D. J. *v.* F. D.*
(AC 46821)

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

Syllabus

The plaintiff appealed from the judgment of the trial court ordering the equitable distribution of real property that he jointly owned with the defendant and ordering the defendant to pay him $2000 as just compensation for his interest in the property pursuant to the applicable statute (§ 52-500 (a)). The plaintiff claimed, inter alia, that the court abused its discretion in determining that he had only a minimal interest in the property. *Held*:

The trial court did not abuse its discretion in determining that the plaintiff had only a minimal interest in the property for purposes of § 52-500 (a)

* 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, a protective order, or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

because that determination was supported by the legislative history, which indicated that the plaintiff's one-half fee interest in the property did not preclude such a finding, and the relevant equitable factors.

The trial court did not abuse its discretion in making its award of just compensation to the plaintiff for his interest in the property because his one-half ownership interest did not entitle him to 50 percent of the equity, and the court found, inter alia, that the plaintiff did not contribute financially to the property's purchase, mortgage, taxes, or insurance, that he provided only $2000 in maintenance expenses, and that his claims of other contributions to the maintenance of the property were not credible.

Argued May 20—officially released November 19, 2024

Procedural History

Action for, inter alia, the partition of certain of the parties' real property, brought to the Superior Court in the judicial district of New London, where the court, *O'Hanlan*, *J.*, granted the plaintiff's motion to cite in Mortgage Electronic Registration Systems, Inc., as a party defendant; thereafter, the named defendant filed a counterclaim; subsequently, the case was tried to the court, *Goodrow*, *J.*; judgment for the named defendant on the complaint and in part on the counterclaim, from which the plaintiff appealed to this court. *Affirmed.*

Aimee L. Siefert, for the appellant (plaintiff).

Edward C. Taiman, *Jr.*, for the appellee (named defendant).

Opinion

MOLL, J. In this partition action, the plaintiff, D. J., appeals from the judgment of the trial court ordering the equitable distribution of a parcel of real property jointly owned by the plaintiff and the defendant F. D.[1]

[1] Mortgage Electronic Registration Systems, Inc. (MERS), was cited in as an additional defendant in March, 2022. In his operative amended complaint dated March 2, 2022, the plaintiff alleged that MERS may claim an interest in the property at issue by virtue of a mortgage on the property. Although MERS had filed an appearance, counsel for MERS did not appear at trial, and the plaintiff's and F. D.'s respective counsel represented that the parties had reached an agreement regarding MERS' interest in the action. MERS is not participating in this appeal. Accordingly, we refer to F. D. as the defendant.

and ordering the defendant to pay the plaintiff $2000 as just compensation for his interest in the property pursuant to General Statutes § 52-500 (a).[2] On appeal, the plaintiff contends that the court abused its discretion in determining that (1) he had only a minimal interest in the property and (2) the just compensation owed to him for his interest in the property was $2000. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, as found by the trial court or as are undisputed in the record, and procedural history are relevant to our resolution of this appeal. In 2015, the defendant purchased certain real property in North Franklin (property). The plaintiff did not contribute financially to the purchase of the property. The parties were involved in a romantic relationship prior to the purchase of the property, and, "[a]t some point after the purchase, the plaintiff moved into the home, as did the plaintiff's son." The defendant was solely responsible for the mortgage, taxes, and insurance, and she made such payments. The plaintiff contributed $400 per month toward groceries and other household items during most of the time that he lived with the defendant. The court also found that the value of the plaintiff's contribution toward the maintenance of the property was $2000.

On November 27, 2017, the defendant quitclaimed the property to the parties as joint tenants with rights

[2] General Statutes § 52-500 (a) provides: "Any court of equitable jurisdiction may, upon the complaint of any person interested, order the sale of any property, real or personal, owned by two or more persons, when, in the opinion of the court, a sale will better promote the interests of the owners. If the court determines that one or more of the persons owning such real or personal property have only a minimal interest in such property and a sale would not promote the interests of the owners, the court may order such equitable distribution of such property, with payment of just compensation to the owners of such minimal interest, as will better promote the interests of the owners."

of survivorship. In 2019, the romantic relationship of the parties ended, and the plaintiff moved from the property, taking with him some furnishings purchased by the defendant and making no financial contributions toward the property thereafter. The parties stipulated that, at the time of trial, the fair market value of the home was $280,000, and the mortgage payoff was $132,000, leaving $148,000 in equity.

On July 7, 2021, the plaintiff commenced the present action against the defendant. In his operative, two count, amended complaint dated March 2, 2022, the plaintiff sought (1) the partition of the property pursuant to General Statutes § 52-495 and (2) an accounting and contribution from the defendant for expenses related to the property pursuant to the common law and/or General Statutes § 52-404 (b). On September 1, 2022, the defendant filed an answer, a special defense asserting bad faith by the plaintiff, and a one count counterclaim seeking an accounting and contribution from the plaintiff for expenses related to the property. On September 2, 2022, the plaintiff filed a reply denying the allegations set forth in the defendant's special defense, and, on March 22, 2023, the plaintiff filed an answer to the defendant's counterclaim.

On April 20, 2023, the matter was tried to the court, *Goodrow*, *J*. The court heard testimony from the plaintiff and the defendant and admitted numerous exhibits into evidence. Following the close of evidence, the court asked the parties to state during closing arguments "exactly what it is each side is requesting the court to do in this case." The plaintiff's counsel requested that the court order a partition by sale and that the proceeds be split evenly between the plaintiff and the defendant. The defendant's counsel requested that the property not be partitioned by sale and that any required payment of just compensation to the plaintiff in connection with the equitable distribution of the property be minimal. Thereafter, the parties filed posttrial briefs.

On June 30, 2023, the court issued a memorandum of decision ordering an equitable distribution of the property and just compensation to be paid to the plaintiff. The court found "the defendant's testimony generally credible" and "the plaintiff's testimony not credible." More specifically, the court expressly did not credit the plaintiff's testimony that (1) "he paid $60,000 toward the maintenance and upkeep of the . . . property," instead finding that "the value of the plaintiff's contribution to the maintenance of the property was $2000," (2) "he paid the defendant $4000 when he left the property," or (3) he contributed $1000 on a monthly basis toward property expenses, instead finding that he paid the defendant $400 per month for groceries and other household expenses during most of the time while he lived with the defendant and has made no financial contribution toward the property since he vacated it in 2019.[3] The court concluded, pursuant to § 52-500 (a), that "the plaintiff has only a minimal interest in the

[3] At trial, the plaintiff was asked, inter alia, about (1) income reported in his tax filings, (2) his ability to afford making his claimed contributions toward improvements to the property, (3) the circumstances surrounding other women transferring property to him, and (4) his ability to produce bank statements. In response, the plaintiff invoked his fifth amendment privilege against self-incrimination and refused to respond to the questions. The court instructed the parties to address in their posttrial briefs the question of "whether or not the court has the discretion to draw adverse inferences in a civil action, different from a criminal action, when an individual asserts their fifth amendment privilege." In her posttrial brief, citing *Baxter* v. *Palmigiano*, 425 U.S. 308, 318, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976), among others, the defendant argued that the fifth amendment does not forbid the drawing of an adverse inference in a civil action when a party invokes the privilege when refusing to testify in response to a probative question. The defendant argued that the court should draw such an inference. The plaintiff argued that, although the privilege does not prohibit the drawing of an adverse inference in a civil action, "this does not negate the work that [the plaintiff] put in on the property." In its memorandum of decision, the court stated that it was drawing "no adverse inference regarding the assertion by the plaintiff of his constitutional right. Absent any consideration of such assertion, the plaintiff's testimony, particularly as to key issues in dispute, was simply not credible."

property and a sale would not promote the interests of the parties as owners" because "the defendant seeks to remain in the property to provide stability and security for herself and her family."[4] Accordingly, the court ordered that "[t]he plaintiff shall transfer his interest in the property by quitclaim deed to the defendant by August 30, 2023, and that simultaneously therewith, the defendant shall transfer to the plaintiff the sum of [$2000] as just compensation." On July 19, 2023, the plaintiff filed a motion to reargue, which the court denied. This appeal followed.

Before addressing the merits of the plaintiff's claims on appeal, we begin by setting forth the relevant language of the partition statute at issue. Section 52-500, titled in part "Sale or equitable distribution of real or personal property owned by two or more persons," provides in relevant part: "(a) Any court of equitable jurisdiction may, upon the complaint of any person interested, order the sale of any property, real or personal, owned by two or more persons, when, in the opinion of the court, a sale will better promote the interests of the owners. If the court determines that one or more of the persons owning such real or personal property have only a minimal interest in such property and a sale would not promote the interests of the owners, the court may order such equitable distribution of such property, with payment of just compensation to the owners of such minimal interest, as will better promote the interests of the owners. . . ." As we discuss more fully in this opinion, the statute was amended in 2004 to add the final sentence of subsection (a)—to allow a trial court, upon making the requisite findings, to order equitable distribution of property—instead of limiting the remedy in a partition action to partition in

[4] At trial, the defendant testified that she was residing at the property with her sister and her sister's family.

kind or partition by sale (2004 amendment). See Public Acts 2004, No. 04-93, § 1 (P.A. 04-93).

Additionally, we recognize the long-standing principle that "[a] partition action is equitable in nature. Accordingly, [t]he determination of what equity requires is a matter for the discretion of the trial court. . . . In determining whether the trial court has abused its discretion, we must make every reasonable presumption in favor of the correctness of its action. . . . Our review of a trial court's exercise of the . . . discretion vested in it is limited to the questions of whether the trial court correctly applied the law and could reasonably have reached the conclusion that it did." (Internal quotation marks omitted.) *DiCerto* v. *Jones*, 108 Conn. App. 184, 188–89, 947 A.2d 409 (2008).

I

The plaintiff first claims that, in connection with ordering the equitable distribution of the property (as opposed to a partition by sale, as he had requested), the trial court abused its discretion in determining that he had only a minimal interest in the property for purposes of § 52-500 (a).[5] Specifically, as clarified by the plaintiff's counsel during oral argument before this court, the plaintiff argues that, by virtue of his 50 percent fee interest, as reflected in the 2017 quitclaim deed alone, the court erred in determining that he had only a minimal interest. We disagree.

Resolving the plaintiff's claim requires us to construe the term "minimal interest," as set forth in § 52-500 (a), to determine whether it (1) relates solely to a property owner's fee interest or (2) contemplates consideration of any relevant equitable factors in addition to that fee interest. Thus, we are presented with a question of

[5] We note that the plaintiff does not challenge the trial court's related determination that a sale would not promote the interests of the parties.

statutory interpretation over which our review is plenary. See *AAA Advantage Carting & Demolition Service, LLC* v. *Capone*, 221 Conn. App. 256, 270, 301 A.3d 1111, cert. denied, 348 Conn. 924, 304 A.3d 442 (2023), and cert. denied, 348 Conn. 924, 304 A.3d 442 (2023). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter." (Internal quotation marks omitted.) Id.

"[M]inimal interest," as that term is used in § 52-500 (a), is not statutorily defined, nor is either of the individual terms "minimal" or, of most import, "interest." See General Statutes § 52-500 (a). "Generally, in the absence of statutory definitions, we look to the contemporaneous dictionary definitions of words to ascertain their commonly approved usage." (Internal quotation marks omitted.) *Wind Colebrook South, LLC* v. *Colebrook*, 344 Conn. 150, 164, 278 A.3d 442 (2022). At the time of the 2004 amendment, Merriam-Webster's

Collegiate Dictionary (Merriam-Webster) defined "interest" as (1) a "right, title, or legal share in something," (2) "participation in advantage and responsibility," (3) "a charge for borrowed money generally a percentage of the amount borrowed," (4) "the profit in goods or money that is made on invested capital," and (5) "an excess above what is due or expected . . . ." Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) p. 652. Black's Law Dictionary contemporaneously defined "interest" as (1) "[a]dvantage or profit, esp. of a financial nature" and (2) "[a] legal share in something; *all or part of a legal or equitable claim to or right in property* . . . ." (Emphasis added.) Black's Law Dictionary (7th Ed. 1999) p. 816; see also Black's Law Dictionary (8th Ed. 2004) p. 828 (same). Merriam-Webster also contemporaneously defined "minimal" as "relating to or being a minimum: as" (1) "the least possible," (2) "barely adequate," and (3) "very small or slight . . . ." Merriam-Webster's Collegiate Dictionary, supra, p. 791.

These definitions provide little, if any, guidance in resolving whether the term "minimal interest," as set forth in § 52-500 (a), relates solely to a property owner's fee interest or contemplates the consideration of equitable factors in addition thereto. Because we consider either interpretation to be reasonable, we conclude that the meaning of "minimal interest," for purposes of § 52-500 (a), is not plain and unambiguous. See *Gonzalez* v. *O & G Industries, Inc.*, 322 Conn. 291, 303, 140 A.3d 950 (2016) ("[t]he test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation" (internal quotation marks omitted)).

Having concluded that the term "minimal interest" is ambiguous, we turn to the relatively scant legislative

history and the circumstances surrounding the enactment of the 2004 amendment to § 52-500 (a) for guidance.[6] See *AAA Advantage Carting & Demolition Service, LLC* v. *Capone*, supra, 221 Conn. App. 270. During a Judiciary Committee hearing regarding the 2004 amendment, Attorney Deborah Fuller, a representative from the external affairs division of the Judicial Branch, who appeared in support of Senate Bill No. 290, 2004 Sess., titled "An Act Concerning Partition Actions," which was part of the Judicial Branch's legislative package, testified that the 2004 amendment "would provide judges hearing partition actions with more flexibility to resolve those cases." Conn. Joint Standing Committee Hearings, Judiciary, Pt. 4, 2004 Sess., p. 1174. In addition to the two possible modes of relief then available to a trial court in a partition action (i.e., partition in kind and partition by sale), the 2004 amendment sought to provide a third mode of relief, namely, the ability to order—upon finding that one or more property owners has only a "minimal interest" in the property and that a sale of the property would not promote the interest of the owners—that a party's "minimal interest" be bought out for just compensation in exchange for a quitclaim deed. Id. This third mode of relief, which already existed in marital dissolution actions, was proposed in direct response to a decision by our Supreme Court in *Fernandes* v. *Rodriguez*, 255 Conn. 47, 761 A.2d 1283 (2000). See Conn. Joint Standing Committee Hearings, supra, p. 1174, remarks of Deborah Fuller.

By way of background, in *Fernandes*, the parties had purchased certain real property and held title thereto as joint tenants. *Fernandes* v. *Rodriguez*, supra, 255

[6] As stated previously, § 52-500 was amended in 2004 to add the final sentence of subsection (a) to allow a trial court in a partition action—upon finding that (1) one or more property owners has only a "minimal interest" in the property and (2) a sale would not promote the interests of the owners—to order equitable distribution of the property, with payment of just compensation to the owner(s) of such minimal interest. See P.A. 04-93.

Conn. 49–50. The plaintiff brought a partition action, seeking a partition in kind or, alternatively, a partition by sale. Id., 49. Following a trial, the trial court found that the defendant's interest was minimal. Id., 51–52. In support thereof, the court found that the defendant had paid less than 7 percent of the down payment toward the purchase of the property and subsequently had contributed little or nothing to the property. Id., 51. Whereupon the court found that the defendant should recover (1) his net share of certain rental proceeds, (2) the amount he paid toward the closing costs, and (3) 10 percent of the equity in the property. Id. The court ordered that the plaintiff pay the defendant a sum certain and that the defendant execute and deliver to the plaintiff a quitclaim deed relinquishing his interest in the property. Id., 52. On appeal to this court, the defendant claimed, inter alia, that the trial court had exceeded its authority in ordering equitable distribution by payment of money rather than ordering a partition by sale or in kind. *Fernandes* v. *Rodriguez*, 54 Conn. App. 444, 445, 735 A.2d 871 (1999), rev'd, 255 Conn. 47, 761 A.2d 1283 (2000). We concluded that, based on the underlying findings that "one owner had only a minimal interest in the property and that the other had a substantial interest and resided on the property," the judgment requiring the payment of money in exchange for a conveyance of title was proper. Id., 453.

Our Supreme Court disagreed and held that, in a partition action, pursuant to §§ 52-495 and 52-500, as those statutes then existed, a trial court did not have the equitable power to order, as relief, the payment of money from one property owner to another holding a minimal interest in exchange for a quitclaim deed to the real property. *Fernandes* v. *Rodriguez*, supra, 255 Conn. 53–55. Instead, the court held that the trial court was limited to the then existing statutory remedies of partition in kind or partition by sale. Id., 57.

With this judicial decision as the impetus to the proposed legislation allowing for the "equitable distribution of [the] property, with payment of just compensation to the owners of [a] minimal interest"; Senate Bill No. 290; when asked during the previously mentioned Judiciary Committee hearing by then Senator Andrew J. McDonald whether the Judicial Branch was concerned "about how far the definition of 'minimal' might be taken," Attorney Fuller replied: "[W]e think that the judges can probably determine that. . . . I'm not sure how you would statutorily define it, if you tried to put something in the definition as opposed to a case-by-case basis. I mean, I don't know if you could put a percentage on it. . . . I think that the judges would be capable of making that determination . . . ." Conn. Joint Standing Committee Hearings, supra, p. 1175. Attorney Fuller further testified that the interest involved would not be limited to a property owner's fee interest. See id.; see also id., p. 1176 ("I think the judge would have to consider . . . if there were other factors, they would have to consider that . . . . I think it would be an equitable solution and . . . they would be looking at the whole picture, not just the money that somebody put into it, by any means.").

During the legislative debate in the Senate, Senator McDonald stated that the 2004 amendment "allows further discretion and opportunity for a judge of the Superior Court to consider all of the merits and equitable considerations of an action and potentially avoiding needless expenses associated with a partition sale." 47 S. Proc., Pt. 4, 2004 Sess., pp. 1130–31.

During the legislative debate in the House of Representatives, in an exchange with no other hypothetical facts provided, Representative Robert M. Ward inquired whether a "50 percent interest" is a "minimal interest" under the 2004 amendment. 47 H.R. Proc., Pt. 7, 2004 Sess., p. 2026. Representative Christopher R. Stone, who

moved for the bill's adoption; id., p. 2023; responded that "the definition of minimal interest is not contained in the bill and it would be determined by the court under the totality of the circumstances." Id., 2026. Representative Stone went on to state: "[I]n my opinion . . . [a] 50 percent interest would not be a minimal interest . . . and would most likely be handled in another way, most likely a sale." Id. Representative Ward then stated, "I just thought it was important to get on the record for legislative intent that minimal interest was meant to be what the word means in common English, a relatively small interest." Id. Representative Ward proceeded to convey his opinion that a 5 percent or 8 percent interest would be a minimal interest, whereas a 35 percent or a 50 percent interest would be "a substantial interest . . . ." Id., pp. 2026–27. Thereafter, Representative Robert Farr stated: "I just want to add to the legislative history here that it isn't just the size [of one's interest in property]. It's also, I think, the cost of the sale. . . . I think the cost [of the sale] has to [be] weigh[ed] . . . as one of the factors as well [as] the percentages. We grappled with trying to put some definition in the statute and decided, since . . . the court is a court of equity in these cases, that we felt it was best to leave the discretion to the court to determine when it's most reasonable to do this . . . ." Id., p. 2028.

Our review of the legislative history of the 2004 amendment to § 52-500 (a) leads us to conclude that the legislature intended for a trial court to determine whether an individual holds a "minimal interest" in property on the basis of the totality of the circumstances and not merely on the basis of the owner's fee interest. The legislative history reflects that a property owner's fee interest is but one factor for a court to consider in determining whether the owner's interest in the property is minimal. Stated differently, one's fee interest as

reflected in the relevant deed is not dispositive. Although there are a few legislative comments to suggest that a 50 percent ownership interest would not be "minimal," these legislative comments only go so far in providing interpretive guidance. That is, the comments were made in the context of hypotheticals with all other things being equal. In this connection, we recognize that in many, if not most, circumstances, a one-half ownership interest likely would *not* result in a court's determination that such interest is minimal for purposes of § 52-500 (a). Nevertheless, it bears repeating that " '[t]he determination of what equity requires is a matter for the discretion of the trial court' to be determined on a case-by-case basis. . . . *DiCerto* v. *Jones*, supra, 108 Conn. App. 188 n.3." *Cavanagh* v. *Richichi*, 212 Conn. App. 402, 416, 275 A.3d 701 (2022).

