility that the witness made a mistake in the identification. A witness may honestly believe he or she saw a person, but perceive or remember the event inaccurately. You must decide whether the witness's identification is not only truthful, but accurate.

"People have the ability to recognize others they have seen and to accurately identify them at a later time, but research and experience have shown that people sometimes make mistakes in identification.

"The mind does not work like a video recorder. A person cannot just replay a mental recording to remember what happened. Memory and perception are much more complicated. Remembering something require[s] three steps. First, a person sees an event. Second, the person's mind stores information about the event. Third, the person recalls stored information. At each of these stages, a variety of factors may affect—or even alter—someone's memory of what happened and thereby affect the accuracy of identification testimony. This can happen without the witness being aware of it.

"I am going to list some factors that you should consider in determining whether identification testimony is accurate.

"a. You should consider whether the person was disguised or had his or her facial features obscured. For example, if the person wore a hat, hoodie or sunglasses, it may affect the witness's ability to accurately identify the person.

"b. You should consider the physical and mental characteristics of the witness when the observation was made. For example, how good was the witness's eyesight? Was the witness experiencing illness, injury, or fatigue? Was the witness under a high level of stress? High levels of stress may reduce a person's ability to make an accurate identification.

"c. You should consider whether, at the time of the observation the witness was under the influence of alcohol or drugs, if so, to what degree.

"d. You should consider how much time passed between the event observed and the identification. Generally, memory is most accurate immediately after the event and beings to fade soon thereafter.

"e. You should consider that the accuracy of identification testimony may be affected by information that the witness received between the event and the identification, or received after the identification. Such information may include identifications made by other witnesses, physical description given by other witnesses, photographs or media accounts, or any other information that may affect the independence or accuracy of a witness's identification. Exposure to such information not only may affect the accuracy of an identification, but also may affect the witness's certainty in the identification and the witness's memory about the quality of his or her opportunity to view

court, based on Connecticut Criminal Jury Instruction 2.6-4 (revised to November 20, 2017), failed to give proper guidance to the jury. He contends that the court should have instructed the jury specifically on the stages of memory and recall, good faith misidentification, and the effects of high-level stress, disguise, intoxication, and after-acquired information. We conclude that the defendant's claim is not of constitutional magnitude and that the court's instructions were not improper.

The following additional facts are necessary for our discussion. On January 17, 2020, the defendant presented expert testimony from Michael Leippe, a professor and social psychologist, to the jury.[44] Leippe's

the event. The witness may not realize that his or her memory has been affected by this information.

"An identification made after suggestive conduct by the police or others should be scrutinized with great care. Suggestive conduct may include anything that a person says or does that might influence the witness to identify a particular individual. Suggestive conduct need not be intentional and the person doing the 'suggesting' may not realize that he or she is doing anything suggestive."

[44] In *State* v. *Guilbert*, supra, 306 Conn. 220–21, our Supreme Court overruled *State* v. *Kemp*, 199 Conn. 473, 477, 507 A.2d 1387 (1986), and *State* v. *McClendon*, 248 Conn. 572, 586, 730 A.2d 1107 (1999), which had concluded that an average member of the jury knew about the factors that affected the reliability of eyewitness identification and that expert testimony on that issue was disfavored because it invaded the province of the jury to determine what weight to give that evidence. Specifically, our Supreme Court stated: "[There is now] the widespread judicial recognition that eyewitness identifications are potentially unreliable in a variety of ways unknown to the average juror. This broad based judicial recognition tracks a near perfect scientific consensus. The extensive and comprehensive scientific research, as reflected in hundreds of peer reviewed studies and meta-analyses, convincingly demonstrates the fallibility of eyewitness identification testimony and pinpoints an array of variables that are most likely to lead to a mistaken identification. [T]he scientific evidence . . . is both reliable and useful. . . . Experimental methods and findings have been tested and retested, subjected to scientific scrutiny through peer-reviewed journals, evaluated through the lens of meta-analyses, and replicated at times in real-world settings. . . . [C]onsensus exists among the experts . . . within the . . . research community. . . . [T]he science abundantly demonstrates the many vagaries of memory encoding, storage and retrieval; the malleability of memory; the contaminating effects of extrinsic information; the influence of police interview techniques and identification procedures; and the many other factors that bear on the reliability of eyewitness identifications." (Cita-

research focused on areas relating to eyewitness identification and the factors relating to memory. Leippe explained that there are three stages of memory: the encoding or acquisition stage, the retention stage, and the retrieval stage. At the outset, Leippe stated that memory is not static, akin to a video recording, but rather "an organized constructive process so . . . lots of things . . . can happen after a person's already encoded a memory [that] can serve to change their memory to integrate their memory with other memories with other information." He also addressed the various factors that can influence an eyewitness' memory at each of the three stages of memory.

With respect to the encoding or acquisition stage, Leippe testified that some of the factors that could disrupt the accuracy of an eyewitness' recollection of a witnessed event include lighting, distance, duration, stress, fear, injury, alcohol intoxication, a disguise, the number of perpetrators, and the amount of activity during an event. With regard to the retention stage, Leippe stated that memories become integrated with and influenced by other memories. Furthermore, he stated that the longer the time between the witnessing of an event and the memory test, the less accurate the eyewitness becomes. As to the retrieval stage, Leippe explained that when it is suggested or told to an eyewitness that a suspect is included in a photo lineup, that eyewitness

tions omitted; footnotes omitted; internal quotation marks omitted.) *State* v. *Guilbert*, supra, 234–37; see also *State* v. *Gore*, 342 Conn. 129, 160–61, 269 A.3d 1 (2022); *State* v. *Scott*, supra, 191 Conn. App. 342 n.34; see generally *State* v. *White*, supra, 334 Conn. 771 (even in cases where identification is not preceded by unnecessarily suggestive procedure, defendant is entitled to present expert testimony on reliability of eyewitness testimony).

The court in *Guilbert* also concluded that testimony by a qualified expert witness on the fallibility of eyewitness identification was admissible pursuant to *State* v. *Porter*, 241 Conn. 57, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998), when that testimony would assist the jury with its evaluation of the identification evidence. *State* v. *Guilbert*, supra, 306 Conn. 221.

is pressured to select someone who best resembles their memory. Leippe also explained the concept of photo biased identification as something that occurs when, "after the event, but before the identification, people are exposed to . . . a picture of . . . the suspect . . . and it biases their original memory because . . . that picture could be incorporated into their memory for the original event or it could overwrite the original memory." Finally, Leippe described unconscious transference, which occurs when an eyewitness confuses the context of a viewed photograph and transfers the recognition of an individual to the events of criminal activity. The state cross-examined Leippe but did not present its own expert witness.

During the charging conference held on January 15, 2020, defense counsel requested that the court's proposed instructions on the issue of identity be replaced with his request to charge. The prosecutor countered that the defendant's proposed charge was not in accordance with Connecticut law, was not part of this state's model jury instructions, and the court's charge, considered as a whole, covered the issues contained in the language suggested by defense counsel. The court agreed to review the proposed language submitted by defense counsel.

Two days later, the court and counsel again reviewed the proposed jury charge. Defense counsel noted his objection to the court's rejection of his proposed language with respect to the issue of identity and identification. In response, the court stated: "Yes. Thank you for reminding me of that, Counsel. I did look very carefully at that. I think that the Connecticut standard charge, quite frankly, is easier to understand. No disrespect to my colleagues to the north and to the extent that Connecticut already has an established charge on identity, I—I determine to follow that."

On January 21, 2020, the court charged the jury. It directed the members of the jury to decide what testimony to believe and not believe, based in part on "how well the witness was able to recall and describe those things . . . ." It also instructed the jury that if a witness deliberately testified falsely in some respect, then it should consider carefully whether to rely on any of the testimony from that witness. Furthermore, it stated: "In deciding whether or not to believe a witness, keep in mind that people sometimes forget things. You need to consider, therefore, whether a contradiction is an innocent lapse of memory or an intentional falsehood, and that may depend on whether the contradiction has to do with an important fact or with only a small detail."

The court further provided the jury with specific instructions regarding the identity of the defendant as the perpetrator of the criminal conduct alleged. Specifically, it stated: "[I]n arriving at a determination as to the matter of identification, *you should consider all the facts and circumstances that existed at the time of the observation of the perpetrator by each witness*. In this regard, the reliability of each witness is of paramount importance, since identification testimony is an expression of belief or impression by the witness. Its value depends upon the opportunity and ability of the witness to observe the perpetrator at the time of the event and to make an accurate identification later. It is for you to decide how much weight to place upon such testimony.

"Capacity and opportunity of the witness to observe the perpetrator: In assessing the identification of the defendant as the perpetrator by any witness, *you should take into account whether the witness had adequate opportunity and ability to observe the perpetrator on the date in question. This will be affected by such considerations as the length of—length of time available to make the observation; the distance between the witness and the perpetrator; the lighting conditions*

at the time of the offense; whether the witness had known or seen the person in the past; the history, if any, between them, including any degree of animosity; and whether anything distracted the attention of the witness during the incident. You should also consider the witness' physical and emotional condition at the time of the incident and the witness' powers of observation in general. . . .

"Circumstances of identification: *Furthermore, you should consider the length of time that elapsed between the occurrence of the crime and the identification of the defendant by the witness. You may also consider the strength of the identification, including the witness' degree of certainty. Certainty, however, does not mean accuracy.* You should also take into account the circumstances under which the witness first viewed and identified the defendant, the suggestibility, if any, of the procedure used in that viewing, any physical descriptions that the witness may have given to the police, and all the other factors which you find relating to reliability or lack of reliability of the identification of the defendant.

"You may also take into account that an identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness. . . .

"Indicating to a witness that a suspect is present in an identification procedure or failing to warn the witness that the perpetrator may or may not be in the procedure may increase the likelihood that the witness will select one of the individuals in the procedure even when the perpetrator is not present. Thus, such action on the part of the procedure administrator may increase the probability of a misidentification. . . .

"Credibility of witness: You will subject the testimony of any identification witness to the same standards of credibility that apply to all of the witness[es]. When assessing the credibility of the testimony as it relates to the issue of identification, keep in mind that it is not sufficient that the witness be free from doubt as to the correctness of the identification of the defendant; rather, you must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may find him guilty on any charge.

"*You also heard the testimony of . . . Leippe on research on eyewitness identification.* You should—you should evaluate that testimony as I have instructed you on expert testimony.

"Conclusion: In short, you must consider the totality of the circumstances affecting the identification. Remember, the state has the burden to not only prove every element of the crime but also the identity of the defendant as the perpetrator of the crime. You must be satisfied beyond a reasonable doubt of the identity of the defendant as the one who committed the crime, or you must find the defendant not guilty. If you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty." (Emphasis added.)

On appeal, the defendant claims that the court erred in denying his request to instruct the jury with his proposed language regarding eyewitness identification, which was based, in part, on language from the Massachusetts Model Eyewitness Identification Instruction. Specifically, he contends that the court's charge failed to address the following factors relevant to the accuracy of the eyewitness identifications: good faith mistaken identification; the common misperception that memory is like a video recording; the stages of memory in an identification; the effect of concealing a portion of the

perpetrator's head or features; and the effects that high levels of stress, intoxication, delay between the event and the identification procedure, and information given to the witness by others could have on the accuracy of the identification. The defendant additionally argues that Leippe's expert testimony did not constitute an adequate substitute for proper jury instructions. As a result, the defendant argues that the court's instructions denied him his right to due process, failed to guide the jury properly with respect to the identifications made by the victim and Veloz, and misled the jury. We do not agree.[45]

At the outset, we note that "[i]t is a well established principle that a defendant is entitled to have the jury correctly and adequately instructed on the pertinent principles of substantive law. . . . The primary purpose of the charge to the jury is to assist [it] in applying the law correctly to the facts which [it] find[s] to be established. . . . [T]he test of a court's charge is not whether it is as accurate upon legal principles as the opinions of a court of last resort but 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. . . . 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." (Citation omitted; internal quotation marks omitted.) *State* v. *Hazard*, supra, 201 Conn. App. 77–78.

We must first determine whether this claim is of constitutional magnitude. Specifically, the defendant

[45] Contrary to the state's argument, we note that the defendant preserved his claim regarding the court's jury instructions. The defendant filed a written request to charge and raised this issue with the court at the charging conference. See *State* v. *Salmond*, 179 Conn. App. 605, 625–26, 180 A.3d 979, cert. denied, 328 Conn. 936, 183 A.3d 1175 (2018); see also *State* v. *Wilson*, 209 Conn. App. 779, 797–98, 267 A.3d 958 (2022).

contends that the court's instructions deprived him of the right to due process to establish a defense of good faith misidentification. This court, however, on numerous occasions has rejected the claim that an improper jury instruction related to the issue of misidentification rises to the level of a constitutional violation. Moreover, "[o]ur Supreme Court has held that identification instructions are not constitutionally required and [e]ven if [a] court's instructions were less informative on the risks of misidentification . . . the issue is at most one of instructional error rather than constitutional error. A new trial would only be warranted, therefore, if the defendant could establish that it was reasonably probable that the jury was misled. . . . The ultimate test of a court's instructions is whether, taken as a whole, they fairly and adequately present the case to a 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. *Faust*, 161 Conn. App. 149, 183, 127 A.3d 1028 (2015), cert. denied, 320 Conn. 914, 131 A.3d 252 (2016); see also *State* v. *Cerilli*, 222 Conn. 556, 567, 610 A.2d 1130 (1992); *State* v. *Crosby*, 182 Conn. App. 373, 410, 190 A.3d 1, cert. denied, 330 Conn. 911, 193 A.3d 559 (2018); *State* v. *Day*, 171 Conn. App. 784, 831, 158 A.3d 323 (2017), cert. denied, 330 Conn. 924, 194 A.3d 776 (2018). We conclude, therefore, that the defendant's claim of instructional error in this case is not of constitutional magnitude.

"We review nonconstitutional claims of instructional error under the following standard. While a request to charge that is relevant to the issues in a case and that accurately states the applicable law must be honored, a [trial] court need not tailor its charge to the precise letter of such a request. . . . If a requested charge is in substance given, the [trial] 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." (Internal quotation marks omitted.) *State* v. *Crosby*, supra, 182 Conn. App. 410–11; see also *State* v. *Kitchens*, 299 Conn. 447, 455, 10 A.3d 942 (2011); *State* v. *Day*, supra, 171 Conn. App. 831–32.

Our decision in *State* v. *Day*, supra, 171 Conn. App. 784, is particularly instructive to the resolution of this claim. In that case, the defendant was convicted of assault of an elderly person in the first degree, attempt to commit robbery in the first degree, and criminal possession of a firearm. Id., 787. On appeal, the defendant challenged eyewitness identification testimony. Id., 787–88. Specifically, he claimed that his federal and state constitutional due process rights had been violated because the victims' out-of-court identifications were the result of unnecessarily suggestive procedures. Id., 788. The defendant also claimed that the court improperly had precluded certain expert testimony regarding the photo identification procedures and that the court improperly instructed the jury. Id., 788–89.

In addressing the defendant's claim regarding the court's instructions to the jury in *Day*, we initially noted: "[O]ur Supreme Court in *Guilbert* undeniably sought to protect defendants from a specific risk, that of being misidentified as perpetrators by eyewitnesses to criminal activity. . . . Although the defendant in *Guilbert* raised an evidentiary claim, and not a claim of instructional error, the court there recognized not only the importance of expert testimony as to factors affecting the reliability of eyewitness identifications, but also the value of particularized jury instructions as to those factors. [Our Supreme Court] stated: We . . . wish to reiterate that a trial court retains the discretion to decide whether, under the specific facts and circumstances presented, focused and informative jury

instructions on the fallibility of eyewitness identification evidence . . . would alone be adequate to aid the jury in evaluating the eyewitness identification at issue. We emphasize, however, that any such instructions should reflect the findings and conclusions of the relevant scientific literature pertaining to the particular variable or variables at issue in the case; broad, generalized instructions on eyewitness identifications . . . do not suffice." (Citation omitted; emphasis omitted; internal quotation marks omitted.) Id., 832;[46] see also *State* v. *Faust*, supra, 161 Conn. App. 197–98 (*Borden*, *J.*, concurring).

This court then set forth the charge given to the jury regarding eyewitness identification. See *State* v. *Day*, supra, 171 Conn. App. 833–36. We concluded that "[t]he foregoing instructions given by the trial court are precisely the sort of generalized instructions that the court in *Guilbert* described as insufficient, standing alone, to educate a jury about the current state of scientific research concerning the factors affecting the reliability of eyewitness identification testimony." Id., 836. Next, we explained that the existence of expert testimony on the issues relating to the accuracy of eyewitness identification may serve as a remedy to such generalized instructions: "However, when the court [in *Guilbert*] emphasized the need for particularized instructions . . . it noted that these are the findings and conclusions

[46] We note that in *State* v. *Crosby*, supra, 182 Conn. App. 411–12, this court expressly rejected the defendant's claim that the *Guilbert* factors are required in jury instructions. See also *State* v. *Faust*, supra, 161 Conn. App. 185 (following *Guilbert*, trial court retained discretion regarding which instructions regarding reliability of eyewitness identification were warranted given particular facts and circumstances of each case). Furthermore, given that our appellate courts have explained that a trial court must tailor its charge regarding reliability of an eyewitness identification to the evidence presented, we decline the defendant's invitation to recommend replacement language to the model identification instruction on the Judicial Branch website.

that a qualified expert would provide to the jury in the absence of the court's focused jury instructions on the eyewitness identification issue or issues presented by the case. . . . In concluding that generalized instructions that merely touch on the subject of eyewitness identification evidence do not suffice as a substitute for expert testimony on the reliability of such evidence . . . the court [in *Guilbert*] implied that such instructions are at least adequate when expert testimony is presented on that subject. Expert testimony, particularly uncontroverted testimony, fulfills the stated purpose of particularized instructions, which is obviously to educate the jury regarding the findings of scientific researchers as to the reliability of eyewitness identifications." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) Id.

The jury instructions in the present case essentially tracked those given by the trial court in *State* v. *Day*, supra, 171 Conn. App. 833–36. Similar to the facts of *Day*, the defendant here presented expert testimony on the issue of eyewitness identification, including the exact matters that the defendant now contends should have been included in the court's instructions. Specifically, the defendant claims that he "was entitled to a jury instruction that explained concepts like good faith misidentification and the stages of memory and recall. The jury also should have been instructed about high-level stress, disguise, intoxication, and after-acquired information . . . ."

Leippe testified as an expert on the factors that affect the accuracy of an eyewitness identification. He discussed the three stages of memory: encoding or acquisition, retention, and retrieval. Leippe stated that stress and fear have a "deleterious effect on memory." He indicated that one of the effects of alcohol intoxication is that it "debilitates the memory system both at the encoding stage and at the retrieval stage." Leippe agreed

that if "somebody's face is covered that's going to make it more difficult for them to be identified." Leippe also discussed the effect that after-acquired information can have on a memory, specifically that the new information will be incorporated into and potentially alter the memory of the person or event. Finally, Leippe addressed the issue of a good faith misidentification.[47]

We conclude, therefore, as we did in *State* v. *Day*, supra, 171 Conn. App. 836, that Leippe's testimony fulfilled the purpose of particularized jury instructions, namely, to educate the members of the jury regarding the science related to the fallibility of eyewitness identifications and the specific factors that may affect their reliability. See *State* v. *Crosby*, supra, 182 Conn. App. 412 (jury instructions that direct jurors in broad terms to exercise caution in evaluating eyewitness identifications are less effective than expert testimony at informing jury of potential unreliability of said identifications).[48] We further conclude that the court's instruc-

[47] The following colloquy between defense counsel and Leippe illustrates his testimony regarding the topic of good faith misidentification:

"Q. In that situation, would it be fair to say the person isn't lying but actually believes what he or she is saying?

"A. Yeah. All of the research and all of the things I'm talking about—talk about are about sincerely offered memories. Okay. People really believe that's the guy. Okay. I mean, when people make an identification, I mean, most of the time, okay, I mean, we're not talking about lies here, we're talking about things that affect memory without us being aware of—of—of these factors and sincerely believing that, yeah, that's the person."

[48] Assuming arguendo that the court had committed instructional error, the defendant would need to establish harm in order to obtain a new trial. See *State* v. *Faust*, supra, 161 Conn. App. 193. "When a defendant challenges the trial court's failure to provide a requested charge . . . [where] the error is merely of an evidentiary nature . . . the defendant must prove that it was reasonably probable that the jury was misled. . . . Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Citation omitted; internal quotation marks omitted.) Id.

In the present case, the court specifically referenced Leippe's testimony in its charge on eyewitness identification. Additionally, the issues of the reliability factors relating to the eyewitness identification were before the jury during the proceedings. See *State* v. *Day*, supra, 171 Conn. App. 838.

tions, taken as a whole, fairly and adequately presented the case to the jury in such a way that injustice was not done to the defendant pursuant to the established rules of law. Accordingly, the court's instructions were not improper.

The judgment is affirmed.

In this opinion the other judges concurred.

WILLIAM W. TAYLOR *v.* PLANNING AND ZONING COMMISSION OF THE TOWN OF WESTPORT ET AL.
(AC 45252)

Alvord, Prescott and Suarez, Js.

Syllabus

The plaintiff, who owns an unimproved lot of land in the town of Westport, appealed to the trial court from the decision of the defendant planning and zoning commission denying his application for a site plan and a special excavation and fill permit. Prior to the hearing on his application, the commission informed the plaintiff that the application was incomplete and requested that the plaintiff consent to an extension for the hearing date. In response, the plaintiff's attorney filed a memorandum with attached supplemental and revised documents with the commission one day before the scheduled hearing that set forth the reasons why she believed the application was complete. At the hearing, the commission stated that it had not reviewed the memorandum and denied the plaintiff's request to be heard regarding the completeness of the application, and it ultimately denied the application without prejudice on the basis that it was incomplete. Following a hearing, the court rendered judgment denying the plaintiff's appeal, from which the plaintiff, on the granting of certification, appealed to this court. *Held* that the trial court improperly denied the plaintiff's appeal because, under the particular circumstances of this case, the commission's failure to provide the plaintiff with an opportunity to establish a record as to why his application was complete deprived him of his right to fundamental fairness: after scheduling the plaintiff's application for a hearing, the commission became aware that the completeness of the application was in dispute, thus, the commission was required to provide the plaintiff with an

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We conclude, therefore, that the defendant has not established that it was reasonably probable that the jury was misled.

opportunity to be heard on the completeness of his application at the public hearing; moreover, in order for an appellate court to review a planning and zoning commission's decision to deny an application on the ground that the application is incomplete, a record as to why the application was incomplete must be established so that the record may be reviewed; furthermore, here, the record of the hearing before the commission, including commission members' acknowledgements that closing the hearing was unfair and certain intemperate remarks by commission members, demonstrated that the plaintiff did not receive a dispassionate consideration of his application or that the commission's decision was made reasonably and fairly after a full hearing; accordingly, the plaintiff was entitled to a hearing on his application.

Argued February 2—officially released April 11, 2023

Procedural History

Appeal from the decision of the named defendant denying the plaintiff's applications for a site plan and special excavation and fill permit, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Hon. Taggart D. Adams*, judge trial referee; judgment denying the plaintiff's appeal, from which the plaintiff, on the granting of certification, appealed to this court. *Reversed*; *judgment directed*; *new hearing*.

Laurel Fedor, for the appellant (plaintiff).

Peter V. Gelderman, for the appellees (defendants).

Opinion

PRESCOTT, J. In this certified zoning appeal, the plaintiff, William W. Taylor, appeals from the judgment of the Superior Court denying his appeal from the decision of the defendant Planning and Zoning Commission of the Town of Westport (commission),[1] denying his

[1] The town of Westport was also named as a defendant in the underlying action. The original amended complaint contained seven counts against the defendants. The court granted the defendants' motion to strike counts two through seven of that amended complaint, which were primarily brought against the town of Westport. The plaintiff pleaded over, removing counts two through seven, leaving the first count as the sole remaining count of the plaintiff's complaint.

2019 site plan and special excavation and fill permit applications.[2] The principal issue in this certified appeal is whether the court improperly concluded that the commission did not deprive the plaintiff of fundamental fairness by preventing him from being heard on whether his application was sufficiently complete such that it should be adjudicated on its merits. We reverse the judgment of the court because, under the circumstances of this case, the commission was required to provide the plaintiff with an opportunity to be heard on whether his application was complete at the public hearing on his application, prior to denying it for incompleteness.

The following facts and procedural history are relevant to our resolution of this appeal. The plaintiff owns an unimproved lot of land at 715 Post Road East in Westport (property). In 2014 and 2018, the plaintiff submitted site plan and special excavation and fill permit applications to the commission seeking its approval to build an office building on the property. In an effort to obtain the commission's approval of the 2014 and 2018 applications, the plaintiff sought and received the approval of the building design from Westport's architectural review board and also obtained the necessary zoning variances from Westport's zoning board of appeals. The plaintiff, however, ultimately withdrew his 2014 and 2018 applications to the commission.

On April 11, 2019, the plaintiff submitted to the commission the site plan and special permit for excavation and fill application that is the subject of the present appeal. The plaintiff's 2019 application sought the commission's approval to build a 4220 square foot office

[2] The plaintiff was required to submit both a site plan application and an application for a special permit for excavation and fill. These applications, however, were processed together as application #19-020. Therefore, we refer to the 2019 site plan and special permit applications together as the plaintiff's application.

building with 22 parking spaces on the property.[3] The plaintiff did not seek any additional or new approvals from the architectural review board or obtain new zoning variances for his 2019 application. The application was scheduled to be heard before the commission on June 20, 2019.[4] The plaintiff retained an attorney, Laurel Fedor, to represent his interests in the application process.

