IN RE SKYE B.*
(AC 47760)

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

Syllabus

The respondent father appealed from the judgment of the trial court for the petitioner, the Commissioner of Children and Families, terminating his

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

Moreover, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49, 851; we decline to identify any person protected or sought to be protected under a protection

parental rights as to his minor child. He claimed that the court violated his fifth amendment right against self-incrimination when it terminated his parental rights for failure to rehabilitate on the basis of his unwillingness to admit to the potentially criminal conduct that initiated the underlying child protection case. *Held*:

The respondent father's unpreserved claim that the trial court violated his fifth amendment right against self-incrimination failed under the third prong of *State* v. *Golding* (213 Conn. 233) because the alleged constitutional violation did not exist, as the court's decision was not based on an invocation of the father's right to remain silent but, instead, on his voluntary denials of the existence of intimate partner violence in his relationship with the child's mother, which were contradicted by compelling evidence.

Argued December 19, 2024—officially released February 20, 2025**

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of Fairfield, Juvenile Matters at Bridgeport, and tried to the court, *Skyers*, *J.*; judgment terminating the respondents' parental rights, from which the respondent father appealed to this court. *Affirmed*.

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

Nisa J. Khan, assistant attorney general, with whom were *Ciarra J. Minacci-Morey*, assistant attorney general, and, on the brief, *William Tong*, attorney general, for the appellee (petitioner).

Opinion

SUAREZ, J. The respondent father, Shane B., appeals from the judgment of the trial court rendered in favor of the petitioner, the Commissioner of Children and Families, terminating his parental rights with respect

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

** February 20, 2025, the date that this opinion was released as a slip opinion, is the operative date for all substantive and procedural purposes.

to his minor child, Skye B.[1] On appeal, the respondent claims that the court violated his fifth amendment right against self-incrimination when it terminated his parental rights for failure to rehabilitate on the basis of his unwillingness to admit to the potentially criminal conduct that initiated the underlying child protection case.[2] We affirm the judgment of the court.

The following facts, which the court found by clear and convincing evidence, and procedural history are relevant to the resolution of this appeal. The Department of Children and Families (department) first became involved with the respondent on February 24, 2021, when the Middletown Police Department reported a domestic incident involving the respondent that occurred on February 2, 2021. During that incident, the respondent and the mother were engaged in a verbal argument that "turned into a physical altercation between the two parties and [the respondent] dragged [the mother] out of bed, onto the floor, banging her head into the wall, inflicting injuries to her head and hand. Then he punched a hole into the wall. Thereafter, he grabbed the front of her shirt and lifted her off the ground where she had trouble breathing. At the time . . . Skye was six months old and was in another room during the incident.

"As a result, [the respondent] was arrested and charged with strangulation, assault, criminal mischief and disorderly conduct. . . . The criminal case was still pending in this matter as of the date of the [termination of parental rights] trial. A full no contact protective order was issued where the mother was the protected

[1] In the underlying proceeding, the respondent mother, Caleigh D., consented to the termination of her parental rights, and she is not participating in this appeal. All references in this opinion to the respondent are to Shane B. only.

[2] The attorney for the minor child filed a statement adopting the brief filed by the petitioner.

party. The protective order expired in March, 2023. . . . There is a history of ongoing intimate partner violence where both parents blame each other for the incident."

An order of temporary custody was granted by the court, *Sanchez-Figueroa*, *J.*, on April 14, 2021, and sustained on April 27, 2021. On February 22, 2022, the court, *Maronich*, *J.*, adjudicated Skye neglected and committed her to the care and custody of the petitioner. The court issued specific steps for the reunification of Skye with her parents.[3] On August 3, 2022, the petitioner filed a termination of parental rights petition seeking to terminate the parental rights of the respondent and the mother. On January 26, 2023, the respondent filed a motion to revoke commitment.

On January 9 and 10, 2024, the court, *Skyers*, *J.*, held a consolidated hearing on the petitioner's petition for the termination of parental rights and the respondent's motion to revoke commitment.[4] The respondent appeared

[3] In particular, the court issued the following orders, inter alia, to the respondent: "Take part in counseling and make progress toward the identified treatment goals . . . . Attend and complete an appropriate domestic violence program. Address intimate partner violence/domestic violence with a qualified therapist . . . ." In a section of the orders titled "Other," the court set forth two programs: "24/7 Dads—Participate in parenting program to strengthen understanding of age and developmentally appropriate expectations. Develop a plan for childcare and how you will ensure your child's physical, emotional and social needs are met. Yale [Intimate Partner Violence] Program for Fathers—Demonstrate understanding of how exposure to [intimate partner violence] impacts your child. Develop coping skills to deal with stress in a healthy way. Develop skills which demonstrate no violent or intimidating behaviors toward anyone."

[4] "A hearing on a petition to terminate parental rights consists of two phases, adjudication and disposition. . . . In the adjudicatory phase, the trial court determines whether one of the statutory grounds for termination of parental rights [under General Statutes § 17a-112 (j)] exists by clear and convincing evidence." (Internal quotation marks omitted.) *In re Shane M.*, 148 Conn. App. 308, 316, 84 A.3d 1265 (2014), aff'd, 318 Conn. 569, 122 A.3d 1247 (2015) Section 17a-112 (j) provides in relevant part: "The Superior Court, upon notice and hearing . . . may grant a petition [to terminate parental rights] if it finds by clear and convincing evidence that . . . (B) the child . . . has been found . . . to have been neglected . . . or uncared for in a prior proceeding . . . and the parent of such child has been provided

and was represented by counsel. Immediately prior to the commencement of trial, the court advised the respondent of his rights, including his right to remain silent and to not testify.

The court heard testimony from Jessica Biren Caverly, a licensed clinical psychologist who performed a court-ordered evaluation of the respondent. In her report, which was admitted as an exhibit at trial, Biren Caverly reported that the respondent "appears to have struggled with completing [court-ordered] specific steps for approximately a year and a half before becom-

specific steps to take to facilitate the return of the child to the parent . . . and [the parent] has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable amount of time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . ." General Statutes § 17a-112 (j) (3) (B) (i). "If the trial court determines that a statutory ground for termination exists, it proceeds to the dispositional phase. In the dispositional phase, the trial court determines whether termination is in the best interests of the child." (Internal quotation marks omitted.) *In re Shane M.*, supra, 316.