In addition, the fact that the 2004 amendment was enacted in response to *Fernandes* v. *Rodriguez*, supra, 255 Conn. 47, in which each owner held an undivided one-half fee interest in the property; *Fernandes* v. *Rodriguez*, 90 Conn. App. 601, 609 n.5, 879 A.2d 897, cert. denied, 275 Conn. 927, 883 A.2d 1243 (2005), cert. denied, 547 U.S. 1027, 126 S. Ct. 1585, 164 L. Ed. 2d 312 (2006); bolsters our conclusion that a one-half fee interest *may* be deemed, if the totality of the circumstances warrants, a minimal interest for purposes of the equitable contribution option set forth in § 52-500 (a). In sum, guided by the legislative history, we reject the plaintiff's assertion that his one-half fee interest in the property precludes, as a matter of law, a determination that his interest in the property was minimal for purposes of § 52-500 (a).[7]

[7] We note that in *Zealand* v. *Balber*, 205 Conn. App. 376, 257 A.3d 411 (2021), this court upheld the trial court's determination that, notwithstanding that the plaintiff was a tenant in common with a one-half fee interest in the property at issue, the plaintiff's interest was minimal pursuant to § 52-500 (a); however, this court did not engage in a statutory analysis of the term "minimal interest" in that decision. Id., 385–88.

We note that taking the plaintiff's position to its logical conclusion would deprive the court of the additional equitable discretion that the legislature gave the court when it enacted the 2004 amendment to § 52-500 (a), while providing no real benefit to the plaintiff. That is, if a one-half interest in real property could not, as a matter of law, be considered a "minimal interest" for purposes of § 52-500 (a), a trial court, in crafting a remedy, would be limited, as it was prior to the 2004 amendment, to ordering either a partition in kind or a partition by sale. See *Fernandes* v. *Rodriguez*, supra, 255 Conn. 57 (prior to 2004 amendment creating third mode of relief, court reaffirmed that partition by division and partition by sale were only two modes of relief available to trial court in partition action). Forcing the parties to remain in an ownership relationship would not be a legally permissible option. See *Geib* v. *McKinney*, 224 Conn. 219, 224, 617 A.2d 1377 (1992) (" 'No person can be compelled to remain the owner with another of real estate, not even if he becomes such by his own act; every owner is entitled to the fullest enjoyment of his property, and that can come only through an ownership free from dictation by others as to the manner in which it may be exercised. Therefore the law afforded to every owner with another relief by way of partition . . . .' *Johnson* v. *Olmsted*, 49 Conn. 509, 517 (1882) . . . ." (Citations omitted.)). Thus, in the plaintiff's view, the court would have to choose between a partition in kind, which likely is impracticable in the context of a parcel that includes a physical structure such as a house, and a partition by sale. A partition by sale likely would lead to the same result for the party seeking partition (in this case, the plaintiff) as he would achieve through the statute's third mode of relief, i.e., equitable distribution (the option exercised by the trial court). Here, had the trial court ordered a partition by sale, the court would have had

the discretion to award the plaintiff the same amount he complains of now as just compensation. See, e.g., *Fernandes* v. *Rodriguez*, supra, 255 Conn. 60 (in context of partition by sale, trial court may distribute sale proceeds in accordance with equitable interest of each party). Other than vindicating some other motive, it is not clear how a partition by sale would benefit the plaintiff, as he still would be entitled to only his equitable share of the sale proceeds.[8] By contrast, the defendant clearly would be harmed because she would be required to vacate her home and find a new place for her and her family to live using the proceeds from the sale. The legislative history makes clear that § 52-500 (a) was amended to give the court the equitable discretion to avoid such an anomalous result.

Finally, and relatedly, we note that our conclusion is consistent with the well settled principle, in the partition by sale context, that, simply because a party owns by title an undivided one-half interest in property, "it does not follow that he or she will necessarily be entitled to equal shares of the moneys obtained from the sale. Equities must be considered and, if established, must be liquidated before distribution is ordered." *Levay* v. *Levay*, 137 Conn. 92, 96, 75 A.2d 400 (1950); see *Hackett* v. *Hackett*, 42 Conn. Supp. 36, 40, 598 A.2d 1112 (1990), aff'd, 26 Conn. App. 149, 598 A.2d 1103 (1991), cert. denied, 221 Conn. 905, 600 A.2d 1359 (1992); see also, e.g., *Cavanagh* v. *Richichi*, supra, 212 Conn. App. 413 ("[b]ecause a partition action is an equitable action, the court has the authority to determine an unequal award on the basis of the evidence presented, including the value of the property and the equitable interests" (internal quotation marks omitted)).

Having concluded that the term "minimal interest," as set forth in § 52-500 (a), contemplates consideration

[8] See footnote 5 of this opinion.

of both a property owner's fee interest *and* any relevant equitable factors, we turn to our review of the trial court's determination that the plaintiff had a minimal interest in the property. At the outset, we observe that the court made several significant factual findings to support that determination, none of which the plaintiff meaningfully contests on appeal. Specifically, the court found that (1) in 2015, the defendant purchased the property with no financial assistance from the plaintiff, (2) the defendant alone paid the mortgage, taxes, and insurance on the property, (3) the plaintiff, along with his son, moved in with the defendant at some point after the purchase of the property, (4) the plaintiff paid the defendant $400 per month for groceries and other household expenses, and he contributed $2000 toward the maintenance of the property, (5) in 2019, the plaintiff vacated the property, taking with him some furnishings purchased by the defendant, (6) the plaintiff did not make a purported $4000 payment to the defendant upon moving out of the property, and (7) the plaintiff has not made any financial contributions toward the property after moving out in 2019. In light of these findings, and mindful that "we must make every reasonable presumption in favor of the correctness of its action"; (internal quotation marks omitted) *DiCerto* v. *Jones*, supra, 108 Conn. App. 189; we conclude that the court did not abuse its discretion in determining that, notwithstanding his status as a joint tenant of the property, the plaintiff had a minimal interest in the property for purposes of § 52-500 (a). See *Zealand* v. *Balber*, 205 Conn. App. 376, 385–86, 257 A.3d 411 (2021) (upholding trial court's determination that plaintiff, tenant in common, had minimal interest in property, which was supported by findings that (1) defendant was " 'sole source of providing the moneys' " to purchase property, to make improvements to property, to purchase furnishings, artwork, and other artifacts, and to take on mortgage debt and other expenses, (2) property was not

parties' principal residence and was used in limited capacity for approximately three and one-half years, and (3) parties had not reached agreement as to disposition of property if they parted ways).

To support his position that the court incorrectly determined that he had a minimal interest in the property, the plaintiff principally relies on *Fusco* v. *Austin*, 141 Conn. App. 825, 64 A.3d 794 (2013). His reliance is misplaced. In *Fusco*, the trial court determined that the plaintiff's joint tenancy did not constitute a minimal interest in the property, "particularly in view of the fact that [the plaintiff] lived on the property for twenty-three years and acquired his interest at the same time the defendant acquired her interest." Id., 833–34. Moreover, the court further "specifically found that during the period of the parties' cohabitation, their contributions to the property were relatively equal"; id., 834; and that, at the time of the closing, the parties had executed an agreement providing in relevant part that, "if the property is sold, the defendant will receive 55 percent of the net proceeds and the plaintiff will receive 45 percent of the net proceeds, subject to either party's claim for verified costs for property improvements." (Internal quotation marks omitted.) Id., 827. In stark contrast to the trial court's findings in *Fusco*, in the present case, (1) the parties, who were in a romantic relationship, lived together at the property for approximately four years, (2) the defendant purchased the property and paid the mortgage, taxes, and insurance for the property without financial assistance from the plaintiff, who acquired his interest in the property by way of a quitclaim deed a couple of years after the purchase, (3) the parties' contributions to the property were far from equal, and (4) there was no evidence of any agreement setting forth the parties' respective rights and responsibilities concerning the property. Thus, *Fusco* does not advance the plaintiff's position.

In sum, we conclude that the court did not abuse its discretion in determining that the plaintiff had a minimal interest in the property for purposes of § 52-500 (a).

II

The plaintiff next claims that the trial court abused its discretion in awarding him, pursuant to § 52-500 (a), $2000 in just compensation for his interest in the property, which equates to 1.35 percent of the $148,000 in equity in the property. The plaintiff maintains that the court failed "to consider the ownership percentages of the parties . . . and the amount of monthly contribution [the plaintiff] provided while living in the residence." We are not persuaded.

"In a partition action, a court is required to balance the equities between the parties. . . . [I]t is not always true that each tenant in common or joint tenant is entitled to equal shares in the real estate. . . . Because a partition action is an equitable action, the court has the authority to determine an unequal award on the basis of the evidence presented, including the value of the property and the equitable interests of the parties. . . . Additionally, as our Supreme Court has explained in the context of our government takings jurisprudence, [t]he question of what is just compensation is an equitable one rather than a strictly legal or technical one." (Citations omitted; internal quotation marks omitted.) *Cavanagh* v. *Richichi*, supra, 212 Conn. App. 413–14.

When determining just compensation, a trial court does not merely consider the parties' ownership percentages, but, rather, "[the] court may take into consideration contributions, including improvements, that the parties have made to the subject property in its determination of just compensation. See, e.g., *Zealand* v. *Balber*, [supra, 205 Conn. App. 393–94] ('[i]n light of those contributions, the court awarded the plaintiff $25,000 as just compensation'); *Young* v. *Young*, 137

Conn. App. 635, 651, 49 A.3d 308 (2012) (trial court properly considered plaintiff's expenditures related to upkeep, including mortgage payments, household repairs and grounds maintenance and taxes, against countervailing claims for use and occupancy); *Hackett* v. *Hackett*, 26 Conn. App. 149, 150, 598 A.2d 1103 (1991) (following partition sale, party may 'be compensated out of the proceeds from the sale of the parties' jointly owned property for his past payments for mortgage, insurance, taxes, improvements and repairs'), cert. denied, 221 Conn. 905, 600 A.2d 1359 (1992)." *Cavanagh* v. *Richichi*, supra, 212 Conn. App. 416–17. In *Fernandes* v. *Rodriguez*, supra, 90 Conn. App. 601, for example, the trial court found the monetary contributions of each party toward the purchase of the property at issue to be particularly relevant to its determination of the equities and, despite the plaintiff's status as a joint tenant, awarded him a 5 percent equitable interest in the property. Id., 610–12.

Here, the court found that the plaintiff did not contribute financially to the property's purchase, mortgage, taxes, or insurance and that he participated financially only to the extent of (1) $2000 in maintenance expenses and (2) $400 per month for groceries and other household expenses during most of the time that he lived with the defendant (a period during which his son also lived in the home). Moreover, the court expressly did not credit the plaintiff's claims of various contributions to the maintenance of the property. In light of these findings based on the evidence presented, we conclude that the court did not abuse its discretion in making its award of just compensation.

Insofar as the plaintiff argues that his one-half title ownership interest in the property as a joint tenant entitles him to 50 percent of the equity, that argument has been squarely rejected by our appellate courts. See id., 609 ("One of the defendant's principal arguments

on appeal is that the court's initial finding that each party possessed a one-half interest in the property as joint tenants required the court to award him one half of the proceeds of the partition sale. This contention finds no support in the case law." (Footnote omitted.)); see also *Levay* v. *Levay*, supra, 137 Conn. 96 ("Although each party was the owner of an undivided one-half interest in the property, it does not follow that he or she will necessarily be entitled to equal shares of the moneys obtained from the sale. Equities must be considered . . . ."); *Zealand* v. *Balber*, supra, 205 Conn. App. 387 ("it is not always true that each tenant in common . . . is entitled to equal shares in the property" (internal quotation marks omitted)). Indeed, we previously have affirmed monetary awards of single-digit equitable interests in the context of one-half ownership interests. See, e.g., *Zealand* v. *Balber*, supra, 379–80, 393–94 (awarding plaintiff just compensation constituting approximately 5.7 percent equitable interest, despite plaintiff's status as tenant in common with one-half ownership interest); *Fernandes* v. *Rodriguez*, supra, 90 Conn. App. 609, 612 (awarding plaintiff 5 percent equitable interest following sale of property, despite plaintiff being joint tenant with one-half ownership interest).

In sum, we conclude that the court did not abuse its discretion in its award of just compensation to the plaintiff for his interest in the property.

The judgment is affirmed and the case is remanded for the purpose of setting a new date by which (1) the plaintiff shall transfer his interest in the property by quitclaim deed to the defendant, and (2) simultaneously therewith, the defendant shall transfer to the plaintiff the sum of $2000 as just compensation.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* DEVIN M.*
(AC 45999)

Alvord, Seeley and Palmer, Js.

Syllabus

Convicted of the crimes of sexual assault in the fourth degree and risk of injury to a child, the defendant appealed. He claimed, inter alia, that the trial court violated his right to due process under the state constitution when it denied his pretrial motion to dismiss the charges against him, in which he alleged that the police improperly failed to preserve and to collect certain evidence. *Held*:

The defendant's due process claim that the police failed to preserve the contents of a certain clothes hamper, which was predicated on his claim that the police failed to seize that hamper, failed as a matter of law, as the failure by the police to collect and preserve that evidence did not implicate the defendant's right to due process pursuant to *State* v. *Morales* (232 Conn. 707).

The defendant was not deprived of his state constitutional right to due process by the state's failure to preserve certain evidence, namely, two photographs, as all four factors of the balancing test set forth in *State* v. *Asherman* (193 Conn. 695) weighed against the defendant with respect to the lost photographs.

The trial court did not abuse its discretion by declining to engage in extensive inquiry into an allegation of juror misconduct, as the inquiry it conducted was adequate pursuant to *State* v. *Brown* (235 Conn. 502).

Argued September 17—officially released November 19, 2024

Procedural History

Substitute information charging the defendant with the crimes of sexual assault in the fourth degree and risk of injury to a child, brought to the Superior Court in the judicial district of Litchfield, geographical area number eighteen, where the court, *Pelosi*, *J.*, denied the defendant's motion to dismiss; thereafter, the case

* 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 use the defendant's full name or to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

was tried to the jury before *Pelosi*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Shanna P. Hugle, deputy assistant public defender, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *David R. Shannon*, state's attorney, and *Terri L. Sonnemann*, senior assistant state's attorney, for the appellee (state).

Opinion

SEELEY, J. The defendant, Devin M., appeals from the judgment of conviction, rendered after a jury trial, of sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (1) (A)[1] and risk of injury to a child in violation of General Statutes § 53-21 (a) (2). On appeal, the defendant claims that the trial court (1) violated his right to due process under article first, § 8, of the Connecticut constitution, when it denied his pretrial motion to dismiss the charges against him,[2] in which he alleged that the police improperly failed to preserve and to collect certain evidence relating to clothing recovered from the laundry hamper (hamper)[3] in the victim's bedroom, and (2) abused its discretion by failing to conduct additional inquiry into an allegation of juror misconduct. We disagree and, accordingly, affirm the judgment of the court.

[1] Although § 53a-73a was the subject of amendments in 2019 and 2023; see Public Acts 2019, No. 19-16, § 16; Public Acts 2019, No. 19-93, § 10; Public Acts 2023, No. 23-47, § 10; Public Acts 2023, No. 23-149, § 3; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[2] As an alternative to dismissal, the defendant asked the court to suppress the evidence or to permit the jury to draw an adverse inference against the state for its failure to preserve evidence.

[3] The object at issue was referred to as a "hamper" and "laundry basket" by different parties throughout the proceedings. For consistency in this opinion, we refer to it as a hamper.

The jury reasonably could have found the following facts based on the evidence and testimony presented. In May, 2017, the defendant was a houseguest staying at the eleven year old victim's home in Thomaston, where she lived with her mother, her father and her older brother. The defendant's and the victim's families were close—the defendant was a close friend of the victim's brother, the defendant's mother was close friends with the victim's mother, and the families sometimes did activities together. The victim's parents had agreed to allow the defendant to stay with them, in the bedroom of the victim's brother, after the defendant was "kicked out" of his girlfriend's home. Late at night, on May 19, 2017, the defendant entered the victim's bedroom after everybody else in the house had gone to sleep. This woke the victim up, and the defendant told her to "shush," pulled down her pants and underwear, pulled down his pants, and then placed his penis near the crack of her buttocks. The defendant rubbed his penis on the victim's buttocks for a few minutes before leaving the victim's bedroom and going to the bedroom of the victim's brother, at which point the victim pulled her pants up, curled up in a ball in the corner of her bed for a time before she got up to change her clothes, placed the clothes she was wearing[4] into the hamper in her room, and then went to the living room, where her father was sleeping, to go back to sleep.

Approximately a week later, the victim disclosed being sexually assaulted for the first time, telling her best friend, J, that the defendant had come into her room in the middle of the night and rubbed his penis on her buttocks. J encouraged the victim to inform her brother about what happened, which she did on May 26, 2017. The victim's brother subsequently informed their mother about what the victim had told him. The

[4] The evidence established that the victim was wearing leggings and underwear at the time of the assault.

victim's mother called the victim's father to notify him, and, although they decided to wait until he got home from work to talk to the victim about it, the victim's mother "couldn't hold it in anymore" and questioned her alone. When asked, the victim told her mother that the defendant had come into her room and sexually assaulted her. Immediately after the victim made that statement, the victim's mother went to the home of the defendant's mother with the victim and informed the defendant's mother about what had happened. The defendant's mother then called the police. Around the time the police arrived at the home, the victim's father arrived with the victim's brother, and the victim was eventually transported by ambulance to Saint Mary's Hospital in Waterbury for a medical examination, at which her mother and father were present. At the hospital, the victim told hospital staff that the clothes she was wearing during the sexual assault were still in the hamper in her bedroom.

In the meantime, Detective Keith Koval of the Thomaston Police Department arrived at the home of the defendant's mother. He took a statement from the victim's brother and then spoke on the phone with the victim's father, who told Koval about the clothes in the hamper. Thereafter, Koval went to the victim's home, accompanied by the victim's brother and, with the consent of the victim's parents, entered the home to locate evidence of the sexual assault, namely, the leggings and underwear in the hamper in the victim's bedroom that she reported she was wearing at the time of the sexual assault. Koval found and collected the leggings and underwear from the hamper in the victim's bedroom, processed the evidence at the police department, and then brought the evidence to the state laboratory for forensic testing. He also collected a DNA sample from the victim and obtained a search warrant to collect DNA from the defendant.

At the state laboratory, forensic testing conducted on a "whitish stained area" found by a forensic examiner on the victim's underwear produced a positive reaction for semen, and a microscopic examination of the area revealed the presence of spermatozoa. A DNA extraction from that same area yielded a DNA mixture of two persons, at least one of whom was male. The defendant's DNA profile was included within the male DNA profile of the extracted DNA mixture. A forensic examiner concluded from the DNA analysis, after assuming that the victim was the other contributor, that the DNA mixture was one hundred billion times more likely to occur if it came from the defendant and the victim, rather than from the victim and another unknown individual in the general population.

The defendant was subsequently arrested and charged in a long form information with sexual assault in the fourth degree in violation of § 53a-73a (a) (1) (A) and risk of injury to a child in violation of § 53-21 (a) (2). A trial followed, at which the state presented testimony from the victim; J; the victim's brother; the victim's mother; Jason Paul Prevelige, the physician's assistant at Saint Mary's Hospital who examined the victim; Danielle Williams, an expert on child forensic interviews; Koval; Christine Roy, the state forensic examiner who tested the clothing; and Jian Tao, the state forensic analyst who conducted the DNA analysis. The defense presented testimony from the defendant's mother and Nancy Eiswirth, an expert on investigation protocols used in sexual assault cases involving child victims. At the conclusion of trial, the jury found the defendant guilty of both charges. On August 26, 2022, the court, *Pelosi*, *J.*, sentenced the defendant to a total effective sentence of twenty years of incarceration, execution suspended after nine years, five of which were a statutory mandatory minimum, and fifteen years of probation. It also ordered the defendant to register as a sexual

offender for a period of ten years. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant claims that the court violated his right to due process under article first, § 8, of the Connecticut constitution,[5] when it denied his pretrial motion to dismiss the charges against him or, in the alternative, to suppress evidence, in which he alleged that the police improperly failed to preserve and to collect certain evidence relating to the leggings and underwear recovered from the hamper in the victim's bedroom. He asserts that an order of remand for dismissal or a new trial is warranted. We disagree.

The following additional facts and procedural history are relevant to our resolution of this claim. When Koval went to the victim's home to locate the leggings and underwear that she was wearing during the sexual assault, the victim's brother directed him to the victim's bedroom. On entering the victim's bedroom, Koval located the hamper and took a photograph of "the hamper itself." After taking that photograph, Koval put gloves on and moved other clothes in the hamper to the side to search for the leggings and underwear. Koval testified that, while he was searching through the hamper, he saw "typical girl's laundry, underwear, socks, shirts" but that he was not really paying attention to the other clothes inside of it, nor did he collect anything else as evidence from the hamper or the rest of the home. He did not take a photograph of any of the other items in the hamper. After finding the leggings and underwear in the hamper,[6] he collected them and

[5] Article first, § 8, of the Connecticut constitution provides in relevant part: "No person shall be . . . deprived of life, liberty or property without due process of law . . . ."