Following the submission of the application, but prior to the hearing, Cindy Tyminski, the deputy planning and zoning director for Westport, emailed Fedor on June 4, 2019, and informed her that the application was "not ready to appear" before the commission because it was incomplete. Tyminski stated that the application was incomplete because it required new variances from the zoning board of appeals, an updated traffic report to supplement the original report that was completed approximately five years earlier, a drainage report, a new approval from the architectural review board so that the board could review the modifications in the site plan in relation to the building's design, and revisions to the intended tree plantings to conform with the dictates of Westport's tree board. Tyminski requested that the plaintiff consent to an extension for the application's hearing date so that the application could be completed.[5]

[3] There is a dispute between the parties as to the extent to which the plaintiff's 2019 application differed from his 2014 and 2018 applications. This dispute, however, does not affect our resolution of this appeal.

[4] According to General Statutes § 8-3c, the commission was required to hold a public hearing on the application for a special permit, in accordance with General Statutes § 8-7d. Pursuant to § 8-7d, a hearing must be held within sixty-five days after the commission's receipt of the application, unless the petitioner or applicant consents to an extension of this period. According to § 43-5.1 of the Westport Zoning Regulations, the commission was required to consider the special permit and site plan together at the same public hearing because the special permit was dependent on the approval of the site plan. The parties do not dispute that a hearing on the application was required and had been scheduled pursuant to § 8-7d.

[5] Pursuant to General Statutes § 8-7d, the applicant may consent to an extension of the hearing date for an application.

Rather than consent to an extension, that same day, Fedor emailed Mary Young, Westport's planning and zoning director. Fedor informed Young that Tyminski had requested that the plaintiff consent to an extension in order for him to complete the application prior to it being heard. Fedor expressed her opinion that the application was complete. Fedor explained to Young in her email that the plaintiff had previously obtained the required zoning variances and architectural review board approval, the site plan had not changed since the variances and approval were obtained, the drainage report had been submitted with the plaintiff's application on April 11, 2019, the intended tree plantings on the site plan had been revised, and "[t]he traffic study was updated in 2017." Finally, Fedor stated that, for these reasons, the plaintiff wished to have the application heard, as originally scheduled, on June 20, 2019.[6]

On June 13, 2019, Tyminski distributed a memorandum to the commission regarding the plaintiff's application. Tyminski's memorandum to the commission stated that "[t]he public hearing should not be closed until all the outstanding issues are addressed. The commission may also consider a denial as the application is incomplete." In concluding that the application was incomplete, Tyminski cited the "outstanding issues" in the application that she had brought to Fedor's attention previously in her June 4, 2019 email.

After receiving a copy of Tyminski's memorandum, Fedor responded by filing[7] her own memorandum that

[6] Young responded to Fedor's email, stating: "Both [Tyminski] and I offer suggestions in the spirit of facilitating all our applicants to a successful hearing, but ultimately the choice is the applicant's whether to take our advice or leave it. Your application will remain scheduled for our June 20 [public hearing] as you are declining to [consent to] an extension and provide us with the requested materials."

[7] The memorandum was addressed to Tyminski and the commission members and stamped "received" on June 19, 2019.

set forth the reasons why she believed the application was complete and attached supplemental and revised documents to it. Fedor's memorandum was received one day before the scheduled hearing on the application. Fedor's arguments in her memorandum as to why the plaintiff's application was complete were the same arguments Fedor set forth in her email to Young. In her memorandum, Fedor first argued that the plaintiff did not need to obtain new zoning variances for his application because the site plan application had not been modified since the original variances were obtained in 2014 and 2018. In response to Tyminski's statement in her memorandum that the site plan had been modified because, unlike in the 2014 and 2018 site plans, the 2019 site plan required the removal and reconstruction of a large retaining wall on the property, Fedor argued that the site plan filed on April 11, 2019, contained a typographical error. Fedor said that a revised site plan was attached to her memorandum and that it showed that there would be "no removal or reconstruction of [the] existing concrete retaining walls." Fedor next argued that a new approval from the architectural review board should not be required because the building's design in the site plan had not changed since the architectural review board approved it in 2014. Fedor also argued that the intended tree plantings in the site plan had been revised to conform with the tree board's requirements, that the traffic report had been "updated" in 2017 and that all of this supplemental information was attached to the memorandum. She also stated that a drainage report was attached to the memorandum and previously had been submitted with the application on April 11, 2019.

On the day of the hearing, Tyminski sent an updated memorandum to the commission. Tyminski informed the commission that "additional information and revised plans" had been submitted by Fedor the day

before and that these new materials pertaining to the application had not been reviewed by planning and zoning staff members. She concluded in her June 20, 2019 memorandum that "the public hearing should not be closed until all the outstanding issues in the staff report AND supplemental report are addressed. The applicant may consider withdrawing and resubmitting after the variance and [architectural review board] approvals are received. The comission may also consider a denial as the application is incomplete."

The hearing on the application was opened on June 20, 2019, as scheduled. Fedor was present at the hearing. Immediately after opening the hearing, Paul Lebowitz, the commission chairman, told Fedor, "I don't want to hear this right now." Lebowitz explained that he did not approve of the manner in which Fedor had handled the application, particularly because she submitted a revised site plan the day before the hearing. Lebowitz told Fedor, "So what I'm going to give you is a choice, because that's what we do here. We may continue this. [Or] [y]ou may withdraw it." Fedor replied that the plaintiff would not withdraw his application and asked for an opportunity to be heard, specifically requesting fifteen minutes. Lebowitz quickly cut her off and stated, "No, no. I'm sorry. In reference to what I just addressed. Not in reference to your application. In reference to what I've asked you regarding either continue or withdraw." Fedor attempted to address the completeness of the application, but Lebowitz denied her the opportunity to be heard further on the application. Lebowitz then asked, "Any other commissioners want to weigh in on this?"

Commission member Chip Stephens[8] stated that the application should not be considered. Specifically, Stephens stated: "This commission, most of the people

[8] Chip Stephens is also known as Ronald F. Stephens.

sitting here have been through this three other times and [it has been] rejected three times because of the location, because of problems and for us to spend time that is very valuable tonight and any other time, to have your application come in in pieces at the tail end [and] for you to have treated the staff in the manner you have, bringing things in reluctantly, late and everything else, I find it wrong that this commission even move forward. We [do not] have the documents that were requested. We have a new state statute that requires when applications like this are changed quite a bit that they return to the [zoning board of appeals]. I believe [you have] been told that repeatedly by [Tyminski]. . . . I think that this commission should close this issue and then move on."

Al Gratrix, another commission member, also stated that, in his view, the application was incomplete and that the commission should not be holding a hearing on it. Stephens made a motion to close the hearing, and Gratrix seconded the motion. The commission unanimously voted to close the hearing before Fedor had the opportunity to respond to the commission's position that the application was incomplete or to present evidence in support of her position.

Following the public hearing, the commission met three times to deliberate publicly on the application. The first meeting took place on July 11, 2019, at which time Lebowitz expressed his position that, "out of fairness," the commission should provide the plaintiff another opportunity to withdraw the application. Lebowitz stated that he did not want to "short circuit any applicant." He further explained: "I [do not] like to have any applicant on any application, regardless of whether we like them, [do not] like them, like the application, [do not] like the application. . . . Regardless of whether [we have] seen the applicant before on this site, I [do not] ever want to . . . turn to an applicant

and before they say one word I say to them that I move to close. . . . [B]ecause it is an unheard application, I should have instead of saying closed, I should have said continued. Go away."

Lebowitz's opinion that the commission acted unfairly by prematurely closing the hearing was a point of contention among the commission members. Stephens, who did not agree with Lebowitz, moved to deny the application immediately, rather than provide the plaintiff with an additional opportunity to withdraw it. Stephens stated: "We voted to close [the hearing] because [the plaintiff and Fedor] stomped on the staff. The staff told them to do certain things [to] which they totally said no, [we are] not going to do it. [We are] not going to go to the [zoning board of appeals] no matter what you said, in their face. They would not provide information that was needed and we have considered this property three—at least three other times, I believe, in my tenure, which is a very troubled property. And instead of, in your words, just a few minutes ago, being contrite or helpful, or [cooperative] they completely gave the staff holy hell for asking for everything that was needed and decided. [Fedor] sat there and you gave her plenty of opportunity to come back, to withdraw or to get it right. She looked at you, [Lebowitz], and said no, [I am] going to do this. . . .

"You did mention, you said I hate as a person to turn down something that, you know, we [did not] like the person. The person's fine. Everybody has their right to build in this town. You have a right as a landowner to do whatever you want if you can get it by the commission. [This person] was egregious. [This person] was confrontational. [This person] would not listen to our chairman, who repeatedly . . . [asked] would you like to withdraw or would you like to change this, and the answer was no. I will remind you that on the day of that application [Fedor] threw a bunch of crap at us

that was crap. We [could not] even, you know, work on that stuff. So, no, I totally disagree. I think we should have had a resolution tonight."

All other members who voiced an opinion immediately agreed with Stephens that the application should be denied. Even Lebowitz, who did not immediately agree that the application should be denied, described one of the plaintiff's previous applications as a "shit show . . . . It was horrible. The site is horrible. Everything's horrible. . . . And, quite frankly, the way we were treated by the applicant was horrible. No question about all of those things. You're absolutely a hundred percent right." Stephens also used a strong expletive to describe one of the plaintiff's previous applications.[9]

Stephens moved to deny the application. That motion was seconded by commission member Catherine Walsh. Walsh later stated: "I want to deny her, get her out and have her come back." After the motion to deny the application was seconded, but before a vote on the motion was taken, Lebowitz told the commission that he was concerned that there was no basis on which the application could be properly denied. Lebowitz initially opined that, because a hearing had not been held, there was no evidence in the record. Lebowitz stated: "Based on what though? We [did not] have any testimony. [W]e [did not] hear [from Fedor]. . . . The first thing out of my mouth when she got up was. . . I berated her for dumping on our staff . . . . I stopped her cold. She never got a chance to say anything other than the word no, which was when I asked her. So, in other words, [there is] no record of testimony. [There is] no reading in of the staff report. We never went through any of the materials . . . ." After further discussion and a brief recess, the commission members, including Lebowitz, agreed that the application materials and memoranda regarding the application were in the record

[9] Specifically, Stephens said it was: "Clustered. A 'CF.' "

because the hearing had been opened.[10] Lebowitz ultimately stated that there were "a lot of good reasons for a denial."

During this July 11, 2019 deliberation session, the commission unanimously voted to deny the plaintiff's application. The commission decided that a resolution formally denying the application would be drafted and then it would be reviewed at the next deliberation session. Prior to ending the session, Young advised the commission: "I do think [it is] good for the record, if you find yourself in a similar situation, to at least give a token five minutes to an applicant at the podium to either dig their grave further, giving more reasons for denial. But to dismiss someone who sat there for hours for the opportunity to be heard then say we [do not] want to hear you [does not] look well—"

The plaintiff's application was briefly discussed again at a deliberation session on July 18, 2019. Young told the commission that she intended to have the town attorney review the resolution denying the plaintiff's application prior to the commission voting on it.

The final deliberation session on the application was held on July 25, 2019. At the outset, Lebowitz stated that the town attorney had advised the commission to deny the application without prejudice because it was incomplete. Stephens strongly disagreed and stated that the application should be denied with prejudice. A heated discussion ensued. Following further discussion, Stephens begrudgingly agreed to deny the application without prejudice stating: "Wait till this person

[10] The resolution denying the plaintiff's application states that the planning and zoning staff notified the commission that the plaintiff had submitted a memorandum with supplemental and revised materials attached to it on June 19, 2019, but that there was inadequate time to review them prior to the June 20, 2019 public hearing. Therefore, we conclude that the commission reviewed Tyminski's June 13, 2019 and June 20, 2019 memoranda but did not review Fedor's June 19, 2019 memorandum and the supplemental and revised materials attached to it.

comes back. And I'm not reading this. I'm not giving them—" The commission reviewed the resolution and unanimously voted to deny the application without prejudice. The commission's reasons for its denial were grounded in the incompleteness of the application and the commission's need for more information and time to determine whether the application should be approved.[11]

The plaintiff appealed from the commission's denial of his application to the Superior Court, claiming that the commission (1) deprived him of a full and fair hearing on the application, (2) was biased against his application and, (3) arbitrarily denied the application. Following a hearing, the court denied the plaintiff's appeal. The court concluded that the commission's denial of the plaintiff's application without prejudice was well

[11] Specifically, the resolution cited the following reasons for denial: "(1) The application as submitted was incomplete. (2) More information is needed to confirm that this application conforms to all applicable zoning standards. (3) More information is needed to determine whether the application conforms to § 32-8.5 [of the Westport Zoning Regulations] that requires the commission [to] consider impacts to the public, health, safety, and welfare associated with the proposed excavation and fill activities. (4) More information is required to determine whether the application conforms to the special permit standards contained in § 44-6 [of the Westport] Zoning Regulations that requires in part, that the project may not have a significant adverse effect on [the] safety in the streets nor [cause] unreasonable traffic congestion in the area, nor interfere with the pattern of highway circulation. (5) More information is required to determine whether the application conforms to the legislative intent defined in § 1 of the [Westport] Zoning Regulations that requires in part, that the [commission] administer the Westport Zoning Regulations to promote health, safety, and general welfare. (6) The site plan application for development of the property is contingent upon approval of the special permit for excavation and fill activities that has not yet been granted. (7) More time is needed for [planning and zoning] staff to verify the applicant's claim that [the] revised plans submitted on [June 19, 2019] do not require further review by the zoning board of appeals and architectural review board. (8) An updated traffic safety and operations peer review needs to be conducted of the application and revised plans as authorized pursuant to § 43-6.4 of the [Westport] Zoning Regulations as the town of Westport does not have a traffic engineer on staff."

within its authority and that substantial evidence supported the commission's decision, particularly in light of the fact that the plaintiff submitted a "revised proposal" on June 19, 2019, which the planning and zoning staff was unable to review before the hearing. To support its conclusion, the court found that the plaintiff was "clearly in a hurry to obtain comission approval" and that "the record [did] not provide specific reasons for the applicant's rush, and particularly [did] not support why a revised plan submitted on June 19, 2019, had to be approved by the full comission on June 20, without input and analysis from its staff." The court also was unpersuaded by the plaintiff's claim that the commission violated his rights by failing to provide him with an opportunity to be heard on his application because the court found that the claim was "unsupported by any citation to authority." The plaintiff filed a petition for certification to appeal, which we granted. This appeal followed.

On appeal, the plaintiff claims that the court improperly (1) concluded that the commission did not violate the principles of fundamental fairness by depriving him of an opportunity to be heard on his application, (2) concluded that substantial evidence supported the commission's decision, and (3) failed to conclude that the application was complete. We conclude that the court improperly denied the plaintiff's appeal because, under the particular circumstances of this case, the commission's failure to provide the plaintiff with an opportunity to establish a record as to why his application was complete deprived him of his right to fundamental fairness. Because that issue is dispositive of the present appeal, we do not reach the plaintiff's remaining claims.

We begin by setting forth the relevant legal principles, including our standard of review. When a planning and zoning commission acts on an application for a special permit or site plan, it acts in an administrative capacity,

and it must determine whether the applicant's proposed use is one that satisfies the standards set forth in existing zoning regulations and statutes. See *Priore* v. *Haig*, 344 Conn. 636, 653, 280 A.3d 402 (2022) (when acting on special permit application, commission acts in administrative capacity and it must determine whether application meets standards set forth in zoning regulations); *Pansy Road, LLC* v. *Town Plan & Zoning Commission*, 283 Conn. 369, 375, 926 A.2d 1029 (2007) ("[w]hen reviewing a site plan application, a planning commission similarly acts in an administrative capacity and may not reject an application that complies with the relevant regulations").

A planning and zoning commission may deny an application because it fails to provide the required information pursuant to the applicable zoning regulations. See *Friedman* v. *Planning & Zoning Commission*, 222 Conn. 262, 267–69, 608 A.2d 1178 (1992). "Where an administrative agency denies an application and gives reasons for its action, the question on appeal is whether the evidence in the record reasonably supports the agency's action, and the court cannot substitute its judgment as to the weight of the evidence for that of the agency." R. Fuller, 9A Connecticut Practice Series: Land Use Law and Practice (4th Ed. 2015) § 33.3, p. 272. Accordingly, in order for an appellate court to review a planning and zoning commission's decision to deny an application for which the reason given for its denial is that the application is incomplete, a record as to why the application is incomplete must be established so that the record may be reviewed.[12]

[12] An applicant should be permitted to create a record that includes the applicant's argument as to why their application is not incomplete. Otherwise, a court would be unable to review fairly a planning and zoning commission's denial of an application on the grounds of incompleteness. The defendants conceded as much at oral argument. In the present case, the record contains the application that was submitted by the applicant, as well as the statements made by the commission members reflecting the reasons why they voted to deny the application. The consequence of the commission

Section 44 of the Westport Zoning Regulations provides in relevant part: "For all uses requiring a Special Permit or Site Plan, a complete application shall be submitted on Westport Planning and Zoning forms together with . . . the following information." Westport Zoning Regs., § 44-1. "The applicant shall obtain a written report indicating recommendations, preliminary approvals, final approvals or disapprovals from any of the following agencies having jurisdiction over the application . . . ."[13] Id., § 44-2.1. "A storm drainage analysis shall be required for any project containing . . . twenty (20) or more parking spaces in a new or expanded parking lot . . . ." Id., § 44-2.4. "A traffic impact analysis submitted by a recognized traffic engineer shall be required . . . ."[14] Id., § 44-2.5.

"[Although] proceedings before zoning and planning boards and commissions are informal and are conducted without regard to the strict rules of evidence . . . they cannot be so conducted as to violate the fundamental rules of natural justice. . . . Fundamentals

having denied the applicant the right to present evidence and arguments that were contrary to the commission's view that the application was not complete, however, is that such contrary evidence and arguments are not part of the record before this court. Because appellate review of a planning and zoning decision is confined to matters in the record, a planning and zoning commission's deprivation of an applicant's right to be heard with respect to the completeness of an application may thereafter thwart an applicant's ability to demonstrate on appeal that the commission improperly denied an application on the ground of incompleteness. Stated otherwise, prohibiting an applicant from presenting evidence and argument before the commission may unfairly insulate an erroneous ruling from review.

[13] The agencies from which approval may be required include the zoning board of appeals, architectural review board, and tree board. See Westport Zoning Regs., § 44-2.1.

[14] General Statutes § 8-3 (g) (1) provides in relevant part: "The zoning regulations may require that a site plan be filed with the commission or other municipal agency or official to aid in determining the conformity of a proposed building . . . with specific provisions of such regulations. . . . A site plan may be modified or denied only if it fails to comply with requirements already set forth in the zoning . . . regulations. . . ."

of natural justice require that there must be due notice of the hearing, and at the hearing no one may be deprived of the right to produce relevant evidence or to cross-examine witnesses produced by his adversary . . . . Put differently, [d]ue process of law requires that *the parties involved have an opportunity to know the facts on which the commission is asked to act . . . and to offer rebuttal evidence*." (Citation omitted; emphasis added; internal quotation marks omitted.) *Megin* v. *Zoning Board of Appeals*, 106 Conn. App. 602, 608–609, 942 A.2d 511, cert. denied, 289 Conn. 901, 957 A.2d 871 (2008).

"In determining whether a land use commission has violated an applicant's right to fundamental fairness, [w]e generally employ a deferential standard of review to [its] actions . . . . [C]ourts are not to substitute their judgment for that of the board, and . . . the decisions of local boards will not be disturbed as long as honest judgment *has been reasonably and fairly made after a full hearing*. . . . Judicial review of administrative process is designed to assure that administrative agencies act on evidence which is probative and reliable and act in a manner consistent with the requirements of fundamental fairness. . . . Further, we have repeatedly emphasized that [n]eutrality and impartiality of members are essential to the fair and proper operation of . . . [zoning] authorities. . . . In reviewing the challenged conduct of public officials, fairness and impartiality are fundamental." (Citations omitted; emphasis added; internal quotation marks omitted.) *Barry* v. *Historic District Commission*, 108 Conn. App. 682, 704–705, 950 A.2d 1, cert. denied, 289 Conn. 942, 959 A.2d 1008 (2008), and cert. denied, 289 Conn. 943, 959 A.2d 1008 (2008).

"The question of whether the board violated the plaintiff's right to fundamental fairness in [an] administrative proceeding presents a question of law . . . ." (Internal

quotation marks omitted.) Id., 705. "When . . . the [Superior Court] draws conclusions of law, [the scope of our appellate] review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Andrews* v. *Planning & Zoning Commission*, 97 Conn. App. 316, 319, 904 A.2d 275 (2006).

We begin by noting that the court's memorandum of decision is unclear as to whether the court reviewed the merits of the plaintiff's claim regarding his right to be heard on his application or whether it declined to review that claim because it was inadequately briefed. We construe the memorandum of decision as concluding that the court was not persuaded by the merits of the plaintiff's claim because, in its view, he had failed to cite *persuasive* authority.[15] Moreover, for the reasons we discuss further, we conclude that the court improperly held that, under the particular circumstances of this case, the plaintiff was not deprived of his right to fundamental fairness.

The defendants argue that "there was no reason to hear from the applicant where the application was incomplete." The purpose of requiring a hearing to be held on a zoning application, however, is to afford interested parties the opportunity to present their views to the commission as to how it should decide an application. See *Clifford* v. *Planning & Zoning Commission*, 280 Conn. 434, 443, 908 A.2d 1049 (2006). In the present case, the commission, having scheduled the plaintiff's

[15] To the extent that the court's holding was based on its conclusion that the plaintiff failed to adequately brief the claim, we note that, in the plaintiff's brief before the Superior Court, the plaintiff made similar arguments to those presented to this court on appeal. The plaintiff cited relevant and pertinent authority in support of his claim that fundamental fairness required that he have an opportunity to be heard on his application.

application for a hearing, became aware that the completeness of the application was in dispute and that this was the main issue that needed to be resolved prior to the hearing being closed. The commission opened the hearing and stated, for the record, its view that the application was incomplete. But the commission prohibited the plaintiff from addressing that concern.[16] Given these factual circumstances, the commission was required to provide the plaintiff with an opportunity to be heard on the completeness of his application at the public hearing.

Our conclusion that the commission deprived the plaintiff of his right to fundamental fairness is further supported by the commission's discussion of the plaintiff's application at the deliberation hearings that followed. Lebowitz recognized the inherent unfairness in closing the hearing without providing the plaintiff with a full opportunity to be heard and initially stated that, because the plaintiff was deprived of this opportunity, he did not think there was a basis on which the commission properly could deny the application. Young also acknowledged that it was unfair to close the hearing. She advised the commission that, in the future, it should refrain from depriving an individual who "sat for hours for the opportunity to be heard" from receiving their "token five minutes." Despite these concerns, other members disagreed with the notion that the application had been handled unfairly. Rather than focusing solely on the purported incompleteness of the current application to support their position, the commission members justified the closing of the hearing by stating that the

[16] As previously discussed, Fedor filed a memorandum on June 19, 2019. That memorandum set forth the plaintiff's argument that his application was complete. Attached to the memorandum were revised and supplemental documents that related to the application. The record reflects that the memorandum and attached documents were not reviewed by the commission members prior to denying the application on the basis that it was incomplete. See footnote 10 of this opinion.

plaintiff "stomped on the staff," "gave the staff holy hell," "was egregious," "was confrontational," and that "on the day of the application [Fedor] threw a bunch of crap at [them] that was crap." Furthermore, the members commented on the plaintiff's previous applications, stating repeatedly that they were a "shit show," and "horrible."[17] Accordingly, even a deferential review of the commission's actions leads us to conclude that the plaintiff did not receive a dispassionate consideration of his application or that the commission's decision was made reasonably and fairly after a full hearing at which the plaintiff was allowed to address the dispute over whether his application was complete.[18]

We reverse the judgment of the Superior Court and remand with direction to sustain the plaintiff's appeal and to order the commission to hold a hearing on the plaintiff's application.

In this opinion the other judges concurred.

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[17] Fundamental fairness requires both that a full and fair opportunity to be heard is provided and that commission members are neutral and impartial when deciding whether to approve zoning applications. See *Barry* v. *Historic District Commission*, supra, 108 Conn. App. 705. Based on certain commission members' intemperate remarks that suggest an absence of neutrality or impartiality toward the plaintiff and his application, on remand, and upon an appropriate motion, some members of the commission should consider recusing themselves.

[18] In his principal brief and at oral argument before our court, the plaintiff argued that his site plan and special permit application should be automatically approved, presumably pursuant to General Statutes § 8-3 (g) (1). Section 8-3 (g) (1) provides in relevant part: "Approval of a site plan shall be presumed unless a decision to deny or modify it is rendered within the period specified in section 8-7d. . . ." We disagree with the plaintiff that his site plan application and special permit application must be automatically approved under the circumstances of this case, in which the critical question to be reviewed is whether the plaintiff ever filed a complete application. To apply § 8-3 (g) (1) to an application that is or may be incomplete would be nonsensical.