"The trial court is required, pursuant to § 17a-112, to analyze the [parent's] rehabilitative status as it relates to the needs of the particular child, and further . . . such rehabilitation must be foreseeable within a reasonable time. . . . The statute does not require [a parent] to prove precisely when [he or she] will be able to assume a responsible position in [his or her] child's life. Nor does it require [him] to prove that [he] will be able to assume full responsibility for [his] child, unaided by available support systems. It requires the court to find, by clear and convincing evidence, that the level of rehabilitation [he] has achieved, if any, falls short of that which would reasonably encourage a belief that at some future date [he] can assume a responsible position in [his] child's life. . . . Personal rehabilitation as used in [§ 17a-112 (j) (3) (B) (i)] refers to the restoration of a parent to his or her former constructive and useful role as a parent. . . . [I]n assessing rehabilitation, the critical issue is not whether the parent has improved [his] ability to manage [his] own life, but rather whether [he] has gained the ability to care for the particular needs of the child at issue. . . . [The] completion or noncompletion [of the specific steps], however, does not guarantee any outcome. . . .

"A conclusion of failure to rehabilitate is drawn from both the trial court's factual findings and from its weighing of the facts in assessing whether those findings satisfy the failure to rehabilitate ground set forth in § 17a-112 (j) (3) (B)." (Citations omitted; internal quotation marks omitted.) *In re Niya B.*, 223 Conn. App. 471, 488–90, 308 A.3d 604, cert. denied, 348 Conn. 958, 310 A.3d 960 (2024).

ing more consistent with services and visitation in the fall of 2022. However, [the respondent] continues to maintain that he has done nothing wrong and that there has not been intimate partner violence. He represented that the criminal court plans to dismiss his charges once the protective order expires; however, there is no documentation to support this assertion. . . . It is unclear if [the respondent] has limited insight into his behaviors and how they are impacting the current custody situation or if he is intentionally trying to present himself in a positive light. Psychological testing as part of the current evaluation supported that [the respondent] is acting intentionally . . . . It is strongly believed that [the respondent] is now only putting in effort as a way to avoid his parental rights being terminated for his criminal case. Therefore, it is unlikely that he will make significant changes in his beliefs about needing services." According to Biren Caverly, the respondent "initially declined engagement with Fathers for Change and an intimate partner violence program. He ultimately completed these programs but maintained that he had not done anything wrong and did not need services. . . . Throughout this case, [the respondent] has been reticent about completing necessary services, often putting up impediments for attendance or requiring workers to schedule appointments but then saying that he was no longer available." Biren Caverly "strongly recommended that [the respondent] engage in individual therapy with a provider who can also work with him on gaining a better understanding of domestic violence and its impact on children."

Biren Caverly testified that "[i]t's very concerning if he's not able to take any accountability or ownership with what had happened." She further testified that "[she] had a lot of concerns about [the respondent's] personality functioning. And how much he was able to accept responsibility for what had happened. How

much he was able to hear from others how likely he would be to make changes to his own behavior." According to Biren Caverly, the respondent did not demonstrate the type of growth expected for someone who had received counseling in a domestic violence program, regardless of whether that person had actually engaged in domestic violence. She explained that everyone in a relationship could learn from a domestic violence program, even if their relationship did not involve intimate partner violence. According to Biren Caverly, the respondent's continuous denials demonstrated a lack of growth. In her expert opinion, she "did not think it was in [Skye's] best interest to be returned to [the respondent's] care."

The court also heard testimony from Nancy Stewart, a department social worker who prepared a social study dated June 4, 2021. In her social study, which was admitted as a full exhibit at trial, Stewart stated the following: "The last report received [from the office of victim services and family relations] was that [the respondent] will be recommended to participate in a family violence program regarding his current criminal charges. [The respondent] reports that he is not in agreement with participating in the court recommended services. He maintains that he does not have a need for the services as he has not done anything wrong." Stewart further indicated that the respondent "has been very difficult to engage in treatment planning services . . . becomes angry and defensive when confronted with concerns . . . has unaddressed [intimate partner violence] issues." Stewart testified that she had spoken with the respondent and that he denied having engaged in intimate partner violence. Stewart also testified that she interviewed the mother after the February 2, 2021 incident, and the mother provided her with photographs depicting the injuries and bruising to her hands, arm,

neck, and body, as well as a photograph of an indentation in the wall where the respondent had punched it during the incident. The photographs were introduced as full exhibits at trial. Stewart also testified that the mother showed her a copy of a text exchange between the mother and the respondent in which he indicated to her that "you've put hands on me too." Stewart further testified that her investigation revealed that there had been a prior incident of intimate partner violence on December 24, 2020, during which the mother reported to her that the respondent hit her. Stewart testified that, although the mother did not provide much detail about the prior incident of intimate partner violence, the mother characterized the December 24, 2020 incident as worse than the February 2, 2021 incident.

Additionally, the court heard testimony from Randall Brown, a department social worker assigned to Skye's case. Brown prepared a permanency plan study, dated September 9, 2023, and a status report, dated December 19, 2023, which were introduced as full exhibits at trial. Brown reported in the September 9, 2023 permanency plan study that the respondent "has not been able to achieve a reasonable degree of rehabilitation in order for Skye to be safely return[ed] to his care within a reasonable amount of time," in part due to his noncompliance with the court-ordered specific steps. Specifically, the respondent has failed to "[d]emonstrate an understanding of how mental health and intimate partner violence . . . impacts the ability to safely parent [children] . . . [and] [a]ddress mental health and [intimate partner violence] needs." Brown described the respondent as noncompliant for denying the need for mental health and intimate partner violence treatment as well as minimizing the domestic violence programs he was referred to and the intimate partner violence incident that caused him to lose custody of Skye. In the December 19, 2023 status report, Brown recommended

termination of the respondent's parental rights in part because, "although he finished the [intimate partner violence] services, he continues to deny that he was the aggressor and takes no responsibility."

At the hearing, Brown testified that, although the respondent acknowledged to him that he had attended intimate partner violence programs and had listened to the speakers, he did not indicate that he had gained any relevant knowledge concerning intimate partner violence. Brown further testified that the respondent seemingly attended these programs purely for the sake of attendance instead of progress. Brown testified that the petitioner was recommending the termination of the respondent's parental rights because "the respondent hasn't completed or [the respondent] hasn't had any acknowledgment of the issues that brought this case to [the department]. And seen any insight to any changes that he may make . . . with regards to relationships, especially relationships with women."

On April 29, 2024, the court issued a memorandum of decision terminating the respondent's parental rights. In its memorandum of decision, the court found by clear and convincing evidence that, "[e]arly in the case, [the respondent] found it very difficult to comply with the court-ordered specific steps because he would not engage in many of the recommended services. [The respondent] denied a history of intimate partner violence with [the mother] and said that [the mother] was not telling the truth about the [February 2, 2021] incident. However, in a text exchange with [the mother] on February 12, 2021, he referred to the incident that occurred on February 2, 2021, and stated, '[y]ou put your hands on me too,' essentially providing his admission" that he actively participated in the physical altercation that took place on that date by also putting his hands on the mother. (Emphasis omitted.)