[6] Koval described the state of the leggings and underwear in the hamper as being "together, the underwear [was] inside of the pants."

brought them to the police station for processing, where he took a photograph of the leggings. He then separated the leggings and the underwear and placed each item into its own evidence bag. Thereafter, the clothing was brought to the state laboratory for testing. Subsequently, both of the photographs taken by Koval—one of the hamper taken in the victim's room and one of the leggings taken at the police station—were lost when he attempted to transfer them from his camera to a computer at the police department.[7]

Prior to trial, on May 2, 2022, the defendant filed a motion to dismiss the charges against him, or alternatively, to suppress the evidence from the hamper "and the 'poison fruit' results of any forensic testing performed upon the seized clothing," pursuant to *State* v. *Morales*, 232 Conn. 707, 657 A.2d 585 (1995), based on the failure of law enforcement to collect and preserve evidence. Specifically, in his motion to dismiss the defendant argued that Koval's failure to "preserve the hamper and its contents" was a violation of his right to due process under the state constitution. The defendant further argued that the evidence in question was exculpatory given the defense's theory of DNA transfer—that the other contents of the hamper, if preserved, could have exonerated the defendant because, if any of the uncollected clothes in the hamper belonged to the defendant, that could have provided an explanation for how his DNA transferred onto the victim's clothing.

On May 20, 2022, the court held an evidentiary hearing and heard oral argument on the defendant's motion.

[7] When asked during cross-examination by defense counsel to explain the process of how the photographs were lost, Koval testified: "The SD card was taken from the camera, put into a card reader, which was attached to the computer. . . . And when the [police] sergeant went to transfer them, there must have been a faulty SD card or SD reader." Koval also stated that he did not report the loss of the photographs or make any efforts to recover them.

The defendant called Koval as a witness and argued that the failure to collect and preserve the contents of the hamper and the loss of the two photographs taken by Koval deprived him of material evidence and the opportunity to fully present his DNA transfer defense because (1) other items in the hamper could not be tested for the defendant's DNA and (2) neither the jury nor the defense would be able to see the state of the hamper's contents from Koval's position at the time he seized evidence from it. In response, the state argued that *Morales* and its progeny pertain to claims regarding the preservation of evidence that is lost or destroyed, not claims that law enforcement failed to preserve evidence that it never collected. The state also argued that the other contents of the hamper could not be considered material evidence because whether such evidence would have benefitted the defendant was speculative and that any failure to preserve evidence by Koval was not done in bad faith.

The court orally denied the defendant's motion on the first day of trial, May 24, 2022, and subsequently issued a memorandum of decision dated June 29, 2022.[8] The court applied the four factor balancing test set forth in *State* v. *Asherman*, 193 Conn. 695, 724, 478 A.2d 227 (1984), cert. denied, 470 U.S. 1050, 105 S. Ct. 1749, 84 L. Ed. 2d 814 (1985), to determine whether Koval's failure to preserve the contents of the hamper, the photograph of the hamper and the photograph of the leggings, violated the defendant's state constitutional right to due process. Specifically, the court considered "[1] the materiality of [the] missing evidence, [2] the likelihood of mistaken interpretation of the missing . . . evidence by witnesses or the jury, [3] the reason for [the] nonavailability [of the evidence], [and] [4]

[8] The court incorporated the findings of its oral decision into its memorandum of decision.

the prejudice to the defendant caused by the unavailability of the evidence." The court applied each factor to the defendant's claims regarding the contents of the hamper and the lost photographs.

As to the contents of the hamper, the court determined that, (1) "even assuming that the defendant's DNA was transferred to the [victim's] underwear through commingling in the hamper, this is not [material because it is not] dispositive of the charges the defendant faces [and] [i]ndeed, the [victim] has stated to a number of people, including medical personnel, police officers, and constancy witnesses that she was assaulted by the defendant"; (2) "there is little likelihood of mistaken interpretation, as the defendant will have the opportunity to cross-examine [Koval] concerning the collection of the DNA evidence . . . and the decision to not test the other contents in the hamper"; (3) "there was no improper motive or bad faith on the part of . . . Koval . . . [and] at the time the evidence was seized, it was unclear if it would yield any useful information [and] [f]urther, it was outside of the state's purview that failing to test and photograph all of the items in the hamper may yield some injustice to the defendant"; and (4) "[t]he defendant . . . will not suffer substantial prejudice by way of the missing evidence. The court can address any potential prejudice that this evidence will have on the defendant by allowing the defendant to cross-examine the state's witnesses and by allowing the defendant to focus on the state's failure to preserve the other contents of the hamper in his closing argument. Additionally, the court could provide the jury with a limiting instruction or an instruction concerning the weight they are permitted to give to certain evidence."

Regarding the lost photographs, the court held that (1) "the defendant is unable to show that there is a reasonable probability that, had the photo[graph] taken

by . . . Koval of the [victim's] hamper been preserved, the result of the present proceeding would be different [and] [i]t is speculative that the photograph taken by . . . Koval, alone, would be exculpatory"; (2) "there is little likelihood of mistaken interpretation, as the defendant will have the opportunity to cross-examine the state's witnesses concerning . . . the missing photograph"; and (3) "the loss of the photograph was unintentional and was not done in bad faith or with malice."

At trial, the defendant's theory of the case was that there were communal hampers in the victim's home and, therefore, his DNA could have become commingled with the victim's DNA. The defense attempted to advance his theory by cross-examining the victim's brother and her mother about how laundry was typically done in the home.[9] Defense counsel also extensively cross-examined Koval about his investigation of the home—including whether he was concerned about the possibility of DNA transfer—and about the loss of the photographs. In addition, the defense called the defendant's mother as a witness and elicited testimony concerning her knowledge of the location and use of hampers in the victim's home.[10] Defense counsel continued

[9] The victim's brother and her mother both testified, however, that the hampers in the home were not communal. The victim's mother testified that "we each have our own [hampers] in our bedrooms." Likewise, the victim testified that each member of her family had a hamper that was a different color and that "everyone's clothes were kept separate." She described her hamper as being white, tall and circular and further testified that it was for her room only.

[10] The defendant's mother testified that she "frequently" visited the victim's home and would assist with household chores, including laundry, due to the close relationship between her and the victim's mother, that she never observed any effort in the victim's home to keep the laundry for each resident of the home separate, and that the hampers were not exclusive to any particular room in the home. She also testified, however, that from the date of the sexual assault to the date it was first reported, she did not assist with laundry in the victim's home and that she had stated she would stand by her son the morning after learning about the assault.

reinforcing the theory of commingling and DNA transfer during closing argument by arguing that the victim's account that she did not feel anything wet on her buttocks was inconsistent with the presence of the defendant's bodily fluids on her underwear. Defense counsel also asked the jury if it was reasonable to believe that the evidence remained in the hamper for eight days without contamination and stated that the DNA analysis cannot explain how, when or in what order the defendant's genetic materials ended up in the hamper.

Defense counsel also challenged the adequacy of the police investigation through his cross-examination of Koval and in his closing argument. As a result, the court gave an instruction on the adequacy of the police investigation to the jury, which included an instruction regarding the failure of the police to adequately preserve and document evidence relating to the contents of the hamper and their failure to preserve the two photographs.[11]

We next set forth the relevant standard of review and principles of law that govern this claim. "[O]ur Supreme

[11] The court's jury instruction stated in relevant part: "You have heard some testimony of witnesses and arguments by counsel that the state did not adequately preserve and document evidence relative to lost photographs and the documentation of the hamper and its contents. This is a factor that you may consider in deciding whether the state has met its burden of proof in this case, because the defendant may rely on relevant deficiencies or lapses in the police investigation to raise reasonable doubt. Specifically, you may consider whether a failure to adequately preserve and document this evidence would normally be . . . taken under the circumstances. Whether if these actions were taken, they could reasonably have been expected to lead to significant evidence of the defendant's guilt or evidence creating a reasonable doubt of his guilt and whether there are reasonable explanations for the admission of those actions. If you find that any omission[s] in the investigation were significant and not reasonably explained, you may consider whether the omissions tend to affect the quality, reliability or credibility of the evidence presented by the state to prove beyond a reasonable doubt that the defendant is guilty of the counts with which he is charged in the information. The ultimate issue for you to decide, however, is whether the state, in light of all the evidence before you, has proved beyond a reasonable doubt that the defendant is guilty of the counts for which he is charged."

Court has set forth the analytical path for determining whether the failure of the police to preserve evidence constitutes a due process violation under our state constitution. In [*Morales*], the court expressly rejected the federal standard of *Arizona* v. *Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988).[12] The court in *Morales* held that 'the good or bad faith of the police in failing to preserve potentially useful evidence cannot be dispositive of whether a criminal defendant has been deprived of due process of law. . . . Rather, in determining whether a defendant has been afforded due process of law under the state constitution, the trial court must employ the [*Asherman*] balancing test, weighing the reasons for the unavailability of the evidence against the degree of prejudice to the accused. More specifically, the trial court must balance the totality of the circumstances surrounding the missing evidence, including the following factors: [(1) the materiality of the missing evidence, (2) the likelihood of mistaken interpretation of it by witnesses or the jury, (3) the reason for its nonavailability to the defense, and (4) the prejudice to the defendant caused by the unavailability of the evidence.]' . . . '[P]olice [are not required] to preserve every shred of physical evidence, every object . . . [seized] from a crime scene, no matter how remote or tangential to the case the item seems to be. The . . . court should . . . [consider] the reason for the unavailability of an item of evidence, as well as the motivation and good or bad faith of the police in failing to preserve that evidence.' " (Citations omitted; footnote in original.) *State* v. *Thompson*, 128 Conn. App. 296, 301–303, 17 A.3d 488 (2011), cert. denied, 303 Conn. 928, 36 A.3d 241 (2012).

[12] "In *Arizona* v. *Youngblood*, supra, 488 U.S. 58, the United States Supreme Court stated: 'We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.' " *State* v. *Thompson*, 128 Conn. App. 296, 302 n.1, 17 A.3d 488 (2011), cert. denied, 303 Conn. 928, 36 A.3d 241 (2012).

"[W]hether [the circumstances] constituted a violation of the [defendant's right to due process] is a mixed determination of law and fact that requires the application of legal principles to the historical facts of the case. . . . Whether the historical facts as found by the [trial] court constituted a violation of the [defendant's right to due process] is subject to plenary review by this court, unfettered by the clearly erroneous standard." (Internal quotation marks omitted.) *State* v. *Gray*, 212 Conn. App. 193, 206–207, 274 A.3d 870, cert. denied, 343 Conn. 929, 281 A.3d 1188 (2022).

A

We first address the defendant's claim as it pertains to the failure of law enforcement to preserve the contents of the hamper. Particularly, the defendant claims that Koval's failure to preserve "uncollected evidence"—the contents of the hamper at the time he searched it—violated the defendant's right to due process. We disagree.

Both the state and the defendant analyzed this issue in their appellate briefs pursuant to *Morales* and by applying the *Asherman* balancing test. The state, however, also advanced the argument that "Koval's alleged failure . . . did not implicate the defendant's due process right under *Morales* because it relates to the creation, not preservation, of evidence." The defendant claims that this argument constitutes an improper alternative ground for affirmance, which is not supported by the record, and that Koval "had an obligation to preserve the evidence inside the hamper, which was under his possession and control at the time that he seized the [victim's] clothing." After considering the arguments of the state and the defendant on this issue, we agree with the state that any failure by law enforcement in this case to collect and preserve the contents

of the hamper does not implicate the defendant's right to due process.

The defendant argues that we are barred from affirming the court's decision on this ground because nothing in the record establishes that such reasoning was an alternative ground for the court's denial of the defendant's due process claim. This assertion, however, ignores the fact that our review of the court's conclusions regarding "[w]hether the historical facts . . . constituted a violation of the [defendant's right to due process]" is plenary. (Internal quotation marks omitted.) *State* v. *Gray*, supra, 212 Conn. App. 206–207; see also *Council* v. *Commissioner of Correction*, 114 Conn. App. 99, 103 n.1, 968 A.2d 483 ("[a]n allegation of a violation of due process . . . is a question of law"), cert. denied, 292 Conn. 918, 973 A.2d 1275 (2009). It follows that the same standard of review applies when determining whether the historical facts of a case *implicate* a defendant's right to due process because for conduct to constitute a violation of an individual's due process rights, it must implicate those rights in some tangible way. See *State* v. *Collymore*, 334 Conn. 431, 477, 485, 223 A.3d 1 (applying plenary review to defendant's due process claim based on admission of identification testimony and rejecting claim because testimony "*did not implicate* the defendant's due process rights" (emphasis added)), cert. denied, U.S. , 141 S. Ct. 433, 208 L. Ed. 2d 129 (2020). Therefore, we reject the defendant's contention that we cannot affirm the judgment of conviction on this basis because, regardless of whether the trial court relied on it as an alternative ground for its decision, our plenary standard of review over this issue entitles us to determine, as a matter of law, whether the conduct at issue implicated the defendant's right to due process under *Morales*. If it did, application of the *Asherman* balancing test is

appropriate, but if it did not, the defendant's due process claim regarding the contents of the hamper must fail outright. See *State* v. *Johnson*, 288 Conn. 236, 281, 951 A.2d 1257 (2008) (rejecting defendant's due process claim brought pursuant to *Morales* without applying *Asherman* test because defendant did "not adequately [allege] a failure to preserve . . . thus, *Youngblood* and *Morales* [were] not applicable" and "no need for the *Morales* remedies ever arose").

To resolve this claim, we therefore first must determine whether the claim that Koval failed to collect and preserve the entire contents of the hamper as evidence is an allegation that sufficiently implicates the defendant's due process rights under *Morales*. "[I]t is well established that there are two areas of constitutionally guaranteed access to evidence such that denying or foreclosing the defendant's access to that evidence may constitute a due process violation. . . . The first situation concerns the withholding of exculpatory evidence by the police from the accused. . . . The second situation . . . concerns the failure of the police to preserve evidence that might be useful to the accused." (Citations omitted; emphasis omitted; internal quotation marks omitted.) Id., 275–76. The defendant claims that Koval's failure to collect and preserve the entire contents of the hamper as evidence is encompassed by the second situation.

Significantly, *Johnson* involved a similar claim, namely, that law enforcement's failure to record the entirety of an interview with a state's witness violated the defendant's right to due process. Id., 270. In that case, our Supreme Court clarified that "*Morales* and *Youngblood* address the 'preservation' of evidence, *not the collection and creation of evidence*" and "conclude[d] that the duty to preserve with which *Morales* and *Youngblood* are concerned *depends on the* [*state's*] *possession of evidence* capable of being preserved."

(Emphasis added.) Id., 279. The court further noted that "a review of our case law generally reveals nothing . . . that would *support the existence of an affirmative duty to create evidence* . . . ." (Emphasis added.) Id. Our Supreme Court, therefore, rejected the defendant's claim that "police officers ha[ve] a duty to record the entirety of their interviews with [state's witnesses] and that [the] failure to do so constitute[s] a failure to preserve evidence within the meaning of *Morales* and *Youngblood*." Id., 278. As a result, the court concluded that "the state did not violate the defendant's due process rights, as a matter of law," and, in doing so, it denied the due process claim without any application of the *Asherman* balancing test. Id., 281.

More recently, this court relied on *Johnson* in rejecting "an analogous claim" that "[a law enforcement officer's] decision to turn off his body microphone so that his conversation with [another law enforcement officer] was never recorded is, in essence, the legal equivalent of the state failing to preserve or destroying evidence" within the meaning of *Morales* and *Youngblood*. *State* v. *Bouvier*, 209 Conn. App. 9, 35, 267 A.3d 211 (2021), cert. denied, 341 Conn. 903, 269 A.3d 789 (2022). In *Bouvier*, we determined that "[a] trooper's choice not to record audio of a consultation between himself and another law enforcement officer did not result in the creation of evidence that was capable of either preservation or destruction" and, thus, the "basic factual predicate underlying the alleged due process violation [was] missing . . . ." Id., 39. Accordingly, we rejected the defendant's due process claim in *Bouvier* without applying the *Asherman* balancing test.

Importantly, our holding in *Bouvier* recognized that, generally, procedures amounting to "administrative directives or best practices" do not "[create] any cognizable due process interest in the defendant as might be the case with a duly enacted statute or properly

promulgated regulation"; id., 38; and that, as "the [Supreme] [C]ourt in *Johnson* made clear, *the due process clause is not implicated by a claim that*, in the absence of an express legal duty to do so, *the state failed to collect or create certain evidence*." (Emphasis added.) Id., 37–38.[13]

In the present case, the evidence in the record persuades us that Koval's failure to collect and preserve the contents of the hamper as evidence did not implicate the defendant's right to due process under *Morales*. We also conclude that we need not apply the *Asherman* balancing test in such circumstances, as the alleged failure to preserve, which was predicated on a failure to collect or to create evidence, did not implicate the defendant's right to due process.[14] The record in this case shows that Koval never seized the contents of the hamper, meaning those contents were never in his possession, and the defendant acknowledges as much in his appellate brief on the issue when he refers to the contents of the hamper as "*uncollected evidence*." (Emphasis added.) Therefore, the defendant cannot demonstrate that the state was in possession of the contents of the hamper but failed to preserve them, which is required to show a due process violation under

[13] See also *State* v. *Beckerman*, 145 Conn. App. 767, 85 A.3d 655 (2013), cert. denied, 311 Conn. 938, 89 A.3d 349 (2014). In *Beckerman*, we noted in dicta that the defendant's due process claim in an arson prosecution, namely, that "the state had a duty to preserve for testing a sample of the area around the furnace [in the home that caught fire] where [the canine belonging to the fire marshal detective investigating the scene] alerted to the presence of accelerants"; id., 774; rested "on the premise that the state has a duty to *collect* evidence, rather than simply to preserve evidence that has been collected in the course of an investigation"; (emphasis in original) id., 777 n.6; and we rejected the claim because it did not challenge the trial court's finding that there was no bad faith. Id., 777.

[14] Additionally, the defendant's reference in his appellate brief to "best practices" in evidence gathering is immaterial because the defendant has failed to demonstrate that any of these "best practices" created a "cognizable due process interest" in him. *State* v. *Bouvier*, supra, 209 Conn. App. 38.

Morales.[15] See *State* v. *Johnson*, supra, 288 Conn. 279. As we have stated, this court and our Supreme Court have recognized that *Morales* does not apply to "the collection . . . of evidence"; id.; and the defendant has provided no support for his claim that law enforcement officers possess an affirmative constitutional duty to collect evidence. Thus, we conclude that the conduct at issue in the present case does not implicate the defendant's right to due process under *Morales*.[16] The defendant's due process claim, therefore, fails as a matter of law.

[15] We find the defendant's argument that the state was obligated to preserve the entire contents of the hamper because they were in Koval's possession and under his control at the time of his search to be without merit for a number of reasons. First, the defendant did not provide any authority to support his proposition that the state is considered to be in possession of containers that law enforcement officers search but do not seize. Second, applying the defendant's proposed logic to commonplace scenarios involving law enforcement would defy practicality. See *State* v. *Johnson*, supra, 288 Conn. 279–80 (declining to adopt rule proposed by defendant because "[t]here is a need by law enforcement personnel for considerable flexibility in how they go about their investigations, and courts should not intrude into this area," and "the adoption of such a rule would place a substantial burden on the administration of law enforcement and would amount to an unwarranted intrusion by the courts into the professional practices chosen by our trained law enforcement personnel" (internal quotation marks omitted)). For instance, under the defendant's logic, law enforcement officers who exercise control over a home while executing a search warrant would be in possession of the home, which would then entail an obligation to preserve the entire contents of the home as evidence. Such a result would clearly be impractical and more importantly, would also be contrary to our Supreme Court's recognition in *Morales* that "the *Asherman* test does not require the police to preserve every shred of physical evidence, every object it seizes from a crime scene, no matter how remote or tangential to the case the item seems to be." *State* v. *Morales*, supra, 232 Conn. 723.