MARCUS GREGORY *v.* COMMISSIONER OF CORRECTION
(AC 44886)
(AC 44957)

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

Syllabus

The petitioner, who had been convicted of various crimes in connection with a home burglary in Ansonia and, on pleas of nolo contendere, of various crimes in connection with two home burglaries in Bridgeport, sought a writ of habeas corpus, claiming, in the first count, that his conviction of kidnapping in the Ansonia case violated his rights to due process under the federal and state constitutions because the trial court did not provide the jury with an incidental restraint instruction pursuant to *State* v. *Salamon* (287 Conn. 509), which was decided approximately ten years after his conviction, in the second count, that his nolo contendere pleas in the Bridgeport cases were not knowing, voluntary, or intelligent in light of the subsequent change in the law announced in *Salamon*, and, in the third count, that his convictions in the Bridgeport cases were illegal due to the ineffective assistance of prior habeas counsel in failing to raise the *Salamon* claims asserted in the first and second counts of his habeas petition. The petitioner moved for summary judgment as to the first count and the respondent Commissioner of Correction moved for summary judgment as to the second count. After hearings on the motions, the habeas court granted the habeas petition as to the first count and vacated the petitioner's conviction of kidnapping and conspiracy to commit kidnapping in the Ansonia case, determining that he was entitled to a new trial under *Salamon* because a reasonable jury could have concluded that the restraint involved was incidental to the commission of the other offenses. The habeas court denied the habeas petition as to the second and third counts and granted the respondent's motion for summary judgment as to the second count, concluding that *Salamon* should not have been applied retroactively to the Bridgeport convictions. On the granting of certification, the petitioner and the respondent filed separate appeals with this court. *Held*:

1. The habeas court improperly granted summary judgment for the petitioner on the first count of his habeas petition because, on the basis of a review of the record and in consideration of the six *Salamon* factors, this court concluded that, given the expanse and duration of the petitioner's criminal conduct and the kidnapping statute (§ 53a-92 (a) (2) (B)) under which he was charged, the failure to provide an incidental restraint instruction was harmless, as a properly instructed, reasonable jury would have found the petitioner guilty of kidnapping and conspiracy to commit kidnapping beyond a reasonable doubt: the criminal conduct in the

Ansonia case took place over the course of more than one and one-half hours, during which the petitioner and his two accomplices committed multiple crimes against the victims, F and his wife, R, and restrained them in multiple ways to a greater degree than was necessary to complete the other crimes; moreover, contrary to the petitioner's claim, his acts, and those of his accomplices, including transporting F from his house to a nearby bank, holding F's family, R and their two children, captive at the house to ensure that F provided them with the correct access code to his bank account, holding R at gunpoint for more than one hour, which restraint continued even after one of the perpetrators had sexually assaulted her, pointing a gun at the victims' infant daughter, and threatening to kill the victims' cat, were not just done within the confines of the other crimes, but constituted gratuitous restraints used to advance both the sexual assault of R and the subsequent robbery of the house in violation of § 53a-92 (a) (2) (B), and the restraints were not inherent in the other crimes committed; furthermore, although some of the restraints involved could have been interpreted as preventing resistance, many of them, including the continued restraint of F after he withdrew money from the bank and the continued restraint of R after the sexual assault was completed, were solely for the purpose of avoiding detection and hindering the victims from summoning assistance; additionally, the intruders' conduct undoubtedly caused the victims to experience greater fear and psychological harm than that which they would have experienced during an ordinary robbery in which the perpetrator simply took the victims' property and left, as, after robbing F and R in their garage, the petitioner and his accomplices forced R at gunpoint into the house while suggesting that they intended to sexually assault her, removed F and R's daughter from her crib and threw her on the bed next to R, sexually assaulted R while her daughter lay awake on the bed beside her, threatened to kill the family's cat, and kept F and R isolated from one another throughout the duration of the incident.

2. The habeas court properly rendered summary judgment for the respondent on the second count of the habeas petition: the traditional rationales for the writ of habeas corpus did not favor applying *Salamon* retroactively to undo the petitioner's negotiated plea agreement because the state relied to its detriment on our Supreme Court's pre-*Salamon* interpretation of the kidnapping statutes when it negotiated the petitioner's pleas, and, had the state anticipated *Salamon*, it could have selected one or more of the nonkidnapping offenses to which the petitioner did not plead nolo contendere to achieve the desired sentence, which would have made *Salamon* irrelevant; moreover, assuming arguendo that the petitioner's pleas were involuntary, the entire plea agreement, and not just the kidnapping convictions, would have to be vacated, which would constitute an undeserved windfall for the petitioner because it was questionable whether the state would be able to prosecute the Bridgeport crimes, more than twenty-five years after they were committed, as the

victims had been in their sixties and seventies when the crimes were perpetrated.

Argued November 8, 2022—officially released April 11, 2023

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Bhatt*, *J.*, granted the motions for summary judgment filed by the petitioner and the respondent; thereafter, the court, *Bhatt*, *J.*, rendered judgment granting in part and denying in part the habeas petition, from which, on the granting of certification, the petitioner and the respondent filed separate appeals with this court. *Reversed in part*; *further proceedings.*

Sarah Hanna, senior assistant state's attorney, with whom, on the brief, were *Margaret E. Kelley*, state's attorney, and *Jo Anne Sulik*, senior assistant state's attorney, for the appellant in Docket No. AC 44886 (respondent).

Shanna P. Hugle, deputy assistant public defender, with whom was *Pamela S. Nagy*, assistant public defender, for the appellant in Docket No. AC 44957 and the appellee in Docket No. AC 44886 (petitioner).

Sarah Hanna, former senior assistant state's attorney, with whom, on the brief, were *Joseph T. Corradino*, state's attorney, and *Melissa E. Patterson* and *Jo Anne Sulik*, senior assistant state's attorneys, for the appellee in Docket No. AC 44957 (respondent).

Opinion

BRIGHT, C. J. In these certified appeals, the petitioner, Marcus Gregory, and the respondent, the Commissioner of Correction, appeal from the judgment of the habeas court granting in part and denying in part the petitioner's amended petition for a writ of habeas corpus. In Docket No. AC 44886, the respondent claims

that the court improperly rendered summary judgment for the petitioner on the first count of his petition alleging that his kidnapping conviction violated the state and federal constitutions because the trial court failed to instruct the jury pursuant to *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008), that, to find him guilty of kidnapping, the jury was required to find that he restrained the victims to a greater extent than necessary to complete other crimes. In Docket No. AC 44957, the petitioner claims that the habeas court improperly rendered summary judgment for the respondent on the second count of his petition alleging that his nolo contendere pleas in two separate cases to kidnapping and other offenses were not made knowingly, intelligently, and voluntarily because *Salamon* was decided more than ten years after he entered his pleas. We agree with the respondent's claim but disagree with the petitioner's claim. Accordingly, we reverse in part the judgment of the court.

The record reveals the following undisputed facts and procedural history. For his role in a 1997 home invasion in Ansonia,[1] the petitioner was charged with various offenses in two separate informations, which were joined for trial (Ansonia cases). After a jury trial, the petitioner was convicted of "conspiracy to commit kidnapping in the first degree in violation of General Statutes §§ 53a-92 (a) (2) (B) and 53a-48, kidnapping in the first degree in violation of General Statutes §§ 53a-92 (a) (2) (B) and 53a-8, conspiracy to commit burglary in the first degree in violation of General Statutes [Rev. to 1997 §] 53a-101 (a) (2)[2] and [§] 53a-48, burglary in the first degree in violation of . . . §§ 53a-101 (a) (2) and 53a-8, conspiracy to commit robbery in

[1] We note that the petitioner's crimes predated the enactment of General Statutes § 53a-100aa (effective March 1, 2008), which created the crime of home invasion.

[2] Hereinafter, unless otherwise indicated, all references to § 53a-101 in this opinion are to the 1997 revision of the statute.

the first degree in violation of General Statutes §§ 53a-134 (a) (4) and 53a-48, aiding robbery in the first degree in violation of . . . §§ 53a-134 (a) (4) and 53a-8, and larceny in the third degree in violation of General Statutes [Rev. to 1997] § 53a-124 (a) (1) as a lesser included offense of larceny in the second degree under General Statutes [Rev. to 1997] § 53a-123 (a) (1)." (Footnote added.) *State* v. *Gregory*, 56 Conn. App. 47, 48–49, 741 A.2d 986 (1999), cert. denied, 252 Conn. 929, 746 A.2d 790 (2000). In March, 1998, the court, *Thompson*, *J.*, imposed a total effective sentence of ninety years of imprisonment, and this court affirmed the judgments of conviction.[3] Id., 54.

Following his arrest in connection with the Ansonia cases, the police linked the petitioner to two burglaries in Bridgeport, and the state charged him with various offenses in connection therewith (Bridgeport cases). See *State* v. *Gregory*, 74 Conn. App. 248, 254–55, 812 A.2d 102 (2002), cert. denied, 262 Conn. 948, 817 A.2d 108 (2003). In September, 1999, the petitioner entered conditional pleas of nolo contendere to two counts of kidnapping in the first degree in violation of § 53a-92 (a) (2), one count of burglary in the first degree in violation of § 53a-101 (a) (2), one count of sexual assault in the first degree in violation of General Statutes (Rev. to 1997) § 53a-70 (a) (1), and one count of burglary in the second degree with a firearm in violation of General Statutes § 53a-102a (a). Pursuant to an agreement with the state, the sentences imposed in the Bridgeport cases would run concurrently with the sentences the petitioner had received in the Ansonia cases, and the petitioner reserved the right to appeal from the denial of

[3] The court merged the three conspiracy convictions and sentenced the petitioner to twenty years for conspiracy to commit first degree kidnapping. On the remaining counts charging the substantive crimes, the court sentenced the petitioner to twenty-five years for aiding first degree kidnapping, twenty years for aiding first degree burglary, twenty years for aiding first degree robbery, and five years for third degree larceny. The court ordered that all sentences run consecutively.

his motion to suppress. The court, *Thim*, *J.*, accepted the pleas and imposed a combined total effective sentence of 100 years to run concurrently with the sentences imposed in the Ansonia cases. On appeal, this court affirmed the judgments. *State* v. *Gregory*, supra, 74 Conn. App. 264.

Approximately ten years after the petitioner's trial in the Ansonia cases, and nearly nine years after he entered his nolo contendere pleas in the Bridgeport cases, our Supreme Court reinterpreted the intent element of our kidnapping statutes in *State* v. *Salamon*, supra, 287 Conn. 541–42. The court held that "to commit a kidnapping in conjunction with another crime, a defendant must intend to prevent the victim's liberation for a longer period of time or to a greater degree than that which is necessary to commit the other crime." Id., 542. In 2011, the court adopted a general presumption that the rule announced in *Salamon* applies retroactively in habeas cases. See *Luurtsema* v. *Commissioner of Correction*, 299 Conn. 740, 764, 12 A.3d 817 (2011).

In 2016, following several prior unsuccessful habeas petitions,[4] the petitioner filed the underlying habeas petition as a self-represented party. The court appointed counsel to represent the petitioner, and counsel filed an amended petition on January 27, 2020. In the amended

[4] In 2000, the petitioner filed his first habeas petition, alleging ineffective assistance of trial and appellate counsel in the Ansonia cases. The court, *Swords*, *J.*, denied the petition on April 23, 2007, and this court affirmed the judgment. See *Gregory* v. *Commissioner of Correction*, 111 Conn. App. 430, 431, 959 A.2d 633 (2008), cert. denied, 290 Conn. 906, 962 A.2d 794 (2009). In 2008, the petitioner filed his second habeas petition, which was denied on May 31, 2011. The petitioner withdrew his appeal challenging that judgment on January 18, 2012. In 2009, the petitioner filed his third habeas petition, alleging ineffective assistance of his first habeas counsel. The court, *Newson*, *J.*, denied the petition on October 23, 2012, and this court affirmed the judgment. See *Gregory* v. *Commissioner of Correction*, 157 Conn. App. 902, 114 A.3d 192 (2015).

petition, the petitioner alleged that (1) his convictions for kidnapping and conspiracy to commit kidnapping in the Ansonia cases violated his rights to due process under the federal and state constitutions because the court did not provide the jury with an incidental restraint instruction pursuant to *State* v. *Salamon*, supra, 287 Conn. 509 (first count), (2) his nolo contendere pleas in the Bridgeport cases were not knowing, voluntary, or intelligent in light of the subsequent change in the law announced in *Salamon* (second count), and (3) his convictions in the Bridgeport cases are illegal due to the ineffective assistance of his prior habeas counsel in failing to raise the *Salamon* claims asserted in the first and second counts (third count).

In August, 2020, the petitioner moved for summary judgment on the first count of the petition and filed an amended memorandum of law in support of the motion on January 25, 2021. In connection with his motion, the petitioner submitted several exhibits, which included excerpts from transcripts of the trial in the Ansonia cases. The petitioner claimed that a *Salamon* instruction was required in the Ansonia cases and that the failure to provide one was not harmless error. On January 25, 2021, the respondent filed an objection to the motion for summary judgment and a supporting memorandum of law, claiming that the *Salamon* error was harmless.

The court held a hearing on the motion for summary judgment on January 26, 2021. After hearing from both sides, the court took the matter under advisement and asked the petitioner's counsel how much time he would need for a trial on the remaining two counts of the petition. At that point, counsel for the respondent indicated that she intended to file a motion for summary judgment as to the second count of the petition. After a brief discussion, the parties agreed that, on March 26, 2021, the court would hear the respondent's motion

for summary judgment on the second count of the petition and would allow the petitioner to present evidence in support of the third count alleging ineffective assistance of prior habeas counsel.

On March 3, 2021, the respondent moved for summary judgment as to the second count of the petition. In his memorandum of law in support of the motion, the respondent claimed that the petitioner is not entitled to the retroactive application of *Salamon* to his conditional nolo contendere pleas. The respondent submitted transcripts of the petitioner's plea and sentencing hearings in the Bridgeport cases as exhibits in support of the motion. The petitioner filed an objection to the motion and an accompanying memorandum of law on March 25, 2021. On March 26, 2021, the parties appeared before the court. The court began by allowing the petitioner to testify in support of the petition before hearing argument on the respondent's motion for summary judgment. The petitioner was the only witness to testify. After the petitioner rested, the court heard argument on the respondent's motion for summary judgment and took the matter under advisement.

On July 26, 2021, the habeas court issued a memorandum of decision granting the petition as to the first count and denying the petition as to the second and third counts. The court determined that the petitioner was entitled to a new trial in the Ansonia cases under *Salamon* because a reasonable jury could conclude that the restraint involved was incidental to the commission of the other offenses. Accordingly, the court vacated the petitioner's kidnapping convictions in the Ansonia cases.[5] The court next granted the respondent's motion for summary judgment as to the second count of the

[5] The respondent filed a motion for articulation, requesting that the court clarify whether it vacated the petitioner's conspiracy to commit kidnapping conviction. The court granted the motion and issued an articulation clarifying that it had vacated the conspiracy to commit kidnapping conviction.

petition, concluding that "the traditional rationales underlying the writ of habeas corpus do not favor applying *Salamon* retroactively to the Bridgeport convictions." Finally, because the third count alleged ineffective assistance of prior habeas counsel for failing to assert the *Salamon* claims brought in counts one and two of the petition, the court held that any alleged ineffectiveness either was moot or unproven on the basis of its rulings on the parties' motions for summary judgment.[6] The court subsequently granted the parties' petitions for certification to appeal, and these appeals from the summary judgment rulings followed.[7] Additional facts will be set forth as necessary.

As a preliminary matter, we set forth the standard of review applicable to both appeals. "On review from the granting of a motion for summary judgment, our task is to determine whether the court correctly determined that the moving party was entitled, as a matter of law, to summary judgment on the basis of the absence of any genuine issues of material fact requiring a trial. Because this inquiry requires a legal determination, our review is plenary." (Internal quotation marks omitted.) *White* v. *Commissioner of Correction*, 170 Conn. App. 415, 422, 154 A.3d 1054 (2017). Likewise, "[t]he applicability of *Salamon* and whether the court's failure to give a *Salamon* instruction was harmless error are issues of law over which our review is plenary." (Internal quotation marks omitted.) *Coltherst* v. *Commissioner of Correction*, 208 Conn. App. 470, 489, 264 A.3d 1080 (2021), cert. denied, 340 Conn. 920, 267 A.3d 857 (2022).

[6] The court explained that the ineffective assistance claim was unproven as to the *Salamon* claim in the first count because the petitioner "provided neither meaningful evidence . . . that prior habeas counsel rendered deficient performance nor that such deficient performance prejudiced him" and was moot as to the claim raised in the second count because the court granted the respondent's motion for summary judgment on that claim.

[7] The petitioner has not appealed from the court's judgment denying the third count of his petition after a trial.

I

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The respondent claims that the court improperly concluded that the absence of a *Salamon* instruction harmed the petitioner as to his kidnapping convictions in the Ansonia cases.[8] We agree.

The following additional facts, which the jury reasonably could have found, are relevant to the respondent's claim. On the night of January 9, 1997, the male victim, F, was taking care of his two children, a four year old son and an eight month old daughter, while his wife, R, was at work. F put the children to bed around 9 or 10 p.m. and proceeded to watch television in the living room on the first floor of the house, which was directly above the garage. Around midnight, F heard R arrive home and pull her car inside the garage. When R exited her vehicle to manually close the garage door, the petitioner suddenly appeared and prevented her from doing so, causing R to scream. At that point, a second male

[8] The respondent also claims that the court lacked subject matter jurisdiction over the petitioner's claim as to the conspiracy to commit kidnapping conviction. More specifically, the respondent claims that the petitioner's challenge to his conspiracy to commit kidnapping conviction is moot because he failed to challenge the other two conspiracy convictions for burglary and robbery in the first degree, which were merged with the conspiracy to commit kidnapping conviction. We disagree.

Burglary and robbery in the first degree are class B felonies punishable by a term of imprisonment not less than one year nor more than twenty years; see General Statutes (Rev. to 1997) §§ 53a-35a (5) and 53a-101; General Statutes § 53a-134; whereas kidnapping in the first degree is a class A felony punishable by a term of imprisonment not less than ten nor more than twenty-five years. See General Statutes (Rev. to 1997) § 53a-35a (3); General Statutes § 53a-92 (a). Given the difference between the allowable sentences for the different conspiracy convictions, we are unable to conclude that the court would have imposed an identical sentence in the absence of the conspiracy to commit kidnapping conviction. As a result, we conclude that this claim is not moot and that the court therefore had subject matter jurisdiction over the petitioner's claim challenging his conspiracy to commit kidnapping conviction.

intruder appeared and assisted the petitioner in forcing R inside the garage and onto the floor. R felt two guns on her back after the two intruders forced her to the ground.

After hearing R scream, F ran downstairs and, when he opened the interior door to the garage, he saw the petitioner standing over his wife and pointing a gun at him. F initially jumped back into the house but complied when one of the men ordered him to get onto the garage floor. At this point, a third male intruder appeared, forced F to the ground and pointed a gun at his back. The intruders then "hogtied" F, tying his hands behind his back and his feet to his hands, leaving him lying facedown in the doorway between the cellar and garage.

While he was being restrained, F removed his wedding ring and gave it to one of the intruders after they attempted to take it off his finger. When prompted by the intruders, F stated that the only other people in the house were his children who were asleep upstairs and told them where they could find his wallet and the family's jewelry. Both F and R told the men that they could have anything but pleaded for them to not hurt their children. F testified: "When [the intruders] asked where . . . the bank card was . . . and the credit cards, again I said, 'Don't hurt the kids' and then, I'm not exactly sure [what] the terminology was, but they indicated they were going to take my kids and, if everything went okay, they would bring them back. And I said, 'The hell you are, I'll go to the bank with you [because] I know the code.' "

After hogtying F, two of the intruders picked R up and searched her pockets. They removed her rings, flipped through her wallet, and took her checkbook. One of the intruders grabbed R by the hair on the back of her head and forced her head into her chest as he and another man walked her into the cellar and upstairs

to the first floor of the house. As they were bringing R upstairs, F overheard one of the men say to the other that "[t]hey were going to go upstairs and get some cream" in reference to F's wife. One man stayed in the cellar with F, who was hogtied on the cellar floor for "[q]uite a while." During that time, F heard the other two men rummaging around upstairs, unplugging electronics and removing items from various rooms.

The two men brought R to her bedroom on the first floor and threw her facedown on the bed. One of the men put his legs across the back of R's legs. As this was happening, R heard her daughter crying in the bedroom on the second floor and pleaded for the men not to hurt the children. One of the men brought the baby from the second floor to R's bedroom and threw her onto the bed next to R. Both men told R to "shut [the baby] up" and proceeded to ransack the house, unplugging electronics and rummaging through dressers and closets. When they finished, they told R that they were taking F to the bank and that, if something went wrong, they would come back and "mess [her] up."

The two men returned to the cellar with pants and boots for F and told him to get dressed. Two of the men then forced F into his wife's car, a red Subaru, and told him to keep his head down and not to look at them. F obeyed their commands because he was afraid that they would shoot him, his wife, or his children. The two men brought F to the bank, which was located a few miles from F's house, with one of the men driving the car while the other sat in the backseat next to F. After approximately five minutes in the car, they arrived at the bank and all three went inside to the automated teller machine (ATM). The two men forced F to withdraw a total of $600 in three separate transactions. The receipts of those transactions showed that the first withdrawal occurred at 1:09 a.m. on January 10, 1997, and that the last withdrawal occurred two minutes later

at 1:11 a.m. The two men forced F back into the car and returned to the house.

While his accomplices were transporting F to and from the bank, the third intruder remained with R in her bedroom. R was lying facedown on the bed with her infant daughter, and the intruder had his leg across her legs and a gun at her back. The victims' cat came into the bedroom and sat on the bed next to R's head and the baby; when the cat hissed at the intruder, he put his gun on the cat and threatened to shoot it. The cat quieted down and stayed next to the baby girl, who also quieted down. At some point, the intruder took R's pants and underwear off and squeezed her breasts so hard that it was painful. In order to deter the man from sexually assaulting her, R falsely told him that she had contracted AIDS while working at a hospital. After a failed search for condoms, the intruder forced R to perform oral sex on him. During the sexual assault, R's daughter was awake, lying on the bed next to R. After the man ejaculated, he smoked a cigarette in the hallway between the bedroom and the kitchen.

Around 1:15 or 1:20 a.m., the two intruders returned with F in R's car, at which point the third intruder hurried back into the bedroom with R and the baby, put his leg on top of R's legs, and pointed his gun at her back. When the other two intruders came upstairs with F, they told him to lie down in the hallway outside the bedroom and hogtied him again, "only tighter." F called out to R and asked if she was okay; R responded, "Yes." At some point, R heard the intruder who had sexually assaulted her tell the other two men to "leave [her] alone because [she] had the bug."

After hogtying F, the intruders emptied R's wallet on her back, asking her if any of the various cards they found would allow them to obtain cash, and rummaged through some closets and a spare room before loading

items into R's car. For approximately fifteen minutes, one of the intruders stayed upstairs with F and R while the other two men went downstairs and loaded the victims' possessions into R's car. The intruders left the house between 1:30 and 1:45 a.m. Before leaving the house, one of the intruders pressed his gun into F's back and said, "Thank God for your kids." After F heard the garage door close, he waited approximately ten minutes before telling R to untie him; R had to use a knife to cut the ropes. Once freed, F ran upstairs and grabbed his son, who was still asleep in his bed, and the whole family got in F's truck and drove to the Ansonia Police Department, arriving there around 2 a.m.

The petitioner was arrested in Bridgeport in the early morning hours of January 10, 1997, after he was observed driving R's red Subaru with the headlights off; the victims' possessions were inside the car, and, when the police searched the petitioner, they found F's ring and his beeper. See *State* v. *Gregory*, supra, 56 Conn. App. 49–51.

At the petitioner's criminal trial, the court instructed the jury in relevant part: "As you can see, in the first, third and fifth counts, [the petitioner] is charged with the crime of conspiracy. In counts two, four and six . . . the [petitioner] is charged with the substantive crimes, which are referred to in the conspiracy counts. Therefore, I will instruct you as to those substantive crimes first, and thereafter will instruct you as to the crime of conspiracy. As to each of those substantive [crimes], [the petitioner] is charged as an accessory, and I will also explain that term to you.

"A person is criminally liable for a criminal act if he directly commits it or if he is an accessory in the criminal act of another. This basic principle is stated in § 53-8 . . . which provides as follows: A person, acting with

the mental state required for the commission of an offense, who intentionally aids another person to engage in conduct which constituted an offense—or constitutes an offense—shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender. If the [petitioner] did any one of these things—did these things as specified in the statute, he is guilty of the crime charged as though he had directly committed it or participated in its commission. . . .

"Thus, you must find that the state has proven beyond a reasonable doubt that the [petitioner] assisted another person to commit the crime charged in the information. You must also find beyond a reasonable doubt that the [petitioner] had the intent to commit the crime charged and did intentionally aid another in the commission of the crime charged in the information to find the [petitioner] guilty as an accessory.

"Now, in the second count of the information, the state charges the [petitioner] with aiding kidnapping in the first degree. Specifically, that in Ansonia, during the late evening hours of January 9, 1997, and the early morning hours of January 10, 1997, in the area of 177 1/2 Wakelee Avenue, that [the petitioner] did aid in the abduction and restraint of the person abducted with the intent to accomplish—or advance—the commission of a felony in violation of . . . §§ 53a-92 (a) [2] (B) and 53-8. [Section] 53a-92 (a) . . . provides as follows: A person is guilty of kidnapping in the first degree when he abducts another person and he restrains the person abducted with intent to accomplish or advance the commission of a felony.

"For you to find the [petitioner] guilty of this charge, the state must prove the following beyond a reasonable doubt. First, that the [petitioner] aided in the abduction of the victim. Two, that the [petitioner] aided in the

unlawful restraint of the person that was abducted. And, three, that he did so with the intent to accomplish or advance the commission of a felony.

"The term 'abduct' means to restrain a person with intent to prevent his liberation by using or threatening to use physical force or intimidation. Abduction need not be proven by establishing the use of . . . force if the proof establishes that the [petitioner] threatened its use in such a manner that the victim reasonably believed force would be applied to him if he sought to escape or to thwart the abductor's intention.

"The term 'restrain' means to restrict the person's movement intentionally and unlawfully in such a manner as to interfere substantially with his liberty by moving him from one place to another or by confining him either in the place where the restriction commences or in a place to which he has been moved without consent. . . . The state charges that the [petitioner] aided in the abduction and restraint of [F and R] with intent to accomplish or advance the commission of the felonies of robbery and sexual assault.