The court provided the following additional analysis: "The department referred [the respondent] to participate in intimate partner violence services at the Yale Fathers for Change program due to the allegation of [intimate partner violence] in the relationship. He completed the intake on October 13, 2021, but, on November 16, 2021, he vehemently declined the services and would not engage in the program, indicating that he had no desire or intent on attending '*this little group*.' The Fathers for Change program reported that, on November 29, 2021, they attempted a second time to get [the respondent] started with the program, and, once again, he adamantly refused to engage in the program and declined services. [The respondent] reported that there was no intimate partner violence in the relationship, therefore he did not need the Fathers for Change program. The department referred [the respondent] to the 24/7 Dads Program. He successfully completed it on December 20, 2021, and the reports reflect that [the respondent] was fully engaged.

"[The respondent] was recommended to Southwest Community Health Center (SWCHC) to participate in a mental health and substance abuse evaluation in October, 2021. [The respondent] denied a history of illicit substance abuse and completed the substance abuse evaluation. However, he failed to complete the accompanying urine screen. He initially claimed that he was unable to get there due to transportation issues. However, even after the department offered to provide transportation, he did not show up and the screening never took place. In November, 2021, [the respondent] participated in a psychiatric evaluation at [SWCHC]. As per the evaluation, he was diagnosed with Adjustment Disorder with Mixed Anxiety and Depressed Mood and was recommended for individual therapy. [The respondent] would not engage in individual therapy as recommended. . . .

"[The respondent] was ordered by the criminal court to engage in the Explore program. Explore is a twenty-six session program for men for intimate partner violence. He was referred in August, 2022, and completed the Explore program in January, 2023. Originally, he was referred to the Family Violence Program . . . a nine week diversionary program. However, the court ordered a more intensive program for this case. . . . The department again recommended [the respondent] for further individual mental health counseling at Birmingham Healthcare . . . in April, 2022. However, [the respondent] felt that he did not need therapy, stating that he 'made it twenty-five years in life without counseling' and decided that he would only engage in the program that was ordered by the criminal court regarding his pending criminal charges." (Emphasis in original.)

The court found by clear and convincing evidence that the petitioner made reasonable efforts to reunify the respondent with Skye. The court further found that the respondent "waited over a year before actively engaging in services and, upon completion of the program, still maintained that he did nothing wrong. [The respondent] has attended programs such as Explore, 24/7 Dads, and Circle of Security. During the pendency of this case, [the respondent] has repeatedly showed up for an intake, then subsequently refused to engage or participate in the programs that were offered and recommended by the department. His inconsistency speaks volumes to his understanding of the role he played in having his daughter removed from his care. [The respondent] has failed to learn or take anything from the programs he attended and apply them to his life and circumstances. He has been going through the motions and not benefitted from the programmatic substance.

"Over the course of the three years since Skye's removal [the respondent] has failed to gain insight as

to the reasons why Skye was removed from his home. [The respondent] continues to deny the very existence of intimate partner violence in the relationship with Skye's mother, notwithstanding the photos of the injuries to her and his text message admission. There is no reasonable prospect that given additional time [the respondent] could assume a responsible position in the life of his daughter Skye."

The court further found by clear and convincing evidence that "Skye . . . has been found in a prior proceeding to have been neglected or uncared for" and that "the respondent . . . has failed to sufficiently adjust his circumstances, conduct or conditions to make it in the best interest of [Skye] to be reunified with him in the foreseeable future. [The respondent] consistently visited with Skye and has only sporadically engaged in the recommended services during the pendency of this case. He has been unable or unwilling to sufficiently address the reasons why Skye was removed from his care and is not able to provide her with a safe, permanent and stable home environment where she would be able to thrive." The court concluded "that the termination of the [respondent's] parental rights is in the best interest of . . . Skye." This appeal followed.

In this appeal, the respondent does not claim that any of the court's factual findings are clearly erroneous or that the court misapplied the relevant legal principles to the issues before it. Instead, the respondent claims, for the first time on appeal, that the court violated his fifth amendment right against self-incrimination based on his unwillingness to admit to the potentially criminal conduct that initiated the underlying child protection case.[5] Specifically, he argues that the court's determination that he had failed to rehabilitate was improperly

[5] The fifth amendment to the United States constitution provides in relevant part: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const., amend. V.

"drawn from his refusal to accept responsibility for the February 2, 2021 domestic incident, [and, thus, the court] improperly compelled him to tell [department] investigators and the court-appointed psychological evaluator that he had engaged in criminal conduct in order to avoid the termination of his parental rights." We disagree.

The respondent acknowledges that his claim was not preserved at the time of trial but argues that it is reviewable under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). Under *Golding* review, which applies in both criminal and civil cases; see, e.g., *Gleason* v. *Smolinski*, 319 Conn. 394, 402 n.10, 125 A.3d 920 (2015); "[a respondent] can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 239–40; see also *In re Yasiel R.*, supra, 781 (modifying third prong of *Golding*).

"The first two [prongs of *Golding*] involve a determination of whether the claim is reviewable; the second two . . . involve a determination of whether the [party claiming error] may prevail." (Internal quotation marks omitted.) *State* v. *Gray*, 342 Conn. 657, 668, 271 A.3d 101 (2022).

The fifth amendment right against self-incrimination is applicable to the states through the due process clause of the fourteenth amendment to the United States constitution. See, e.g., *Malloy* v. *Hogan*, 378 U.S. 1, 6, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).

We agree with the respondent that the record is adequate to review the claim and that it is of constitutional magnitude, alleging the deprivation of his fifth amendment privilege. For the reasons that follow, however, we disagree with the respondent that a constitutional violation exists and deprived him of his right to a fair trial.

The respondent's constitutional claim presents a question of law over which our review is plenary. See *In re Ivory W.*, 342 Conn. 692, 705, 271 A.3d 633 (2022). "It is well established that [t]he fifth amendment privilege against self-incrimination not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings. . . . Although a defendant has the right to refuse to testify in a civil proceeding when doing so might be incriminatory, [a] defendant has no absolute right not to be forced to choose between testifying in a civil matter and asserting his [f]ifth [a]mendment privilege. . . . Put another way, the fact that there may be adverse consequences when a defendant invokes the fifth amendment in a civil proceeding does not necessarily mean that the defendant is subject to unlawful compulsion for fifth amendment purposes. . . .