[16] We note that a majority of the states that have reached this issue have likewise determined that constitutional due process requirements do not impose on law enforcement officers a duty to collect evidence. See, e.g., *People* v. *Fultz*, 69 Cal. App. 5th 395, 425, 284 Cal. Rptr. 3d 515 (2021) ("[D]ue process does not require the police to collect particular items of evidence. . . . The police cannot be expected to gather up everything which might eventually prove useful to the defense." (Internal quotation marks omitted.)); *State* v. *Stepter*, 794 S.W.2d 649, 655 (Mo. 1990) ("[t]he state is not bound to gather and present all physical evidence conceivably germane to its [case-

B

We next address the defendant's claim as it pertains to the failure of police to preserve the two photographs

in-chief]" nor "is [it] required to account for its failure to gather or present such evidence" (internal quotation marks omitted)); *Taylor* v. *State*, 375 Mont. 234, 238, 335 P.3d 1218 (2014) ("[p]olice officers have no duty to take initiative or even assist in procuring evidence on behalf of a defendant"); *Belcher* v. *State*, 136 Nev. 261, 272, 464 P.3d 1013 (2020) ("[p]olice officers generally have no duty to collect all potential evidence from a crime scene" (internal quotation marks omitted)); *State* v. *Ware*, 118 N.M. 319, 323, 881 P.2d 679 (1994) ("the failure to gather evidence is not the same as the failure to preserve evidence, and . . . the [s]tate generally has no duty to collect particular evidence at the crime scene"); *State* v. *Steffes*, 500 N.W.2d 608, 612 (N.D. 1993) ("[p]olice generally have no duty to collect evidence for the defense"); *State* v. *Young*, 176 N.E.3d 1074, 1106 (Ohio App. 2021) ("the state has no duty to gather exculpatory evidence"), review denied, 165 Ohio St. 3d 1505, 179 N.E.3d 122 (2022); *State* v. *Pemental*, 434 A.2d 932, 936 (R.I. 1981) (no due process violation in sexual assault case where defendant claimed law enforcement "fail[ed] to seize the bed linen of the victim and to have the linen scientifically analyzed"). Although a few states have indicated that this rule is not absolute; see, e.g., *People ex rel. Gallagher* v. *District Court*, 656 P.2d 1287, 1291 (Colo. 1983) ("police investigators have no general duty to search out possible exculpatory evidence or to perform tests . . . however . . . when evidence can be collected and preserved in the performance of routine procedures by state agents . . . the state must employ regular procedures to preserve evidence which a state agent, in the regular performance of his duties, could reasonably foresee might be favorable to the accused" (citations omitted)); *State* v. *Hayes*, 203 Vt. 153, 160, 154 A.3d 964 (2016) ("even though police do not have a duty to collect *all* potentially exculpatory evidence, [a state law remedy may] apply in situations where the [s]tate's failure to procure potentially exculpatory evidence results in prejudice—for example, failing to procure a bloody knife lying next to a body in a murder case" (emphasis in original)); only a minority of states, Alaska and Kentucky among them, have adopted a contrary rule. See *Snyder* v. *State*, 930 P.2d 1274, 1277 (Alaska 1996) (state rules of criminal procedure impose affirmative duty on state to collect "*material*" evidence (emphasis in original; internal quotation marks omitted)); *Collins* v. *Commonwealth*, 951 S.W.2d 569, 572 (Ky. 1997) (applying *Youngblood* to due process claim that state failed to collect evidence).

Federal courts, however, have reached differing conclusions on the issue. Compare *Miller* v. *Vasquez*, 868 F.2d 1116, 1119–20 (9th Cir. 1989) (noting that government's duty to preserve evidence does not impose duty to obtain evidence but nonetheless "hold[ing] that a bad faith failure to collect potentially exculpatory evidence would violate the due process clause"), with *United States* v. *Roper*, Docket No. 1:23-cr-1617 (WJ), 2024 WL 3688266, *2

that Koval took of the hamper and the leggings, to which the *Asherman* balancing test applies.

The first *Asherman* factor involves the materiality of the missing evidence. "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed [or available] to the defense, the result of the proceeding would have been different. . . . On the other hand, [t]he defendant's mere speculation that the [lost evidence] could have been beneficial or not does not meet the standard necessary to prove materiality." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Fox*, 192 Conn. App. 221, 237–38, 217 A.3d 41, cert. denied, 333 Conn. 946, 219 A.3d 375 (2019). The defendant argues that the lost photographs were material based on his theory of the case because "the lack of photographic documentation undermined any ability to observe the hamper, its condition and contents or any other missed details," and the "[m]ovement of the [victim's] clothing during Koval's seizure *could have* been a source of [DNA] transfer." (Emphasis added.) Therefore, he argues, the "court . . . had insufficient information . . . without photographs" to reach conclusions regarding the location of the leggings and underwear when Koval found them.

We are not persuaded that there is a reasonable probability that, had the photograph of the hamper located in the victim's room and the photograph of the leggings taken at the police station been available to the defendant, the result of the proceeding would have been

(D.N.M. August 7, 2024) ("the [d]ue [p]rocess [c]lause is not violated if law enforcement simply fails to collect evidence"); *White* v. *Tamlyn*, 961 F. Supp. 1047, 1062 n.12 (E.D. Mich. 1997) (characterizing *Miller* as "an aberration and the law only in the Ninth Circuit"); *Colon* v. *Kuhlmann*, Docket No. 87-CIV. 2980 (MGC), 1988 WL 61822, *5 (S.D.N.Y. June 3, 1988) (failure to collect rape victim's underwear did not violate due process because "due process clause . . . does not require that particular evidence be gathered"), aff'd, 865 F.2d 29 (2d Cir. 1988).

different. The lost photographs, as described in the record, would have shown nothing more than "the hamper itself" before Koval searched it and the state of the victim's leggings and underwear before they were separated, placed into evidence bags and sent to the state laboratory. Thus, we conclude that the defendant cannot establish the materiality of the two lost photographs, and, therefore, the first *Asherman* factor weighs in favor of the state.[17]

The second *Asherman* factor requires us to consider the likelihood of mistaken interpretation of the missing evidence by witnesses or the jury. "This court . . . has held that [m]istaken interpretation can be minimized at the trial by permitting testimony on the issue"; (internal quotation marks omitted) *State* v. *Gray*, supra, 212 Conn. App. 211; or "by an appropriate instruction from the court permitting the jury to draw an adverse inference against the state." (Internal quotation marks omitted.) *State* v. *Jones*, 50 Conn. App. 338, 357–58, 718 A.2d 470 (1998), cert. denied, 248 Conn. 915, 734 A.2d 568 (1999). The defendant argues that, "[a]lthough [he] was able to cross-examine the state's witnesses [about the lost photographs], that testimony did not minimize the significance of the missing evidence or the risk of mistaken interpretation" because "[t]he jury also heard conflicting and vague testimony from Koval about the contents of the hamper."

[17] The defendant's argument that the lost photographs of either the hamper or the leggings *could* have supported a theory of DNA transfer is misplaced because photographs of the "hamper itself" and the leggings do not do anything to further that theory. Indeed, such a purely speculative argument is not sufficient to show a reasonable probability that the result of the proceeding would have been different if the photographs were available. See *State* v. *Barnes*, 127 Conn. App. 24, 33, 15 A.3d 170 (2011) (first *Asherman* factor weighed against defendant who argued that lost audio recordings "were the only piece of evidence that 'could have' proven [his] guilt or innocence" because "mere speculation that the tapes could have been beneficial *or not* simply does not meet the standard necessary to prove materiality" (emphasis in original)), aff'd, 308 Conn. 38, 60 A.3d 256 (2013).

Here, the court permitted defense counsel to engage in extensive cross-examination of Koval regarding the lost photographs,[18] which elicited a description of how they were lost, and he also referenced Koval's inadequate and incomplete investigation and the lost photographs several times during closing argument, claiming that Koval tainted the investigation in an attempt to raise reasonable doubt in the minds of the jurors. Finally, the court gave the jury a detailed instruction[19] addressing the lost photographs that included the following language: "If you find that any omission[s] in the investigation were significant and not reasonably explained, you may consider whether the omissions tend to affect the quality, reliability or credibility of the evidence presented by the state to prove beyond a

[18] For example, during defense counsel's cross-examination of Koval, the following exchange occurred:

"[Defense Counsel]: Okay. So, what did you do [after learning that the photographs were lost]?

"[Koval]: I didn't do anything at that point.

"[Defense Counsel]: Okay. You didn't complete a supplemental report documenting the fact that this evidence had been lost?

"[Koval]: Not at that point, no.

"[Defense Counsel]: Okay. At any point in time did you author a police report documenting the loss of those photographs?

"[Koval]: No.

"[Defense Counsel]: Did you take that SD card or that camera and send it up to the state lab in an effort to recover these photos?

"[Koval]: No.

"[Defense Counsel]: So, the only documentation of that hamper—did you do anything else to document that hamper in the position it was in?

"[Koval]: No.

"[Defense Counsel]: So, the only documentation of that—of that hamper, in that position where it was, has been lost?

"[Koval]: Correct.

"[Defense Counsel]: And no effort was made to try and recover those photos, correct?

"[Koval]: Not at that time, no.

"[Defense Counsel]: And no documentation was made regarding that loss of evidence?

"[Koval]: Correct."

[19] See footnote 11 of this opinion.

reasonable doubt that the defendant is guilty of the counts with which he is charged in the information." On the basis of the record in this case, including the testimony that described the content of the photographs and how they were lost, it is not likely that the jury was misled by the missing photographs, as it was presented with ample testimony and an instruction concerning the missing photographs. See *State* v. *Fox*, supra, 192 Conn. App. 240 (second *Asherman* factor weighed in favor of state "[g]iven the ample testimony regarding the missing photographs"); *State* v. *Barnes*, 127 Conn. App. 24, 33–34, 15 A.3d 170 (2011) (same where defendant was "provided wide leeway" in cross-examination about missing evidence and "used the missing [evidence] as a means of attempting to raise reasonable doubt in the mind of the jury during closing argument"), aff'd, 308 Conn. 38, 60 A.3d 256 (2013). We therefore conclude that the likelihood of mistaken interpretation of the missing evidence at trial was minimal and that this factor weighs in the state's favor.

The third *Asherman* factor concerns the reason for the nonavailability of the evidence. "In weighing the third *Asherman* factor . . . our cases have focused on the motives behind the destruction of the evidence. . . . In examining the motives . . . our courts have considered such factors as whether the destruction was deliberate and intentional rather than negligent . . . or done in bad faith or with malice . . . or with reckless disregard . . . or calculated to hinder the defendant's defense, out of other animus or improper motive, or in reckless disregard of the defendant's rights." (Internal quotation marks omitted.) *State* v. *Gray*, supra, 212 Conn. App. 212.

The defendant concedes that there is no evidence of bad faith by law enforcement here but, nonetheless, argues that this factor weighs in his favor because "Koval's gross indifference in the . . . preservation of

the evidence . . . result[ed] in a fundamentally unfair trial." Given the defendant's concession that there was no evidence that Koval acted with bad faith in his handling of the lost photographs, we conclude that this factor weighs in favor of the state.[20] See *State* v. *Fox*, supra, 192 Conn. App. 241 (third *Asherman* factor weighed in favor of state because defendant was "unable to establish" that missing evidence was due to "improper motive or animus"); *State* v. *Barnes*, supra, 127 Conn. App. 34 (same where defendant conceded lack of evidence of bad faith).

The final *Asherman* factor requires consideration of the prejudice caused to the defendant due to the unavailability of the evidence. "In measuring the degree of prejudice to an accused caused by the unavailability of

[20] Despite acknowledging the lack of evidence of bad faith here, the defendant attempts to support his claim on appeal by arguing that Koval acted with "gross indifference" with respect to the preservation of evidence at the crime scene. Unlike a reference to bad faith, malice, or even gross negligence, the defendant's reference to "gross indifference" does not invoke a legal term of art commonly used by Connecticut courts in any context. Nevertheless, based on the arguments made by the defendant, we do not view the claimed "gross indifference" as rising to the same level of severity as conduct undertaken maliciously, or with bad faith or reckless indifference, of which the *Asherman* test requires consideration. Rather, we view the defendant's claim of "gross indifference" as invoking conduct more akin to ordinary, or gross, negligence. See *Rubel* v. *Wainwright*, 86 Conn. App. 728, 741, 862 A.2d 863 ("[r]ecklessness . . . is more than negligence and also is more than gross negligence"), cert. denied, 273 Conn. 919, 871 A.2d 1028 (2005); see also *State* v. *Gray*, supra, 212 Conn. App. 214–15 (finding third *Asherman* factor weighed against state even though record did not reflect animus or improper motive, because police department's policy violating state law "constituted a reckless disregard of the defendant's rights").

Even if we assume that Koval was grossly negligent in his handling of the lost photographs, that fact would not impact our *Asherman* analysis. See *State* v. *Gray*, supra, 212 Conn. App. 212 ("[i]n examining the motives [behind the destruction of evidence] . . . our courts have considered such factors as whether the destruction was deliberate and intentional *rather than* negligent" (emphasis added; internal quotation marks omitted)); see also *State* v. *Morales*, 39 Conn. App. 617, 627, 667 A.2d 68 ("while the police department may have been negligent in returning the jacket to the victim," because there was "no evidence of bad faith or an intention to harm," it was not improper for the court to find "that the reason for the unavailability

the evidence, a proper consideration is the strength or weakness of the state's case, as well as the corresponding strength or weakness of the defendant's case. . . . [T]his court repeatedly has held that a trial court may ameliorate any prejudice resulting from unavailable evidence by providing the defendant with unfettered cross-examination and by allowing the defendant to focus on the state's failure to produce such evidence during closing argument." (Citations omitted; internal quotation marks omitted.) *State* v. *Gray*, supra, 212 Conn. App. 215–16. "In analyzing this prong, our courts have evaluated the strength of the state's case by reviewing the 'testimony and exhibits [introduced at trial], *aside from*' the missing evidence." (Emphasis in original.) Id., 236 (*Prescott*, *J.*, concurring), quoting *State* v. *Morales*, 90 Conn. App. 82, 92, 876 A.2d 561, cert. denied, 275 Conn. 924, 883 A.2d 1250 (2005). The defendant argues that "Koval's failure to properly document or observe the crime scene made the loss of the only photograph taken there critical" and that "the missing photographs . . . undermined the defendant's ability to present a defense and hobbled his [DNA] transfer theory."

Our review of the record leads us to conclude that the direct and circumstantial evidence presented by the state provided strong evidence of the defendant's guilt. At trial, the victim testified about the details of the sexual assault and identified the defendant as the perpetrator, and three constancy of accusation[21] witnesses—

of the jacket did not significantly tip the *Asherman* scale in favor of the defendant"), cert. denied, 235 Conn. 938, 668 A.2d 376 (1995).

[21] "[T]he constancy of accusation doctrine . . . permits the victim in a sexual assault case . . . to testify on direct examination regarding the facts of the sexual assault and the identity of the person or persons to whom the incident was reported. . . . Thereafter, if defense counsel challenges the victim's credibility by inquiring, for example, on cross-examination as to any out-of-court complaints or delayed reporting, the state will be permitted to call constancy of accusation witnesses subject to [certain] limitations . . . . If defense counsel does not challenge the victim's credibility in any fashion on these points, the trial court shall not permit the state to introduce constancy testimony but, rather, shall instruct the jury that there are many

the victim's mother and brother, and J—testified that the victim told them that the defendant had sexually assaulted her.[22] Moreover, the underwear itself, along with the leggings worn by the victim during the assault, were both entered into evidence as physical exhibits for the jury to inspect. The state also offered as evidence the results of a DNA analysis linking the defendant to a semen stain found on the victim's underwear and testimony from the state laboratory employees who analyzed the evidence. Furthermore, the prosecutor elicited testimony from Williams, an expert witness on child forensic interviews, explaining how perceived inconsistencies in the account of a child who has been

reasons why sexual assault victims may delay in officially reporting the offense, and, to the extent the victim delayed in reporting the offense, the delay should not be considered by the jury in evaluating the victim's credibility. . . . A constancy of accusation witness is limited to testifying only with respect to the fact and timing of the victim's complaint; any testimony by the witness regarding the details surrounding the assault must be strictly limited to those necessary to associate the victim's complaint with the pending charge, including, for example, the time and place of the attack or the identity of the alleged perpetrator." (Citation omitted; internal quotation marks omitted.) *State* v. *Dionne*, 207 Conn. App. 106, 112–13, 262 A.3d 961, cert. denied, 340 Conn. 910, 264 A.3d 577 (2021).

[22] Given this testimony, the court gave the jury a constancy of accusation limiting instruction, stating, in part: "In this case you heard testimony that, sometime after the alleged sexual offense, [the victim] made out-of-court statements to other persons, [her brother], [J] and [her mother], about what had taken place. More particularly, there was testimony about the time, place, identity and general nature of the defendant's alleged sexual assault of [the victim]. The law recognizes that people might assume that anyone subjected to a sexual offense would complain within a reasonable time to someone to whom she ordinarily would turn for sympathy, protection or advice. If there was no evidence that a complainant made such a complaint, some might conclude that no sexual offense occurred. As a result, in cases involving an allegation . . . of a sexual offense, the state is permitted in certain circumstances to introduce out-of-court statements to other persons about what occurred. The only reason that the evidence is permitted, is to negate the inference that the complainant failed to confide in anyone about the sexual offense. In other words, the narrow purpose of the constancy evidence is to negate any inference that [the victim] failed to tell anyone about the sexual offense and therefore that [her] later assertion cannot be believed."

sexually assaulted can arise and be cleared up during the forensic interview process.[23]

By contrast, the defendant presented a DNA transfer theory, which, aside from the testimony of his mother that she had assisted with laundry at the victim's home, although not during the time period after the sexual assault, amounted to unsubstantiated speculation based on what the photograph and contents of the hamper *could have* shown if available. Indeed, the theory and testimony offered by the defendant was contradicted by the testimony of the victim, her brother, and her mother, as well as the lack of *any* evidence in the record that the defendant had masturbated in the victim's home, which was the factual predicate underlying his theory of DNA transfer. Likewise, the record was devoid of any evidence that, in the eight days that elapsed between the sexual assault and the victim's report, the defendant's mother assisted with laundry at the victim's home or the defendant deposited clothing in the hamper in the victim's room. Apart from the DNA transfer theory, the defendant's other primary strategy was to attempt to undermine the credibility of the victim's story by calling the jury's attention to claimed

[23] For instance, Williams testified in part: "So the forensic interview process looks to clarify inconsistencies, we expect to have some, but there's a difference between [an] inconsistency and a discrepancy. And so . . . an inconsistency we expect. A discrepancy would be, for example . . . if I was interviewing . . . a child who had been beaten very much and was in the hospital . . . and I'm interviewing them about the physical abuse and they say: 'Nope, I was never physically abused,' but then later in the interview may . . . refer to being hit with a broom or something, that would be a discrepancy, versus an inconsistency where a child might say: 'Well, the blanket was red,' but the blanket was blue, because we really haven't gathered all that information, and so they've told that one person and that one person only heard that one aspect, and the child's memory might have been when there was a red blanket there, so those inconsistencies we expect them, and . . . if the child provides a credible enough disclosure, then those inconsistencies may be cleared up and then simply . . . the other investigators would move on with their investigation."

inconsistencies in the victim's retellings of what happened, but, importantly, these purported inconsistencies were explained as being common and, in fact, expected, by the state's expert witness on child forensic interviews.

In the present case, the court provided defense counsel with a full opportunity to engage in "unfettered cross-examination" of Koval about the missing photographs; *State* v. *Gray*, supra, 212 Conn. App. 216; and likewise permitted him to focus on the state's loss of the photographs during closing argument. This resulted in the jury having an adequate opportunity to consider the defendant's narrative, the reason the photographs were lost, and the prejudicial concerns stemming from the unavailability of the photographs. Furthermore, the state introduced into evidence several photographs taken of the underwear at the state laboratory by the forensic examiner, and its case was not based on the missing photographs. See *State* v. *Weaver*, 85 Conn. App. 329, 353, 857 A.2d 376 (fourth *Asherman* factor weighed in state's favor because state's "strong" case "was not in any way based upon the lost evidence"), cert. denied, 271 Conn. 942, 861 A.2d 517 (2004). There was also no affirmative evidence in the record indicating that the victim possessed a motive to fabricate the accusation against the defendant or had a tendency to be dishonest. See *State* v. *Morales*, 39 Conn. App. 617, 629–31, 667 A.2d 68 (weighing victim's credibility during prejudice analysis in *Asherman* challenge to, inter alia, sexual assault conviction), cert. denied, 235 Conn. 938, 668 A.2d 376 (1995); cf. *State* v. *Aaron L.*, 272 Conn. 798, 815–16, 865 A.2d 1135 (2005) (considering victim's "motive to fabricate or lack thereof" as factor in evaluating admissibility of statement under residual exception to hearsay rule (internal quotation marks omitted)). Accordingly, any prejudice to the defendant resulting from the missing photographs was minimal, and we

conclude that the fourth *Asherman* factor weighs in favor of the state.

For the foregoing reasons, having determined that all of the *Asherman* factors, on balance, weigh against the defendant with respect to the lost photographs, we conclude that the defendant was not deprived of his state constitutional right to due process.