* * *

"A person is guilty of conspiracy . . . when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such a conduct and anyone of them commits an overt act in pursuance of such conspiracy. . . . [T]he state must prove the following elements beyond a reasonable doubt: One, that there was an agreement between two or more persons to engage in conduct constituting a crime. Second, that there was an overt act in furtherance of the subject of the agreement and, third, that there was an intent on the part of the [petitioner] that conduct constituting a crime be performed.

* * *

"Now, as to the first count, the state charges [that] the [petitioner], acting with the intent that the crime of kidnapping in the first degree be performed, did agree with Shaun Smith and another coconspirator to abduct another person and that one or more of the coconspirators did restrain that person abducted with the intent to accomplish or advance the commission of a felony. . . . As to this first count, the overt act which [the] state charges is that, in furtherance of the conspiracy, three coconspirators entered the victims' home and tied up one of the victims." The jury found the petitioner guilty as charged in the six count information and, with respect to the separate, single count information, guilty of larceny in the third degree as a lesser included offense of larceny in the second degree.

More than ten years after the petitioner's conviction in the Ansonia cases, "our Supreme Court [in *State* v. *Salamon*, supra, 287 Conn. 509] reconsidered [its] long-standing interpretation of our kidnapping statutes, General Statutes §§ 53a-91 through 53a-94a. . . . [T]he defendant [in *Salamon*] had assaulted the victim at a train station late at night . . . and ultimately was charged with kidnapping in the second degree in violation of . . . § 53a-94, unlawful restraint in the first degree, and risk of injury to a child. . . . At trial, [the defendant] requested a jury instruction that, if the jury found that the restraint had been incidental to the assault, then the jury must [find him not guilty] of the charge of kidnapping. . . . [Consistent with established precedent of our Supreme Court] [t]he trial court declined to give that instruction [and the defendant was convicted of kidnapping in the second degree in addition to the two other crimes]. . . .

"[The Supreme Court] . . . ultimately concluded that [o]ur legislature . . . intended to exclude from the

scope of the more serious crime of kidnapping and its accompanying severe penalties those confinements or movements of a victim that are merely incidental to [or] necessary for the commission of another crime against that victim.[9] Stated otherwise, to commit a kidnapping in conjunction with another crime, a defendant must intend to prevent the victim's liberation for a longer period of time or to a greater degree than that which is necessary to commit the other crime . . . or than that which was merely incidental to that underlying crime. . . .

"Our Supreme Court thus explained in *Salamon* that a defendant may be convicted of both kidnapping and another substantive crime if, at any time prior to, during, or after the commission of that other crime, the victim is moved or confined in a way that had independent criminal significance, that is, the victim was restrained to an extent exceeding that which was [incidental to or] necessary to accomplish or complete the other crime. Whether the movement or confinement of the victim is merely incidental to [or] necessary for another crime

[9] In *Banks* v. *Commissioner of Correction*, 339 Conn. 1, 51–55, 259 A.3d 1082 (2021), "our Supreme Court stated that the terms incidental to the underlying crime, necessary to commit the underlying crime, inherent in the nature of the underlying crime, and having no independent criminal significance . . . are merely different ways of expressing the same concept, namely, whether the restraint imposed evidenced an independent criminal intent or subjected the victims to risks distinct from those necessarily entailed by or inherent in the underlying offenses. . . . Our Supreme Court concluded that conduct that is wholly incidental to the commission of an underlying crime cannot qualify as kidnapping, *regardless of whether it is strictly necessary to commit that crime*. . . . Accordingly, the court confirmed that a defendant is entitled to *Salamon*'s protections if his actions are either incidental to *or* necessary to commit the underlying offense. . . . Thus, throughout this opinion and in accordance with our Supreme Court's analysis in *Banks*, we use the phrase incidental to *or* necessary for, as opposed to incidental to *and* necessary for, the commission of another substantive crime." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *McCarthy*, 210 Conn. App. 1, 12–13 n.3, 268 A.3d 91, cert. denied, 342 Conn. 910, 271 A.3d 136 (2022).

will depend on the particular facts and circumstances of each case. Consequently, when the evidence reasonably supports a finding that the restraint was not merely incidental to the commission of some other, separate crime, the ultimate factual determination must be made by the jury. For purposes of making that determination, the jury should be instructed to consider . . . various relevant factors . . . .

"Since its decision in *Salamon*, our Supreme Court has reiterated that, when a criminal defendant is charged with kidnapping in conjunction with another underlying crime . . . the jury must be provided a *Salamon* instruction. . . . The failure to charge in accordance with *Salamon* is viewed as an omission of an essential element . . . and thus gives rise to constitutional error . . . that is subject to harmless error analysis." (Citations omitted; footnote altered; internal quotation marks omitted.) *State* v. *McCarthy*, 210 Conn. App. 1, 11–14, 268 A.3d 91, cert. denied, 342 Conn. 910, 271 A.3d 136 (2022).

In *Banks* v. *Commissioner of Correction*, 339 Conn. 1, 24–25, 259 A.3d 1082 (2021), our Supreme Court held "that, when a habeas petitioner convicted of kidnapping has demonstrated that the jury was not properly instructed in accordance with *Salamon*, the state meets its burden of establishing harmlessness only if the reviewing court, following a thorough, de novo review of the record, has confidence that a properly instructed jury would have found the [petitioner] guilty beyond a reasonable doubt."[10]

[10] The court "adopted the harmlessness standard laid out by the United States Supreme Court in *Brecht* v. *Abrahamson*, 507 U.S. 619, 637, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993), under which the harmlessness of constitutional errors is assessed according to whether the error had [a] substantial and injurious effect or influence in determining the jury's verdict. . . . The *Brecht* standard reserves the remedy of a new trial for errors resulting in actual prejudice, as distinguished from errors giving rise to a mere possibility of harm." (Internal quotation marks omitted.) *State* v. *McCarthy*, supra, 210 Conn. App. 14 n.4.

In the present case, it is undisputed that the court did not provide the jury with an incidental restraint instruction as later required by *Salamon*. In determining whether that omission was harmless, the habeas court applied the six factors set forth in *Salamon* for assessing whether the movement or confinement of the victims was merely incidental to or necessary for the other crimes. "Those factors are (1) the nature and duration of the victim's movement or confinement, (2) whether that movement or confinement occurred during the commission of the separate offense, (3) whether the restraint was inherent in the nature of the separate offense, (4) whether the restraint prevented the victim from summoning assistance, (5) whether the restraint reduced the perpetrator's risk of detection, and (6) whether the restraint created a significant danger or increased the victim's risk of harm independent of that posed by the separate offense." Id., 42.

The court concluded that these factors "could tip one way or the other. A jury could reasonably find that the act of hogtying [F] was not necessary or incidental to the commission of the robbery or burglary. Similarly, a jury could also reasonably find that it was so. . . . [T]he court cannot say that a jury would not find . . . that the facts demonstrate that the restraint on liberty was merely incidental to the commission of other offenses. The evidence as presented to the jury demonstrates that, at all times that [F] and [R] were restrained, [the petitioner] and his accomplices were committing other offenses.

"Ultimately, the motion for summary judgment must be granted because this court cannot, with confidence, say that a properly instructed jury, faced with these facts and these charges, would have reached only one conclusion: that the restraint and abduction bore independent criminal significance. Thus, because the court is in equipoise as to the question . . . the error must

be deemed to have affected the verdict. . . . Since the evidence regarding the perpetrator's intent is susceptible to more than one interpretation, that question is one for the jury." (Citations omitted; internal quotation marks omitted.)

On appeal, the respondent claims that "consideration of *Salamon*'s six factors lead[s] inexorably to the conclusion that the petitioner's restraint of R and F was not limited to any restraint inherent in the charged robbery and burglary, or in the [uncharged] sexual assault . . . ." The petitioner responds that the court properly applied the *Salamon* factors in concluding that the respondent was unable to demonstrate harmless error. On the basis of our review of the record and consideration of those factors, we conclude that, given the expanse and duration of the petitioner's criminal conduct and the kidnapping statute under which the petitioner was charged, the failure to provide an incidental restraint instruction was harmless because a properly instructed jury would have found the petitioner guilty of kidnapping and conspiracy to commit kidnapping beyond a reasonable doubt.

At the outset, we note that, when "a victim is restrained in the midst of a robbery, rather than after the victim's property has been taken, then it rarely will be possible to say, as a matter of law, that the restraint bore independent criminal significance and was not merely incidental to the completion of the underlying crime. That determination will hinge on heavily fact based considerations, such as the distance of the asportation, the duration and degree of the restraints, the perpetrator's apparent motives for restricting the victim's movements, and the additional risks to which the victim was subjected." *Bell* v. *Commissioner of Correction*, 339 Conn. 79, 93–94, 259 A.3d 1073 (2021). Additionally, "[a]nalyses of *Salamon* claims have focused on a variety of factors in determining whether a kidnapping

conviction can stand, but the timing, location, and manner in which the [petitioner] commits criminal acts against a victim are particularly crucial factors." *Wilcox* v. *Commissioner of Correction*, 162 Conn. App. 730, 743, 129 A.3d 796 (2016). With these principles in mind, we consider the habeas court's application of the *Salamon* factors in the present case.

A

As to the first factor, the nature and duration of the victims' movement or confinement, our Supreme Court has explained that, "[a]lthough no minimum period of restraint or degree of movement is necessary for the crime of kidnapping, an important facet of cases where the trial court has failed to give a *Salamon* instruction and that impropriety on appellate review has been deemed harmless error is that longer periods of restraint or greater degrees of movement demarcate separate offenses. See *State* v. *Hampton*, [293 Conn. 435, 463–64, 988 A.2d 167 (2009)] (defendant confined victim in a car and drove her around for approximately three hours before committing sexual assault and attempted murder); *State* v. *Jordan*, [129 Conn. App. 215, 222–23, 19 A.3d 241] (evidence showed the defendant restrained the victims to a greater degree than necessary to commit the assaults even though assaultive behavior spanned entire forty-five minute duration of victims' confinement) [cert. denied, 302 Conn. 910, 23 A.3d 1248 (2011)]; *State* v. *Strong*, [122 Conn. App. 131, 143, 999 A.2d 765] (defendant's prolonged restraint of victim while driving for more than one hour from one town to another not merely incidental to threats made prior to the restraint) [cert. denied, 298 Conn. 907, 3 A.3d 73 (2010)]; and *State* v. *Nelson*, [118 Conn. App. 831, 860–62, 986 A.2d 311] (harmless error when defendant completed assault and then for several hours drove victim to several locations) [cert. denied, 295 Conn. 911, 989 A.2d 1074 (2010)]. Thus, as these cases demonstrate,

multiple offenses are more readily distinguishable—and, consequently, more likely to render the absence of a *Salamon* instruction harmless—when the offenses are separated by greater time spans, or by more movement or restriction of movement.

"Conversely, multiple offenses occurring in a much shorter or more compressed time span make the same determination more difficult and, therefore, more likely to necessitate submission to a jury for it to make its factual determinations regarding whether the restraint is merely incidental to another, separate crime. In those scenarios, where kidnapping and multiple offenses occur closer in time to one another, it becomes more difficult to distinguish the confinement or restraint associated with the kidnapping from another substantive crime. The failure to give a proper *Salamon* instruction in those scenarios is more likely to result in harmful error precisely because of the difficulty in determining whether each crime has independent criminal significance. See *State* v. *Thompson*, [118 Conn. App. 140, 144, 162, 983 A.2d 20 (2009)] (within fifteen minutes defendant entered victim's car, pushed her behind a building and sexually assaulted her) [cert. denied, 294 Conn. 932, 986 A.2d 1057 (2010)]; *State* v. *Flores*, [301 Conn. 77, 82, 89, 17 A.3d 1025 (2011)] (defendant's robbery of victim in her bedroom lasted between five and twenty minutes); *State* v. *Gary*, [120 Conn. App. 592, 611, 992 A.2d 1178] (defendant convicted of multiple sexual assaults and an attempted sexual assault that were in close temporal proximity to the defendant's restraint of the victim; thus court determined evidence reasonably supports a finding that the restraint merely was incidental to the commission of other crimes, namely, sexual assaults and attempted sexual assault; lack of *Salamon* instruction harmful error) [cert. denied, 297 Conn. 910, 995 A.2d 637 (2010)]." (Internal

quotation marks omitted.) *Hinds* v. *Commissioner of Correction*, 321 Conn. 56, 92–93, 136 A.3d 596 (2016).

In the present case, the criminal conduct took place over the course of more than one and one-half hours, during which time the petitioner and his accomplices committed multiple crimes against the victims and restrained them in multiple ways. F and R were first restrained at gunpoint in their garage and ordered to lay on the ground. F was hogtied there. The intruders then forcibly restrained R by the head and moved her into the house and upstairs to her bedroom. One of the intruders then restrained R on her bed by placing his legs on top of her. R was forced at gunpoint to perform oral sex on one of the intruders with her infant daughter, who had been forcibly removed from her crib in another room, on the bed next to her. Approximately one hour after the incident began, two of the intruders forced F into R's car and drove him to a bank located more than one mile from the victims' house and forced him to withdraw money from an ATM. After obtaining the cash from F, the two men forced him back into the car, brought him back to the house, and hogtied him again, this time in the upstairs hallway. While F was hogtied, one armed intruder remained with him while the other two removed items from the victims' house.

The respondent argues that these facts establish that "the nature and length of the restraints cannot be characterized as anything other than extreme, and they provide strong evidence that the restraints had independent criminal significance." The petitioner responds that this factor favors him because "[F's] and R's restraint occurred so close in time as to make it difficult to determine whether there was independent criminal significance to the conduct." We agree with the respondent.

Given both the duration of the incident and the nature of the restraints—hogtying F and holding both victims

at gunpoint throughout the entire ordeal—the present case is in line with those cases in which the victims were restrained for longer and confined or moved to a greater degree than necessary to complete other crimes. Indeed, the encounters deemed brief and the movements deemed incidental by this state's appellate courts have been counted in minutes and measured in feet or yards, whereas the incident here lasted for more than one hour, during which time both victims were restrained in multiple ways, and F was transported more than one mile from the house to a bank and then back to the house. Compare *Banks* v. *Commissioner of Correction*, supra, 339 Conn. 42 ("jury reasonably could conclude that moving robbery victims fewer than ten yards and confining them for, at most, a few minutes during a perpetrator's escape from the crime scene does not, simply by virtue of the times and distances involved, bear independent criminal significance"), and *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 79 (finding *Salamon* error harmful when petitioner's actions "were a continuous, uninterrupted course of conduct lasting minutes"), with *Nogueira* v. *Commissioner of Correction*, 168 Conn. App. 803, 841, 149 A.3d 983 (reasoning that, because petitioner dragged victim 113 feet during incident that lasted approximately two hours, "petitioner's movement of the victim . . . [was] distinguishable from the facts in *Hinds*, where the victim was moved only a matter of yards, which occurred in a matter of seconds" (internal quotation marks omitted)), cert. denied, 323 Conn. 949, 169 A.3d 792 (2016).

In the present case, the court recognized the long duration of the restraint of the victims but seemed to discount it because the "the 'kidnapping related actions were closely aligned in time, place, and manner to [the petitioner's] other criminal acts.' *Wilcox* v. *Commissioner of Correction*, supra, 162 Conn. App. 743." A closer examination of our decision in *Wilcox* makes

clear that the habeas court's reliance on the isolated language it quoted from that decision is misplaced.

In *Wilcox*, the petitioner offered the victim a ride to her home, which was a five minute walk from where the petitioner picked her up. Id., 747. The petitioner drove the victim past her home, refused to permit her to exit the car, and drove her for about twenty minutes to Cockaponset State Forest. Id., 747–48. Once there, the petitioner dragged the victim out of his car and approximately twenty feet into the woods where he sexually assaulted her and then attempted to sexually assault her a second time before the victim escaped. Id., 748. On the basis of these facts, this court concluded that the absence of a *Salamon* incidental restraint instruction at the petitioner's criminal trial was harmless because the "restraint and abduction of the victim in [the petitioner's] car were not merely incidental to [the] ultimate sexual assault of her in Cockaponset State Forest." Id. In particular, the court concluded that it was reasonable to infer that the drive to the state forest "was to avoid detection, and not necessary only to complete the act of sexual assault" and was "to hinder [the victim's] ability to call for assistance . . . ." Id., 749. This court explained that "[o]ne also can reasonably infer, given that the petitioner attempted a second sexual assault of the victim, that he intended to confine her for a lengthy period of time in order to perpetrate more than a single sexual assault of her." Id. Thus, the closeness in time, place, and manner of the restraint to other criminal acts must be considered in light of the purpose of the restraint. In *Wilcox*, the restraint of the victim, although closely aligned in time, place, and manner with the sexual assault, had independent legal significance because it was done not just to commit the sexual assault but also to evade detection, to hinder the victim from calling for help, and to commit additional crimes against her. Id. As we discuss more fully

in connection with the other *Salamon* factors, the same is true in the present case.

B

As to the second *Salamon* factor, whether the movement or confinement occurred during the commission of the separate offense, it is significant that the petitioner was convicted of violating § 53a-92 (a) (2) (B), which provides in relevant part that "[a] person is guilty of kidnapping in the first degree when he abducts another person and . . . he restrains the person abducted with intent to . . . accomplish or advance the commission of a felony . . . ." Thus, the jury in the petitioner's criminal trial was instructed that "[t]he state charges that the [petitioner] aided in the abduction and restraint of [F and R] with intent to accomplish or advance the commission of the felonies of robbery and sexual assault."

In *Banks*, our Supreme Court discussed § 53a-92 (a) (2) (B) and explained: "As we concluded in *Salamon* with respect to the underlying crime of assault . . . it is clear that the legislature did not intend to criminalize as kidnapping unlawful restraint that is no greater than necessary for, [or] involves no wrongful intent other than that inherent in, the completion of a robbery. It is equally clear, however, that the legislature, in adopting § 53a-92 (a) (2) (B), *did* intend that additional, gratuitous restraint used to accomplish or advance the commission of a robbery carry the added penalties associated with kidnapping. In other words, the mere fact that a perpetrator restrains a victim during the course of and in the service of a robbery does not mean that, under *Salamon*, the conduct does not constitute kidnapping. To so hold—or to permit a jury to so reason—would be to render § 53a-92 (a) (2) (B) a nullity, insofar as that statute criminalizes only such kidnappings. See

State v. *Buggs*, 219 Kan. 203, 214, 547 P.2d 720 (1976) (construing similar Kansas statute).

"Accordingly, we are not persuaded by the reasoning . . . that a jury reasonably might find that the petitioner's conduct was not kidnapping merely because it occurred as part of the course of events of the robberies. . . . [T]hat is not the relevant legal inquiry. . . . Rather, under *Salamon*, a jury, having found abduction, restraint, and the criminal intent associated therewith in the furtherance of a robbery, will necessarily find the petitioner guilty of kidnapping under § 53a-92 (a) (2) (B) *unless* it also finds that the restraint, and the associated criminal intent, was limited to that *inherent* in the robbery itself. . . . [T]o instruct a jury that it could find that there was no kidnapping merely because the restraint occurred in the course of an ongoing robbery would effectively override the will of our state's legislature, which was to impose heightened penalties for precisely such conduct." (Citations omitted; emphasis in original.) *Banks* v. *Commissioner of Correction*, supra, 339 Conn. 36–38.

In the present case, the habeas court, although mentioning *Banks* when discussing the second and third *Salamon* factors, did not seem to appreciate that the statute under which the petitioner was charged affects the application of the *Salamon* factors. It made no mention of § 53a-92 (a) (2) (B) or of the discussion in *Banks* of how a charge under that statute significantly impacts a court's analysis.

The respondent, relying on our Supreme Court's discussion in *Banks*, argues that "the mere fact that the victims' restraint occurred in close connection with the commission of other felonies does not favor the petitioner, where, as here, a jury convicted him of violating . . . § 53a-92 (a) (2) (B)." (Internal quotation marks omitted.) The petitioner responds that "[F's] and

R's restraint occurred close in time and place to the other offenses and no gratuitous restraint was used to accomplish the commission of the other crimes. Although the restraint occurred over a long period of time, it was done within the confines of the other crimes. In other words, this is unlike cases where the victims were restrained for several hours before or after the crimes or moved far away for purposes unrelated to the commission of the crime." We are not persuaded by the petitioner's argument.

In short, our Supreme Court has rejected the same reasoning advanced by the petitioner in the present case because such reasoning "runs afoul of the statutory language . . . ." *Banks* v. *Commissioner of Correction*, supra, 339 Conn. 38. Indeed, the petitioner's argument that the restraint, though lengthy, did not constitute kidnapping because "it was done within the confines of the other crimes" misses the forest for the trees. That is, the victims were held captive for a lengthy period of time specifically so that the petitioner and his accomplices could commit a series of other felonies against them. For example, F testified that the intruders initially suggested taking one of the children to the bank to be sure that the victims provided the correct access code but, instead, took F and held his family captive at the house, which is precisely the type of "additional, gratuitous restraint used to accomplish or advance the commission of a robbery" proscribed by § 53a-92 (a) (2) (B). *Banks* v. *Commissioner of Correction*, supra, 37. The same is true with respect to R: the restraint of R at gunpoint in a bedroom for more than one hour while the petitioner and his accomplices robbed the victims and while one of them sexually assaulted her exceeded the force and restraint necessary to commit the other crimes against her. Indeed, the man who sexually assaulted R pointed a gun at her and her infant daughter, and threatened to kill the family's cat, while

forcing R to perform oral sex on him, all of which clearly exceeded any restraint inherent in the sexual assault. The perpetrator of the sexual assault then continued to physically restrain R in the house afterward so that he and his accomplices could commit more crimes when the accomplices returned from the bank with F. These acts constituted gratuitous restraints used to advance both the sexual assault and subsequent robbery of the house in violation of § 53a-92 (a) (2) (B). Accordingly, we conclude that this factor supports the respondent's claim that the failure to give an incidental restraint instruction was harmless.

C

The third factor, whether the restraints were inherent in the nature of the separate offenses, is essentially the same as the second factor when the kidnapping charge is a violation of § 53a-92 (a) (2) (B). Put another way, a gratuitous restraint that would support a conviction under § 53a-92 (a) (2) (B) is greater restraint than is inherent in the nature of the separate offenses. See id., 339 Conn. 37. For the reasons previously stated as to the second factor, we conclude that the restraints the victims endured were not inherent in the other crimes committed by the petitioner and his accomplices.

D

The fourth and fifth factors—whether the restraint prevented the victims from summoning assistance and whether the restraints reduced the perpetrators' risk of detection—both favor the respondent.

After the initial confrontation in the garage when F was hogtied, the petitioner and his accomplices moved both victims inside the house, held both victims at gunpoint throughout the incident, drove F to a bank, and brought him back to the house. All of these actions undoubtedly prevented the victims from summoning

assistance and reduced the perpetrators' risk of detection. The petitioner nevertheless argues that "the restraint could be interpreted as preventing resistance while the crimes were being completed and not to reduce detection." Although some of the restraint involved could be interpreted as preventing resistance, much of it was solely for the purpose of avoiding detection and hindering the victims in summoning assistance. For example, the intruders continued to restrain F after he withdrew money from the bank even though that part of the robbery was completed. They could have released F at that point because he was in no position to interfere with the bank robbery or with the additional crimes being committed at the house. The only reason to continue to restrain F and to bring him back to the house was to allow the petitioner and his accomplices to complete their criminal activities without fear that F would summon assistance and thereby increase the risk that they would be caught. Accordingly, restraining F *after* completion of the bank transactions is not susceptible to more than one reasonable interpretation. See *Banks* v. *Commissioner of Correction*, supra, 339 Conn. 44 ("The goal of a robbery is to take possession of another's property. Once that property has been taken by force, the purpose of leading the victims to a different, more isolated location and requiring that they remain there for some period of time is, undoubtedly, to facilitate the offender's escape from the premises, undetected and unobstructed."). Similarly, one of the intruders continued to restrain R after he sexually assaulted her while waiting for his accomplices to return with F from the bank. The restraint of R at that time necessarily could not be to thwart her resistance to the sexual assault; its only purpose was to prevent R from summoning help or escaping.

E

Finally, as to the sixth factor, whether the restraints created a significant danger or increased the victims'

risk of harm independent of that posed by the separate offense, our Supreme Court has explained that "the distinct danger that is relevant to the question of whether criminal conduct bears independent significance as kidnapping need not be physical danger. . . . Criminal conduct that inspires distinct fears or has a uniquely harmful psychological impact on the victim also qualifies. . . . Isolating and restraining victims at gunpoint after having robbed them causes them to experience fears that are different both in degree and in kind from the fears that naturally accompany being robbed. . . . The case books are filled with instances in which a robber restrains, isolates, and/or moves his victims after taking their money as a prelude to committing additional, more dangerous crimes. The robbery victim who is led at gunpoint away from the visibility of a commercial storefront understands that the offender may be isolating and restraining her not merely to facilitate his escape but as a prelude to a physical assault, sexual assault, use of the victim as a hostage or human shield, or even murder. The prospect is undeniably terrifying. . . .

"Moreover, the harms and dangers involved in a post-robbery kidnapping are not solely psychological. Even if the perpetrator does not plan to assault, imperil, or kill his victims following a robbery, spiriting them at gunpoint to a more isolated location necessarily increases the risk that they will suffer serious physical injury or death. . . . [I]t takes but little imagination to envision the kind of violent events whose likelihood of occurrence is great [when a kidnapping victim is forced to travel a great distance under the threat of injury by a deadly weapon]. Ready examples include not only desperate attempts by the victim to extricate himself but also unforeseen intervention by third parties. . . . Once again, one need not look far to find cases in which a victim, fearing that kidnapping would be a precursor

to rape, assault, or murder, panicked or tried to resist, bringing about a tragic, self-fulfilling prophesy." (Citations omitted; footnotes omitted; internal quotation marks omitted.) Id., 46–48.