"There are limits, however, to the general rule that an individual constitutionally may be required to choose between accepting the consequences of testifying at a civil trial—namely, the potential for self-incrimination—and accepting the consequences of invoking his or her fifth amendment right to remain silent. The United States Supreme Court has held that a [s]tate may not impose *substantial* penalties because a witness elects to exercise his [f]ifth [a]mendment right not to

give incriminating testimony against himself." (Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) Id., 705–707.

For the right against self-incrimination to be implicated, compulsion is required. "Voluntary statements of any kind are not barred by the fifth amendment. . . . Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." (Citations omitted; internal quotation marks omitted.) *State* v. *Edwards*, 325 Conn. 97, 116, 156 A.3d 506 (2017). Moreover, in civil proceedings, the right against self-incrimination "is not self-executing [and] must be expressly invoked at the time that allegedly incriminatory evidence is sought to be compelled or introduced." (Internal quotation marks omitted.) *Johnson* v. *Raffy's Café I, LLC*, 173 Conn. App. 193, 205, 163 A.3d 672 (2017). Termination of parental rights cases are civil proceedings. See *In re Katia V.*, 214 Conn. App. 468, 486, 281 A.3d 509, cert. denied, 345 Conn. 913, 283 A.3d 980 (2022).

In the present case, the respondent did not testify at trial and never invoked his fifth amendment right to remain silent during the pendency of the case.[6] Instead, he continuously and voluntarily denied engaging in intimate partner violence to Biren Caverly, Stewart, and Brown.

Moreover, contrary to the respondent's assertion, the record does not reflect that the court terminated the respondent's parental rights because he did not admit that his relationship with the mother involved intimate partner violence. Rather, the court found by clear and

[6] Moreover, the respondent's counsel conceded at oral argument before this court that the respondent was never coerced to admit responsibility for the incident of intimate partner violence. See *State* v. *Edwards*, supra, 325 Conn. 116 ("[v]oluntary statements of any kind are not barred by the fifth amendment" (internal quotation marks omitted)).

convincing evidence that there was an incident of intimate partner violence between the respondent and the mother, for which he was arrested and charged with assault, strangulation, disorderly conduct, and criminal mischief, a finding the respondent does not challenge on appeal. The court's findings with respect to this incident were supported, inter alia, by the photographs of the mother's injuries, the damage to their dwelling, and the respondent's self-incriminating text message to her. Consequently, the court's conclusion was not based on the fact that the respondent wanted to remain silent as to the incident but, instead, on the fact that he repeatedly denied that there was any intimate partner violence in the relationship despite evidence to the contrary. The court further found, by clear and convincing evidence, that the respondent was referred to many intimate partner violence programs, from which even a person who had not been involved in intimate partner violence would benefit, yet he consistently failed to gain any insight into the impact intimate partner violence has on children. As the court noted, his participation in these services was solely for the purpose of gaining an advantage in his criminal and custody cases. The court reasoned that the respondent's failure to meaningfully engage in these services prevented him from achieving such degree of personal rehabilitation as would encourage the belief that within a reasonable amount of time, considering the age and needs of Skye, he could assume a reasonable position in her life. In sum, the court's decision was based not on an invocation of the respondent's right to remain silent but, instead, on his voluntary denials of the existence of intimate partner violence in his relationship with the mother, which were contradicted by compelling evidence. Consequently, the court's decision did not implicate, let alone violate, the respondent's fifth amendment privilege against self-incrimination. In light of the fore-

going, we conclude that the respondent's claim fails under *Golding*'s third prong.

The judgment is affirmed.

In this opinion the other judges concurred.

ANTHONY SANTANIELLO, JR. *v.* COMMISSIONER OF CORRECTION
(AC 46199)

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

Syllabus

The petitioner, who had been convicted of several crimes, appealed, on the granting of certification, from the habeas court's judgment denying his habeas corpus petition. The petitioner claimed, inter alia, that the habeas court improperly rejected his claim that his prior habeas counsel, B, had rendered ineffective assistance, inter alia, by failing to allege that his criminal trial counsel, R, and his counsel on direct appeal, S, were ineffective in failing to raise a claim that the admission of statements by a jailhouse informant, M, at the petitioner's criminal trial violated the petitioner's sixth amendment right to confrontation under *Crawford* v. *Washington* (541 U.S. 36), which had been decided eleven days before his sentencing.

The habeas court properly concluded that B did not render ineffective assistance by not raising the *Crawford* claim as to R because R did not perform deficiently by failing to move for a new trial in the eleven day period before the petitioner's sentencing, as no court during that time frame had further clarified how *Crawford* applied generally or specifically as to the statements of government informants such as M, and R's failure to advance a novel constitutional argument did not constitute ineffective assistance.

This court concluded that B did not render ineffective assistance by not raising the *Crawford* claim as to S because, although S should have known that she could have raised the unpreserved *Crawford* claim on direct appeal in light of *State* v. *Greene* (274 Conn. 134), which had adjudicated an unpreserved *Crawford* claim several months before S filed her appellate brief, the habeas court properly concluded that any improper admission of M's statements constituted harmless error, as M's statements were unnecessary and cumulative of other independent evidence of the petitioner's guilt, and, because there was not a reasonable likelihood that the *Crawford* claim would have succeeded on appeal, the petitioner was not prejudiced by S's decision to forgo that claim.

B did not render ineffective assistance by failing to claim that R had performed deficiently in making a tactical decision at trial not to assert that the state violated the petitioner's right to counsel under *Massiah* v. *United States* (377 U.S. 201) by using M to elicit incriminating statements about the petitioner, as it was M who had initiated contact with the state, and the state never asked M to collect information about the petitioner or promised or offered M any benefit for doing so.

Argued September 5, 2024—officially released February 25, 2025

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, *M. Murphy, J.*; thereafter, the petition was withdrawn in part; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Desmond M. Ryan, assistant public defender, for the appellant (petitioner).

Nancy L. Chupak, senior assistant state's attorney, with whom, on the brief, was *Jo Anne Sulik*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

BRIGHT, C. J. Following the granting of his petition for certification to appeal, the petitioner, Anthony Santaniello, Jr., appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the court improperly rejected his claim that his prior habeas counsel performed deficiently by failing to allege that (1) both his trial counsel and appellate counsel provided ineffective assistance in failing to raise the claim that the admission of a jailhouse informant's statements at trial violated his right to confrontation under the United States constitution pursuant to *Crawford* v. *Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), and (2) his trial counsel rendered ineffective assistance when he waived the petitioner's claim that

the state violated his right to counsel pursuant to *Massiah* v. *United States*, 377 U.S. 201, 206, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), by using the same jailhouse informant to elicit incriminating statements from him. For the reasons that follow, we affirm the judgment of the habeas court.