II

The defendant next claims that the court abused its discretion in conducting an insufficient inquiry into an allegation of juror misconduct. Specifically, he argues that the inquiry the court engaged in was not adequate under *State* v. *Brown*, 235 Conn. 502, 668 A.2d 1288 (1995),[24] given the nature of the allegation and defense counsel's request that further inquiry, including the recalling and questioning of a particular juror, be conducted. The defendant asks this court for a "remand to conduct a *Brown* inquiry [that] appropriately addresses the allegations of juror misconduct." Conversely, the state argues that the extent of the court's inquiry was appropriate and within its discretion. We agree with the state.

The following additional facts and procedural history are relevant to our analysis of this claim. On August 26, 2022, at the start of the defendant's sentencing hearing, the court indicated to both parties that an allegation of juror misconduct raised by defense counsel needed to be addressed. Defense counsel then described the issue and how it had come to his attention, stating: "Early . . . last week, [the defendant] advised me of

[24] In *State* v. *Brown*, supra, 235 Conn. 504, our Supreme Court held that the trial court's "duty to conduct an inquiry into . . . allegations [of serious jury misconduct]" was triggered when the court "received an anonymous note" informing it that "the jurors overheard the sheriffs betting that the defendant would be found guilty because he was black and from New York." (Internal quotation marks omitted.) Id., 519–20.

a conversation he had with a young man by the name of Nathan Gray. . . . Gray had advised [the defendant] that he had spoken to a gentleman by the name of Chris [Durante] through work. [Durante] was a supervisor at [their workplace]. He worked with [Gray]. [Durante] had spoken to one of the jurors, and what was conveyed by [Durante] to [Gray], was that this juror had told him that at some point during the trial [the juror] knew what he was gonna say before he went into the jury room. That information, once it got to me, I contacted my investigator and I asked my investigator to, basically, track this down. I had him start by talking to . . . Gray. The investigator confirmed the information from . . . Gray. . . . [M]y investigator then went and spoke to . . . Durante about this alleged conversation with the juror. . . . Durante denied having that conversation to my investigator, so my investigator then came back to me with that information. I asked my investigator to follow up with . . . Gray. . . . Gray remained consistent in what he said, and we obtained a statement from him . . . . [W]hen I got the statement in my possession, I contacted the state's attorney, let her know and explained, basically, what I just explained to the court, and provided a copy of the statement as well so that's how we got to this point. And then, at some point this week, it was brought to the court's attention, and we are here today."

The court then engaged in a preliminary inquiry into the allegation by questioning defense counsel about it. In response to the court's questions, defense counsel explained that the source of the allegation, Gray, is the boyfriend of the sister of the defendant's girlfriend and that Durante "denied ever having that conversation . . . with [Gray] or the juror." Defense counsel conceded that the statement "is hearsay layered upon hearsay" but nevertheless asked the court to find that "a sufficient basis [existed] to conduct further inquiry and

to conduct some inquiry of the juror himself." The state opposed further inquiry by the court into the allegation.

After hearing argument from both counsel on the issue, the court recessed for a short period and then orally denied the defendant's request for further inquiry into the allegation of juror misconduct. In doing so, the court applied the factors set forth by our Supreme Court in *Brown*, discussing each factor in detail, and concluding, in pertinent part: "[R]elevant case law states that a trial court must conduct a preliminary inquiry on the record whenever it is presented with any allegations of juror misconduct in a criminal case. Although the form and scope of such an inquiry lie within a trial court's discretion, the court must conduct some type of inquiry in response to the allegations of jury misconduct. . . . Whether a preliminary inquiry of counsel or some other limited formal proceeding will lead to [more] extensive proceedings will depend on what is disclosed during the initial limited proceeding and on the exercise of the trial court's sound discretion with respect thereto. . . .

"In this case, the defendant did not in [the court's] opinion, request only a minimal type of proceeding: it asked that the court bring in the actual juror who committed the alleged misconduct. In contrast, although the defendant can request an evidentiary hearing, the trial court should not hold such a proceeding if it's persuaded that a less extensive inquiry is more appropriate in light of all the circumstances; so, the court is taking that factor into consideration. . . .

"The defense has presented extremely weak evidence relevant to its claim of juror misconduct and rel[ies] solely on double hearsay statements that were denied by the middle declarant . . . Durante. . . . Gray has a connection or apparent possible bias to the defendant as there's a nexus between him and the defendant's girlfriend. The statement is also very vague. We don't

know at what point of the trial or . . . when the statement was made. It could have been made during deliberations. The court is [entitled] to rely on its jury instructions that the jury would not deliberate until all evidence was submitted to the jury and that [it] would deliberate in good faith. Again . . . Durante denies making the statement. I'll also note that, during the trial, the jury did in fact have readback and a question relative to the evidence. There's nothing in the statement to suggest either that he shared any of his thoughts with the other jurors. Balancing those factors against the state's strong interest in the finality of verdicts and how our caselaw explains [that] the danger in discussing or forcing a juror to come in, explain his thought process during the trial or during the deliberations, simply outweighs having any evidentiary proceeding based on the facts and circumstances of this case.

"So, the inquiry will end here. And again, based on these factors and weighing these factors and circumstances of . . . Gray's statement, its reliability, its bias, versus the strong interest with the finality of judgments and the state's [interest in] protecting the privacy and integrity of any jury deliberations, a full evidentiary hearing is not warranted."

We next set forth our standard of review for a claim that a court's inquiry into an allegation of jury misconduct or bias was insufficient. "[J]ury impartiality is a core requirement of the right to trial by jury guaranteed by the constitution of Connecticut, article first, § 8, and by the sixth amendment to the United States constitution. . . . In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors. . . . The modern jury is regarded as an institution in our justice system that determines the case solely on the basis of the evidence and arguments given [it] in the adversary arena after proper instructions on the law by the court. . . . We have recognized, moreover, that [t]he trial court, which

has a [firsthand] impression of [the] jury, is generally in the best position to evaluate the critical question of whether the juror's or jurors' exposure to improper matter has prejudiced a defendant." (Internal quotation marks omitted.) *State* v. *Montanez*, 185 Conn. App. 589, 602–603, 197 A.3d 959 (2018), cert. denied, 332 Conn. 907, 209 A.3d 643 (2019).

"Our review on appeal is limited to the inquiry of whether the court's review of the alleged jury misconduct can be characterized fairly as an abuse of discretion"; *State* v. *Kamel*, 115 Conn. App. 338, 343, 972 A.2d 780 (2009); and "[a]ppellate review of a trial court's preliminary inquiry into claims of jury misconduct or bias is governed by [*Brown*]. In *Brown*, our Supreme Court invoked its supervisory authority over the administration of justice to hold that a trial court must conduct a preliminary inquiry, on the record, whenever it is presented with any allegations of jury misconduct in a criminal case, regardless of whether an inquiry is requested by counsel. . . . The form and scope of such inquiry is left to the discretion of the trial court based on a consideration of multiple factors, including: (1) the private interest of the defendant; (2) a risk and value assessment of additional procedural safeguards; and (3) the [state's] interest. . . . In outlining these factors, we also [have] acknowledged, however, that [i]n the proper circumstances, the trial court may discharge its obligation simply by notifying the defendant and the state of the allegations, providing them with an adequate opportunity to respond and stating on the record its reasons for the limited form and scope of the proceedings held. . . . Accordingly, [a]ny assessment of the form and scope of the inquiry that a trial court must undertake when it is presented with allegations of jur[or] [bias or] misconduct will necessarily be fact specific." (Citations omitted; internal quotation marks omitted.) *State* v. *Montanez*, supra, 185 Conn.

App. 603–604; see also *State* v. *Biggs*, 176 Conn. App. 687, 704, 171 A.3d 457 ("we recognize that the trial court has wide latitude in fashioning the proper response to allegations of juror [misconduct]" (internal quotation marks omitted)), cert. denied, 327 Conn. 975, 174 A.3d 193 (2017).

"In *Brown*, [our Supreme Court] noted that '[t]here may well be cases . . . in which a trial court will rightfully be persuaded, solely on the basis of the allegations before it and the preliminary inquiry of counsel on the record, that such allegations lack any merit. In such cases, a defendant's constitutional rights may not be violated by the trial court's failure to hold an evidentiary hearing . . . .' " *State* v. *Michael J.*, 274 Conn. 321, 340, 875 A.2d 510 (2005). "[O]f course . . . it is within the discretion of the trial court to make credibility assessments and determine whether the allegations [of juror misconduct] are facially credible." (Internal quotation marks omitted.) *State* v. *Roman*, 262 Conn. 718, 728, 817 A.2d 100 (2003); see also *State* v. *Brown*, supra, 235 Conn. 527–28 ("the trial judge has a superior opportunity to assess the proceedings over which he or she personally has presided . . . and thus is in a superior position to evaluate the credibility of allegations of . . . misconduct, [regardless of] their source" (citations omitted)).

"[A]lthough the defendant can request an evidentiary hearing, the trial court should not hold such a proceeding if it is persuaded that a less extensive inquiry is more appropriate in light of all the circumstances. . . . It should also consider the seriousness of the allegation by taking into account the prejudicial nature of the alleged misconduct as well as the nature and degree of the jury's alleged involvement in the misconduct. . . . *Brown* also advises that, when exercising its discretion as to how to proceed with a claim of juror misconduct, a court should credit the [state's] interest in the finality

of judgments, protecting the privacy and integrity of jury deliberations, preventing juror harassment, and maintaining public confidence in the jury system." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Biggs*, supra, 176 Conn. App. 709–10.

We conclude that the court did not abuse its discretion in denying the defendant's request for additional inquiry into the allegation of juror misconduct. By notifying the parties about the allegation, engaging in a preliminary inquiry during which it questioned defense counsel and heard from both parties on the issue, and then thoughtfully applying the *Brown* factors after learning about the allegation, the court conducted the "meaningful, on the record, preliminary inquiry . . . required by *Brown* and its progeny." *State* v. *Kamel*, supra, 115 Conn. App. 344; see *State* v. *Biggs*, supra, 176 Conn. App. 711 n.7 ("[a]lthough . . . courts have heard testimony from jurors accused of misconduct before rendering decisions as to whether juror misconduct occurred and thus prejudiced the defendant . . . the court here was within its province to determine, in its fact specific inquiry, that such testimony was unnecessary in light of its preliminary inquiry" (citation omitted)). The court specifically stated on the record its reasons for the limited form and scope of its inquiry; see *State* v. *Montanez*, supra, 185 Conn. App. 604; particularly, its findings that the source of the allegation was connected to the defendant, the statement itself was vague, it was double hearsay, and the purported middle declarant of that double hearsay statement denied ever having made the statement.

The facts of the present case fall squarely within those cases in which we have held that the court's inquiry was adequate under *Brown*.[25] For example, in

[25] The present case differs from those in which we have found a court's inquiry into an allegation of juror misconduct or bias to be insufficient under *Brown*. For instance, in *State* v. *Kamel*, supra, 115 Conn. App. 348–50, we

State v. *Necaise*, 97 Conn. App. 214, 220–26, 904 A.2d 245, cert. denied, 280 Conn. 942, 912 A.2d 478 (2006), we determined that the court responded appropriately after it received a note from a juror suggesting possible bias by conducting a preliminary inquiry, on the record, in which it notified the parties about the note, gave them an opportunity to propose possible remedial actions, including requesting further inquiry, and then determined that a curative instruction without further inquiry was warranted. See also *State* v. *Alston*, 272 Conn. 432, 453, 862 A.2d 817 (2005) (court did not abuse its discretion and clearly satisfied preliminary inquiry required by *Brown* when, "[a]fter learning about the alleged misconduct, the . . . court, on the record, alerted both parties to it [and] allowed them to respond and to request a more extensive inquiry"). Likewise, in the present case, the court notified the parties, on the record, about the allegation, inquired into the allegation by questioning defense counsel, and provided both the state and the defendant an opportunity to be heard as to how it should proceed. In light of the "wide latitude" the court has in making credibility determinations and "in fashioning the proper response to allegations of juror [misconduct]" under *Brown*; (internal quotation marks omitted) *State* v. *Biggs*, supra, 176 Conn. App. 704; and the nature of the allegation made in the present case, as revealed through the court's meaningful questioning, the court was well within its discretion to "dis-

held that the court abused its discretion by failing to conduct the meaningful, on the record, preliminary inquiry required by *Brown* because, after the court discovered brass knuckles—which were not admitted into evidence—in the jury deliberation room, it failed "to inform both sides that the jury was exposed to the brass knuckles," or to inquire into the matter on the record. See also *State* v. *Roman*, supra, 262 Conn. 727–28 (court abused its discretion by failing to conduct any on record inquiry into specific and facially credible allegation that juror spoke to victim's family member); *State* v. *Centeno*, 259 Conn. 75, 82–83, 787 A.2d 537 (2002) (court abused its discretion by failing to conduct at least "some inquiry" on record into defendant's facially credible allegation that he knew juror from prior, possibly criminal, relationship).

charge its obligation simply by notifying the defendant and the state of the allegations, providing them with an adequate opportunity to respond and [then] stating on the record its reasons" for going no further than a preliminary inquiry, as it did. (Internal quotation marks omitted.) *State* v. *Montanez*, supra, 185 Conn. App. 604.

We conclude that it was not an abuse of discretion for the court to determine that recalling a juror for questioning three months after the jury delivered its verdict was unwarranted; see *State* v. *Biggs*, supra, 176 Conn. App. 709; see also *United States* v. *Scarfo*, 41 F.4th 136, 209 (3d Cir. 2022) ("substantial evidence of jury misconduct . . . [is required] [before] a district court may, within its sound discretion, investigate the allegations through juror questioning" (internal quotation marks omitted)), cert. denied sub nom. *Pelullo* v. *United States*, U.S. , 143 S. Ct. 1044, 215 L. Ed. 2d 201 (2023); *Walters* v. *Hitchcock*, 237 Kan. 31, 36, 697 P.2d 847 (1985) (acknowledging that "recall of jurors after their service has ended to testify . . . is a serious step"); and that, instead, a less extensive inquiry was appropriate given the circumstances surrounding the allegation and the considerations outlined in *Brown*.[26] Accordingly, we reject the defendant's claim that the court abused its discretion in declining to engage in further inquiry into the allegation of juror misconduct.

The judgment is affirmed.

In this opinion the other judges concurred.

[26] "Moreover, [when, as here] the trial court was in no way responsible for the juror misconduct . . . we have repeatedly held that a defendant who offers proof of juror misconduct bears the burden of proving that actual prejudice resulted from that misconduct." (Internal quotation marks omitted.) *State* v. *James H.*, 150 Conn. App. 847, 854, 95 A.3d 524, cert. denied, 314 Conn. 913, 100 A.3d 404 (2014). The defendant has not made any such showing of prejudice in his brief or at oral argument before this court.

STATE OF CONNECTICUT *v.* TIMOTHY A. LEE (AC 46751)

STATE OF CONNECTICUT *v.* CLIFTON LABREC (AC 46758)

Moll, Suarez and Prescott, Js.

Syllabus

The state appealed in each case from the judgment of the trial court granting the defendant's motion to dismiss the underlying charges brought against him on statute of limitations grounds. The state, which did not challenge the dismissal of the charge of failure to appear brought against each defendant, claimed that the court improperly applied statute of limitations principles in dismissing the underlying timely filed charges brought against each defendant. *Held*:

The trial court improperly granted the defendants' motions to dismiss insofar as it dismissed the underlying charges, as there was no basis on which this court could conclude that the unreasonable delay in the service of certain rearrest warrants for failure to appear should affect the prosecution of the underlying charges, which were timely brought and which did not proceed earlier because the defendants failed to appear in court, a circumstance of the defendants' own making.

Argued September 9—officially released November 19, 2024

Procedural History

Information, in the first case, charging the defendant with the crimes of operating a motor vehicle while under the influence of alcohol or drugs, possession of cannabis, failure to drive in the proper lane, and failure to appear in the second degree, brought to the Superior Court in the judicial district of Tolland, geographical area number nineteen, and information in a second case charging the defendant with the crimes of operation of a motor vehicle while under the influence of alcohol or drugs, traveling unreasonably fast, and failure to appear in the second degree, brought to the Superior Court in the judicial district of Tolland, geographical area number nineteen, where, in the first case, the count charging the defendant with possession of cannabis

was dismissed; thereafter, in each case, the court, *Klatt*, *J.*, granted the defendant's motion to dismiss and rendered judgment thereon; subsequently, in each case, the court, *Klatt*, *J.*, granted the state's motion for permission to appeal, and the state filed separate appeals to this court. *Reversed in part*; *further proceedings*.

Laurie N. Feldman, assistant state's attorney, with whom, on the brief, were *Matthew C. Gedansky*, state's attorney, and *Jonathan M. Shaw* and *Ashely Sgro*, assistant state's attorneys, for the appellant (state).

Cameron L. Atkinson, with whom, on the brief, was *Herman Woodard*, for the appellee (defendant in Docket No. AC 46751).

Nicole Van Lear, deputy assistant public defender, for the appellee (defendant in Docket No. AC 46758).

Opinion

MOLL, J. These two appeals, although not consolidated, involve an identical issue, namely, whether the unreasonable delay in the execution of a rearrest warrant for failure to appear, which led to the dismissal of the failure to appear charge on statute of limitations grounds, also warranted, on statute of limitations grounds, the dismissal of the otherwise timely filed underlying charges. In Docket No. AC 46751, the state appeals from the judgment of the trial court dismissing the charges brought against the defendant Timothy A. Lee. In Docket No. AC 46758, the state appeals from the judgment of the court dismissing the charges brought against the defendant Clifton Labrec. In both appeals, the state asserts that, in connection with dismissing the defendants' respective failure to appear charges on statute of limitations grounds, which the state does not challenge, the court improperly applied statute of limitations principles in dismissing the underlying timely filed charges brought against each defendant.

We agree with the state and, accordingly, reverse the judgments of the trial court insofar as the court dismissed the defendants' respective underlying charges.

I

A

AC 46751

The following undisputed facts and procedural history are relevant to our resolution of the appeal in AC 46751. On February 26, 2017, Lee was arrested on site and charged with operating a motor vehicle while under the influence of alcohol or drugs in violation of General Statutes § 14-227a[1] and failure to drive in the proper lane in violation of General Statutes § 14-236.[2] On April 3, 2017, Lee pleaded not guilty to those charges. On November 20, 2018, Lee failed to appear for a scheduled court date, whereupon a bail commissioner's letter was sent to him ordering his appearance. On December 10, 2018, after Lee again failed to appear in court, Lee's rearrest was ordered for failure to appear in the second degree in violation of General Statutes § 53a-173, with a rearrest warrant being signed by the trial court, *Sicilian, J.*, on December 12, 2018. The rearrest warrant was not served until February 20, 2023.

On April 3, 2023, pursuant to Practice Book § 41-8 (7)[3] and article first, § 8, of the Connecticut constitu-

[1] Section 14-227a was amended during a special session of the legislature in June, 2021; see Public Acts, Spec. Sess., June, 2021, No. 21-1, §§ 116 and 117; however, that amendment has no bearing on the merits of the appeal in AC 46751. In the interest of simplicity, we refer to the current revision of the statute.

[2] Lee also was charged with the possession of less than one-half ounce of cannabis in violation of General Statutes (Rev. to 2017) § 21a-279a, but this charge was dismissed as a result of the decriminalization of the offense subsequent to the date of the charge.

[3] Practice Book § 41-8 provides in relevant part: "The following defenses or objections, if capable of determination without a trial of the general issue, shall, if made prior to trial, be raised by a motion to dismiss the information . . . (7) [c]laim that the defendant has been denied a speedy trial . . . ."

tion,[4] Lee moved to dismiss all of the charges pending against him on the basis that, notwithstanding that he had resided at the same address for the past fifteen years, "[t]he police made no reasonable effort to serve the [rearrest] warrant from 2018 to 2023," which "prejudiced" him and "denied [him of] his right to a speedy trial." The state objected on the ground that the motion to dismiss was "premature because [Lee] never filed a motion asserting his right to a speedy trial [pursuant to General Statutes § 54-82m]."[5] Moreover, the state argued that (1) Lee also appeared to be asserting a violation of the statute of limitations vis-à-vis the failure to appear charge, and such assertion lacked merit because (a) the signing of the rearrest warrant tolled the applicable statute of limitations and (b) Lee failed to demonstrate that the warrant was not executed with due diligence, and (2) "[a]ny claim regarding the statute

[4] Article first, § 8, of the Connecticut constitution, as amended by articles seventeen and twenty-nine of the amendments, provides in relevant part: "In all criminal prosecutions, the accused shall have a right . . . to a speedy, public trial by an impartial jury. . . ."