In the present case, the petitioner argues that "[t]here was nothing especially dangerous about the restraints that increased [F's] and R's risk of physical danger. Robberies and assaults are often accomplished with the use of weapons and by tying up the victims. . . . Most violent crimes create a significant amount of fear in the victims. . . . Because F and R would have some psychological trauma from any of these crimes, this factor does not necessarily favor the [r]espondent." (Citations omitted.) We are not persuaded.

It is hard to imagine a factual scenario that more clearly demonstrates the concerns identified in *Banks*. The petitioner and his accomplices robbed both victims in their garage, then violently forced R at gunpoint into the house while suggesting that they intended to sexually assault her. They took R upstairs, closer to where her two children were sleeping, and one of the intruders then removed F and R's daughter from her crib, threw her on the bed next to R, and told her to make her daughter stop crying. One intruder threatened to kill the family's cat before sexually assaulting R, as her daughter lay awake on the bed beside her. The intruders also first threatened to take F and R's children to the bank to ensure F's and R's assistance. When the intruders changed their plan and decided to take F to the bank, one of them told R that, if something went wrong, they would come back and "mess [her] up." Similarly, F knew that his wife and children were in danger if he did not cooperate with the intruders' demands. Furthermore, throughout the entire incident, the intruders kept F and R isolated from one another, not only while committing their crimes, but also afterward. The intruders' conduct undoubtedly caused the victims to experience

greater fear than that involved in an ordinary robbery in which the perpetrator simply takes the victim's property and leaves. See *Banks* v. *Commissioner of Correction*, supra, 339 Conn. 46 ("[i]solating and restraining victims at gunpoint after having robbed them causes them to experience fears that are different both in degree and in kind from the fears that naturally accompany being robbed"); see also *State* v. *McCarthy*, supra, 210 Conn. App. 29–30 (noting that victim's fear that defendant would harm her grandchildren while they briefly were restrained in stolen vehicle was distinct from fear involved in theft of vehicle). Accordingly, we are not persuaded by the petitioner's argument that the restraint and movement imposed on the victims did not increase the risk of physical and psychological harm independent of the other crimes.

F

In sum, we disagree with the habeas court's assessment of the *Salamon* factors and conclude that they lead to only one conclusion—the absence of an incidental restraint instruction was harmless error. As this court has observed, "[t]he salutary effect of the *Salamon* rule is to prevent the prosecution of a defendant on a kidnapping charge in order to expose him to the heavier penalty thereby made available, [when] the period of abduction was brief, the criminal enterprise in its entirety appeared as no more than an offense of robbery or rape, and there was lacking a genuine kidnapping flavor." (Internal quotation marks omitted.) *John B.* v. *Commissioner of Correction*, 194 Conn. App. 767, 783, 222 A.3d 984 (2019), cert. denied, 334 Conn. 919, 222 A.3d 513 (2020). In the present case, however, the period of abduction was extensive, the acts of restraint were particularly brutal, the criminal enterprise involved several distinct crimes committed against multiple victims, and the restraint and movement of the victims has "a genuine kidnapping flavor."

(Internal quotation marks omitted.) Id. Simply put, any attempt to equate the brief and limited restraints at issue in *Bell* and *Salamon* with the restraints the petitioner and his accomplices used while they engaged in a series of violent crimes in this case is unavailing. Cf. *Bell* v. *Commissioner of Correction*, supra, 339 Conn. 94 ("given the relatively limited nature and scope of the petitioner's asportation and restraint of the victims, and the ambiguity surrounding why [the petitioner] chose to confine his victims during the robberies, we are not prepared to say that the omission of a *Salamon* instruction was harmless"); *State* v. *Salamon*, supra, 287 Conn. 549 (victim restrained on ground where assault began for "at least five minutes before she was able to get away"). Accordingly, we have no doubt that the conduct in the present case is precisely the type of gratuitous restraint the legislature intended to punish under § 53a-92 (a) (2) (B).

Consequently, given the facts involved in the present case, we are confident that a reasonable jury, properly instructed, would have found the petitioner guilty of the kidnapping offenses beyond a reasonable doubt. Therefore, the habeas court improperly granted summary judgment for the petitioner on the first count of the petition.

II

AC 44957

In the petitioner's appeal, he claims that the court improperly granted the respondent's motion for summary judgment as to the second count of his petition alleging that his nolo contendere pleas in the Bridgeport cases were not knowing, intelligent, and voluntary. We disagree.

The following additional facts are relevant to the petitioner's claim. In Docket No. CR-97-131450-T, the

state charged the petitioner with kidnapping in the first degree, robbery in the first degree, burglary in the second degree with a firearm, commission of a felony with a firearm, larceny in the third degree, and being a persistent dangerous felony offender. *State* v. *Gregory*, Conn. Appellate Court Records & Briefs, September Term, 2002, Record pp. 24–26. In that matter, the petitioner pleaded nolo contendere to one count of kidnapping in the first degree and one count of burglary in the second degree with a firearm. The prosecutor stated the following factual basis for the charges on the record:

"[The crimes] occurred on [January 5, 1997], in the area of Madison Avenue in Bridgeport. . . . [T]he victim indicate[d] that he was out visiting friends. When he returned home, he found two individuals, this was about 8:30 in the evening hours, and he saw two individuals who apparently were in the process of burglarizing his house. When he realized what was happening and they saw him there, he was confronted by one of them who had a handgun and admonished him not to scream or attempt to leave or he would shoot. At that point, they threw a coat over his head so he could not observe them any further, brought him into the basement of his home, and tied him up with electrical wire. [While] he was bound in [the] basement, he heard people carrying things out of his house. And, eventually, when he didn't hear the noises anymore, he managed to free himself and went to a nearby business and called the police, who eventually came. There were items taken from his home that were valued at approximately . . . $1000. But, in any event, this is an individual who was born in 1922, is about now seventy-seven years old, so he would have been about seventy-five at the time that this occurred."

In Docket No. CR-97-131100-T, the state charged the petitioner with sexual assault in the first degree, robbery in the first degree, burglary in the first degree,

kidnapping in the first degree, larceny in the first degree, assault in the third degree, and being a persistent dangerous felony offender. *State* v. *Gregory*, Conn. Appellate Court Records & Briefs, September Term, 2002, Record pp. 9–11. In that matter, the petitioner entered conditional nolo contendere pleas to sexual assault in the first degree, burglary in the first degree, and kidnapping in the first degree. The prosecutor stated the following factual basis on the record:

"A female who was at the time sixty years old indicated that she had just fallen asleep in her bedroom and she was sleeping on the second floor of her home . . . . In any event, she said she was just falling asleep and woke up and noticed a man was there with a hand over her mouth in her bedroom. And this man then proceeded, when she tried to resist, to strike her several times in the face with his hand [and] told her to be quiet. At that point, he had immobilized her on the floor by holding her down so she could not escape, and at that time had sexual intercourse with her and ejaculated inside of her at that point. She was then persuaded by this man to tell [him] where she kept her jewelry, and he then went about the house, getting other items after making her go downstairs, pushing her down the stairs . . . where she retrieved her pocketbook. She saw that he had a gun. She saw a second male in the house carrying items from her home. She emptied out her pocketbook, which included her cash and car keys . . . . After he took some cash and the car keys, she was taken back upstairs, her nightgown was ripped off, and there was another attempt to sexually assault her . . . . At that point, the second suspect came upstairs and this was interrupted. She was bound at that point by her hands and her feet with the phone cord and was able to free herself after she heard the two individuals leave in her car, which was parked in an attached garage. . . .

"The [petitioner's] blood was taken in order to analyze it with regard to the Ansonia crime, which also involved a sexual assault, and there was a search warrant ultimately applied for [by] the state to compare . . . the [petitioner's] DNA . . . with samples taken from the victim . . . . And, in fact, at that point it was determined by the state forensic laboratory that [the petitioner's] DNA matched the DNA of the sample that was taken from the victim."

The court accepted the petitioner's nolo contendere pleas and imposed a total effective sentence of 100 years to run concurrently with the ninety years imposed in the Ansonia cases.

In the second count of the underlying habeas petition, the petitioner alleged that his convictions and incarceration in the Bridgeport cases are illegal because they were obtained in violation of his due process rights under the state and federal constitutions in light of our Supreme Court's decision in *State* v. *Salamon*, supra, 287 Conn. 509. The respondent moved for summary judgment on the second count of the petition. Relying on this court's decision in *Little* v. *Commissioner of Correction*, 177 Conn. App. 337, 172 A.3d 325, cert. granted, 327 Conn. 990, 175 A.3d 562 (2017) (appeal withdrawn February 15, 2019), the respondent argued that *Salamon* did not apply retroactively in the petitioner's case because (1) the petitioner waived his right to a jury trial by pleading nolo contendere, (2) applying *Salamon* retroactively to his negotiated pleas would grant the petitioner an undeserved windfall when the state had relied on the prior interpretation of the kidnapping statutes in entering into the plea agreement, and (3) the petitioner could not establish that the failure to apply *Salamon* retroactively would be a miscarriage of justice given the evidence of the requisite intent under *Salamon*.

In *Little*, the petitioner, Jermaine Little, and three accomplices forced the victim into his car outside his office in Bridgeport and drove the victim to his house in Shelton, where they stole money and jewelry from a safe in the victim's bedroom. Id., 339–40. Little "was charged in state court with kidnapping in the first degree . . . burglary in the first degree . . . and robbery in the first degree . . . . [Little] was further charged in federal court with being a felon in possession of a firearm in violation of 18 U.S.C. § 922 (g) (1) . . . . During this time, [Little] also had an ongoing state narcotics case, for which he received a sentence of eight years of imprisonment while the state and federal cases remained pending. . . .

"[Little] decided to plead guilty pursuant to separate written plea agreements with the state and the federal government. Under the terms of those agreements, [Little] agreed to plead guilty to kidnapping in the first degree in the state case and to being a felon in possession of a firearm in the federal case. In exchange, the state and the federal government agreed to recommend to their respective sentencing courts a sentence of fifteen years and eight months of imprisonment, and to request that the state and federal sentences run concurrently. The parties further agreed that it would be left to the discretion of the sentencing courts whether to run those sentences concurrently with or consecutively to the eight year sentence that [Little] had begun serving in the narcotics case.

"On November 29, 2004, [Little] pleaded guilty in federal court to being a felon in possession of a firearm. . . . On December 22, 2004, [Little] pleaded guilty to kidnapping in the first degree. . . . [After canvassing Little as to his plea], [t]he court found that [Little's] plea was knowing, intelligent, and voluntary and accepted it.

"[Little] was subsequently sentenced, in accordance with the terms of his plea agreement, to fifteen years

and eight months of imprisonment in the state case and the federal case, and those sentences were run concurrently with each other and with [Little's] sentence in the narcotics case. The prosecutor in the state case further indicated at the sentencing hearing that she had entered a nolle prosequi with respect to the . . . remaining charges of burglary in the first degree and robbery in the first degree." (Citations omitted; footnotes omitted.) Id., 341–44.

In 2013, Little brought a habeas petition alleging that his guilty plea was not knowing, intelligent, and voluntary because *Salamon* had not been decided when he entered his plea and that he was actually innocent of kidnapping in the first degree pursuant to *Salamon* because he did not possess the requisite intent to prevent the victim's liberation. See id., 346. After a trial, the habeas court denied both claims. Id.

On appeal, the issue presented was whether *Salamon* applied retroactively to Little's conviction when he pleaded guilty to one count of kidnapping. Id., 351. In resolving that issue, this court reviewed our Supreme Court's decision in *Luurtsema* v. *Commissioner of Correction*, supra, 299 Conn. 764, 773, in which the court addressed whether *Salamon* applied retroactively in habeas corpus proceedings and whether it applied in that petitioner's case in particular. *Little* v. *Commissioner of Correction*, supra, 177 Conn. App. 354.

In a plurality opinion in *Luurtsema*, our Supreme Court decided the retroactivity issue as a matter of state common law and "adopted a general presumption in favor of full retroactivity for judicial decisions that narrow the scope of liability of a criminal statute. . . . The plurality cautioned that this general presumption would not necessarily require that relief be granted in cases where continued incarceration would not represent a gross miscarriage of justice, such as where it is

clear that the legislature did intend to criminalize the conduct at issue, if perhaps not under the precise label charged. In situations where the criminal justice system has relied on a prior interpretation of the law so that providing retroactive relief would give the petitioner an undeserved windfall, the traditional rationales underlying the writ of habeas corpus may not favor full retroactivity. . . . The plurality observed that one can conceive of circumstances in which prosecutors rely on a prior interpretation of a statute to such an extent that retroactive application of a different subsequent interpretation might not be warranted. . . . For example, [i]f there are cases in which a petitioner was not convicted of the underlying assault, in reliance on a pre-*Salamon* interpretation of § 53a-92 (a) (2) (A), we have left open the possibility that retroactive relief may not be available. . . .

"The plurality [also] agree[d] with [Peter Luurtsema] that, as a matter of state common law, *Salamon* should be afforded fully retroactive effect in his particular case. . . . The plurality reasoned: [Luurtsema's case] is not a case . . . in which the state, in selecting the crimes with which to charge [Luurtsema], can plausibly be said to have relied to its detriment on the prior interpretation of the kidnapping statutes. . . . Here, [Luurtsema] was charged with every crime for which he might reasonably have been held liable . . . . That is, the record discloses no indication that the state would have charged [Luurtsema] differently had it anticipated the subsequent interpretation of § 53a-92 (a) (2) (A) in *Salamon*. . . . The plurality further stated that it could not discern any evidence from the current record that [Luurtsema] intended to restrain the victim more than was necessary to effect the underlying assault. . . . Justices Katz, Palmer, and McLachlan each filed concurring opinions in which no other justices joined." (Citations omitted; internal quotation marks omitted.) Id., 355–56.

This court determined in *Little* "that the only parts of the plurality opinion . . . that have any precedential value are the court's affirmative answers to the reserved questions of whether *Salamon* applie[d] retroactively in habeas corpus proceedings and to Luurtsema's case in particular. . . .

"With respect to the first reserved question, although a majority of the court . . . agreed that *Salamon* could be applied retroactively in collateral proceedings, there was no clear majority concerning how and to what extent *Salamon* should be applied retroactively. The three justice plurality adopted a general presumption of full retroactivity, subject to certain limited exceptions, while Justice Katz supported a per se rule in favor of full retroactivity. Neither Justice Palmer nor Justice McLachlan expressly endorsed a particular approach to retroactivity; they concurred only in the result reached by the plurality.

"With respect to the second reserved question, the facts of [*Little*] are sufficiently distinguishable from those in *Luurtsema* . . . such that the court's affirmative answer to the second reserved question also does not control the outcome of [*Little*]. [Little] was convicted after pleading guilty pursuant to a plea agreement with the state and federal government, and admitting his role in the [victim's] abduction and robbery. Luurtsema was convicted after a jury trial in which the jury was not instructed that, to find him guilty of kidnapping, it had to find beyond a reasonable doubt that he intended to prevent the victim's liberation for a longer period of time or to a greater degree than that which was necessary to commit the other crime. A majority of the court in *Luurtsema* . . . further appears to have agreed that this instructional error was not harmless beyond a reasonable doubt in light of the facts and circumstances of Luurtsema's case.

"As a result, there [was] no binding precedent controlling the unique issue [in *Little*]: whether *Salamon* should be applied retroactively to collateral attacks on a kidnapping conviction when the defendant pleaded guilty to that charge, and only that charge, pursuant to a plea agreement. . . . [This court found] the reasoning of the plurality of the [Supreme] [C]ourt . . . to be the most persuasive in the context of *Salamon*. As the United States Supreme Court has observed, one of the reasons that decisions narrowing the scope of a criminal statute should generally apply retroactively is because [those decisions] necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him. . . . As [Little's] case exemplifies, however, there are situations where the traditional rationales underlying the writ of habeas corpus simply do not favor full retroactivity." (Citations omitted; internal quotation marks omitted.) Id., 358–60.

Little argued "that *Salamon* should be applied retroactively because there is no differentiation between a conviction obtained as a result of a trial or by way of a plea and because there is a risk that after *Salamon*, his conviction does not comport with the due process requirements for guilty pleas." (Internal quotation marks omitted.) Id., 360. In rejecting his claim, this court explained that, although plea bargains provide speedy dispositions of cases and thereby conserve judicial resources, "[t]hese advantages can be secured . . . only if dispositions by guilty plea are accorded a great measure of finality. . . . Yet arrayed against the interest in finality is the very purpose of the writ of habeas corpus—to safeguard a person's freedom from detention in violation of constitutional guarantees. . . .

"To balance these competing interests of finality and personal freedom from detention in violation of constitutional guarantees, our courts have required a petitioner to demonstrate a miscarriage of justice or other

prejudice and not merely an error which might entitle him to relief on appeal in order to mount a successful collateral attack on his conviction. . . . [T]o demonstrate such a fundamental unfairness or miscarriage of justice, the petitioner should be required to show that he is burdened by an unreliable conviction." (Citations omitted; internal quotation marks omitted.) Id., 361–62.

Applying these principles, this court concluded in *Little* that the traditional rationales for the writ of habeas corpus did not favor applying *Salamon* retroactively. Id., 360, 363. The court reasoned: "There is no risk that [Little] stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him. The state has also relied sufficiently to its detriment on our Supreme Court's prior interpretation of our kidnapping statutes when constructing the terms of the plea agreement such that applying *Salamon* retroactively in the present case would be inappropriate. Accordingly, [Little's] due process claim, which is predicated on the retroactive application of *Salamon*, necessarily fails." Id., 367–68.

In the present case, the habeas court concluded that, as in *Little*, the petitioner could not "avail himself of the retroactive application of *Salamon* to undo his guilty plea[s]. . . . First, the facts clearly establish the commission of several criminal offenses—various robberies and sexual assaults. Second, the sentence imposed for the kidnapping is within the relevant statutory limits. Third, and most importantly, [the petitioner] entered his pleas of nolo contendere to a number of charges with the express purpose of appealing the denial of his motion to suppress. Unlike the [Ansonia] cases, [the petitioner] did not go to trial and instead chose to accept the court's finding of guilty and imposition of sentence so that he could appeal a dispositive motion. If successful, that appeal would have significantly impacted the state's ability to prosecute [the petitioner]. . . .

"For those reasons, the court concludes that the traditional rationales underlying the writ of habeas corpus do not favor applying *Salamon* retroactively to the Bridgeport convictions. There is no miscarriage of justice or other prejudice resulting from [the petitioner] being convicted in the two Bridgeport cases, including the two kidnapping charges, because of his written nolo contendere pleas. These convictions are neither unreliable nor unfair. . . . The court concludes, therefore, that as a matter of law [the petitioner] cannot prevail on the claim in count two."[11] (Citation omitted.)

On appeal, the petitioner claims that *Salamon* should apply retroactively to his case. According to the petitioner, "[t]he key distinction between this case and *Little* is that [Little] received a benefit for pleading guilty—he had numerous charges nolled and received a sentence that was fifty years [fewer] than his exposure. . . . The only benefit [the petitioner] received was the recommendation for a concurrent sentence with his existing . . . sentence, which this sentence exceeded. . . . Further, retroactive relief would not grant [the petitioner] an unexpected windfall. [I]n selecting the crimes with which to charge [the petitioner], [the state cannot] plausibly be said to have relied to its detriment on the prior interpretation of the kidnapping statutes." (Citation omitted; footnote omitted; internal quotation marks omitted.) The respondent disagrees and argues that the state relied to its detriment on the law as it existed prior to *Salamon* and that retroactive application of *Salamon* to the petitioner's case would result

[11] We note that the habeas court did not credit the petitioner's testimony at the habeas trial that he would not have entered his nolo contendere pleas if he properly understood the intent required for kidnapping. Nevertheless, because the court granted the respondent's motion for summary judgment as to this count, we do not consider the court's credibility determination in our analysis. See *Kellogg* v. *Middlesex Mutual Assurance Co.*, 211 Conn. App. 335, 350, 272 A.3d 677 (2022) ("[i]n deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party" (internal quotation marks omitted)).

in an unjust windfall. For the reasons that follow, we conclude that the traditional rationales for the writ of habeas corpus do not favor applying *Salamon* retroactively in the present case to undo the petitioner's negotiated plea agreement.

In *Little*, this court discussed the significance of Little's negotiated plea agreement with the state, explaining that Little "received precisely what he bargained for under the terms of that agreement. If *Salamon* is applied retroactively in the present case and the petitioner's conviction[s] [are] vacated, however, the state will have lost the benefit of its bargain. We recognize that in many cases the state and society's interest in finality must give way to the demands of liberty and a proper respect for the intent of the legislative branch. . . . Nevertheless, we cannot ignore the fact that, unlike in *Luurtsema* [v. *Commissioner of Correction*, supra, 299 Conn. 773], the state in the present case can plausibly be said to have relied to its detriment on our Supreme Court's prior interpretation of our kidnapping statutes when constructing the terms of the plea agreement. To authorize a term of fifteen years and eight months imprisonment, [Little] could have pleaded guilty to kidnapping in the first degree, burglary in the first degree, robbery in the first degree, or another appropriate felony offense, e.g., conspiracy to commit one of the aforementioned felonies. Had the state been prescient enough to foresee *Salamon* and thus selected a nonkidnapping offense as the basis for the guilty plea, *Salamon* would be irrelevant and the state would not be faced with the prospect of reconstructing and reprosecuting a fourteen year old case.

"In light of these facts and circumstances, we fail to see how not applying *Salamon* retroactively in the present case would be fundamentally unfair or manifestly unjust. Plea bargains always entail risks for the parties—risks relating to what evidence would or would

not have been admitted at trial, risks relating to how the jury would have assessed the evidence and risks relating to future developments in the law. The salient point is that a plea agreement allocates risk between the two parties as they see fit. If courts disturb the parties' allocation of risk in an agreement, they threaten to damage the parties' ability to ascertain their legal rights when they sit down at the bargaining table and, more problematically for criminal defendants, they threaten to reduce the likelihood that prosecutors will bargain away counts (as the prosecutors did here) with the knowledge that the agreement will be immune from challenge on appeal." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Little* v. *Commissioner of Correction*, supra, 177 Conn. App. 366–67.

The same reasoning applies in the present case, in which the petitioner entered nolo contendere pleas to only five of the thirteen charges he faced. Significantly, among the charges bargained away by the state was a part B charge of being a persistent dangerous felony offender under General Statutes (Rev. to 1997) § 53a-40 (a) and (f), which would have allowed the sentencing court to impose an enhanced sentence of an additional forty years. See General Statutes (Rev. to 1997) § 53a-40 (f) (when person is found to be persistent dangerous felony offender and court is of opinion that extended incarceration will best serve public interest, court "shall sentence such person to a term of imprisonment of not more than forty years"). Accordingly, as in *Little*, the petitioner obtained the benefit of his bargain, but, if *Salamon* is applied retroactively to invalidate his pleas, the state would lose the benefit of its bargain.

Likewise, had the state anticipated *Salamon* in the present case, it could have selected one or more of the nonkidnapping offenses to which the petitioner did not plead nolo contendere to achieve the desired sentence, and "*Salamon* would be irrelevant and the state would

not be faced with the prospect of reconstructing and reprosecuting [twenty-four] year old case[s]." *Little* v. *Commissioner of Correction*, supra, 177 Conn. App. 366. Furthermore, assuming arguendo that the petitioner's pleas were involuntary, the entire plea agreement, and not just the kidnapping convictions, would have to be vacated. As noted by the respondent, given that the victims in the Bridgeport cases were in their sixties and seventies at the time of the crimes in 1997, it is questionable whether the state would be able to prosecute those crimes now, twenty-five years later. Such a result certainly would constitute an undeserved windfall for the petitioner.

Accordingly, we conclude that the traditional rationales supporting the writ of habeas corpus do not favor applying the retroactive application of *Salamon* in the present case. As in *Little*, the state relied to its detriment on our Supreme Court's pre-*Salamon* interpretation of our kidnapping statutes when negotiating the petitioner's plea agreement and, therefore, "applying *Salamon* retroactively in the present case would be inappropriate." Id., 368. Consequently, the habeas court properly rendered summary judgment for the respondent on the second count of the petition.

The judgment is reversed as to the granting of the petitioner's motion for summary judgment on the first count of the petition, and the case is remanded to the habeas court for further proceedings on that count; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ORANE C.*
(AC 44410)

Alvord, Cradle and Suarez, Js.