The following facts underlying the petitioner's criminal conviction, which the jury reasonably could have found on the basis of the evidence admitted at trial, were set forth previously by this court in our decision addressing the petitioner's direct criminal appeal. See *State* v. *Santaniello*, 96 Conn. App. 646, 902 A.2d 1, cert. denied, 280 Conn. 920, 908 A.2d 545 (2006). "The [petitioner] and the victim were acquaintances. The victim lived in a single-family dwelling with her daughter and a female friend, S. On January 12, 2002, the [petitioner] and the victim spent part of the day together, and the victim told the [petitioner] that she planned to go to a local pub in the evening. The victim went to the pub at approximately 9 p.m., where she met several friends including the [petitioner] and S. They remained at the pub until it closed at approximately 2 a.m. Thereafter, the victim returned to her apartment alone, where she left the door unlocked in case S returned later, and she went to bed. She spoke with the [petitioner], via the telephone, during the night.

"Some time thereafter, the [petitioner] appeared in the victim's bedroom. He sat on her bed and proceeded to make advances toward her. The victim repeatedly told the [petitioner] to stop, but he became forceful and overcame the victim, removing her sweatpants, tearing her panties and sexually assaulting her. The victim was left bruised and had a rope like burn on her hip where her panties had been torn from her.

"When S returned home later that afternoon, she knew that something was wrong with the victim. When

S questioned the victim, the victim became emotional and 'lost it.' She then told S what had happened. S urged the victim to telephone the police, but the victim did not want to report the incident because she was afraid of the [petitioner]. S, however, continued to urge the victim to report the incident, and four days later, the victim filed a complaint with the Enfield police. A forensic examination of the victim's panties revealed a stain that contained the [petitioner's] DNA. The [petitioner] was arrested on February 22, 2002. In an amended long form information, the [petitioner] was charged with two counts of sexual assault in the first degree, burglary in the first degree and kidnapping in the first degree (sexual assault case).

"Following the [petitioner's] arrest, he was incarcerated at the Cheshire Correctional [Institution], where he shared a cell with Thomas Marra from May 13 until July 30, 2002. In August, 2002, Marra contacted George Nobile, an inspector with the division of criminal justice, informing Nobile that he had a cell mate who wanted to have a witness killed. Nobile and a supervisor, Gregory Dillon, met with Marra on September 4, 2002, and Marra informed them that the [petitioner] wanted to have the victim killed so that she could not testify against him. Marra provided a letter written by the [petitioner] and explained the code words used in the letter. Subsequently, Marra also provided Nobile and Dillon with further correspondence from and to the [petitioner] concerning the [petitioner's] desire to have the victim killed.

"On October 9, 2002, Marra telephoned the [petitioner] and told him he could put the [petitioner] in contact with an assassin. Nobile then assumed the undercover role of the assassin and contacted the [petitioner] on October 14 and 18, 2002. Nobile set up a meeting with the [petitioner] for the morning of October

21, 2002, but the [petitioner] did not appear for that meeting.

"The [petitioner] was arrested on October 25, 2002, and was held at the Bridgeport Correctional Center, where he shared a cell with Andre Holeman. The [petitioner] told Holeman that he was facing sexual assault charges and that he had wanted the victim killed so that she could not testify against him. He also told Holeman about Marra and his arranging a meeting with an assassin. He further explained to Holeman that he was supposed to pay the assassin $7500 to kill the victim but that he did not have the funds and, therefore, was considering killing the victim himself. The [petitioner] also asked Holeman to telephone the [petitioner's] attorney to report that the [petitioner] had been set up by Marra. In an amended long form information, the [petitioner] was charged with attempt to commit murder, inciting injury to another person and intimidating a witness (attempted murder case)." (Footnote omitted.) Id., 649–51.

At trial, the petitioner was represented by then Attorney, now Superior Court Judge, Kevin A. Randolph. On January 20, 2004, "[a]fter a consolidated trial, the jury found the [petitioner] guilty of sexual assault in the first degree, kidnapping in the first degree, attempt to commit murder, inciting injury to another person and intimidating a witness." Id., 651. On March 19, 2004, the court, *Lavine*, *J.*, sentenced the petitioner to a total effective term of forty-two years of incarceration. See id., 648.

The petitioner appealed, claiming that the trial court "improperly (1) abused its discretion in joining and refusing to sever two separate informations, (2) denied the [petitioner's] motion to suppress, (3) failed to conduct an in camera review of documents and (4) refused to consider the [petitioner's] postverdict letter requesting

a new trial." Id. Attorney Deborah G. Stevenson, a special public defender, represented the petitioner in his direct appeal. This court affirmed the judgments of conviction, concluding that "(1) there was no substantial injustice in the joinder of the informations in a single trial, (2) the court properly denied the motion to suppress the [petitioner's] statements because there was adequate evidence from which it could have found that the [petitioner] implicitly waived his right to remain silent, (3) the court was not obligated to review documents and prison records in camera because defense counsel agreed on the record that it was unnecessary and (4) defense counsel unequivocally stated that he was withdrawing his petition for a new trial and would be refiling the petition separately as a civil matter." Id., 648–49. Our Supreme Court subsequently denied the petitioner's petition for certification to appeal. See *State* v. *Santaniello*, 280 Conn. 920, 908 A.2d 545 (2006).

While his direct appeal was pending, the petitioner pursued a petition for a new trial, initially represented by Randolph and then by Attorney William H. Paetzold.[1] At the trial on the petition, the petitioner presented testimony from Felix Cotto, another inmate, as newly discovered evidence supporting a claim that Holeman fabricated his testimony at trial. The court, *Hon. Joseph Q. Koletsky*, judge trial referee, denied the petition,

[1] On March 8, 2004, Randolph filed a petition for a new trial in the underlying criminal case on the basis of a letter sent by Marra to Judge Lavine in which Marra stated that he had manipulated and convinced the petitioner to have the victim killed. On March 19, 2004, prior to the sentencing hearing, the court addressed the petition. Randolph argued before the court that the letter constituted newly discovered evidence. Randolph, however, agreed with the court that the petition for a new trial should have been filed instead as a civil action pursuant to Practice Book § 42-55 and General Statutes § 52-270 and, therefore, withdrew the petition. Thereafter, the new petition was filed on May 6, 2004., In his direct appeal, the petitioner claimed that the trial court improperly refused to consider the improperly filed petition for a new trial, and this court concluded that his claim was baseless. See *State* v. *Santaniello*, supra, 96 Conn. App. 672–73.

concluding that "[t]here is considerable evidence in the record so that even if the court were to accept Cotto's testimony about [Holeman's] unsworn recantation, there is no indication that the result of the trial would have been different more likely than not."