[5] General Statutes § 54-82m provides: "In accordance with the provisions of section 51-14, the judges of the Superior Court shall make such rules as they deem necessary to provide a procedure to assure a speedy trial for any person charged with a criminal offense on or after July 1, 1985. Such rules shall provide that (1) in any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of a criminal offense shall commence within twelve months from the filing date of the information or indictment or from the date of the arrest, whichever is later, except that when such defendant is incarcerated in a correctional institution of this state pending such trial and is not subject to the provisions of section 54-82c, the trial of such defendant shall commence within eight months from the filing date of the information or indictment or from the date of arrest, whichever is later; and (2) if a defendant is not brought to trial within the time limit set forth in subdivision (1) of this section and a trial is not commenced within thirty days of a motion for a speedy trial made by the defendant at any time after such time limit has passed, the information or indictment shall be dismissed. Such rules shall include provisions to identify periods of delay caused by the action of the defendant, or the defendant's inability to stand trial, to be excluded in computing the time limits set forth in subdivision (1) of this section."

of limitations for the [alleged] offenses that occurred on February 26, 2017, [is] without merit because [Lee] was arrested on site, on the date of the incident," thereby necessarily satisfying the statute of limitations that governed the underlying charges.

On July 19, 2023, the court, *Klatt*, *J.*, held a hearing on Lee's motion to dismiss.[6] After setting forth the factual background of the case, which the parties did not dispute, the court (1) found that Lee was not elusive following the execution of the rearrest warrant and (2) concluded there was an unreasonable delay in the service of the rearrest warrant. The court then noted, and the state confirmed, that the state was abandoning its objection to the dismissal of the failure to appear charge against Lee, but it was maintaining that the unreasonable delay in the execution of the rearrest warrant did not justify also dismissing the underlying charges against Lee.

The court proceeded to grant orally the motion to dismiss as to all of the charges against Lee. In doing so, the court discussed the purposes of statutes of limitations, which included "protect[ing] the individual[s] from having to defend themselves against charges when the basic facts may have become obscured by [the] passage of time and to minimize the danger of an official punishment because of acts in the far distant past. It also may have the salutary effect of encouraging law enforcement officials to promptly investigate suspicious criminal activity." The court concluded that the underlying charges against Lee were "equally [as] stale [as the failure to appear charge against him] because of the state's failure to meet its burden" to serve the

[6] The court held a preliminary hearing on June 2, 2023, during which the court encouraged the parties to submit a factual stipulation and to prepare for additional argument on July 19, 2023. The record does not reflect that the parties submitted a stipulation prior to the court's ruling on Lee's motion to dismiss.

rearrest warrant without unreasonable delay. The court further stated: "The case law in this case . . . and the statute [refer] to the prosecution, not to individual charges. [The underlying charges against Lee] are in the same situation as [Lee's] failure to appear [charge], if not worse. They are equally stale, if not more so. Evidence and witnesses' memories are now six years old. There is no case law that I see or found that suggests different [charges] should be treated differently, and both the statute and case law, again, refer to the prosecution, which is all three [charges]. The [rearrest] warrant did not begin a new prosecution. It was . . . only the means of bringing [Lee] to court. It is all one prosecution. . . . On that basis, the court finds that the unreasonable delay extends to all of the [charges], and accordingly, I will grant [Lee's] motion regarding the remaining three [charges] . . . ." Thereafter, the state moved for permission to appeal, which the court granted. The appeal in AC 46751 followed.

B

AC 46758

The following undisputed facts and procedural history are relevant to our resolution of the appeal in AC 46758. On June 16, 2012, Labrec was arrested on site and charged with operating a motor vehicle while under the influence of alcohol or drugs in violation of § 14-227a[7] and traveling unreasonably fast in violation of General Statutes § 14-218a.[8] On July 17, 2012, Labrec first appeared in court. Following Labrec's subsequent

[7] Since the events underlying Labrec's arrest in 2012, the legislature has amended § 14-227a in ways that have no bearing on the merits of the appeal in AC 46758. In the interest of simplicity, we refer to the current revision of the statute.

[8] Since the events underlying Labrec's arrest in 2012, the legislature has amended § 14-218a in ways that have no bearing on the merits of the appeal in AC 46758. In the interest of simplicity, we refer to the current revision of the statute.

failure to appear in court on October 1, 2012, Labrec was sent a bail commissioner's letter to appear on October 15, 2012, on which date he again failed to appear. Accordingly, Labrec's rearrest was ordered on October 15, 2012, for failure to appear in the second degree in violation of § 53a-173, with a rearrest warrant being signed by the court, *Graham*, *J.*, on October 18, 2012. On September 1, 2022, Labrec was arrested for his failure to appear.

On July 14, 2023, pursuant to Practice Book § 41-8 (3),[9] Labrec filed a motion to dismiss all of the charges pending against him, arguing that the period of time between the issuance of the rearrest warrant in October, 2012, and the execution of the warrant in September, 2022, constituted "a lengthy and unreasonable delay in service" and that, during such time period, "[h]e was neither elusive nor unavailable." The state opposed the motion to dismiss, arguing that Labrec (1) "elud[ed] the authorities and was difficult to apprehend" with respect to the rearrest warrant and (2) failed to demonstrate prejudice caused by the alleged delay in the execution of the rearrest warrant.

On July 26, 2023, one week following the hearing held on Lee's motion to dismiss, the court, *Klatt*, *J.*, conducted a hearing on Labrec's motion to dismiss. During the hearing, the court heard testimony regarding the availability of Labrec and whether it was unreasonable for the state to have served the rearrest warrant ten years after Labrec's failure to appear. On the basis of the evidence adduced, the court (1) found that Labrec

[9] Practice Book § 41-8 provides in relevant part: "The following defenses or objections, if capable of determination without a trial of the general issue, shall, if made prior to trial, be raised by a motion to dismiss the information . . . (3) [s]tatute of limitations . . . ."

In support of his motion to dismiss, Labrec also cited unspecified federal and state constitutional rights, the statute of limitations set forth in General Statutes § 54-193 (d), and our Supreme Court's decision in *State* v. *Swebilius*, 325 Conn. 793, 159 A.3d 1099 (2017).

was not unavailable or elusive during that time frame and (2) concluded that the ten year delay by the state in serving the rearrest warrant was unreasonable. The court then considered whether to grant Labrec's motion to dismiss in toto or as to Labrec's failure to appear charge only, with the state arguing that the "failure to appear [charge] should be the only charge that would be eligible for a dismissal under the circumstances." The court proceeded to grant orally the motion to dismiss as to all of the charges against Labrec. Insofar as the court dismissed Labrec's underlying charges, the court relied on its reasoning from its decision granting Lee's motion to dismiss. Specifically, the court stated: "I had a full argument regarding that issue last week with another member of the state's attorney's office . . . . And the court's reasoning then, and it's the same now—to begin with, the statute and case law [refer] to one prosecution, not several, not separate offenses, but one prosecution. And they also refer to the purpose of the statute of limitations. Why we have that is [to] prevent stale prosecutions. The original offense[s] [are] now equally even more stale, and [they have] been made more so by . . . the state's failure [in] creating this unreasonable delay in the execution of the [rearrest] warrant. . . . If [the state] had served the failure to appear [warrant] in [a] timely fashion or made some effort [to serve the rearrest warrant], then [Labrec] could've answered to the charges in a timely fashion. He's been unable to do so, and it's been—and that's at the hands of the state. So, I will grant the motion as to all counts." Thereafter, the state moved for permission to appeal, which the court granted. The appeal in AC 46758 followed. Additional facts and procedural history will be provided as necessary.

II

Before addressing the merits of the state's claims in these appeals, we set forth the applicable standard of

review and legal principles. "A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . [O]ur review of the trial court's ultimate legal conclusion and resulting [denial] of the motion to dismiss will be de novo. . . . Factual findings underlying the court's decision, however, will not be disturbed unless they are clearly erroneous. . . . The applicable standard of review for the denial of a motion to dismiss, therefore, generally turns on whether the appellant seeks to challenge the legal conclusions of the trial court or its factual determinations." (Internal quotation marks omitted.) *State* v. *Smith*, 178 Conn. App. 715, 721, 177 A.3d 593 (2017), cert. denied, 328 Conn. 906, 177 A.3d 564 (2018). The question of whether a prosecution for a particular charge is barred by the statute of limitations is primarily a question of law, which this court reviews de novo. See *State* v. *Freeman*, 344 Conn. 503, 512, 281 A.3d 397 (2022).

The parties agree that the underlying charges brought against each defendant, respectively, are governed by the one year statute of limitations set forth in General Statutes § 54-193 (d)[10] which provides that "[n]o person

[10] General Statutes § 54-193 provides: "(a) There shall be no limitation of time within which a person may be prosecuted for (1) (A) 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, or (B) any other offense involving sexual abuse, sexual exploitation or sexual assault if the victim of the offense was a minor at the time of the offense, including, but not limited to, a violation of subdivision (2) of subsection (a) of section 53-21, (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) (1) Except as provided in subsection (a) of this section or subdivision (2) of this subsection, no person may be prosecuted for a violation of a (A)

may be prosecuted for any offense, other than an offense set forth in subsection (a), (b) or (c) of this section, except within one year next after the offense has been committed." "[T]he purpose of a statute of limitations is to [assure] a timely commencement of prosecution . . . ." *State* v. *Crawford*, 202 Conn. 443, 447–48, 521 A.2d 1034 (1987). It is well settled that "a warrantless arrest constitutes the commencement of a criminal prosecution against an arrestee for statute of limitation[s] purposes. . . . Accordingly, [a] defendant's warrantless arrest on the same day as the

class B felony violation of section 53a-70, 53a-70a or 53a-70b, (B) class C felony violation of section 53a-71 or 53a-72b, or (C) class D felony violation of section 53a-72a, except within twenty years next after the offense has been committed.

"(2) Except as provided in subsection (a) of this section, no person may be prosecuted for any offense involving sexual abuse, sexual exploitation or sexual assault of a victim if the victim was eighteen, nineteen or twenty years of age at the time of the offense, except not later than thirty years next after such victim attains the age of twenty-one years.

"(3) No person may be prosecuted for a class A misdemeanor violation of section 53a-73a if the victim at the time of the offense was twenty-one years of age or older, except within ten years next after the offense has been committed.

"(c) No person may be prosecuted for any offense, other than an offense set forth in subsection (a) or (b) 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.

"(d) No person may be prosecuted for any offense, other than an offense set forth in subsection (a), (b) or (c) of this section, except within one year next after the offense has been committed.

"(e) If the person against whom an indictment, information or complaint for any of said offenses is brought has fled from and resided out of this state during the period so limited, it may be brought against such person at any time within such period, during which such person resides in this state, after the commission of the offense.

"(f) When any suit, indictment, information or complaint for any crime may be brought within any other time than is limited by this section, it shall be brought within such time."

We note that, although the legislature has amended § 54-193 since the date of the incident underlying each appeal; see, e.g., Public Acts 2019, No. 19-16, § 17; those amendments have no bearing on the merits of these appeals. Hereinafter, unless otherwise indicated, all references to § 54-193 in this opinion are to the current revision of the statute.

offenses are alleged to have been committed by him [is] a timely prosecution of the defendant within the [applicable] statute of limitations." (Citation omitted; internal quotation marks omitted.) *State* v. *Nelson*, 144 Conn. App. 678, 686, 73 A.3d 811, cert. denied, 310 Conn. 935, 79 A.3d 888 (2013).

"[T]he primary purpose of statutes of limitations is to encourage law enforcement officials promptly to investigate suspected criminal activity . . . *so as to ensure that a defendant receives notice*, within a prescribed time, of the acts with which he is charged . . . ." (Citation omitted; emphasis added; internal quotation marks omitted.) *State* v. *A. B.*, 341 Conn. 47, 68–69, 266 A.3d 849 (2021); *State* v. *Almeda*, 211 Conn. 441, 446, 560 A.2d 389 (1989) ("[a]t the core of the limitations doctrine is notice to the defendant"). Statutes of limitations exist for "[t]he purpose of . . . limit[ing] exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity." (Internal quotation marks omitted.) *State* v. *A. B.*, supra, 56.

Pursuant to Practice Book § 41-8 (3), a criminal defendant may assert a statute of limitations defense by way of a motion to dismiss. When asserting this defense in the context of the state's failure to serve an arrest warrant within the limitation period, the defendant has the burden of "present[ing] evidence of his availability for arrest during the limitation period, [whereupon] the burden shifts to the state to present evidence of its due

diligence in executing the warrant." *State* v. *Swebilius*, 325 Conn. 793, 803, 159 A.3d 1099 (2017). There is no per se rule regarding what is reasonable but, rather, this "determination must be made on a case-by-case basis in light of the particular facts and circumstances presented." Id., 809–10.

With these legal principles in mind, we turn to the merits of the state's claims on appeal. At the outset, we iterate that the state does not challenge the respective dismissals of the failure to appear charges brought against the defendants. Instead, the state argues that the court improperly dismissed the underlying charges in connection with its dismissal of the failure to appear charges on statute of limitations grounds. In connection with this claim, the state asserts that (1) the statute of limitations was satisfied for the underlying charges, as both defendants were arrested on site, and (2) the court incorrectly applied the principles underlying statutes of limitations to conclude that the unreasonable delay in the execution of the rearrest warrants in both cases justified the dismissal of the underlying charges. In response, the defendants argue that the court properly applied statute of limitations principles in dismissing the underlying charges. We agree with the state.

Lee was arrested on site on February 26, 2017, for driving under the influence and for failure to drive in the proper lane, putting him on notice of the underlying charges against him on the same date of these alleged offenses. Similarly, Labrec was put on notice of the underlying charges against him on June 16, 2012, when he was arrested on site for driving under the influence and for driving unreasonably fast. These two "warrantless arrest[s] constitute[d] the commencement of . . . criminal prosecution[s] against [the defendants] for statute of limitation[s] purposes"; *State* v. *Nelson*,

supra, 144 Conn. App. 686; and, therefore, the underlying charges were timely brought within the one year limitation period.

As an initial matter, we observe that the "burden shifting framework" for a statute of limitations defense in the context of the state's failure to serve an arrest warrant within the limitation period; *State* v. *Swebilius*, supra, 325 Conn. 804; as imported by the trial court, simply does not apply to the underlying charges, as such defense applies only if there is a "delay between the issuance and the service of an arrest warrant"; id., 809; for a particular charge, which did not occur in connection with the defendants' underlying charges.

The state argues, and we agree, that the court improperly applied statute of limitations principles, including concerns regarding staleness and loss of evidence, to justify the dismissal of the timely filed underlying charges. It is well settled that statutes of limitations are intended to mitigate *prearrest* delay. See *State* v. *Daren Y.*, 350 Conn. 393, 410, A.3d (2024) (citing *United States* v. *Marion*, 404 U.S. 307, 322, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971), for proposition that "statute of limitations provide[s] . . . [mechanism] to guard against . . . prejudice resulting from the passage of time between crime and arrest or charge" (internal quotation marks omitted)). Although issues of staleness and the risk of loss of evidence caused by the state's unreasonable delay in executing an arrest warrant are important concerns underlying statutes of limitations in general, such concerns do not apply when the statute of limitations has been satisfied with respect to initial charges and a defendant subsequently fails to appear. In that case, it is the defendant's conduct, and not the state's conduct, that is the principal cause of any negative impact from the delay in prosecution.

The state also argues, and we again agree, that the court incorrectly reasoned, for statute of limitations

purposes, the defendant's cases each involved a single prosecution such that the underlying charges could not be separated from the failure to appear charges. The language of § 54-193 (d), however, concerns the respective timing of the prosecution of individual offenses: "No person may be prosecuted for any offense . . . except within one year next after the offense has been committed." The statute does not make any reference to the prosecution of multiple charges against the defendant as being a single unit. This conclusion is further bolstered by this court's history of affirming the dismissal of certain charges within a prosecution due to the expiration of the limitation period, while allowing the prosecution to continue with respect to other charges that were brought in a timely manner. See, e.g., *State* v. *Greer*, 213 Conn. App. 757, 774–75, 279 A.3d 268, cert. denied, 345 Conn. 916, 284 A.3d 299 (2022), cert. denied, U.S. , 143 S. Ct. 1061, 215 L. Ed. 2d 282 (2023); *State* v. *Menzies*, 26 Conn. App. 674, 678–82, 603 A.2d 419, cert. denied, 221 Conn. 924, 608 A.2d 690 (1992).

The defendants rely on multiple cases that discuss the "burden shifting framework" and stand for the proposition that arrest warrants must be executed with due diligence, with the state's failure to do so warranting dismissal of the charges. It is true that the circumstances surrounding the rearrest warrants that were issued for the failure to appear charges would fall into the line of cases cited by the defendants. See, e.g., *State* v. *Swebilius*, supra, 325 Conn. 802 (holding that arrest warrant must be executed without unreasonable delay); *State* v. *Crawford*, supra, 202 Conn. 450–51 ("an arrest warrant, when issued within the time limitations of [the applicable statute of limitations], must be executed without unreasonable delay"). The problem with the defendants' assertion as it pertains to the present cases, however, is that the underlying charges did not result

from warrants that were executed with a lack of due diligence. Cf. *State* v. *Soldi*, 92 Conn. App. 849, 851, 860, 887 A.2d 436 (holding that trial court improperly denied motion to dismiss because "warrant was not executed with due diligence in that it was not served on her until more than five years after it had been issued"), cert. denied, 277 Conn. 913, 895 A.2d 792 (2006). Stated simply, the fact that the statute of limitations was not satisfied with respect to the defendants' failure to appear charges does not affect, let alone undo, the state's compliance with the statute of limitations for the underlying charges.

In short, there is no basis on which this court can conclude that the unreasonable delay in the service of the rearrest warrants for failure to appear should affect the prosecution of the underlying charges, which were timely brought and which did not proceed earlier because the *defendants* failed to appear in court. In other words, this is a circumstance of the defendants' own making. Indeed, reaching a contrary conclusion would yield an absurd result and would incentivize defendants to avoid appearing in court.[11] Accordingly, we conclude that the court improperly granted the defendants' respective motions to dismiss insofar as the court dismissed the underlying charges.

III

We briefly turn our attention to the alternative grounds for affirmance raised by Lee and/or Labrec. First, both defendants argue that the judgments of dismissal in their respective cases can be affirmed on the alternative ground that there was insufficient cause for

[11] Although a defendant risks incurring additional criminal liability by failing to appear in court, a defendant may believe that the risk of additional criminal liability is justified depending on the severity of the underlying charges and the possibility that the state will not serve the rearrest warrant on a timely basis.

the continuation of their respective prosecutions pursuant to General Statutes § 54-56.[12] See *State* v. *Corchado*, 200 Conn. 453, 460, 512 A.2d 183 (1986) (§ 54-56 acts as safeguard against prosecutorial overreach by giving statutory authority to trial courts to dismiss charges "where the circumstances are compelling"). Second, Lee argues that the judgment of dismissal rendered in his favor can be affirmed on the alternative grounds that (1) the court's dismissal of the charges against him constituted a proper exercise of its inherent authority to manage its docket and (2) the state's unreasonable delay in executing the rearrest warrant on him violated his right to a speedy trial pursuant to article first, § 8, of the state constitution. The state contends that these alternative grounds for affirmance are unpreserved and, in addition, lack an adequate record for review. For the reasons that follow, we decline to review these alternative grounds for affirmance.

"[O]nly in [the] most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court. . . . This rule applies equally to alternat[ive] grounds for affirmance." (Internal quotation marks omitted.) *State* v. *Juan J.*, 344 Conn. 1, 12–13, 276 A.3d 935 (2022); see also Practice Book § 60-5 ("[t]he court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial").

The defendants' claims based on the "insufficient cause" prong of § 54-56, as well as Lee's claim based

[12] General Statutes § 54-56 provides: "All courts having jurisdiction of criminal cases shall at all times have jurisdiction and control over informations and criminal cases pending therein and may, at any time, upon motion by the defendant, dismiss any information and order such defendant discharged if, in the opinion of the court, there is not sufficient evidence or cause to justify the bringing or continuing of such information or the placing of the person accused therein on trial."

on the trial court's inherent authority to control its docket, were not distinctly raised before the trial court. Thus, these unpreserved claims are not properly before us. Moreover, even if preserved, we would decline to review them due to the lack of an adequate record. In neither case did the court make factual findings regarding the factors required for a § 54-56 analysis. See *State* v. *Dills*, 19 Conn. App. 495, 503–504, 563 A.2d 733 (1989) ("Dismissal under § 54-56 for insufficient cause to justify the prosecution requires the court explicitly to weigh all the competing factors and considerations of fundamental fairness to both sides—the defendant, the state and society, and presumably the victim. This must be done with great caution, and a dismissal ordered only when the circumstances are compelling. . . . This difficult and delicate process necessarily involves a careful consideration by the court of such factors as the strength of the state's case, the likelihood of conviction, the severity of the crime, its effect on the victim, the strength of the defendant's defense, the defendant's personal situation, and all the other myriad factors that underlie a judgment regarding fundamental fairness." (Citation omitted.)). Likewise, in Lee's case, even assuming arguendo that the court had the inherent authority in this context, the court made no factual findings concerning any exercise of such authority.