Syllabus

Convicted, after a jury trial, of three counts of sexual assault in the first degree in connection with the sexual abuse of S, his stepdaughter, the defendant appealed to this court. In 2018, the defendant was arrested pursuant to a warrant, which contained an affidavit that detailed allegations of sexual assault against S, including three specific incidents that occurred in 2014, 2016, and 2017. A long form information was then filed, charging the defendant with, inter alia, a single count of aggravated sexual assault that occurred in 2017. Thereafter, in 2020, a substitute long form information was filed, charging the defendant with one additional count of aggravated sexual assault in the first degree for conduct that occurred in 2014, and one additional count of sexual assault in the first degree for conduct that occurred in 2016. During trial, the defendant moved to dismiss the second count of the substitute information alleging the 2014 aggravated sexual assault, on the ground that the count was time barred by the statute of limitations ((Rev. to 2019) § 54-193 (b)), because it charged the defendant with conduct that was not charged in an information until more than five years after it occurred. The trial court, after considering the factors set forth in *State* v. *Golodner* (305 Conn. 330), denied the motion, finding that the defendant had notice of the alleged 2014 assault via the arrest warrant affidavit. Prior to trial, the defendant moved to suppress a recording of a conversation during a phone call with R, in which the defendant admitted to repeatedly engaging in sexual intercourse with S since she was fourteen years old, arguing that the recording was inadmissible under the statute (§ 52-184a) pertaining to the admission of evidence obtained illegally by the use of an electronic device, as it was made by R without the defendant's knowledge or consent in violation of statute (§ 52-570d). The trial court denied the motion and admitted the recording as a full exhibit. *Held*:

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

Moreover, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49, 851; we decline to identify any person protected or sought to be protected under a protection order, protective order, or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

1. The trial court properly denied the defendant's motion to dismiss the second count of the substitute information charging aggravated sexual assault in the first degree: the affidavit that accompanied the arrest warrant described, in detail, the factual predicate of the 2014 assault and, therefore, the defendant had notice that he would have to defend against allegations of that charge, the elements thereof, and the evidence on which the charges were predicated; moreover, an analysis of the 2020 substitute information pursuant to the *Golodner* factors, revealed that the factual allegations underlying the 2020 substitute information were substantially similar to the facts underlying the first long form information filed in 2018, as it alleged violations of the same statute, containing the same elements, as the 2018 information, the additional charge relied on the same evidence on which the 2018 information was predicated, and, even though the defendant was exposed to a potentially greater sentence if convicted of count two, the increase in exposure was not, under these circumstances, dispositive, as the 2020 information did not broaden or substantially amend the charges made in the 2018 information.
2. The defendant could not prevail on his claim that he was deprived of a fair trial when the trial court admitted into evidence an allegedly illegal recording of his phone conversation with R, in violation of §§ 52-570d and 52-184a: even if the admission of the recording was in error, such error was harmless because the record was replete with evidence, independent of the alleged illegal recording, of the defendant's prior admissions of guilt, which diminished his credibility, specifically, his statements made via Facebook that contained similar admissions of guilt as to those in the recording and were similarly deleterious to his credibility, R's testimony regarding his other phone conversations with the defendant during which the defendant made similar admissions of guilt, and the defendant's confused and inconsistent testimony about his prior admissions to other witnesses; moreover, had the recording not been admitted into evidence, R could have testified as to the substance of the call, thus introducing the same admission to the jury, and S provided compelling and detailed testimony as to the allegations, which was corroborated by S's sister, who testified as to her firsthand observations that led her to believe that the defendant was sexually assaulting S; accordingly, in light of the record, this court had a fair assurance that the recording did not substantially affect the verdict.
3. The defendant could not prevail on his unpreserved claim that the trial court's limitation of defense counsel's closing argument, which sought to raise the issue of S's credibility by drawing inferences from the fact that S had not become pregnant despite the numerous alleged sexual assaults committed by the defendant, violated his constitutional rights to summation and the effective assistance of counsel:

   a. The defendant failed to prove the existence of a constitutional violation that deprived him of his right to summation: defense counsel's statements

during closing argument that S was less credible because there was no evidence that she ever became pregnant invited conjecture, not only of the circumstances of the sexual assaults that could have led to pregnancy, a fact not reasonably inferable from the record, but also that S never truly became pregnant, and having failed to demonstrate that the issue of the lack of pregnancy was reasonably inferable from the facts in evidence, the defendant also failed to prove that the court abridged his right to present closing argument.

b. The defendant could not prevail on his claim that the trial court's limitation of defense counsel's closing argument violated his right to the assistance of counsel, amounting to structural error: the court did not preclude defense counsel from arguing the issue of S's credibility to the jury during closing argument as defense counsel argued several grounds on which the jury could have questioned S's credibility, the defendant acknowledged in his appellate brief that the precluded argument regarding S having never become pregnant was only one of several factors pertaining to her credibility and, although the defendant stressed the importance of this particular factor to his overarching argument challenging S's credibility, the defendant was not necessarily entitled to present his theory of defense any way he chose, and the trial court, within its authority, may limit summation.

Argued November 9, 2022—officially released April 11, 2023

Procedural History

Substitute information charging the defendant with three counts of the crime of sexual assault in the first degree, brought to the Superior Court in the judicial district of Fairfield, where the court, *Calistro*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the case was tried to the jury before *Calistro*, *J.*; subsequently, the court denied the defendant's motion to dismiss; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

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

Laurie N. Feldman, deputy assistant state's attorney, with whom, on the brief, were *Joseph T. Corrandino*, state's attorney, *Ann P. Lawlor*, supervisory assistant state's attorney, and *Susan Campbell*, assistant state's attorney, for the appellee (state).

Opinion

CRADLE, J. The defendant, Orane C., appeals from the judgment of conviction, rendered after a jury trial, of three counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1).[1] The defendant claims that the trial court erred by (1) denying his motion to dismiss the second count of the relevant information on statute of limitations grounds, (2) admitting an allegedly illegal recording of a phone conversation, and (3) restricting the scope of defense counsel's closing arguments. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. The complainant, S, was born in 1996. The defendant, S's stepfather, married S's mother, M, before S turned six.[2] Because M often worked long hours, the defendant would stay home to watch the children while M was working.[3] When S was six years old, the defendant began sexually abusing her by forcing her to have sexual intercourse with him.[4] Following the abuse, the defendant would tell S that he would kill M if S ever said anything about what the defendant was doing to her. The defendant would also frequently hit or choke S if she resisted. The defendant continued to force S to have sexual intercourse with him, repeatedly from

[1] General Statutes § 53a-70 provides in relevant part: "(a) A person is guilty of sexual assault in the first degree when such person (1) compels another person to engage in sexual intercourse by the use of force against such other person or a third person, or by the threat of use of force against such other person or against a third person which reasonably causes such person to fear physical injury to such person or a third person . . . ."

[2] S could not recall exactly what age she was when the defendant married M but testified that it was sometime before she turned six.

[3] Other than S, who is not the defendant's biological daughter, the defendant and M have three daughters together.

[4] The defendant testified at trial that he never sexually assaulted S. However, there was evidence presented to the jury that the defendant sexually assaulted S when she was between the ages of six to twenty.

the time she was six years old until she was twenty, on multiple occasions threatening her with a knife when she fought back. After a confrontation between S and the defendant in June, 2017, when S was twenty years old, M asked to meet with S at a motel to talk about what was going on between S and the defendant. S told M, for the first time, that the defendant had been sexually assaulting her since childhood. S subsequently told her work supervisor who convinced S to report what happened to the police. In July, 2017, S reported to the police that the defendant repeatedly sexually assaulted her from the time she was six years old until she was twenty.[5] Thereafter, the defendant was arrested in February, 2018, pursuant to a warrant alleging one count of aggravated sexual assault in the first degree, threatening in the first degree, and unlawful restraint in the first degree. The operative substitute information charged the defendant with three counts of sexual assault in the first degree for three separate incidents occurring on different dates. After a jury trial, the defendant was convicted of all three counts of sexual assault in the first degree. The trial court, *Calistro*, *J.*, imposed three sentences to run consecutively to one another for a total effective sentence of sixty years of incarceration, execution suspended after thirty years, with thirty years of probation.[6] This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the court improperly denied his motion to dismiss a count of the state's

[5] Although the state introduced evidence at trial that the defendant sexually assaulted S numerous times from age six to age twenty, the defendant was ultimately charged—in the operative information, filed March 9, 2020—with only three counts of sexual assault in the first degree arising from allegations concerning assaults that occurred when S was between the ages of seventeen and twenty years old.

[6] Each individual sentence was for twenty years of incarceration, execution suspended after ten years, followed by thirty years of probation.

substitute information because it was time barred by the statute of limitations. Specifically, the defendant argues that count two of the February 7, 2020 substitute information charged the defendant with conduct not alleged in the original information more than five years after the offense allegedly occurred, in violation of General Statutes (Rev. to 2019) § 54-193 (b).[7] We disagree.

The following additional facts and procedural history are relevant to the resolution of this claim. On February 15, 2018, a Superior Court judge, *Devlin*, *J.*, issued an arrest warrant charging the defendant with aggravated sexual assault in the first degree, threatening in the first degree, and unlawful restraint in the first degree, for conduct alleged to have occurred on or about May 22, 2017. The affidavit attached to the arrest warrant contained detailed allegations of numerous, specific, and frequently recurring instances of sexual assault against S by the defendant when S was age six until she was

[7] General Statutes (Rev. to 2019) § 54-193 provides in relevant part: "(a) There shall be no limitation of time within which a person may be prosecuted for (1) a capital felony under the provisions of section 53a-54b in effect prior to April 25, 2012, a class A felony or a violation of section 53a-54d or 53a-169, (2) a violation of section 53a-165aa or 53a-166 in which such person renders criminal assistance to another person who has committed an offense set forth in subdivision (1) of this subsection, (3) a violation of section 53a-156 committed during a proceeding that results in the conviction of another person subsequently determined to be actually innocent of the offense or offenses of which such other person was convicted, or (4) a motor vehicle violation or offense that resulted in the death of another person and involved a violation of subsection (a) of section 14-224.

"(b) No person may be prosecuted for any offense, other than an offense set forth in subsection (a) of this section, for which the punishment is or may be imprisonment in excess of one year, *except within five years next after the offense has been committed*. . . ." (Emphasis added.)

The charge of aggravated sexual assault in the first degree that is at issue in this claim is not encompassed by subsection (a) of § 54-193, therefore the five year statute of limitations set forth in subsection (b) applies in the present case.

Subsequent amendments to § 54-193 have increased the statute of limitations for sexual assault offenses occurring on or after October 1, 2019, but are not applicable to the present case. See Public Acts 2019, No. 19-16, § 17.

age twenty.[8] Three such incidents—described in the affidavit as having taken place, approximately, in 2014, 2016, and on May 22, 2017[9]—detailed how the defendant used force, and threats of force, to compel S to engage in sexual intercourse with him. The defendant was served with the arrest warrant and a prosecution commenced. On March 12, 2018, the state filed a long form information (first long form information) charging the defendant with one count of aggravated sexual assault in the first degree, threatening in the second degree, and unlawful restraint in the first degree, for conduct alleged to have occurred on or about July 22, 2017.[10]

On February 7, 2020, the state filed a substitute information, which is the subject of the defendant's first

[8] The warrant affidavit alleged multiple discrete instances in which the defendant sexually assaulted her and alluded to several more. Five of these enumerated alleged instances occurred when S was in high school and college.

[9] The identified events are described in the affidavit as taking place during S's senior year of high school, sophomore year of college, and on May 22, 2017.

[10] Count one, charging the defendant with aggravated sexual assault in the first degree, "charges that in the [c]ounty of Fairfield, at the [c]ity of Bridgeport, on or about the 22nd day of July, 2017, at approximately 7:00 a.m., at or near [a street in Bridgeport], within said [c]ity, the [the defendant] compelled another person to engage in sexual intercourse by the use of force against such other person, and in the commission of such offense he displayed a deadly weapon, to wit: a knife, in violation of [§] 53a-70a (a) (1) of the General Statutes."

Count two, charging the defendant with unlawful restraint in the first degree, "charges that in the [c]ounty of Fairfield, at the [c]ity of Bridgeport, on or about the 22nd day of July, 2017, at approximately 7:00 a.m., at or near [a street in Bridgeport], within said [c]ity, the [the defendant] did restrain another person under circumstances which exposed the such other person to a substantial risk of physical injury, in violation of [§] 53d-95 (a) of the General Statutes."

Count three, charging the defendant with threatening in the second degree, "charges that in the [c]ounty of Fairfield, at the [c]ity of Bridgeport, on or about the 22nd day of July, 2017, at approximately 7:00 a.m., at or near [a street in Bridgeport], within said [c]ity, [the defendant] did by physical threat, intentionally placed or attempted to place another person in fear of imminent, serious physical injury, in violation of [§] 53a-62 (a) (1) of the General Statutes."

claim on appeal, charging the defendant with two counts of aggravated sexual assault in the first degree, and one count of sexual assault in the first degree,[11] identifying counts one, two, and three as occurring, respectively, on or about May 22, 2017, on or about January 1, 2014, and on or about January 1, 2016. Trial began on March 3, 2020. On March 5, 2020, following the close of the state's case-in-chief, the defendant moved to dismiss count two of the February 7, 2020 substitute information—concerning the alleged 2014 conduct—on the basis that it was time barred by the statute of limitations because it charged the defendant with conduct that was not charged in an information until more than five years after it occurred.[12]

[11] Count one, charging the defendant with aggravated sexual assault in the first degree, "charges that in the [c]ounty of Fairfield, in the [c]ity of Bridgeport, on or about the 22nd day of May, 2017, at or near . . . [a street in Bridgeport], within said [c]ity, [the defendant] compelled another person to engage in sexual intercourse by the use of force against such other person, and in the commission of such offense was armed with and threatened the use of a deadly weapon, to wit: a knife, in violation of [§] 53a-70a (a) (1) of the General Statutes."

Count two, charging the defendant with aggravated sexual assault in the first degree, "charges that on or about January 1, 2014 at . . . North Bishop Avenue within said [c]ity, [the defendant] compelled another person to engage in sexual intercourse by the use of force against such other person, and in the commission of such offense was armed with and threatened the use of a deadly weapon, to wit: a knife, in violation of [§] 53a-70a (a) (1) of the General Statutes."

Count three, charging the defendant with sexual assault in the first degree, "charges that in the [c]ounty of Fairfield, at the [t]own of Fairfield, on or about January 1, 2016, in the area of [a street in Fairfield] within said [t]own, [the defendant] did compel another person to engage in sexual intercourse by the use of force against such other person which reasonabl[y] caused such other person to fear physical injury in violation of [§] 53a-70 (a) (1)."

[12] On March 9, 2020, the state filed another substitute long form information—the operative charging document on which the defendant's conviction was based—charging the defendant with three counts of sexual assault in the first degree in violation of § 53a-70 (a) (1). The March 9, 2020 information is based on the same incidents alleged in the February 7, 2020 information, which were alleged to have occurred on or about May 22, 2017, January 1, 2016, and January 1, 2014. However, the defendant's motion to dismiss, the court's ruling thereon, and his claim on appeal that the court's ruling was

The court, *Calistro*, *J.*, heard arguments on the motion to dismiss the following day. In an oral ruling on the motion, the court made the following remarks: "[T]here are the four factors the court looks to. Factors to assist in determination of whether the amended information substantially broadens or amends timely charges are one: whether the additional pleadings alleged violations of a different statute. Counts one and two are the same. Two: [do the charges] contain different elements. It's again counts one and two, [which] are the same in terms of the statutory charge of § 53a-70a (a) (1). [Three]: [do the charges] rely on different evidence. During the course of this trial, there's been essentially the same evidence and again I understand . . . that it's still going to be left up to the jury whether they decide whether the state has proven [its case] . . . . And the fourth . . . is whether [the new charge] exposes the defendant to a potentially greater sentence. In this case it would, because if the count were to remain, it would be an additional B felony, exposure of twenty years. [A]nd if it were dismissed, it would only leave counts one and [three]. So, in that sense it would add. However . . . [notice is] the touchstone of the analysis in determining whether an amended or substitute information substantially broadens the timely charges.

"There's a statute of limitations claim. Again, by the dates that were indicated on the record, the court's position is that it tolled. It is tolled by the signing of the warrant which was signed by Judge Devlin. And paragraph fifteen [of the warrant affidavit] . . . spells it out, 2013 to 2014. It was the subject of the uncharged misconduct hearing that we had. . . . [T]here's notice—the case is replete with notice to the defense

erroneous, are based on the February 7, 2020 substitute information. Thus, the parties agree that the subject of our review is count two of the February 7, 2020 substitute information.

from the very beginning when this warrant was served up to the time that [the defendant] retained counsel. He had notice that the alleged [incident] occurred [at a specified residence] . . . . [I]t was still investigated and it's contained within the warrant that was generated by the [police department] and for those reasons, [there was] notice to the defense, the motion to dismiss is denied."

On appeal, the defendant claims that the court improperly denied his motion to dismiss. Specifically, the defendant argues that the February 7, 2020 substitute information "substantially broadened the original charges because count two was based on entirely different facts that were not the basis for the original charges." Further, the defendant contends that count two of the February 7, 2020 substitute information charged the defendant "under the same statute [and] increased his exposure and therefore the charge was time barred." In response, the state argues that "[t]he allegations in the arrest warrant affidavit, as a continuing course of the same kind of criminal conduct, with 2014 conduct in the preceding five years,[13] gave the defendant notice that he might have to defend against this charge." (Footnote added.) For the reasons set forth below, we conclude that the court properly denied the defendant's motion to dismiss count two of the February 7, 2020 substitute information.

We begin our analysis by setting forth the standard of review and relevant legal principles. It is well established that review of a court's legal conclusions and resulting denial of a motion to dismiss is plenary. *State* v. *Golodner*, 305 Conn. 330, 357, 46 A.3d 71 (2012).

"[A] prosecutor has broad authority to file an amended or substitute information before trial." *State*

[13] The defendant does not challenge the state's assertion that the warrant affidavit contained a description of the 2014 conduct that is the subject of count two of the February 7, 2020 substitute information.

v. *Jennings*, 101 Conn. App. 810, 817, 928 A.2d 541 (2007); see also Practice Book § 36-17 (prior to commencement of trial, "the prosecuting authority may amend the information, or add additional counts, or file a substitute information"). "We are cognizant, however, that the broad authority of a prosecutor to amend an information prior to trial is tempered by the applicable statute of limitations. . . . A statute of limitations protects a defendant from stale prosecutions . . . and [ensures] that a defendant receives notice, within a prescribed time, of the acts with which he is charged, so that he and his lawyers can assemble the relevant evidence [to prepare a defense] before documents are lost [and] memor[ies] fade . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Jennings*, supra, 817–18.

When an arrest warrant is timely issued, but not served until beyond the statute of limitations, the arrest warrant "[tolls] the statute of limitations" if the warrant is "executed without unreasonable delay" and "with due diligence." *State* v. *Ali*, 233 Conn. 403, 415–16, 660 A.2d 337 (1995); see also *State* v. *Crawford*, 202 Conn. 443, 445, 451–52, 521 A.2d 1034 (1987). However, "[w]hen the state files an amended or substitute information after the limitations period has passed . . . a timely information will toll the statute of limitations only if the amended or substitute information does not broaden or substantially amend the charges made in the timely information." *State* v. *Golodner*, supra, 305 Conn. 357. Although the arrest warrant was executed with due diligence and without unreasonable delay,[14] and the arrest warrant affidavit contained allegations of the subsequently charged 2014 conduct, the first long form information did not charge the defendant with a crime for said conduct. As stated herein, the defendant was not charged for that conduct until February 7, 2020,

[14] Neither party disputes this fact.

beyond the five year statute of limitations. Therefore, to determine whether the statute of limitations was tolled in the present case, we must decide whether the February 7, 2020 substitute information substantially broadened the charges, which requires an analysis guided by the factors set forth in *Golodner*.

"Although notice is the touchstone of the analysis in determining whether an amended or substitute information substantially broadens or amends the timely charges . . . factors to assist in this determination are whether the additional pleadings allege violations of a different statute, contain different elements, rely on different evidence, or expose the defendant to a potentially greater sentence." (Citations omitted; internal quotation marks omitted.) Id., 357–58. The *Golodner* factors are adopted from the test set forth in *United States* v. *Salmonese*, 352 F.3d 608 (2d Cir. 2003), which provides: "a superseding indictment that supplants a pending timely indictment relates back to the original pleading and inherits its timeliness as long as the later indictment does not materially broaden or substantially amend the original charges." (Internal quotation marks omitted.) Id., 622. In *Salmonese*, the court stated that, "[i]n determining whether a superseding indictment materially broadens or amends the original charges, we will consider whether the additional pleadings allege violations of a different statute, contain different elements, rely on different evidence, or expose the defendant to a potentially greater sentence. . . . *No single factor is determinative*; rather, the touchstone of our analysis is notice, i.e., whether the original indictment fairly alerted the defendant to the subsequent charges against him and the time period at issue."[15] Id. (Citation

[15] Although our Supreme Court, in *Golodner*, did not include the language from *Salmonese* disclaiming the determinative effect of any one factor, it did state that all the factors were intended "to assist" in the determination of the tolling effect of the timely filed information. *State* v. *Golodner*, supra, 305 Conn. 358. We interpret *Golodner* as setting forth factors for analyzing the tolling effect, under specific facts, none of which are necessarily disposi-

omitted; emphasis added; internal quotation marks omitted.)

We begin our discussion by examining the first two factors under *Golodner*. The first factor under *Golodner* calls for an analysis of whether the February 7, 2020 substitute information alleged violations of a different statute, while the second examines whether the new charge contains different elements. *State* v. *Golodner*, supra, 305 Conn. 358. Here, with regard to the 2014 conduct, both the first long form information and the February 7, 2020 substitute information charge the defendant under § 53a-70a (a) (1), with "[compelling] another person to engage in sexual intercourse by the use of force against such other person, and in the commission of such offense" was armed with and threatened the use of "a deadly weapon, to wit: a knife . . . ." Therefore, because the subsequent information alleged violations of the same statute, containing the same elements, as the first long form information, the first and second factors are satisfied. See *State* v. *Saraceno*, 15 Conn. App. 222, 240, 545 A.2d 1116 (finding that additional charge of sexual assault in second degree contained same definitive elements as original charge of sexual assault in first degree even though additional charge alleged conduct taking place on different date from original charge), cert. denied, 209 Conn. 823, 552 A.2d 431 (1988), and cert. denied, 209 Conn. 824, 552 A.2d 432 (1988).

The third factor under *Golodner* addresses whether the additional charge relies on different evidence. *State* v. *Golodner*, supra, 305 Conn. 358. This court has previously considered facts alleged in an arrest warrant affidavit in determining the evidence on which the state

tive of the issue on their own. See *State* v. *Mosback*, 159 Conn. App. 137, 154, 121 A.3d 759 (2015) (concluding that substitute information did not substantially broaden charges even though one of *Golodner* factors weighed in favor of defendant).

predicated the original charges. See *State* v. *Mosback*, 159 Conn. App. 137, 158, 121 A.3d 759 (2015) (including witness statements contained in warrant in analysis of whether "[t]he factual allegations underlying the amended information . . . were substantially similar to the facts underlying the original information" (internal quotation marks omitted)).[16] In the present case, the state, in the arrest warrant affidavit, specifically alleged numerous instances of sexual assault spanning fifteen years, including the 2014 incident, on which count two of the February 7, 2020 substitute information is based. The state, in the arrest warrant affidavit, relying on S's statements to the police, alleged that when S was in the twelfth grade "she moved to Bridgeport, Connecticut [around] 2013-2014. . . . [T]hey lived in [three residences in Bridgeport, including one on] North Bishop Avenue. She recalls [the defendant] raping her at those residences. While she lived at North Bishop Avenue, she recalls [the defendant] would make up excuses to be alone with her and would get her into his room. [The defendant] would tell her at knife point to be quiet to [ensure] her sisters wouldn't hear them. [The defendant] would hold her down on the bedroom floor and would rape her. She recalls one time trying to fight [the defendant] off and pushing him and he attempted to stab her with a knife." In light of this timely allegation, which the state could have relied on

[16] We note that, in *Mosback*, the state, in an untimely substitute information, charged the defendant under a subdivision of the statute cited in the original, timely information. *State* v. *Mosback*, supra, 159 Conn. App. 156–57. This court noted in *Mosback* that, "when the state had filed the original information, it was possible that the state would elect to prosecute the defendant for violating" the specific subdivision on which the state relied in the substitute information. Id., 156. Nonetheless, in its analysis of the similarity of the factual predicate of the timely and untimely charges in *Mosback*, the court considered facts that only appeared in the arrest warrant affidavit, and not in the original information, to arrive at its determination that the factual allegations underlying the amended information were substantially similar to those underlying the original information. Id., 158–59.

as uncharged conduct, the defendant knew, from the inception of the original charges, that he would have to be prepared to defend against evidence of the 2014 incident occurring at the residence on North Bishop Avenue. See *State* v. *Saraceno*, supra, 15 Conn. App. 238–40 (concluding that defendant had sufficient notice of charges associated with 1980 conduct, filed after expiration of statute of limitations, where arrest warrant alleged course of sexual assaults beginning in 1981). Therefore, pursuant to the third *Golodner* factor, we conclude that the additional charge relied on the same evidence on which the first long form information was predicated.

The defendant, however, attempts to construe the present case as a corollary to *Golodner*, in arguing that the February 7, 2020 substitute information introduced charges predicated on new evidence. The defendant argues that, "[j]ust as in *Golodner*, the [substitute] information substantially broadened the original charges because count two was based on entirely different facts that were not the basis for the original charges." In *Golodner*, the defendant was charged on-site with reckless endangerment in the second degree after he intentionally drove his van at a field surveyor and a law enforcement officer. *State* v. *Golodner*, supra, 305 Conn. 336, 355. The state, in the first long form information, charged the defendant with only one count of reckless endangerment in the second degree in connection with his actions against the officer, but a later substitute information, filed after the relevant statute of limitations had already run, added a second count of the same offense for his action as it concerned the field surveyor. Id., 355. Our Supreme Court concluded that the state, by means of the additional charge in the substitute information, substantially broadened the charges from the first long form information—and therefore the first long form information did not toll

the statute of limitations—because it named a new victim. Id., 358–59. Our Supreme Court noted that "the defendant had no notice that he was accused of any criminal conduct related to the new victim, [the field surveyor]." Id., 359. In the present case, the warrant affidavit included detailed allegations concerning the alleged 2014 conduct, but the first long form information did not charge the defendant with sexual assault in connection to those allegations. Conversely, the defendant in *Golodner* was arrested on-site, without a warrant. Id., 337. Therefore, *Golodner* is distinguishable from the present case insofar as the defendant in *Golodner* did not have notice of the factual predicate underlying one of the charges contained in the first long form information.