Following his unsuccessful direct appeal and petition for a new trial, the petitioner commenced his first habeas action, represented by Attorney Walter Bansley IV. In the operative amended petition, the petitioner alleged: (1) his trial counsel (Randolph) performed deficiently by failing (a) to explain the evidence and recommend a plea offer, (b) to explain the right to testify, and (c) to call two witnesses at trial; and (2) his appellate counsel (Stevenson) performed deficiently by failing to claim that there was insufficient evidence for the attempted murder conviction. After a trial on the merits, the first habeas court, *Cobb*, *J.*, denied the petition, concluding that the petitioner had failed to meet his burden of establishing ineffective assistance of counsel for either attorney. The petitioner appealed to this court, challenging the judgment only as to his ineffective assistance of appellate counsel claim. See *Santaniello* v. *Commissioner of Correction*, 152 Conn. App. 583, 584, 99 A.3d 1195, cert. denied, 314 Conn. 937, 102 A.3d 1115 (2014). This court affirmed the first habeas court's judgment; see id.; and our Supreme Court denied the petitioner's petition for certification to appeal. See *Santaniello* v. *Commissioner of Correction*, 314 Conn. 937, 102 A.3d 1115 (2014).

The petitioner then commenced a second habeas action, which underlies the present appeal. In the operative fourth amended petition filed on October 26, 2020, the petitioner alleged, inter alia, that Bansley performed deficiently in the first habeas action by failing to claim

that (1) both Randolph and Stevenson provided ineffective assistance of counsel by failing to raise the petitioner's *Crawford* claim, and (2) Randolph provided ineffective assistance of counsel when he waived the petitioner's *Massiah* claim.

The second habeas court, *M. Murphy*, *J.*, conducted a trial over two days, January 25 and April 18, 2022. During the second habeas trial, the court heard testimony from Randolph, Stevenson, Bansley, Attorney Michael A. Gailor, who was the prosecutor in the original criminal trial, former Inspectors Nobile and Dillon, and three expert witnesses, Attorneys W. Theodore Koch III, Lisa J. Steele, and Vishal K. Garg. The petitioner's arguments at the habeas trial focused on the deficiency of his prior habeas counsel's performance in failing to raise, prove, and argue that (1) pursuant to *Crawford*, the petitioner's right to confrontation was violated when Marra's testimonial statements were presented to the jury despite the fact that Marra was never called as a witness, and (2) the state violated the petitioner's sixth amendment right to counsel when it used Marra to elicit incriminating statements from the petitioner.[2] The court denied the petition, finding that the expert testimony presented by the petitioner was neither helpful nor persuasive, and concluding that the petitioner had failed to show ineffective assistance of counsel by Randolph, Stevenson, or Bansley. This appeal followed. Additional facts and procedural history will be set forth as necessary.

We begin by setting forth guiding principles of law as well as the applicable standard of review for ineffective assistance of counsel claims, which are well settled.

[2] The petitioner also claimed that his prior habeas counsel was deficient in failing to claim that the petitioner's sexual assault and attempted murder cases should not have been joined for trial. The habeas court rejected this claim, and the petitioner does not challenge that conclusion in the present appeal.

"In *Lozada* [v. *Warden*, 223 Conn. 834, 842–43, 613 A.2d 818 (1992)], our Supreme Court established that habeas corpus is an appropriate remedy for the ineffective assistance of appointed habeas counsel, authorizing what is commonly known as a habeas on a habeas, namely, a second petition for a writ of habeas corpus . . . challenging the performance of counsel in litigating an initial petition for a writ of habeas corpus . . . [that] had claimed ineffective assistance of counsel at the petitioner's underlying criminal trial or on direct appeal. . . . Nevertheless, the court in *Lozada* also emphasized that a petitioner asserting a habeas on a habeas faces the herculean task . . . of proving in accordance with *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), both (1) that his appointed habeas counsel was ineffective, and (2) that his trial counsel was ineffective. . . . Any new habeas trial would go to the heart of the underlying conviction to no lesser extent than if it were a challenge predicated on ineffective assistance of trial or appellate counsel. The second habeas petition is inextricably interwoven with the merits of the original judgment by challenging the very fabric of the conviction that led to the confinement." (Internal quotation marks omitted.) *Lebron* v. *Commission of Correction*, 204 Conn. App. 44, 50, 250 A.3d 44, cert. denied, 336 Conn. 948, 250 A.3d 695 (2021).

"To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, [supra, 466 U.S. 687]. *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 [deny] a petitioner's claim if he fails to meet either prong." (Internal quotation marks omitted.) *Crocker* v. *Commissioner of Correction*, 220 Conn. App. 567, 583, 300 A.3d 607, cert. denied, 348 Conn. 911, 303 A.3d 10 (2023).

"The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . [T]his court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous . . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Internal quotation marks omitted.) *Lebron* v. *Commissioner of Correction*, supra, 204 Conn. App. 51. With these principles in mind, we address each of the petitioner's claims in turn.

I

The petitioner first claims that Bansley provided ineffective assistance of counsel by failing to raise a claim regarding both Randolph's and Stevenson's failure to pursue a claim, either at his criminal trial or in his direct appeal, that the admission of Marra's statements through other witnesses violated his right to confrontation under the United States constitution pursuant to *Crawford* v. *Washington*, supra, 541 U.S. 36. Specifically, the petitioner claims that Randolph was ineffective in failing to seek a new trial on the basis of *Crawford*, that Stevenson was ineffective in failing to raise a *Crawford* claim in his direct appeal, and that the

petitioner was prejudiced by these deficiencies.[3] We are not persuaded.

The following additional facts are relevant to our analysis. The sexual assault case and the attempted murder case were consolidated for trial. At trial, the victim testified about the events that occurred the night she was assaulted by the petitioner. To corroborate the victim's testimony that the petitioner had sexually assaulted her, the state introduced exhibit 3, a photo

[3] On appeal, the petitioner also claims that the habeas court erred by applying an incorrect legal standard when evaluating the prejudice prong of the petitioner's ineffective assistance claims relating to the *Crawford* claim. When discussing Randolph's performance, the court concluded that "[the petitioner] has failed to establish that he was prejudiced thereby because he has not demonstrated that the trial court *would* have granted a new trial on this basis." (Emphasis added.) Similarly, the court also concluded that "[the petitioner] has failed to demonstrate that he *would* have prevailed on appeal had Stevenson raised a *Crawford* claim . . . ." (Emphasis added.) The petitioner asserts that, by assessing whether the petitioner would have succeeded as opposed to whether there was a reasonable probability that the petitioner would have succeeded, the habeas court improperly increased the burden of proof borne by the petitioner. See *Delgado* v. *Commissioner of Correction*, 224 Conn. App. 283, 291, 311 A.3d 740 ("[t]o 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" (internal quotation marks omitted)), cert. denied, 349 Conn. 902, 312 A.3d 585 (2024). This claim warrants little discussion.