With respect to Lee's state constitutional claim that his right to a speedy trial was violated, we note that Lee, only in a cursory fashion, referenced this constitutional right in his motion to dismiss. We need not resolve whether Lee adequately preserved this constitutional claim because, whether preserved or unpreserved, the record is inadequate for us to address the merits of this claim.[13] The court made no mention of Lee's right to a

[13] Pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), a party can prevail on an unpreserved constitutional claim on appeal only if four conditions are met, the first of which requires the record to be adequate to review the alleged claim of error.

speedy trial in granting his motion to dismiss and did not make any of the requisite factual findings inherent in an analysis of whether his right to a speedy trial had been violated in this particular case. See *State* v. *Griffin*, 220 Conn. App. 225, 234, 297 A.3d 1056 (2023) ("[r]esolution of the defendant's claim [that the trial court violated his constitutional right to a speedy trial] requires us to apply the balancing test set forth in *Barker* v. *Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), which involves a consideration of the following four factors to determine whether a defendant's constitutional right to a speedy trial has been violated: the length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant"). Without a sufficient factual record, we deem this claim to be unreviewable.

In sum, we conclude that the court improperly dismissed the underlying charges. Accordingly, the respective judgments of dismissal in AC 46751 and AC 46758 must be reversed insofar as the underlying charges were dismissed and we remand the cases with direction to restore the underlying charges and for further proceedings on those charges according to law.

The judgments are reversed with respect to the dismissal of the charges against Timothy A. Lee and Clifton Labrec other than the charge of failure to appear as to both defendants and the charge of possession of cannabis as to Labrec, and the cases are remanded for further proceedings consistent with this opinion; the judgments are affirmed in all other respects.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* MATTHEW T. ABRAMOVICH
(AC 45351)

Elgo, Cradle and Prescott, Js.

Syllabus

Convicted, on pleas of guilty, of criminal trespass in the first degree, assault in the third degree, and violation of a protective order, the defendant appealed. He asked this court to allow him to withdraw his pleas, claiming, inter alia, that his trial counsel rendered ineffective assistance by failing to investigate his competence and to request a competency evaluation. *Held*:

This court declined to review the defendant's unpreserved claims, as he failed to move to withdraw his pleas in accordance with the applicable rules of practice (§§ 39-26 and 39-27) and he failed to adequately brief the claims in accordance with the mandates for the review of unpreserved constitutional claims pursuant to *State* v. *Golding* (213 Conn. 233).

Argued September 9—officially released November 19, 2024

Procedural History

Information, in the first case, charging the defendant with criminal trespass in the first degree, interfering with an officer, breach of the peace in the second degree, and assault in the third degree, and information in the second case charging the defendant with criminal trespass in the first degree and violation of a protective order, brought to the Superior Court in the judicial district of Waterbury, geographical area number four, where the defendant was presented to the court, *Iannotti*, *J.*, on pleas of guilty to one count each of criminal trespass in the first degree, assault in the third degree, and violation of a protective order; judgments of guilty in accordance with the pleas; thereafter, the state entered a nolle prosequi as to the remaining charges, and the defendant appealed to this court. *Affirmed.*

Matthew T. Abramovich, self-represented, the appellant (defendant).

Timothy F. Costello, supervisory assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Elena Palermo* and *Marc Ramia*, senior assistant state's attorneys, for the appellee (state).

Opinion

CRADLE, J. The self-represented defendant, Matthew T. Abramovich, appeals from the judgments of conviction rendered by the trial court, following the defendant's guilty pleas, of assault in the third degree in violation of General Statutes § 53a-61, violation of a protective order in violation of General Statutes § 53a-223, and criminal trespass in the first degree in violation of General Statutes § 53a-107.[1] On appeal, the defendant asks this court to allow him to withdraw his guilty pleas on the grounds that (1) he was not competent to plead guilty; (2) his trial counsel rendered ineffective assistance by failing to investigate his competence and to request a competency evaluation pursuant to General Statutes § 54-56d; (3) he was under duress at the time of his pleas; (4) the court breached the plea agreement; (5) the court failed to substantially comply with Practice Book § 39-19 when it accepted the pleas; (6) the court lacked a factual basis for the pleas; and (7) the court relied on materially false information at sentencing. We affirm the judgments of the trial court.

The following procedural history is relevant to the defendant's claims on appeal. The defendant pleaded guilty in March, 2021, to charges of assault in the third degree, violation of a protective order, and criminal trespass in the first degree in connection with two 2020 domestic violence incidents involving the same com-

[1] The defendant pleaded guilty to assault in the third degree under the *Alford* doctrine. See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

plainant and occurring at the same apartment in Waterbury. Pursuant to the plea agreement, the court, *Iannotti*, *J.*, made a jail re-interview referral and the defendant agreed to participate in inpatient treatment and any recommended outpatient treatment for a period of six months.[2] The court explained that, if the defendant completed the treatment program successfully, he would receive a fully suspended sentence of two years of incarceration followed by two years of probation. If the defendant failed to successfully complete the treatment program, he would face a maximum sentence of eighteen months of incarceration with the right to argue for a lesser period of incarceration.[3] Specifically, the court advised the defendant that, if he did not complete the program successfully, he would be subject to a sentence "between a totally suspended sentence and eighteen months in jail." At the time of the pleas, the defendant responded affirmatively to the court's questions regarding whether he had discussed the plea agreement with his attorney, whether his attorney had explained the maximum penalties of the charges to which he was pleading, whether he understood the plea agreement and whether the pleas were entered knowingly and voluntarily. He also answered negatively to the court's questions of whether he was under the influence of any alcohol, drugs or medication and whether he was being forced or threatened to plead guilty. In accordance with the plea agreement, the defendant was released on a promise to appear, and the case was continued pending the defendant's completion of a resi-

[2] The record reflects that the defendant was referred to a treatment program for mental health issues and alcohol abuse.

[3] Although neither the parties nor the court referred to the agreement as such, the plea agreement in this case was a *Garvin* agreement, which "is a conditional plea agreement that has two possible binding outcomes, one that results from the defendant's compliance with the conditions of the plea agreement and one that is triggered by his violation of a condition of the agreement." (Internal quotation marks omitted.) *State* v. *Stevens*, 278 Conn. 1, 7, 895 A.2d 771 (2006).

dential treatment program at Connecticut Valley Hospital followed by outpatient treatment as recommended. At that time, the court also ordered a presentence investigation.

On August 27, 2021, the court, *Iannotti*, *J.*, received a report that the defendant had failed to comply with treatment program requirements. Accordingly, on November 4, 2021, the court sentenced the defendant to five years of incarceration, execution suspended after one year, followed by three years of probation. Neither the defendant nor his counsel objected to the sentence at that time, nor did the defendant file a motion to withdraw his guilty pleas. This appeal followed.

On appeal, the defendant asks this court to allow him to withdraw his guilty pleas. The defendant did not preserve his claims for review on appeal. Under our rules of procedure, to preserve his claims after the acceptance of his pleas, the defendant would have had to move to withdraw the pleas pursuant to Practice Book §§ 39-26 and 39-27. *State* v. *Williams*, 60 Conn. App. 575, 577–78, 760 A.2d 948, cert. denied, 255 Conn. 922, 763 A.2d 1043 (2000).[4]

[4] Practice Book § 39-26 provides: "A defendant may withdraw his or her plea of guilty or nolo contendere as a matter of right until the plea has been accepted. After acceptance, the judicial authority shall allow the defendant to withdraw his or her plea upon proof of one of the grounds in Section 39-27. A defendant may not withdraw his or her plea after the conclusion of the proceeding at which the sentence was imposed."

Practice Book § 39-27 provides: "The grounds for allowing the defendant to withdraw his or her plea of guilty after acceptance are as follows:

"(1) The plea was accepted without substantial compliance with Section 39-19;

"(2) The plea was involuntary, or it was entered without knowledge of the nature of the charge or without knowledge that the sentence actually imposed could be imposed;

"(3) The sentence exceeds that specified in a plea agreement which had been previously accepted, or in a plea agreement on which the judicial authority had deferred its decision to accept or reject the agreement at the time the plea of guilty was entered;

"(4) The plea resulted from the denial of effective assistance of counsel;

"(5) There was no factual basis for the plea; or

The defendant's failure to file a motion to withdraw his pleas is not, however, fatal to his claims on appeal in that we may review unpreserved constitutional claims. See *State* v. *Reid*, 277 Conn. 764, 777 n.15, 894 A.2d 963 (2006) (failure to file motion to withdraw plea with trial court "need not be fatal to review when constitutional claims are at issue and the record is adequate for review"); *State* v. *Williams*, supra, 60 Conn. App. 578–79 (despite defendant's failure to preserve claim by filing timely motion to withdraw plea, claim nevertheless is reviewable because it asserts violation of fundamental constitutional right; defendant failed, however, to demonstrate constitutional violation occurred); see also *State* v. *Childree*, 189 Conn. 114, 119, 454 A.2d 1274 (1983) (court considered claim that guilty plea was not knowingly and voluntarily made even though it was raised for first time on appeal because it involved violation of fundamental constitutional right).

We consider unpreserved claims of constitutional magnitude according to the requirements of *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).[5] It is well settled that a party seeking

"(6) The plea either was not entered by a person authorized to act for a corporate defendant or was not subsequently ratified by a corporate defendant."

[5] "Under *Golding*, a [party] can prevail on a claim of constitutional error not preserved at trial only if 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 [party] 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. In the absence of any one of these conditions, the [party's] claim will fail. The appellate tribunal is free, therefore, to respond to the [party's] claim by focusing on whichever condition is most relevant in the particular circumstances." (Internal quotation marks omitted.) *In re Riley B.*, 203 Conn. App. 627, 636, 248 A.3d 756, cert. denied, 336 Conn. 943, 250 A.3d 40 (2021).

such extraordinary review need not specifically request it, but must nevertheless "present a record that is [adequate] for review and affirmatively [demonstrate] that his claim is indeed a violation of a fundamental constitutional right." (Internal quotation marks omitted.) *State* v. *Elson*, 311 Conn. 726, 755, 91 A.3d 862 (2014).

Here, the defendant has not requested *Golding* review, in name or in substance. Other than vaguely setting forth various constitutional principles, the defendant has failed to demonstrate, by analysis of the application of those principles to his claims or any coherent discussion of relevant authority, that his claims are of constitutional magnitude. Cf. id., 756. He likewise has failed to adequately brief, by way of a discussion of relevant authority and the application of that authority to his claims, that an alleged constitutional violation exists and that the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. Although we are concerned that, on the basis of the record before us, the defendant may not have understood that the unsuccessful completion of his treatment program might subject him to a split sentence[6] beyond the eighteen months of incarceration that was expressly contemplated by the plea agreement,[7] he has failed to adequately brief this claim, in addition to his other claims, in accordance with the mandates for the review of unpreserved constitutional claims as set forth herein. We therefore decline to review the defendant's claims.[8] See *State* v. *Tierinni*,

[6] A split sentence is a term of imprisonment with the execution of such sentence of imprisonment suspended, either entirely or partially, followed by a period of probation or conditional discharge.

[7] Practice Book § 39-7 provides in relevant part: "If a plea agreement has been reached by the parties, which contemplates the entry of a plea of guilty or nolo contendere, the judicial authority shall require the disclosure of the agreement in open court or, on a showing of good cause, in camera at the time the plea is offered. . . ."

[8] At oral argument before this court, the defendant represented that he has filed with the trial court a motion to correct an illegal sentence pursuant to Practice Book § 43-22, asking the trial court to address this claim.

144 Conn. App. 232, 238, 71 A.3d 675 ("[A party's] failure to address the four prongs of *Golding* amounts to an inadequate briefing of the issue and results in the unpreserved claim being abandoned. . . . We will not engage in *Golding* . . . review on the basis of . . . an inadequate brief." (Internal quotation marks omitted.)), cert. denied, 310 Conn. 911, 76 A.3d 627 (2013); see also *Guiliano* v. *Jefferson Radiology, P.C.*, 206 Conn. App. 603, 624, 261 A.3d 140 (2021).

The judgments are affirmed.

In this opinion the other judges concurred.

RUBEN ROMAN *v.* COMMISSIONER OF CORRECTION (AC 46663)

Elgo, Moll and Cradle, Js.

Syllabus

The petitioner appealed, following the denial of his petition for certification to appeal, from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. The petitioner claimed that the court erred in concluding that his criminal trial counsel, B, had not provided ineffective assistance in failing, inter alia, to properly present evidence regarding the petitioner's drug and alcohol abuse on the night the petitioner committed the crimes at issue. *Held*:

The habeas court did not abuse its discretion in denying the petitioner's petition for certification to appeal, as B, in determining not to emphasize evidence regarding the petitioner's cocaine use on the night of the crimes, reasonably relied on the advice of an expert witness for the defense and the petitioner failed to overcome the presumption that B's decision to pursue an intoxication defense based solely on his alcohol use was sound trial strategy.

Argued September 20—officially released November 19, 2024

Procedural History

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

denying the petition; thereafter, the court, *Newson, J.*, denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Matthew C. Eagan, assigned counsel, for the appellant (petitioner).

Meryl R. Gersz, assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, and *Angela Macchiarulo*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

CRADLE, J. The petitioner, Ruben Roman, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his petition for a writ of habeas corpus. The petitioner claims that the court (1) abused its discretion in denying his petition for certification to appeal and (2) improperly denied his petition for a writ of habeas corpus because the court erred in concluding that his criminal trial counsel had not provided ineffective assistance. We dismiss the appeal.

The following facts, as set forth by our Supreme Court, provide context for the petitioner's claims of ineffective assistance. "[O]n December 24, 1997, the [petitioner] and his live-in girlfriend, [M],[1] hosted a holiday party at the single-family home that they shared in East Hartford. At around midnight, the [petitioner] left to drive several of his family members home. When he returned at approximately 3 a.m. on December 25, 1997, he found [M] sitting at the dining room table with [I], her brother-in-law from a previous marriage, and her

[1] 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.

son and nephew. Shortly after the [petitioner] returned home, he and [M] began to argue. The argument escalated, and the [petitioner], who had consumed alcoholic beverages and cocaine that same evening, shot at [M] several times with a .45 caliber semiautomatic pistol. The [petitioner] also repeatedly shot [I]. Although seriously injured, [M] survived the attack. [I], however, died as a result of gunshot wounds to the abdomen while en route to the hospital." (Footnote added; footnote omitted.) *State* v. *Roman*, 262 Conn. 718, 721, 817 A.2d 100 (2003).

The jury found the petitioner guilty of murder in violation of General Statutes (Rev. to 1997) § 53a-54a, assault in the first degree in violation of General Statutes § 53a-59 (a) (1), criminal possession of a pistol or revolver in violation of General Statutes (Rev. to 1997) § 53a-217c (a) (1) and risk of injury to a child in violation of General Statutes (Rev. to 1997) § 53-21. The petitioner thereafter was sentenced to a total effective sentence of eighty years of incarceration. This court affirmed the judgment of the trial court. *State* v. *Roman*, 67 Conn. App. 194, 197, 205, 786 A.2d 1147 (2001), rev'd in part, 262 Conn. 718, 817 A.2d 100 (2003). Our Supreme Court granted the petitioner's petition for certification to appeal, limited to the issue of whether the trial court was required to hold a preliminary inquiry regarding the petitioner's claim of juror misconduct. *State* v. *Roman*, 259 Conn. 920, 791 A.2d 567 (2002). The Supreme Court held that the trial court improperly declined to conduct such an inquiry, reversed in part the judgment of this court and remanded the case to this court with direction to remand the case to the trial court for further proceedings. *State* v. *Roman*, supra, 262 Conn. 729. Upon remand, the trial court found no evidence of juror misconduct and our Supreme Court affirmed the judgment of the trial court. *State* v. *Roman*, 320 Conn. 400, 403–404, 133 A.3d 441 (2016).

The petitioner commenced this action in 2017 and filed the operative second amended petition for a writ of habeas corpus on January 13, 2020, wherein he alleged ineffective assistance of his trial counsel, Kevin Barrs.[2] Relevant to this appeal,[3] the petitioner claimed that Barrs rendered ineffective assistance in that he failed to properly present evidence regarding the petitioner's drug and alcohol use, failed to properly examine witnesses as to the petitioner being under the influence and failed to correct the court when it instructed the jury on its consideration of expert testimony pertaining to the petitioner's alcohol abuse, versus the combination of the petitioner's drug and alcohol use. On September 7, 2022, the petitioner filed a notice of his intention to present at trial the expert testimony of Kelly Johnson-Arbor, a physician board certified in emergency medicine, medical toxicology and hyperbaric medicine, who would testify as to "how the mix of drugs, specifically cocaine and alcohol, affect the brain and cause a different type of mental status."

The habeas court held a two day trial on March 9 and 15, 2023, during which the petitioner argued that Barrs' ineffective assistance stemmed from his decision to deemphasize the petitioner's use of cocaine. On April 13, 2023, the habeas court, *Newson*, *J.*, issued a memorandum of decision rejecting all of the petitioner's claims. The court reasoned, inter alia: "The petitioner took the stand [during his criminal trial] and was allowed to testify freely about his long history of alcohol and substance use and abuse. . . . Barrs also hired an

[2] The petitioner also alleged that his counsel who represented him after the Supreme Court's remand, Damon Kirschbaum, provided ineffective assistance. The habeas court rejected that claim and the petitioner has not challenged the habeas court's conclusions as to Kirschbaum.

[3] The petitioner alleged in his habeas petition additional ways in which Barrs provided ineffective assistance, but the habeas court rejected those allegations, and the petitioner has not challenged the habeas court's conclusions as to those allegations.

expert witness for the defense . . . Peter Zeman, and had him testify about the effects of alcohol and the various drugs the petitioner admitted to using. What the petitioner really emphasized was a claim that . . . Barrs had failed to emphasize the effects of cocaine and/or the combined effects of cocaine and alcohol on the petitioner. . . . Barrs testified that he consulted in detail with [Zeman] about the effects of alcohol, cocaine, and the combined effects of both. As a result of that consultation, he was advised by [Zeman] that if the defense emphasized the petitioner's cocaine use, he would have to admit that too much cocaine can make a person become violent. Based on that advice, and that the theory of defense was that petitioner's ingestion of substances diminished his capacity to form the intent to commit violence . . . Barrs focused on the petitioner's significant alcohol use and avoided emphasizing cocaine or the combined effect of cocaine and alcohol. The petitioner has offered nothing credible to suggest that counsel following the advice of his hired expert was not a competent and reasonable professional decision under the circumstances." (Citation omitted.) The court thus concluded that the petitioner failed to prove that Barrs' representation of him was deficient as to his claims that Barrs failed to properly present evidence regarding the petitioner's drug and alcohol use and failed to correct the court when it instructed the jury on its consideration of expert testimony pertaining to the petitioner's alcohol abuse, versus the combination of the petitioner's drug and alcohol use. As to the petitioner's claim that Barrs failed to properly examine witnesses as to the petitioner being under the influence on the night in question, the court concluded that the petitioner failed to meet his burden of showing prejudice "because there was no reasonable probability that the testimony he offered [at the habeas trial] would have resulted in any different outcome at

the criminal trial." Accordingly, the court denied the petition for a writ of habeas corpus and thereafter denied the petitioner's petition for certification to appeal. This appeal followed.

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

"To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . . If this burden is not satisfied, then the claim that the judgment of the habeas court should be reversed does not qualify for consideration by this court." (Internal quotation marks omitted.) *Bennett* v. *Commissioner of Correction*, 222 Conn. App. 689, 691, 306 A.3d 1195 (2023), cert. denied, 348 Conn. 948, 308 A.3d 37 (2024).

The standard of review in a habeas corpus proceeding challenging the effective assistance of trial counsel is well settled. "To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong. To

satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong. . . .

"On appeal, [a]lthough the underlying historical facts found by the habeas court may not be disturbed unless they [are] clearly erroneous, whether those facts constituted a violation of the petitioner's rights [to the effective assistance of counsel] under the sixth amendment is a mixed determination of law and fact that requires the application of legal principles to the historical facts of [the] case. . . . As such, that question requires plenary review by this court unfettered by the clearly erroneous standard." (Internal quotation marks omitted.) *Anderson* v. *Commissioner of Correction*, 205 Conn. App. 173, 187–88, 256 A.3d 174, cert. denied, 339 Conn. 916, 262 A.3d 137 (2021).