The defendant also cites *Jennings* as support for his argument that, because the first long form information charged the defendant in connection with allegations of conduct occurring in 2017, and not 2014, the February 7, 2020 substitute information relies on different evidence. In *Jennings*, the defendant was arrested pursuant to an arrest warrant, and an information was timely filed charging him with stalking in the second degree. *State* v. *Jennings*, supra, 101 Conn. App. 812. An untimely substitute information added a second count of stalking in the second degree for conduct occurring on a different day—a charge not alleged in the first long form information or discussed in the arrest warrant affidavit. Id., 813. The court concluded that the addition of a second stalking charge impermissibly broadened the charges made against the defendant because the first long form information only referenced a single instance of stalking occurring on a particular day, and an additional charge would expose the defendant to a potentially greater sentence. Id., 820. However, in *Jennings*, unlike the present case, the warrant did not allege any conduct other than the conduct charged in

the first long form information, making it distinguishable from the present case. Id., 812–13.

The fourth factor under *Golodner* concerns whether the additional charge exposed the defendant to a potentially greater sentence. *State* v. *Golodner*, supra, 305 Conn. 358. The defendant argues that "count two [of the substitute information] substantially broadened the charges by increasing the sentence that the defendant could receive by [twenty] years. Indeed, the trial court [sentenced the defendant to a term of twenty years of incarceration to run] consecutive to his other sentences."[17] However, even though the defendant was exposed to a greater sentence, the increase in exposure is not, under these circumstances, dispositive. See *State* v. *Mosback*, supra, 159 Conn. App. 154 (concluding that new charge, although increasing exposure, did not violate statute of limitations because defendant had notice of charge from original indictment and warrant).

We reemphasize that "notice is the touchstone of the analysis in determining whether an amended or substitute information substantially broadens or amends the timely charges." (Internal quotation marks omitted.) *State* v. *Golodner*, supra, 305 Conn. 357–58. Here, the defendant had notice that he would have to defend against allegations of sexual assault in the first degree, the elements thereof, and the evidence on which the charges were predicated. The arrest warrant affidavit described, in detail, the factual predicate of the 2014 assault. Although the additional charges exposed the

[17] The defendant cites to *Jennings* in support of his contention that because the additional charge led to a longer sentence, the statute of limitations was not tolled. However, we once again note that *Jennings* is distinguishable from the present case. In *Jennings*, the warrant did not contain allegations that supported the untimely charge added by the substitute information, as the warrant here did. *State* v. *Jennings*, supra, 101 Conn. App. 812–13.

defendant to a potentially greater sentence, we conclude that, on balance, the factual allegations underlying the substitute information were "substantially similar to the facts underlying" the first long form information; *State* v. *Almeda*, 211 Conn. 441, 446, 560 A.2d 389 (1989); and the substitute information did not "broaden or substantially amend the charges made in the first information." *State* v. *Jennings*, supra, 101 Conn. App. 818. Therefore, the court properly denied the defendant's motion to dismiss count two of the February 7, 2020 substitute information.

II

The defendant next claims that the court erred in admitting an allegedly illegal recording of a phone conversation to which the defendant was a party. Specifically, the defendant argues that the recording was obtained in violation of General Statutes § 52-570d,[18] rendering it inadmissible under General Statutes § 52-184a.[19] We need not decide whether the court properly admitted the recording into evidence because we conclude that, even if the court erred in admitting the recording, its admission was harmless.

The following facts and procedural history are relevant to the resolution of this claim. On February 10, 2020, the defendant filed a motion to suppress a

[18] General Statutes § 52-570d provides in relevant part: "(a) No person shall use any instrument, device or equipment to record an oral private telephonic communication unless the use of such instrument, device or equipment (1) is preceded by consent of all parties to the communication and such prior consent either is obtained in writing or is part of, and obtained at the start of, the recording, or (2) is preceded by verbal notification which is recorded at the beginning and is part of the communication by the recording party, or (3) is accompanied by an automatic tone warning device which automatically produces a distinct signal that is repeated at intervals of approximately fifteen seconds during the communication while such instrument, device or equipment is in use. . . ."

[19] General Statutes § 52-184a provides: "No evidence obtained illegally by the use of any electronic device is admissible in any court of this state."

recording of a phone call between himself and Daniel Ribacoff that occurred on July 25, 2017. The defendant's motion to suppress stated that "the defendant engaged the services of Daniel Ribacoff and his company . . . to administer to the defendant a polygraph examination relevant to the allegations in this case." Further, "[o]n July 21, 2017, the defendant was administered a polygraph examination by Ribacoff at his office in New York." After the defendant returned to Connecticut, he spoke with Ribacoff over the phone multiple times. On July 25, 2017, Ribacoff recorded a phone call between himself and the defendant without the defendant's knowledge or consent. During the recorded conversation, the defendant admitted to repeatedly engaging in sexual intercourse with S from the time she was fourteen years old.[20] Ribacoff sent this recording containing the defendant's admissions to law enforcement.

The court held a hearing on the motion to suppress on March 2 and 5, 2020, at which Ribacoff and the officer to whom he sent the recording testified to the facts alleged in the motion to suppress. The officer also testified that, although he knew that Ribacoff planned to make the recording, he did not instruct him to do so. Defense counsel argued that §§ 52-570d and 52-184a required that the recording be suppressed because § 52-570d prohibited recording private phone conversations unless all parties consented, and, pursuant to § 52-184a, illegally recorded electronic evidence is inadmissible.[21]

[20] The defendant stated in the call that he did not remember having ever engaged in sexual intercourse with S when she was six years old.

[21] The defendant also noted that the law enforcement exception—set forth in § 52-570d (b) (1)—to the two party consent requirement for recordings did not apply here because Ribacoff was acting of his own accord, and not at the direction of law enforcement.

Moreover, the defendant advanced a due process argument at the suppression hearing, which the court rejected. This argument was not advanced on appeal; therefore, we deem it abandoned. See *Goshen Mortgage, LLC* v. *Androulidakis*, 205 Conn. App. 15, 35 n.15, 257 A.3d 360 ("arguments [that] have not been advanced on appeal . . . are deemed abandoned"), cert. denied, 338 Conn. 913, 259 A.3d 653 (2021).

At the conclusion of arguments on the motion, the court issued an oral ruling: "I think that it's clear from what the court cited as the legislative history . . . that both § 52-570d and § 52-184a are almost exclusively appl[ied] in civil matters. They're civil statutes. There's a civil remedy and therefore the court is finding that they do not apply in this instance, at least in terms for the suppression." On the basis of the foregoing, the court denied the defendant's motion to suppress the recording. The recording was admitted as a full exhibit during trial and played for the jury.

On appeal, the defendant argues that he "was deprived of a fair trial when the court admitted into evidence a recording of a highly incriminating telephone conversation that was obtained illegally." We disagree.

For the purpose of resolving this claim, we will assume, without deciding, that the court improperly admitted the recording. We conclude that the admission of the recording into evidence was harmless error. "When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful.[22] . . . We have concluded that a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict. . . . We previously have considered a number of factors in determining whether a defendant has been harmed by the admission or exclusion of particular evidence. Whether such error is harmless in a particular case depends [on] a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points,

[22] The defendant raised a constitutional argument under the fourth amendment to the United States constitution before the trial court that he expressly abandons on appeal.

the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Considering these various factors, we have declared that the proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error." (Footnote added; internal quotation marks omitted.) *State* v. *Edwards*, 202 Conn. App. 384, 403, 245 A.3d 866, cert. denied, 336 Conn. 920, 246 A.3d 3 (2021).

At trial, the state presented evidence of admissions of guilt the defendant made to two individuals. In addition to the evidence of the July 25, 2017 recording between the defendant and Ribacoff, the jury heard testimony from Ribacoff that the defendant had admitted to him during a different phone call that he sexually assaulted S. Furthermore, the state introduced a chain of Facebook messages the defendant sent a family friend, Jackson, stating that he had "go[ne] wrong" with S from the time she was fourteen years old to the time she was twenty.[23] The defendant's Facebook messages further stated that "it's not a nice thing to go to God and say Lord I molested my daughter."

The defendant argues that, due to the lack of physical evidence, this case hinged on the credibility of his testimony, which was undermined by the recording. He states that "[a] defendant's confession is probably the most probative and damaging evidence that can be admitted against him. . . . The improper admission of the recording undoubtedly convinced the jurors to convict." (Citation omitted; internal quotation marks omitted.)

[23] The defendant testified that Jackson was a "friend of the family" but later stated that, "I know her but not know her" before stating that he did know her. The defendant further testified that he could not remember sending the messages to Jackson because he was distressed. Subsequently, the defendant testified that he sent the messages to Jackson because he thought it would lead to a reconciliation between him and his family.]

Here, the record is replete with evidence, independent of the recording, which reflect the defendant's prior admissions of guilt and diminished his credibility. Particularly, the defendant's statements to Jackson via Facebook contained similar admissions of guilt to those in the recording and were similarly deleterious to the defendant's credibility. Additionally, Ribacoff testified as to his other phone conversations with the defendant during which the defendant made similar admissions of guilt. Moreover, the defendant's confused and inconsistent testimony about his prior admissions to Ribacoff and Jackson inevitably called his credibility into question. See *State* v. *Sinclair*, 332 Conn. 204, 234–36, 210 A.3d 509 (2019) (evidentiary error harmless where, inter alia, defendant's testimony was manifestly not credible). As the state points out, had the recording not been admitted into evidence, Ribacoff could have testified as to the substance of the call, thus introducing the same admission to the jury. Also, S provided compelling and detailed testimony as to the allegations, which was corroborated by S's sister, who testified as to her first-hand observations, which led her to believe that the defendant was sexually assaulting S.[24] Under these circumstances, we have a fair assurance that the recording did not substantially affect the verdict.

III

The defendant's final claims on appeal are based on the assertion that the trial court improperly restricted the scope of defense counsel's closing arguments. Specifically, the defendant argues that the his "constitutional rights to the . . . assistance of counsel, [and] to present summation to the jury . . . were violated when the court limited him from making an argument" that

[24] The defendant also suggests that S's credibility was a central facet of the case. The defendant posits that S had motive to fabricate the allegations because she wanted to be free to see her boyfriend, and the defendant was strictly against her dating outside of their church.

"the fact S never got pregnant created a reasonable doubt."[25] We disagree.

The following facts and procedural history are relevant to the resolution of this claim. S testified at trial that the defendant never used a condom when he sexually assaulted her, that she was not using any form of contraception at the time of the sexual assaults, and that, to her knowledge, she never became pregnant. However, S also testified as to a "pregnancy scare" that occurred after she began menstruating. S testified that the defendant told her to use a pregnancy test, and later began pressing down on S's stomach until "it hurt like crazy." S never saw the result of the test.

During closing argument, defense counsel made the following statement: "I would also ask you to consider what are the odds that [the defendant] could have had unprotected sex with [S] three to four times a month as he indicated on that call with Mr. Ribacoff, over a number of years but never got [S] pregnant? You heard testimony she wasn't on birth control." At that point, the state objected, stating that the argument asked the jurors "to speculate about pregnancies" that were not in evidence. Defense counsel responded that the argument was "based on the lack of evidence." The court sustained the objection. On appeal, the defendant claims that the court's limitation of his defense counsel's closing arguments violated his constitutional rights to summation and the effective assistance of counsel. This

[25] The defendant also claims that his right to present a defense was violated. However, this claim is not briefed beyond a bare assertion, and, accordingly, is inadequately briefed. See *In re A'vion A.*, 217 Conn. App. 330, 356–57, 288 A.3d 231 (2023) ("[C]laims are inadequately briefed when they are merely mentioned and not briefed beyond a bare assertion. . . . Claims are also inadequately briefed when they . . . consist of conclusory assertions . . . with no mention of relevant authority and minimal or no citations from the record . . . ." (Internal quotation marks omitted.)). We therefore decline to review the defendant's claim that the trial court violated his right to present a defense.

claim was not properly preserved and is therefore subject to review under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).[26] Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 239–40; see also *In re Yasiel R.*, supra, 781 (modifying third prong of *Golding*). "The first two [prongs of *Golding*] involve a determination of whether the claim is reviewable; the second two . . . involve a determination of whether the defendant may prevail." (Internal quotation marks omitted.) *State* v. *McKinney*, 209 Conn. App. 363, 389, 268 A.3d 134 (2021), cert. denied, 341 Conn. 903, 268 A.3d 77 (2022).

In the present case, we consider the merits of the defendant's claim, under *Golding*, because the record is adequate for our review, and the claim is of constitutional magnitude. See, e.g., id. (claim that "the court violated his sixth amendment right to the effective assistance of counsel by precluding defense counsel's remarks" during closing arguments was "of constitutional magnitude"); *State* v. *Cunningham*, 168 Conn. App. 519, 530–32, 146 A.3d 1029 (same), cert. denied, 323 Conn. 938, 151 A.3d 385 (2016).

[26] The defendant argues that he is entitled to relief under *Golding* insofar as his claims are unpreserved.

Although we conclude that the defendant's claims are reviewable, we conclude that the court did not violate the defendant's right to present a closing argument, or his right to the effective assistance of counsel and, therefore, the defendant's claims fail under the third prong of *Golding*.

A

First, we address the defendant's claim that the court violated his right to summation.

"The sixth amendment guarantee in the federal constitution of the right to assistance of counsel has been held to include the right to present closing arguments. . . . As the United States Supreme Court has explained, [t]here can be no doubt that closing argument for the defense is a basic element of the adversary [fact-finding] process in a criminal trial. Accordingly, it has universally been held that [defense counsel] has a right to make a closing summation to the jury, no matter how strong the case for the prosecution may appear to the presiding judge. . . .

"In general, the scope of final argument lies within the sound discretion of the court . . . subject to appropriate constitutional limitations. . . . It is within the discretion of the trial court to limit the scope of final argument to prevent comment on facts that are not properly in evidence, to prevent the jury from considering matters in the realm of speculation and to prevent the jury from being influenced by improper matter that might prejudice its deliberations. . . . [Although] we are sensitive to the discretion of the trial court in limiting argument to the actual issues of the case, tight control over argument is undesirable when counsel is precluded from raising a significant issue. . . . Although defense counsel may not make speculative arguments to the jury, we have explained that counsel

may comment [on] facts properly in evidence and [on] reasonable inferences drawn therefrom. . . .

"[T]he right to present a closing argument is abridged not only when a defendant is completely denied an opportunity to argue before the court or the jury after all the evidence has been admitted, but also when a defendant is deprived of the opportunity to raise a significant issue *that is reasonably inferable from the facts in evidence*." (Citations omitted; emphasis added; footnote omitted; internal quotation marks omitted.) *State* v. *Robert R.*, 340 Conn. 69, 79–81, 262 A.3d 810 (2021).

In the present case, the defendant argues that the court violated his right to present summation because the court denied him an opportunity to raise a significant issue, namely, to invite the jury to draw inferences from the fact that S had not become pregnant. He argues that "it was reasonable to infer that a woman having unprotected sex several times a week over the course of several years had a high likelihood of getting pregnant." The defendant therefore concludes that the lack of evidence of a pregnancy, despite fifteen years of sexual abuse, calls S's credibility into question. The state counters that "[t]here was no evidence of whether the defendant ejaculated, his or the victim's fertility, or the likelihood that these sexual assaults would have led to pregnancy." We agree with the state that, for these reasons, the relevant factual predicate for the defendant's argument was not established at trial. Therefore, the defendant's argument that S was less credible because there was no evidence that she ever became pregnant invites conjecture, not only that the circumstances of the sexual assaults *could have* led to pregnancy—a fact that is not reasonably inferable from this record—but also that S truly never became pregnant.

The defendant has failed to demonstrate that the issue he sought to raise during closing argument was reasonably inferable from the facts in evidence. Thus, the defendant has failed to prove that the court abridged his right to present closing argument. Accordingly, the defendant has not proven, under *Golding*'s third prong, that a constitutional violation existed that deprived him of his right to summation.

B

The defendant also claims that the court's limitation of his defense counsel's closing argument violated his right to the assistance of counsel, amounting to structural error.[27] Specifically, the defendant argues that the court violated his right to the effective assistance of counsel by proscribing, during summation, defense counsel's argument that the lack of evidence that S became pregnant diminished her credibility. The defendant argues that this case "turned on issues of credibility," and that "the state was allowed to poke holes in the defendant's version [of the story] and argue S had no reason to lie, [while] the defendant was not given the same opportunity to point out a major flaw in the state's case." We disagree.

It is well established that "[t]he right to the assistance of counsel ensures an opportunity to participate fully and fairly in the adversary [fact-finding] process. . . . It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the

[27] Although the defendant does not cite to any authority to support his assertion that there was structural error, we acknowledge that our Supreme Court has held that "[o]nce a violation of the sixth amendment right to the assistance of counsel has been established, we need not inquire as to whether the error resulted in prejudice to the defendant. [A] per se rule of automatic reversal more properly vindicates the denial of the defendant's fundamental constitutional right to assistance of counsel guaranteed by the sixth amendment." (Internal quotation marks omitted.) *State* v. *Robert R.*, supra, 340 Conn. 89.

trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt. . . . In a criminal trial, which is in the end basically a [fact-finding] process, no aspect of [partisan] advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment. . . .

"Our appellate courts have previously found reversible error when the trial court precluded defense counsel from discussing certain issues during closing argument, particularly when an issue was significant and [bore] directly on the defendant's theory of the defense." (Citations omitted; internal quotation marks omitted.) *State* v. *Robert R.*, supra, 340 Conn. 85–86.

Here, the defendant was not precluded from arguing the issue of S's credibility. Moreover, the argument that S never became pregnant was not the only means of challenging her credibility. Indeed, defense counsel argued several grounds on which the jury could have questioned S's credibility.[28] The defendant acknowledges in his brief that the precluded argument that S

[28] Much of defense counsel's statement at closing argument was concerned with casting doubt on S's credibility, and, with the exception of the previously referenced comments regarding lack of evidence of pregnancy, these statements were not limited by the court. Such statements included: "this was a strict household"; "we know [S] had a boyfriend . . . [and that] [the defendant] wasn't happy about [the boyfriend] being in a relationship with [S]"; "[i]t's only after this blowup with [the defendant] and the argument about [her boyfriend] . . . that [S] runs off [and] tells her mother that [the defendant] has been sexually assaulting her"; "[S's] explanation of why she finally reported [these] alleged assaults to the police, is that she just had enough and she needed it to stop so that she can live her life or words to that effect"; "with the exception of the purported black eye from May of

never became pregnant was a "*factor* that pertained to S's credibility." (Emphasis added.) Although the defendant stresses the importance of this particular factor to his overarching argument as to S's credibility, the defendant is not necessarily entitled to present his theory of the defense any way he chooses, and the court may limit summation within its authority to do so. See *State* v. *Gonzalez*, 338 Conn. 108, 132, 257 A.3d 283 (2021) (holding that sixth amendment rights do not encompass right to present closing argument in exact manner in which state presents evidence).

Therefore, we conclude that the court did not preclude defense counsel from presenting to the jury, during closing argument, a significant issue bearing on the defendant's theory of the case. Thus, the court did not violate the defendant's right to the assistance of counsel. Accordingly, the defendant's claim fails under the third prong of *Golding* because the alleged constitutional violation does not exist.

The judgment is affirmed.

In this opinion the other judges concurred.

SCOTT A. WHITE *v.* WATERBURY FIRE DEPARTMENT ET AL.
(AC 45589)

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

Syllabus

The plaintiff firefighter appealed to this court from the decision of the Compensation Review Board, which affirmed the decision of the Workers' Compensation Commissioner that the plaintiff was not entitled to

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2017, there's been no evidence presented that a single person noticed any sort of injury on [S] despite her claims of being repeatedly, violently sexually assaulted for more than fourteen years"; "[n]ot only does [S] not disclose anything during the fourteen plus years she's claiming this is going on, but when confronted by her mother and [sister] . . . she denied [being sexually assaulted]"; "[h]ow is it that [S] could not tell you whether [the defendant's] penis was circumcised or uncircumcised?"

benefits for injuries he sustained when he fell leaving his home while carrying work gear to work an overtime shift. The plaintiff had agreed to work the overtime shift at a fire station different from the one at which he worked his regular shift. At the conclusion of his regular shift, the plaintiff took certain of his work gear home with him so he would not have to stop at his regular work location to pick it up before going to the overtime shift. The defendant employer neither directed nor requested that the plaintiff bring his work gear home prior to working the overtime shift. The commissioner determined that the plaintiff's injuries did not arise out of or in the course of his employment, reasoning, inter alia, that bringing the work gear home was not a necessary activity that was incidental to the plaintiff's employment or that benefited the defendant but, rather, that the plaintiff brought the work gear home for his sole benefit and convenience. *Held* that the board properly affirmed the commissioner's decision that the plaintiff's injuries were not compensable pursuant to statute (§ 31-275 (1) (E)) because they occurred at his abode as a result of a preliminary act in preparation for work that was not directed or requested by the defendant; moreover, contrary to the plaintiff's contention that the defendant was aware that it was common practice for its employees to bring their work gear home, that did not mean that his doing so was mutually beneficial to both parties and, therefore, compensable; furthermore, his claim that he would have been unable to perform his job as a firefighter had he not brought the work gear home was belied by the commissioner's factual findings, which the plaintiff did not challenge.

Argued March 8—officially released April 11, 2023

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Fifth District denying the plaintiff's claim for benefits, brought to the Compensation Review Board, which affirmed the commissioner's decision, and the plaintiff appealed to this court. *Affirmed.*

Justin A. Raymond, for the appellant (plaintiff).

Daniel J. Foster, corporation counsel, for the appellees (defendants).

Opinion

BRIGHT, C. J. The plaintiff, Scott A. White, appeals from the decision of the Compensation Review Board

(board) affirming the denial of his claim for benefits by the Workers' Compensation Commissioner for the Fifth District (commissioner).[1] The plaintiff, a firefighter for the named defendant, the Waterbury Fire Department,[2] argues that the commissioner and the board erred in concluding that the plaintiff was not entitled to workers' compensation benefits because he was not engaged in an activity for the mutual benefit of both himself and the defendant when he was injured as he left his home to go to work. We affirm the decision of the board.

The following facts, as found by the commissioner and which are not challenged on appeal, and procedural history are relevant to our analysis. On the morning of March 22, 2020, Rick Hart, a deputy chief of the Waterbury Fire Department, asked the plaintiff if he would work an overtime shift that night, beginning at 8 p.m., at the city's Station 5 firehouse. The plaintiff's regular assignment was at Station 2. The plaintiff agreed to work the overtime shift.[3] When leaving Station 2 that morning at the conclusion of his shift there, he gathered his turnout gear, placed it in a large duffel bag, and took it home with him. The gear included items necessary for the plaintiff to perform his firefighting duties, including

[1] We note that, in 2021, the legislature enacted Public Acts 2021, No. 21-18, § 1 (P.A. 21-18), codified at General Statutes § 31-275d, which substituted the term "administrative law judge" for "workers' compensation commissioner" and "commissioner" in several enumerated sections of the General Statutes, including sections contained in the Workers' Compensation Act, General Statutes § 31-275 et seq. Because the events at issue in this appeal occurred prior to October 1, 2021, the effective date of P.A. 21-18, § 1, in this opinion we use the terms workers' compensation commissioner and commissioner.

[2] PMA Management Corporation, the workers' compensation insurer for the Waterbury Fire Department, also was named as a defendant. For ease of reference, we refer to the fire department as the defendant in this opinion.

[3] The plaintiff testified before the commissioner that he could have declined the overtime request. Thus, there was no requirement that the plaintiff work the overtime shift.

boots, pants, a coat, a helmet and gloves. The bag weighed approximately fifty pounds and resembled a bag used to carry hockey equipment. The plaintiff brought his gear home so that he could drive directly to Station 5, rather than having to stop at Station 2 on his way to his overtime shift. He neither was directed nor asked by any superior officer to take his gear home, and he had the option of leaving the gear at Station 2 and picking it up there before going to Station 5 for the overtime shift.

Once he arrived at his home, the plaintiff took the bag with his gear from his car into his house. He did not leave the gear in his car because it was filthy, and he wanted to avoid the odor it would leave in the car. In addition, the gear was worth approximately $5000, and the plaintiff would be financially responsible for it if it were stolen. At approximately 6:30 p.m. that evening, while leaving for his overtime shift, the plaintiff fell down the stairs outside the entrance to his first floor residence when his "turnout gear bag he was carrying struck him after closing the door from his apartment, causing him to fall down his front stairs, injuring his right leg." The plaintiff was diagnosed to have suffered "a minimally displaced tibial plateau fracture" of his right leg as a result of the fall. The plaintiff "opted for nonsurgical treatment, including physical therapy, stretching, and strength training. He was able to return to work in a light-duty capacity on April 11, 2020. He worked [forty] hours per week performing 'clerical work, sitting at a desk' until he was cleared for full-duty work on July 15, 2020. [The plaintiff] still wears a hinged knee brace that allows him to remain working full duty, including overtime assignments."[4]

[4] The plaintiff sought an evaluation for right knee pain on May 26, 2020. An MRI revealed a "[r]ight knee lateral collateral ligament tear grade 3, hamstring tear complete evulsion off the fibula, healing minimally displaced medial tibial plateau fracture." A follow-up examination on September 15, 2020, revealed that the ligament tear had healed and that the plaintiff's right knee was stable.

The plaintiff sought workers' compensation benefits for his injuries. The defendant disputed the claim, arguing that the plaintiff's fall did not occur during the course of his work. An evidentiary hearing was held before the commissioner on March 22, 2021, following which the parties filed proposed findings of fact and the record was closed. On August 31, 2021, the commissioner issued his ruling denying and dismissing the plaintiff's claim. The commissioner concluded that, although the plaintiff was credible, "the facts do not support a finding that the incident of March 22, 2020, occurred in the course and scope of his employment." Central to the commissioner's conclusion were his findings that:

"[T]he primary reason the [plaintiff] brought his gear home prior to working the overtime shift on March 22, 2020, was to shorten his commute to work that night. I find that this was for the sole benefit and convenience of the [plaintiff]. There was no evidence presented indicating that the [plaintiff would] not be able to arrive for his overtime assignment on time had he driven to his normal firehouse and gathered his turnout gear before travelling to Station 5. . . .