The habeas court set forth the correct legal standard for the prejudice prong in its memorandum of decision when discussing the petitioner's claim as to Stevenson: "[W]hen a petitioner is claiming ineffective assistance of appellate counsel, he must establish that there is a reasonable probability that, but for appellate counsel's error, [he] would have prevailed in his direct appeal." (Internal quotation marks omitted.) We do not read the court's omission of the phrase "reasonable probability" in stating its conclusions regarding Randolph as demonstrating that the court applied an incorrect legal standard. In any event, because we hold that the court properly concluded that the petitioner failed to prove that Randolph performed deficiently as to the *Crawford* claim, any misstatement by the court as to the prejudice prong of *Strickland* was harmless. See *Crocker* v. *Commissioner of Correction*, supra, 220 Conn. App. 583 ("[b]ecause both prongs . . . must be established for a habeas petitioner to prevail, a court may [deny] a petitioner's claim if he fails to meet either prong" (internal quotation marks omitted)).

of the injury she sustained during the assault; exhibit 8, the shirt she was wearing; exhibit 6, her sweatpants with a broken drawstring, which the victim explained broke during the assault; and exhibit 7, her underwear. The state also presented the testimony of the victim's roommate, who testified about the victim's recounting of the assault to her, her observations of both the injuries on the victim's body and the victim's emotional state, and her assistance in reporting the crime by calling a crisis hotline to obtain advice for the victim. The victim's testimony also was corroborated by her roommate's spouse, who testified about his observations of the victim's emotional state, the conversation between the victim and her roommate, in which the victim indicated that she had been assaulted, and the roommate's call to the crisis hotline. The state also offered expert testimony describing the forensic examination of the victim's underwear, which contained the petitioner's DNA.

Major Jonathan Hall, an employee at Cheshire Correctional Institution, testified that, on February 27, 2002, the petitioner had been transferred there and that the petitioner and Marra shared a prison cell from May 13 to July 30, 2002, on which date the petitioner was released on bond.

Dillon, an inspector with the Office of the Chief State's Attorney, testified about his participation in the arrest of the petitioner on October 25, 2002, for the attempted murder charge and the statements the petitioner voluntarily made to law enforcement at that time. Dillon testified that the petitioner had told Dillon that he was not familiar with the victim's address as of October, 2002, nor the type of car she operated at that time. Holeman, who briefly shared a prison cell with the petitioner at Bridgeport Correctional Center, testified that the petitioner described the sexual assault charge as a date that went too far. Holeman testified

that the petitioner told him that "Marra was going to handle some things for him," that "Marra was going to kill the person, put the person in the junkyard in a car and get rid of the body," and that the petitioner wanted the victim killed so she could not testify against him. On cross-examination, Holeman testified that he saw a television news report on October 25, 2002, about the petitioner's case. Both Randolph and the state attempted to distinguish between information Holeman learned through the news report and from the petitioner. Holeman testified that the news program gave only the petitioner's name and showed his face, and that the details shared by the petitioner about which Holeman testified were not included in the program.

The most relevant witness to the petitioner's claims in the present case, called by the state at trial, was Nobile. He testified that he had received a letter from Marra in August, 2002, in which Marra wrote that he had a cellmate who wanted to have a witness killed. A copy of that letter was admitted into evidence at trial as exhibit 14. Exhibit 14 is addressed to Nobile and signed by Marra. In the letter, Marra states, "I've been trying to get in touch with you to see if you might be interested in the following information. I'm in contact with this person in the Hartford/Tolland area that wants to have a witness in a major criminal case disappear/murder[ed] as soon as possible." Marra further claimed that he had the witness' identifying information and could put Nobile into direct contact with the petitioner. He made clear, however, that he was "looking for something in return for this." Nobile testified that, after receiving the letter, he and Dillon met with Marra on September 4, 2002. At that meeting, Marra gave them the petitioner's name and an additional correspondence he had with the petitioner, which was admitted into evidence as exhibit 12. Exhibit 12, a letter dated May 8, 2002, and postmarked August 8, 2002, is addressed to

"Tommy" and signed, "Joe." At the petitioner's criminal trial, the state did not rely on the body of the letter, which primarily updated Marra on the petitioner's life since he "came home." Nobile testified that he found two things about the letter significant. At the bottom of exhibit 12 is a reference to "Donna's #" opposite the signature, "Joe." Nobile testified that Marra had told him that Donna referred to the victim, and that "Joe" was short for Joe Black and referred to the petitioner. Nobile further testified that the letter's envelope was significant because the return address, under the name "J. Black," matched the victim's address. Nobile testified that he did not take the information provided by Marra at face value; both Nobile and Dillon conducted further investigation and confirmed the name of the victim and her address.[4] Nobile testified that Dillon had independently researched the significance of the alias, Joe Black, and concluded that it was a reference to a 2001 movie called "Meet Joe Black," in which the character Joe Black represented death.

Nobile testified that he had another meeting with Marra on October 8, 2002. At this meeting, Marra gave him another letter he had received from the petitioner, which was admitted into evidence as exhibit 13. Exhibit 13 is a letter dated September 9, 2002, written to "Bossman" and signed, "J. Black." The letter contains the phrase, "[o]ne ninety Rose Soap Dish is with Donna like also white four-door Blazer." Nobile testified that "190RSD" is the license plate number of the victim's vehicle and that the description, "white four-door Blazer" matched the victim's vehicle. Nobile testified that, at the October 8, 2002 meeting, he and Dillon had asked Marra to make a phone call to the petitioner. The

[4] Dillon similarly testified that, through his own investigation, he had the opportunity to determine the victim's address, car type, and license plate number, and that the address on the envelope of the letter matched the victim's address.

call eventually was arranged for October 9, 2002, and the recording was offered into evidence at trial, with copies of the transcript of the recording given to the jury. During the call, Marra mentioned "our girlfriend" and referred to the letters he and the petitioner had exchanged, to which the petitioner responded affirmatively. During the conversation, Marra and the petitioner discussed the code used in the letters as follows:

"[Marra]: Uhhh, now listen, let me ask you one other question, right.

"[The Petitioner]: Yep.

"[Marra]: The, the letter you sent me about the white truck, I'm not the brightest guy in the world . . . .

"[The Petitioner]: Yup.

"[Marra]: You, you put soap slash. Is that what I think it is?

"[The Petitioner]: What'd you . . . .