"In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. . . . Judicial scrutiny of counsel's performance must be highly deferential and courts must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . ." (Internal quotation

marks omitted.) *Brewer* v. *Commissioner of Correction*, 189 Conn. App. 556, 561–62, 208 A.3d 314, cert. denied, 332 Conn. 903, 208 A.3d 659 (2019).

On appeal, the petitioner claims that the habeas court erred in concluding that Barrs did not provide ineffective assistance in failing to properly present evidence regarding the petitioner's drug and alcohol abuse on the night of the incidents at issue, failing to properly examine Zeman as to the combined effects of alcohol and cocaine, and failing to correct the trial court when it instructed the jury only on how it could use Zeman's testimony in connection with the petitioner's alcohol use instead of the combined effects of alcohol and cocaine. The petitioner acknowledges that "[a]ll of [his] claims presented on appeal stem from trial counsel's decision to deemphasize the petitioner's cocaine use at trial" and "whether trial counsel's decision was reasonable." He contends that the decision to avoid emphasizing his cocaine use was not reasonable because he did not contest the violent nature of the crimes with which he was charged. He argues that evidence of the effect of the combination of alcohol and cocaine would have proven that he did not have the capacity to form the requisite intent to commit those violent acts. We are not persuaded.

At the petitioner's criminal trial, Barrs pursued an intoxication defense, arguing that, at the time the petitioner committed the crimes of which he was convicted, he was suffering from an alcohol induced blackout. At the habeas trial, Barrs explained that Zeman had testified at the criminal trial as to the effects that alcohol has on the brain, the effects that cocaine has on the brain and the effects of the combination of those substances. Barrs recounted: "Based on my conversations and the work we did with [Zeman], he said that we should stress the alcohol and stay away from the cocaine because he said there's a better chance with

[the petitioner] claiming that he had a blackout. And, certainly, his behavior around the incident suggested that he might have had a blackout was stronger evidence than the cocaine."

Barrs' testimony demonstrates that he considered the petitioner's cocaine use, and the combined use of alcohol and cocaine, as part of the intoxication defense, but, upon consultation with Zeman, determined not to emphasize it but, instead, to argue to the jury that the petitioner was suffering from an alcohol induced blackout when he committed the crimes at issue. Not only was Barrs' reliance on Zeman's advice reasonable;[4] see *Ervin* v. *Commissioner of Correction*, 195 Conn. App. 663, 674–75, 226 A.3d 708 (" '[a] trial attorney is entitled to rely reasonably on the opinion of an expert witness' "), cert. denied, 335 Conn. 905, 225 A.3d 1225 (2020); but the petitioner has failed to overcome the presumption that Barrs' decision to pursue an intoxication defense based solely on the petitioner's alcohol use was sound trial strategy. Although, as the petitioner argues, he did not contest at his criminal trial the violent nature of the offenses, it cannot reasonably be disputed that emphasizing that violence would not have been beneficial to the petitioner. Because all of the petitioner's allegations of Barrs' ineffective assistance rest upon his argument that Barrs should not have deemphasized his cocaine use, all of his claims on appeal fail.

On the basis of the foregoing, the petitioner's challenge to the habeas court's determination that Barrs' did not provide ineffective assistance is unavailing. On the basis of our review of the record and the relevant

[4] This is so particularly in light of the fact that there was no testimony presented at the petitioner's criminal trial as to how much cocaine he used on the night he committed the crimes at issue. See *State* v. *Roman*, supra, 67 Conn. App. 205 ("Zeman's estimate[s] about the number of bags of cocaine that the [petitioner] claims to have ingested, as well as the amount of cocaine that was contained in each bag, were uncertain").

legal principles, we cannot conclude that the resolution of the petitioner's claims involves issues that are debatable among jurists of reason, are adequate to deserve encouragement to proceed further or that a court could resolve them in a different manner. Accordingly, the habeas court did not abuse its discretion in denying the petitioner's petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

SHELDON REYNOLDS *v.* COMMISSIONER OF CORRECTION
(AC 44214)

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

Syllabus

The petitioner, who had been convicted of murder and carrying a pistol or revolver without a permit, appealed following the habeas court's denial of his petition for certification to appeal from the court's judgment denying his petition for a writ of habeas corpus. The petitioner's sole claim on appeal was that the court improperly granted his appellate counsel's motion to withdraw her appearance. *Held*:

The habeas court's ruling on appellate counsel's motion to withdraw her appearance was not a proper subject for an appeal from the denial of a habeas corpus petition, and, as the petitioner did not raise or adequately brief any claim that directly challenged the trial court's judgment of conviction, any possible claims he may have had were abandoned.

Argued October 17—officially released November 19, 2024

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Chaplin*, *J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court; subsequently, the court, *Newson*, *J.*, granted the motion to withdraw appearance filed

by the petitioner's appointed appellate counsel. *Appeal dismissed.*

Sheldon Reynolds, self-represented, the appellant (petitioner).

Ronald G. Weller, senior assistant state's attorney, with whom, on the brief, were *Joseph T. Corradino*, state's attorney, *Emily Trudeau*, assistant state's attorney, and *Alexander O. Kosakowski* and *Connor R. Reed*, certified legal interns, for the appellee (state).

Opinion

PER CURIAM. In this habeas corpus matter, the record reveals that the petitioner, Sheldon Reynolds, was found guilty of two counts of murder in violation of General Statutes § 53a-54a (a), and one count of carrying a pistol or revolver without a permit in violation of General Statutes § 29-35. The petitioner's conviction was affirmed on appeal. See *State* v. *Reynolds*, 152 Conn. App. 318, 355, 97 A.3d 999, cert. denied, 314 Conn. 934, 102 A.3d 85 (2014).[1]

Thereafter, the petitioner filed this habeas corpus petition in which he alleged that his trial attorney, Jonathan Demirjian, had provided ineffective assistance. Following a hearing on the habeas petition, in which the petitioner was represented by Attorney Donna Fusco, the court, *Chaplin*, *J.*, denied the petition and subsequently denied certification to appeal. On August 18, 2020, the petitioner filed an appeal from the court's denial of his habeas corpus petition and the denial of

[1] In his direct appeal, the petitioner claimed that the trial court abused its discretion in admitting evidence of his prior misconduct and one of the victim's hearsay statements, violated his constitutional right to confront an adverse witness when it admitted into evidence recordings of two separate 911 calls, and improperly failed to suppress his written statement to the police. See *State* v. *Reynolds*, supra, 152 Conn. App. 320–21. This court was not persuaded by any of the petitioner's appellate claims. See id., 321.

his petition for certification to appeal, for which Attorney Julia K. Conlin was assigned to represent the petitioner on appeal to this court. Subsequently, however, Conlin filed a motion to withdraw as counsel along with a brief pursuant to *Anders* v. *California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967). See, e.g., *Vazquez* v. *Commissioner of Correction*, 88 Conn. App. 226, 234, 869 A.2d 234 (2005).

On March 30, 2023, the court, *Newson*, *J.*, granted Conlin's motion to withdraw her appearance. Thereafter, the petitioner filed a motion for review with this court on April 20, 2023. In that motion, filed pursuant to Practice Book § 66-6 (a) (6),[2] the petitioner sought review of the trial court's decision to grant counsel's motion to withdraw. By order dated June 7, 2023, this court granted the petitioner's motion for review but denied the relief sought.

The petitioner, now self-represented, thereafter pursued this habeas appeal. As noted by the respondent, the Commissioner of Correction, the petitioner does not challenge the merits of the habeas court's ruling in his appellate brief, nor does he address the court's denial of his petition for certification to appeal from the denial of his habeas corpus petition. Instead, the petitioner focuses solely on the court's ruling on the motion to withdraw as counsel filed by Conlin, which is not a proper subject for an appeal from the court's denial of a habeas corpus petition. See *State* v. *Mendez*, 185 Conn. App. 477, 478, 197 A.3d 477 (2018) (motion for review is proper vehicle by which to obtain review of order concerning withdrawal of appointed appellate counsel after appeal is filed). In addition, because the petitioner has not raised or adequately briefed any claim

[2] Practice Book § 66-6 provides in relevant part: "(a) The court may, on written motion for review stating the grounds for the relief sought, modify or vacate . . . (6) any order concerning the withdrawal of appointed appellate counsel pursuant to Section 62-9 (d). . . ."

that directly challenges the judgment of conviction from which he took this appeal, we deem any possible claims abandoned. Id., 479; see also *Joseph* v. *Commissioner of Correction*, 153 Conn. App. 570, 574, 102 A.3d 714 (2014), cert. denied, 315 Conn. 911, 106 A.3d 304 (2015).

The appeal is dismissed.

STATE OF CONNECTICUT *v.* DAVID A. GODBOUT (AC 46567)

Elgo, Suarez and DiPentima, Js.

Syllabus

The defendant appealed from the judgment of conviction rendered by the trial court following his plea of nolo contendere to the crime of disorderly conduct. The defendant claimed, inter alia, that a certain statute (§ 54-94a) and rule of practice (§ 39-18) governing pleas of nolo contendere were unconstitutional because they violated the common-law presumption of innocence. *Held*:

The defendant waived his claims that § 54-94a and Practice Book § 39-18 were unconstitutional, as his plea of nolo contendere operated as a waiver of all nonjurisdictional defects and barred the later assertion of constitutional challenges to pretrial proceedings, and neither of his claims of error challenged either the exercise of jurisdiction by the court or the voluntary and intelligent nature of his plea.

This court declined to review the defendant's inadequately briefed claims that the charges against him lacked probable cause, that the trial court erred in not complying with the requirements of Practice Book § 39-18, that the court violated his due process rights by failing to hold a hearing on certain postjudgment motions and that the judges who presided over his case acted without authority.

The defendant's claim that the trial court exceeded its authority by imposing terms to his conditional discharge was moot, as it was undisputed that this appeal was not heard until after his one year term of conditional discharge had expired, and there was no practical relief this court could provide to the defendant.

Argued September 17—officially released November 19, 2024

Procedural History

Substitute information charging the defendant with the crime of disorderly conduct, brought to the Superior

Court in the judicial district of New London, geographical area number ten, where the defendant was presented to the court, *K. Murphy, J.*, on a plea of nolo contendere; judgment of guilty in accordance with the plea, from which the defendant appealed to this court. *Appeal dismissed in part*; *affirmed.*

David A. Godbout, self-represented, the appellant (defendant).

Raynald A. Carre, Jr., deputy assistant state's attorney, with whom, on the brief, were *Paul J. Narducci*, state's attorney, and *Marissa Goldberg*, assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. The self-represented defendant, David A. Godbout, appeals from the judgment of conviction rendered by the trial court following his plea of nolo contendere to the charge of disorderly conduct in violation of General Statutes § 53a-182.[1] On appeal, the defendant claims that (1) General Statutes § 54-94a[2] is unconstitutional; (2) Practice Book § 39-18[3] is unconstitutional; (3) the charges against him lacked probable

[1] General Statutes § 53a-182 provides in relevant part: "(a) A person is guilty of disorderly conduct when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person: (1) Engages in fighting or in violent, tumultuous or threatening behavior; or (2) by offensive or disorderly conduct, annoys or interferes with another person; or (3) makes unreasonable noise . . . ."

[2] General Statutes § 54-94a provides: "When a defendant, prior to the commencement of trial, enters a plea of nolo contendere conditional on the right to take an appeal from the court's denial of the defendant's motion to suppress or motion to dismiss, the defendant after the imposition of sentence may file an appeal within the time prescribed by law provided a trial court has determined that a ruling on such motion to suppress or motion to dismiss would be dispositive of the case. The issue to be considered in such an appeal shall be limited to whether it was proper for the court to have denied the motion to suppress or the motion to dismiss. A plea of nolo contendere by a defendant under this section shall not constitute a waiver by the defendant of nonjurisdictional defects in the criminal prosecution."

[3] Practice Book § 39-18 provides: "(a) In the discretion of the judicial authority, the defendant may enter a plea of guilty or nolo contendere to

cause; (4) the court erred in not complying with the requirements of Practice Book § 39-18; (5) the court violated his due process rights by failing to hold a hearing on his postjudgment motions; (6) the judges who presided over his case acted without authority; and (7) the court exceeded its authority by imposing terms to his conditional discharge.[4] We affirm the judgment of the court.

The following procedural history is relevant to our resolution of this appeal. On May 16, 2023, pursuant to § 54-94a, the defendant entered a plea of nolo contendere to the charge of disorderly conduct. At the plea hearing, the prosecutor set forth the factual basis for the charge as follows: On December 26, 2018, the defendant went to the office of the tax collector in East Lyme, and "caused a scene" while demanding the tax clerks

the information or complaint at arraignment or any later time, provided that the judicial authority confirms in open court that the defendant has received all discovery materials that he or she requested in writing pursuant to Chapter 40 that are within the possession of the prosecuting authority. If the defendant has not received all requested discovery, the judicial authority shall confirm that the defendant and his or her counsel agree to waive any right to receive further disclosure, before allowing the defendant to enter the plea. Any such waiver shall not apply to the prosecuting authority's continuing obligation to disclose exculpatory information or materials pursuant to Sections 40-3 and 40-11.

"(b) A plea of nolo contendere shall be in writing, shall be signed by the defendant, and, when accepted by the judicial authority, shall be followed by a finding of guilty."

[4] In his principal brief before this court the defendant frames the issues raised on appeal as follows: "1. Practice Book [§] 39-18 (b) and [§] 54-94a are unconstitutional

"2. Court did not comply with Practice Book [§] 39-21

"3. Court did not comply with Practice Book [§] 39-18

"4. The trial court was presided over by people not appointed in sessions of the General Assembly and have no apparent authority

"5. The lack of hearings regarding motions violated due process rights of [the] defendant

"6. The imposition of conditions imposed was without authority."

We have reframed the defendant's claims to more accurately reflect the arguments set forth in his brief. See, e.g., *Doe* v. *Quinnipiac University*, 218 Conn. App. 170, 172–73 n.4, 291 A.3d 153 (2023).

waive certain fees for him. When his request was denied, he became enraged and paced back and forth while yelling obscenities at the clerks in a manner that caused them to fear for their safety. The panic alarm was activated, summoning the police, who arrested the defendant.

The court canvassed the defendant with respect to his plea. Thereafter, the court accepted the plea, entered a finding of guilty, and sentenced the defendant to a term of ninety days of incarceration, execution suspended, with one year of conditional discharge. As for the special conditions of his discharge, the court ordered the defendant to refrain from contacting the victims in this case and to notify the local police department before going to the town hall in East Lyme. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant's first two claims on appeal are that § 54-94a and Practice Book § 39-18 are unconstitutional. Specifically, he asserts that these provisions violate the common-law presumption of innocence. The state argues that the defendant has waived these claims by entering an unconditional plea of nolo contendere. We agree with the state.

We begin by setting forth the following legal principles. "As a general rule, an unconditional plea of guilty or nolo contendere, intelligently and voluntarily made, operates as a waiver of all nonjurisdictional defects and bars the later assertion of constitutional challenges to pretrial proceedings. . . . Therefore, only those issues fully disclosed in the record which relate either to the exercise of jurisdiction by the court or to the voluntary and intelligent nature of the plea are ordinarily appealable after a plea of guilty or nolo contendere." (Internal quotation marks omitted.) *Ross* v. *Commissioner of*

Correction, 217 Conn. App. 286, 321, 288 A.3d 1055, cert. denied, 346 Conn. 915, 290 A.3d 374 (2023).

In the present case, the defendant entered an unconditional nolo contendere plea. The court canvassed the defendant and "found [the plea] to be voluntary, understandably made with the assistance of competent counsel." The court further found that there was "a factual basis for the plea," and accepted the plea. The defendant's plea operates as a waiver of all nonjurisdictional defects and bars the later assertion of constitutional challenges to pretrial proceedings. Moreover, having carefully considered the defendant's argument, we conclude that neither of these two claims of error challenges either the exercise of jurisdiction by the court or the voluntary and intelligent nature of his plea. Accordingly, we conclude that the defendant has waived these claims.

II

The defendant's third, fourth, fifth, and sixth claims on appeal are that he was charged without probable cause, that the court erred in not complying with the requirements of Practice Book § 39-18, that the court violated his due process rights by not holding a hearing on his postjudgment motions, and that the judges who presided over his case acted without authority. Having thoroughly reviewed the defendant's brief, we conclude that these claims have been abandoned due to inadequate briefing, and, thus, we decline to review them.

We set forth the following relevant legal principles. "We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [When] a claim is asserted in the statement of issues but thereafter receives only

cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned. . . . For a reviewing court to judiciously and efficiently . . . consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. . . .

"In addition, briefing is inadequate when it is not only short, but confusing, repetitive, and disorganized. . . . We are mindful that [i]t is the established policy of the Connecticut courts to be solicitous of [self-represented] litigants and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the [self-represented] party. . . . Nonetheless, [a]lthough we allow [self-represented] litigants some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law." (Internal quotation marks omitted.) *C. B.* v. *S. B.*, 211 Conn. App. 628, 630, 273 A.3d 271 (2022).

In the present case, the sections of the defendant's brief dedicated to his third, fourth, fifth, and sixth claims do not set forth any meaningful analysis for this court to consider. The four sections combined include just one citation to the record and almost no citations to applicable legal authorities. The portions of the brief dedicated to the defendant's third claim regarding lack of probable cause, his fourth claim regarding the trial court's compliance with Practice Book § 39-18, and his sixth claim regarding the judicial authority of the presiding judges are conclusory, disorganized, and confusing. The defendant frequently and abruptly changes topics without any explanation of how they relate to each other or the claims at hand. With respect to the defendant's fourth claim, the briefing is so disorganized and confusing that we cannot determine whether his claim of error is premised on the argument that the court's actions violated his constitutional due process rights

or impacted the voluntary and intelligent nature of his plea. The defendant devotes less than two pages out of his entire brief to his fourth claim and a mere four sentences to his fifth claim. "Although the number of pages devoted to an argument in a brief is not necessarily determinative, relative sparsity weighs in favor of concluding that the argument has been inadequately briefed." *State* v. *Buhl*, 321 Conn. 688, 726, 138 A.3d 868 (2016).

We allow the defendant some latitude as a self-represented litigant. However, the sparsity and lack of substantive argument causes his brief to be "inadequate for us to conduct any meaningful review of" these claims. *C. B.* v. *S. B.*, supra, 211 Conn. App. 631; see id., 630–31 (declining to review claims due to inadequate briefing where briefing was sparse, conclusory, disorganized, and confusing). We, therefore, decline to review them.

III

The defendant's final claim is that the court exceeded its authority by imposing terms to his conditional discharge. We dismiss this portion of the appeal as moot.[5]

"Mootness implicates [this] court's subject matter jurisdiction and is thus a threshold matter for us to resolve. . . . It is a [well settled] general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of

[5] After oral argument before this court, we issued the following supplemental briefing order: "As the defendant indicated at oral argument that he has completed his period of conditional discharge, the parties are hereby ordered, sua sponte, to file memoranda of no more than 1500 words on or before October 10, 2024, addressing whether the portion of the defendant's amended appeal challenging the terms of his conditional discharge and July 10, 2023 decision denying his motion to modify his conditions should be dismissed as moot. See *State* v. *Boyle*, 287 Conn. 478, 485–8[7], [949 A.2d 460] (2008)." On October 10, 2024, the state filed a brief asserting that the defendant's final claim is moot, as his term of conditional discharge has expired. The defendant did not comply with the order.

appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot. . . . [A] subject matter jurisdictional defect may not be waived . . . [or jurisdiction] conferred by the parties, explicitly or implicitly. . . . [T]he question of subject matter jurisdiction is a question of law . . . and, once raised, either by a party or by the court itself, the question must be answered before the court may decide the case." (Internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Booker*, 220 Conn. App. 783, 792–93, 299 A.3d 1215, cert. denied, 348 Conn. 927, 304 A.3d 860 (2023). "Because mootness implicates subject matter jurisdiction, it presents a question of law over which our review is plenary." (Internal quotation marks omitted.) *State* v. *Shin*, 193 Conn. App. 348, 372, 219 A.3d 432, cert. denied, 333 Conn. 943, 219 A.3d 374 (2019).

It is undisputed that the defendant was sentenced on May 16, 2023, and that his one year conditional discharge expired on May 16, 2024. This appeal was not heard until September 17, 2024. Because his term of conditional discharge has expired, there is no practical relief that this court can provide to the defendant regarding this claim. See, e.g., id., 372–74. Accordingly, we conclude that the defendant's final claim is moot.

The appeal is dismissed with respect to the defendant's claim that the trial court exceeded its authority by imposing terms to his conditional discharge; the judgment is affirmed.