"[T]here was no evidence presented that the [defendant] . . . received any benefit from the [plaintiff's] decision to carry his turnout gear home prior to his extra-duty assignment. The [plaintiff] was responsible for arriving at this overtime shift timely, without regard to how he transported his turnout gear to the assignment. The evidence supports a finding that the firefighters themselves found this practice convenient and that it had no mutually beneficial impact on performing their overtime shift, including impacting their arrival time. . . .

"[The plaintiff] was not directed by any of his superiors to bring his turnout gear bag home with him prior to working the overtime shift on March 22, 2020. . . .

"[The plaintiff] was not injured on March 22, 2020, while in the process of performing a necessary activity incidental to his employment with the [defendant] or for the joint benefit of himself and the [defendant]. *Spatafore* v. *Yale University*, 239 Conn. 408, [684 A.2d 1155] (1996)."[5]

The plaintiff appealed to the board, claiming that the commissioner improperly determined that his injuries did not arise out of and in the course of his employment. He argued that he brought his turnout gear home so that he could properly perform his functions as a firefighter for the defendant, and, consequently, his "carrying of his turnout gear at the time of his injury was for the mutual benefit of himself and his employer."[6] The board affirmed the decision of the commissioner. It described the plaintiff's bringing of his turnout gear home as a " 'preliminary act' " that would not give rise to a claim for workers' compensation benefits unless it was undertaken at the direction or request of the defendant.[7] The board then reviewed the record before

[5] The commissioner also concluded that, because the plaintiff was still on his property at the time of his fall, the portal-to-portal provision of General Statutes § 31-275 (1) (A) (i) did not provide coverage for the plaintiff's injuries. See *Perun* v. *Danbury*, 143 Conn. App. 313, 317, 67 A.3d 1018 (2013) (injuries resulting from police officer's fall on driveway not compensable because he was still on his property and his commute had not yet begun); cf. *Balloli* v. *New Haven Police Dept.*, 324 Conn. 14, 30, 151 A.3d 367 (2016) (injuries to police officer occurring beyond boundary of his property compensable under § 31-275 (1) (A) (i)). The plaintiff does not challenge this conclusion on appeal.

[6] The plaintiff's reason of appeal to the board also stated that the commissioner erred in ruling that his injury "did not occur within the portal-to-portal exception of [General Statutes] § 31-275 (1) (A) (i)." The board rejected that claim, and the plaintiff does not challenge that part of the board's decision. See footnote 5 of this opinion.

[7] General Statutes § 31-275 (1) (E) provides: "A personal injury shall not be deemed to arise out of the employment if the injury is sustained: (i) At the employee's place of abode, and (ii) while the employee is engaged in a preliminary act or acts in preparation for work unless such act or acts are undertaken at the express direction or request of the employer . . . ."

the commissioner and held that the commissioner "had a basis in the testimony on the record to support his conclusion that the [plaintiff] was not directed or compelled to bring his gear bag home but, rather, chose to do this, as it was personally convenient." Accordingly, the board concluded that the plaintiff had failed to prove that bringing his turnout gear to his home conveyed any benefit to the defendant and that the plaintiff's reliance on the mutual benefit doctrine failed. This appeal followed.

The plaintiff's sole claim on appeal is that the board erred as a matter of law in concluding that his injuries did not arise out of an activity incidental to his employment that was for the mutual benefit of both parties. The defendant argues that application of the mutual benefit doctrine turns on the commissioner's factual finding of whether the plaintiff's bringing home of the turnout gear was done to benefit the defendant. It argues that, because the commissioner found that it was not done to benefit the defendant, and the plaintiff has never challenged that finding, there was no basis for the board to reverse the commissioner's decision. We agree with the defendant.

We begin with our standard of review and the relevant legal principles. A party aggrieved by a commissioner's decision to grant or deny an award may appeal to the board pursuant to General Statutes (Rev. to 2021) § 31-301.[8] "The board is obliged to hear the appeal on the

[8] General Statutes (Rev. to 2021) § 31-301 provides in relevant part: "(a) At any time within twenty days after entry of an award by the commissioner . . . either party may appeal therefrom to the [board] . . . .

"(b) . . . The [board] shall hear the appeal on the record of the hearing before the commissioner . . . .

"(c) Upon the final determination of the appeal . . . the [board] shall issue its decision, affirming, modifying or reversing the decision of the commissioner. . . ."

General Statutes § 31-301b provides in relevant part: "Any party aggrieved by the decision of the Compensation Review Board upon any question or questions of law arising in the proceedings may appeal the decision of the [board] to the Appellate Court . . . ."

record and not retry the facts. . . . [T]he power and duty of determining the facts rests on the commissioner, the trier of facts. . . . The conclusions drawn by him from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . Our scope of review of the actions of the board is similarly limited. . . . The role of this court is to determine whether the . . . [board's] decision results from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them." (Citation omitted; footnote in original; internal quotation marks omitted.) *Brown* v. *United Technologies Corp.*, 112 Conn. App. 492, 496–97, 963 A.2d 1027 (2009), appeal dismissed, 297 Conn. 54, 997 A.2d 478 (2010). "The determination of whether an injury arose . . . in the course of employment is a question of fact for the commissioner. . . . [I]n determining whether a particular injury arose out of and in the course of employment, the [commissioner] must necessarily draw an inference from what he has found to be the basic facts. The propriety of that inference, of course, is vital to the validity of the order subsequently entered. But the scope of judicial review of that inference is sharply limited . . . . If supported by evidence and not inconsistent with the law, the [commissioner's] inference that an injury did or did not arise out of and in the course of employment is conclusive. No reviewing court can then set aside that inference because the opposite one is thought to be more reasonable; nor can the opposite inference be substituted by the court because of a belief that the one chosen by the [commissioner] is factually questionable." (Citation omitted; internal quotation marks omitted.) *Daubert* v. *Naugatuck*, 267 Conn. 583, 590, 840 A.2d 1152 (2004).

The plaintiff has the burden of proving that his injury arose out of his employment and in the course of his

employment. See *McNamara* v. *Hamden*, 176 Conn. 547, 550, 398 A.2d 1161 (1979). General Statutes § 31-275 (1) (E) provides: "A personal injury shall not be deemed to arise out of the employment if the injury is sustained: (i) At the employee's place of abode, and (ii) while the employee is engaged in a preliminary act or acts in preparation for work unless such act or acts are undertaken at the express direction or request of the employer . . . ." In the present case, there is no dispute that the plaintiff's injury occurred at his place of abode. Furthermore, the commissioner found that the defendant neither directed nor requested that the plaintiff bring his turnout gear home.

The plaintiff does not challenge these findings, and the board concluded that they were supported by the evidence presented to the commissioner. Nevertheless, the plaintiff argues that it was common practice for employees of the defendant to bring their turnout gear home, the defendant was aware of the practice, and "the purpose of carrying the bag of turnout gear was for [the plaintiff] to appropriately and dutifully perform his functions as a firefighter for his employer. As such, the [plaintiff's] carrying of the turnout gear at the time of his injury was for the mutual benefit of himself and his employer. Without the turnout gear, he would have been unable to perform the functions of his position as a firefighter for the assignment at the different firehouse." We are not persuaded.

First, the plaintiff's conclusion does not follow from his premise. That it is common practice for firefighters to bring their turnout gear home and that the defendant knows of that practice does not mean that the practice is for the benefit of the defendant and, therefore, compensable. "[I]f the act being performed is for the exclusive benefit of the employee so that it is a personal privilege or is one which the employer permits the employee to undertake for the benefit of some other

person or for some cause apart from his own interests, an injury arising out of it will not be compensable." *Smith* v. *Seamless Rubber Co.*, 111 Conn. 365, 369, 150 A. 110 (1930).

Second, the plaintiff's conclusion that he would be unable to perform his job as a firefighter if he did not bring his turnout gear home is belied by the factual findings of the commissioner, which the plaintiff has not challenged. In particular, the commissioner found: "[T]he primary reason the [plaintiff] brought his gear home prior to working the overtime shift on March 22, 2020, was to shorten his commute to work that night. I find that this was for the sole benefit and convenience of the [plaintiff]. There was no evidence presented indicating that the [plaintiff would] not be able to arrive for his overtime assignment on time had he driven to his normal firehouse and gathered his turnout gear before travelling to Station 5." Based on this finding, the board's conclusion that the plaintiff's fall occurred as a result of a preliminary act at his abode that was not directed or requested by the defendant is legally and logically correct. The plaintiff's injuries therefore are not compensable. See General Statutes § 31-275 (1) (E).

The decision of the Compensation Review Board is affirmed.

In this opinion the other judges concurred.

JOSEPH L. GAUDETT, JR. *v.* BRIDGEPORT POLICE DEPARTMENT ET AL.
(AC 44987)

Alvord, Moll and Cradle, Js.

Syllabus

The plaintiff, a former chief of the defendant police department, appealed to this court from the decision of the Compensation Review Board,

which affirmed the decision of the Workers' Compensation Commissioner dismissing his claim for benefits under the statute (§ 7-433c) governing compensation for municipal police officers or firefighters with hypertension or heart disease. The plaintiff had been hired as a police officer in 1983 and eventually was named acting chief. Following a competitive examination, the plaintiff was selected in 2010 as the chief of police, a nonunion position. His employment agreement for the position of chief and the police pension plan required him to file for retirement and pension rights pursuant to the city's pension plan. The employment agreement also stated that the occupant of the position of chief is a full-time regular uniformed member of the police department. While serving as the chief of police, the plaintiff was prescribed medication for hypertension by a physician and, following his departure from the position of chief in 2016, he filed a claim pursuant to § 7-433c. The plaintiff claimed that the board improperly affirmed the commissioner's decision that his appointment as the chief of police in 2010 constituted a new hire date, rendering him ineligible for benefits pursuant to § 7-433c (b), which precludes benefits to those persons who began employment on or after July 1, 1996. *Held* that the board erred in affirming the commissioner's decision that the plaintiff was not eligible for benefits pursuant to § 7-433c: the commissioner's finding that the plaintiff's acceptance of the chief of police position triggered a new date of hire was an unreasonable inference to draw, as the evidence demonstrated the material and undisputed fact that, despite the plaintiff's election for retirement benefits when he vacated the position of deputy chief of police, there was no break in his status as a regular member of the police department from the time of his hire in 1983 until his final retirement in 2016; moreover, the commissioner's conclusion that the plaintiff was ineligible for benefits because he was receiving pension benefits when he became the chief of police demonstrated an erroneous interpretation of § 7-433c, as the plain and unambiguous language of § 7-433c applies to any regular member of the police department, without limitation or qualification distinguishing claimants by pension status.

Argued January 12—officially released April 11, 2023

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Fourth District determining that the plaintiff was not eligible to receive certain benefits, brought to the Compensation Review Board, which affirmed the commissioner's decision, and the plaintiff appealed to this court. *Reversed*; *judgment directed*; *further proceedings*.

David J. Morrissey, for the appellant (plaintiff).

Joseph J. Passaretti, Jr., with whom, on the brief, was *Jennifer Hock*, for the appellees (defendants).

Opinion

CRADLE, J. The dispositive issue in this appeal is whether the plaintiff, Joseph L. Gaudett, Jr., began employment with the named defendant, the Bridgeport Police Department,[1] on or after July 1, 1996, for purposes of being eligible to receive benefits under General Statutes § 7-433c, the Heart and Hypertension Act, which affords benefits for any eligible regular member of a paid municipal police department who was hired before July 1, 1996.[2] The plaintiff, the former chief of

[1] PMA Management Corporation of New England, a third-party claims administrator, was also named as a defendant and joins in this appeal.

[2] General Statutes § 7-433c provides: "(a) Notwithstanding any provision of chapter 568 or any other general statute, charter, special act or ordinance to the contrary, in the event a uniformed member of a paid municipal fire department or a regular member of a paid municipal police department who successfully passed a physical examination on entry into such service, which examination failed to reveal any evidence of hypertension or heart disease, suffers either off duty or on duty any condition or impairment of health caused by hypertension or heart disease resulting in his death or his temporary or permanent, total or partial disability, he or his dependents, as the case may be, shall receive from his municipal employer compensation and medical care in the same amount and the same manner as that provided under chapter 568 if such death or disability was caused by a personal injury which arose out of and in the course of his employment and was suffered in the line of duty and within the scope of his employment, and from the municipal or state retirement system under which he is covered, he or his dependents, as the case may be, shall receive the same retirement or survivor benefits which would be paid under said system if such death or disability was caused by a personal injury which arose out of and in the course of his employment, and was suffered in the line of duty and within the scope of his employment. If successful passage of such a physical examination was, at the time of his employment, required as a condition for such employment, no proof or record of such examination shall be required as evidence in the maintenance of a claim under this section or under such municipal or state retirement systems. The benefits provided by this section shall be in lieu of any other benefits which such policeman or fireman or his dependents may be entitled to receive from his municipal employer under the provisions of chapter 568 or the municipal or state retirement system under

police employed by the city of Bridgeport (city), appeals from the decision of the Compensation Review Board (board), which affirmed the decision of the Workers' Compensation Commissioner for the Fourth District (commissioner) dismissing his claim for benefits under § 7-433c on the ground that, although the plaintiff initially was hired as a police officer in 1983, the effective date of his employment as chief of police in 2010 constituted a new date of hire such that his claim for benefits was beyond the ambit of § 7-433c. The plaintiff claims that the board improperly affirmed the commissioner's decision because he was a regular member of the Bridgeport Police Department from 1983 until he retired from his position as the chief of police in 2016. We agree and, accordingly, reverse the decision of the board.

In affirming the decision of the commissioner, the board summarized the commissioner's findings as follows: "[T]he [plaintiff] was originally hired as a Bridgeport police officer in 1983 and successfully passed a preemployment physical. He continued in various capacities as a police officer and, in October, 2008, was named acting chief of the [Bridgeport Police Department] by the mayor. He remained part of the pension plan for police officers and a member of the bargaining unit for police officers as acting chief. His permanent rank remained deputy chief because, pursuant to the City of Bridgeport Charter (charter), the permanent chief of police in Bridgeport had to be chosen pursuant to a competitive examination open to any applicant meeting appropriate occupational qualifications and

which he is covered, except as provided by this section, as a result of any condition or impairment of health caused by hypertension or heart disease resulting in his death or his temporary or permanent, total or partial disability. As used in this section, 'municipal employer' has the same meaning as provided in section 7-467.

"(b) Notwithstanding the provisions of subsection (a) of this section, those persons who began employment on or after July 1, 1996, shall not be eligible for any benefits pursuant to this section."

was not a promotional step within the [Bridgeport Police] [D]epartment hierarchy. The [plaintiff] participated in the selection process for police chief and was ultimately chosen by then Mayor Finch for this post. Pursuant to the charter, the post had a five year term of service. The city and the [plaintiff] worked with their counsel to draft an employment contract for this position, commencing December 20, 2010, and ending December 20, 2015. The negotiated agreement and the police pension plan required the [plaintiff] to file for retirement on December 20, 2010. The [plaintiff] also resigned from the police union at this time. In December of 2011, the [plaintiff] completed a form provided by the city to apply for retirement benefits. This form noted that the [plaintiff] was retiring from the police department effective December 20, 2010. The city's retirement board met and approved this pension with the effective retirement date of December 20, 2010, and the [plaintiff] collected a payout against his unused vacation, holiday, and personal leave as well as a retirement pension.

"The [plaintiff]'s contract as chief of police ran from December 20, 2010, until December 20, 2015. The [plaintiff] however remained in the position of chief of police until March 1, 2016, at which time he voluntarily negotiated his departure as chief of police. Prior to leaving his post but subsequent to being treated for a cold in early 2015, the [plaintiff] was observed with an elevated blood pressure reading. The [plaintiff] was prescribed medication for hypertension by a physician on February 23, 2015, and continued to work without disability as police chief until his departure. He filed a claim pursuant to § 7-433c on February 18, 2016. After retiring as police chief, the [plaintiff] once again received a payout for unused vacation and personal time he accrued during his tenure as police chief but also signed a consultancy agreement wherein he agreed to provide services to the city for three years at an annual rate of $125,000."

On the basis of the foregoing, the commissioner concluded: "The [plaintiff] was initially employed by the city of Bridgeport as a police officer from July 20, 1983, until his retirement of December 20, 2010. The [plaintiff's] retirement [on] December 20, 2010, and his subsequent appointment to chief of police created a new date of hire of December 20, 2010, for the [plaintiff]. . . . The [plaintiff's] acceptance and appointment to the position of chief of police was a distinct and separate position from his prior employment with the Bridgeport Police Department. . . . The [plaintiff's] new date of hire, December 20, 2010, was beyond the July 1, 1996 repeal of . . . § 7-433c (b). Accordingly, the [plaintiff] is ineligible for benefits pursuant to . . . § 7-433c (b)." The commissioner, therefore, dismissed the claim for benefits as barred by the statute.

The plaintiff subsequently filed a motion to correct asking the commissioner to find that there had been no break in service for the plaintiff between his date of hire and his retirement as police chief in 2016. The plaintiff also sought to add findings that he was a uniformed police officer during his tenure as chief and had maintained himself in good standing with the Police Officer Standing and Training Council as a police officer during this period. The commissioner denied this motion in its entirety. The plaintiff also filed a motion for articulation seeking to have the commissioner expound upon her reasoning for finding that the plaintiff's original employment had ended, which the commissioner also denied.

The plaintiff thereafter appealed from the decision of the commissioner to the board, which held that "the commissioner could have reasonably determined [that] the [plaintiff's] original service with the Bridgeport Police Department concluded in 2010 and with that event, his eligibility for § 7-433c benefits ceased. The position of police chief was materially different than

that of police officer, was not a subject of internal promotion, and the [plaintiff] received his full retirement benefits at the time of his 2010 retirement. The [plaintiff] testified that, in order to be hired to his new employment as police chief, he had to retire from his existing job." Accordingly, the board affirmed the ruling of the commissioner. This appeal followed.

The principles that govern our standard of review in workers' compensation appeals are well established.[3] "The commissioner has the power and duty, as the trier of fact, to determine the facts . . . and [n]either the . . . board nor this court has the power to retry the facts. . . . The conclusions drawn by [the commissioner] from the facts found [also] must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . .

"The board sits as an appellate tribunal reviewing the decision of the commissioner. . . . The review [board's] hearing of an appeal from the commissioner is not a de novo hearing of the facts. . . . [I]t is [obligated] to hear the appeal on the record and not retry the facts. . . . On appeal, the board must determine whether there is any evidence in the record to support the commissioner's [decision]. . . . Our scope of review of [the] actions of the [board] is [similarly] . . . limited. . . . [However] [t]he decision of the [board] must be correct in law, and it must not include facts found without evidence or fail to include material facts

[3] "[Our Supreme Court] has stated on many occasions that [t]he procedure for determining recovery under § 7-433c is the same as that outlined in chapter 568 [of the Workers' Compensation Act, General Statutes § 31-275 et seq.], presumably because the legislature saw fit to limit the procedural avenue for bringing claims under § 7-433c to that already existing under chapter 568 rather than require the duplication of the administrative machinery available . . . ." (Internal quotation marks omitted.) *Brocuglio* v. *Thompsonville Fire District #2*, 190 Conn. App. 718, 731, 212 A.3d 751 (2019).

which are admitted or undisputed." (Citation omitted; internal quotation marks omitted.) *DeJesus* v. *R.P.M. Enterprises, Inc.*, 204 Conn. App. 665, 676–77, 255 A.3d 885 (2021).

On appeal, the plaintiff argues that the commissioner erred in finding that the effective date of his employment as chief of police constituted a new hire date that was beyond the coverage of § 7-433c. As a threshold matter, in so finding, the commissioner also found that, "[i]n December of 2011, the [plaintiff] completed a form provided by the city to apply for retirement benefits. This form noted that the [plaintiff] was retiring from the police department effective December 20, 2010." This is inaccurate. That form, which is directed to the Bridgeport Police Department Pension Board, states in relevant part: "I respectfully request that I be retired effective December 20, 2010, and that the amount of my pension be determined by the applicable sections of the City Charter and the applicable pension agreement between the City of Bridgeport and Bridgeport, CT Police Department Employees, Local 1159 AFL-CIO." Notably, despite the plaintiff's request that he "be retired effective December 20, 2010," that form does not indicate that the plaintiff is *retiring from the police department*. That form simply reflects the plaintiff's election of retirement benefits—his request for which was necessitated by the fact that the chief of police is not a union member and, therefore, may not participate in the union pension plan. The form did not signal a change in the plaintiff's status as a regular member of the Bridgeport Police Department. In other words, although the plaintiff filed for and received retirement benefits when he vacated the position of deputy chief, he continued in his employ with the Bridgeport Police Department after December 20, 2010, only as the chief of police. Because the chief of police position is a non-union position, the plaintiff would not be covered under

the collective bargaining agreement or enrolled in the union pension plan, once he became the chief of police. Accordingly, his employment contract required that he "file for retirement and pension rights pursuant to Bridgeport Pension Plan B." He did so. Despite taking this contractually required administrative step, the plaintiff never ceased being a regular member of the Bridgeport Police Department. Indeed, his employment contract expressly stated that "the occupant of [the chief of police] position [is] a full-time regular uniformed member of the Bridgeport Police Department."

To be sure, the position of police chief differs from other positions within the department in that it entails different responsibilities and is not a union position subject to the collective bargaining agreement or entitled to the same pension plan as the other positions. We disagree, however, that those factors triggered a break in the plaintiff's status as a regular member of the police department. There simply was no period of time from the plaintiff's hire in 1983 until his retirement in 2016 at which the plaintiff was not a regular member of the Bridgeport Police Department. The commissioner improperly failed to consider this material and undisputed fact. We conclude that the commissioner's finding that the plaintiff's acceptance of the chief of police position triggered a new date of hire is an unreasonable inference to draw from the evidence.

The commissioner's conclusion that the plaintiff was ineligible for benefits because he was receiving pension benefits when he became police chief also demonstrates an erroneous interpretation of § 7-433c. It is well settled that "the traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation . . . ." (Footnote omitted; internal quotation

marks omitted.) *Holston* v. *New Haven Police Dept.*, 323 Conn. 607, 612–13, 149 A.3d 165 (2016). Because the question of whether a claimant's pension status disqualifies him from receiving benefits under § 7-433c does not involve a time-tested agency interpretation, our review is plenary.

"Where the language of the statute is clear and unambiguous, it is assumed that the words themselves express the intent of the legislature and there is no need for statutory construction or a review of the legislative history." (Internal quotation marks omitted.) *Brocuglio* v. *Thompsonville Fire District #2*, 190 Conn. App. 718, 740, 212 A.3d 751 (2019). Contrary to the commissioner's reasoning, § 7-433c does not make any distinction between claimants who are receiving pension benefits and those who are not. The plain and unambiguous language of § 7-433c applies to any regular member of the police department, without limitation or qualification.

Although the issue of whether a claimant's pension status is a factor in determining eligibility for benefits under § 7-433c has not been addressed in our jurisprudence, this court has rejected other attempts to interpret that statute as having a limitation that is not supported by its clear and unambiguous language. In *Bucko* v. *New London*, 13 Conn. App. 566, 537 A.2d 1045 (1988), the defendant sought to preclude the plaintiff from recovering benefits under § 7-433c on the ground that he was not a permanent member of the police department. This court held that "[n]owhere in § 7-433c is there a requirement that any appointment to the regular police force must be a 'permanent' appointment. The qualifiers 'permanent' or 'temporary' are not mentioned in the statute; the only stated prerequisite to the collection of benefits is that the claimant must be a '*regular* member of a paid municipal police department.' " (Emphasis in original.) Id., 570.

Similarly, this court also has held that the clear and unambiguous language of § 7-433c does not limit benefits to those claimants who are employed by municipalities who work for a city or town that opts into a certain public retirement fund. See *Clark* v. *Waterford, Cohanzie Fire Dept.*, 206 Conn. App. 223, 261 A.3d 97, cert. granted, 338 Conn. 916, 259 A.3d 1181 (2021).[4]

The rationale underlying *Bucko* and *Clark* is applicable in this case. There is no language in § 7-433c to suggest that heart and hypertension benefits are not available to claimants who continue to serve as regular members of the police department while also receiving pension benefits for prior service with the same employer. In the absence of statutory language distinguishing claimants by pension status, the commissioner's decision denying the plaintiff's claim under § 7-433c on the ground that he was receiving pension benefits constituted an incorrect application of the law.

Moreover, § 7-433c (b) provides that those "who began employment on or after July 1, 1996, shall not be eligible for any benefits pursuant to this section." In light of the fact that the plaintiff had been continuously employed as a regular member of the Bridgeport Police Department since 1983, we disagree with the commissioner's determination that the plaintiff "began employment" with the Bridgeport Police Department when he became the chief of police in 2010. Accordingly, we conclude that the board erred in affirming the commissioner's decision that the plaintiff was not eligible for benefits pursuant to § 7-433c (b).

The decision of the Compensation Review Board is reversed and the case is remanded to the board with

[4] Notably, in *Clark*, the board also found that the clear and unambiguous language of § 7-433c does not distinguish between part-time and full-time firefighters. *Clark* v. *Waterford, Cohanzie Fire Dept.*, supra, 206 Conn. App. 232. The town challenged the board's conclusion, but this court did not reach that issue on appeal.

direction to reverse the decision of the Workers' Compensation Commissioner and to remand the case to the commissioner for further proceedings consistent with this opinion.

In this opinion the other judges concurred.