"[Marra]: You, you put soap slash, you put rose soap, and with the s you put a slash. You put dish you put a slash.

"[The Petitioner]: Yeah first letters of every, first letters of the uhh, of the thing, the . . . tag. Ya know what I mean?

"[Marra]: The . . .

"[The Petitioner]: It's like when it's S or [whatever] it is, where all of those slashes are.

"[Marra]: Right.

"[The Petitioner]: Those are the, those are the letters.

"Marra: The . . . . Oh, oh, oh yeah. [They are] the first letters of our our deal. [Okay]. I forgot. . . .

"[The Petitioner]: Yeah."

Nobile testified that, in his role as the undercover assassin, he had called the petitioner on October 14, 2002, and left him a voice message. In the voicemail, Nobile referred to himself as "Tommy's friend." When the petitioner returned Nobile's call later that day, Nobile and the petitioner engaged in the following conversation,[5] establishing a time frame, the price for having the victim killed, which Marra previously had told the petitioner, and when to next talk on the phone:

"[Nobile]: What's, uhhh, what's her name 'Donna'?

"[The Petitioner]: Yup.

"[Nobile]: Uhh, wh-what's the time frame on this? Wh-wh-when are things gonna start?

"[The Petitioner]: Uhh, when, whenever really. Umm, it, it doesn't really matter.

"[Nobile]: Yeah, because . . . he made it kinda sound like it was a rush.

"[The Petitioner]: Well, like within a month or so. Ya know, I don't, I mean I don't know what your time frame is, ya know? . . .

"[Nobile]: What'd he tell ya.

"[The Petitioner]: Uhhh, like 75.

"[Nobile]: Yeah, cause he, he kinda low balls it. But that's all right. I mean he, he says that you, you know her pretty well.

"[The Petitioner]: Yep.

* * *

"[Nobile]: Now he also said too, [something] about a different car or somethin[g]. Then he started tellin[g] me somethin[g] about . . . .

[5] Nobile recorded both the voicemail and the phone conversation from October 14, 2002, a transcript of which was admitted into evidence at trial as exhibit 17.

"[The Petitioner]: Uhh, yeah, there's, there's still the same things there from before in the letter I wrote him, just them two.

"[Nobile]: . . . Some numbers and some letters or somethin[g] like that. Right?

"[The Petitioner]: Yuhh, yeah.

"[Nobile]: Alright, uhh . . . what I'll do is I'll give you uhh, I'll give you a call tomorrow about this time.

"[The Petitioner]: OK."

Nobile and the petitioner spoke once more on October 18, 2002. A transcript of that conversation was admitted into evidence as exhibit 18. During the October 18, 2002 conversation, Nobile and the petitioner agreed to meet in the Enfield area. The following exchange occurred between Nobile and the petitioner:

"[Nobile]: Alright I'll give you a call when I get up there.

"[The Petitioner]: OK.

"[Nobile]: And then we can meet from there. Now the only thing is, uhhh, our friend, our friend told ya that there's a, uhhh, a little thing up front for good faith, right?

"[The Petitioner]: Uhhh, I guess we'd, I'd have to talk to more, more or less by Monday, ya know, from what me and [Marra] talked about.

"[Nobile]: OK. Yeah [because] like.

"[The Petitioner]: [You] know, so I'll, I mean, I guess I could talk to you, I should let you know what this all means.

"[Nobile]: OK. Alright, we'll do that, but then figure what I'll do is, uhh, Monday, uhhh, between 10:30 and 11 I'll get up there and I'll give you a call.

"[The Petitioner]: OK."

Nobile testified at trial that the petitioner did not appear at the agreed upon time. Nobile further testified that, sometime thereafter, he and Dillon participated in the execution of a search warrant at the petitioner's house where they located additional letters from Marra to the petitioner in the petitioner's bedroom, including a letter dated August 13, 2002, which was admitted into evidence as exhibit 19, addressed to "Anthony" and signed, "Tom Marra." Part of the August 13 letter reads: "That address is Donna, so I'll start to check it out it would be a big help if you had Donna plate number, then we can get all the information Donna needs for parts." Nobile testified that they also seized an address book from the petitioner's bedroom, which was admitted into evidence as exhibit 20 and contained Marra's inmate number and a phone number at which someone connected with Marra could be reached; a scrap of paper, which was admitted into evidence as exhibit 21 and described by Nobile in his testimony as follows: "It's Tom Marra, the number after it is 73281, and there is a telephone number and a name that is circled. It's 203-372-8993, the name is Connie. Directly below that is the name Joseph Black, name, address, [date of birth], and it also says DOL, meaning driver's license number"; a book that referenced the victim's phone number; and a photo of the victim.

After the conclusion of the state's case, the defense elected not to call any witnesses and moved for a judgment of acquittal, which the court denied on January 12, 2004. Neither the state nor the defense called Marra as a witness.

At the close of trial, the court gave the jury limiting instructions as to what evidence could be considered for what purpose in each case. Specifically, the court instructed the jury that the following evidence, which

had been admitted as exhibits 15 through 18, was admissible for all purposes in the attempted murder case: (1) the telephone conversations between Nobile and the petitioner, as well as those between Marra and the petitioner, in both transcript and recorded form; (2) a notice of rights form, which had been given to the petitioner and admitted into evidence as exhibit 11; and testimony by Dillon as to the petitioner's statements to law enforcement following his arrest on October 25, 2002; (3) the letters between Marra and the petitioner, exhibits 12, 13, 14, 19 and 22; and (4) statements the petitioner made to Marra or Nobile after September 4, 2002, the date when Marra became an agent for the state. With respect to the sexual assault case, the court instructed the jury that exhibit 14 was admitted for all purposes, and that exhibits 12 and 13 were admitted solely as consciousness of guilt evidence.

On January 20, 2004, the jury returned its verdicts, finding the petitioner guilty of all charges. On March 8, 2004, the United States Supreme Court issued its decision in *Crawford* v. *Washington*, supra, 541 U.S. 36, in which the court held that out-of-court statements that are testimonial in nature are barred under the confrontation clause unless the witness is unavailable to testify at trial and the defendant had a prior opportunity to cross-examine the witness. See id., 68. Randolph did not file a motion for a new trial based on *Crawford* prior to the petitioner's March 19, 2004 sentencing and did not raise *Crawford* in the petition for a new trial that he filed on May 6, 2004.

It was unclear whether Randolph was aware of *Crawford* while he represented the petitioner. At the second habeas trial, he testified that, "[t]ypically, I would not be reading federal case law at that time during the course of the trial." Further, Randolph testified that, even if it were assumed that he had been aware of *Crawford* and that the new rule it established applied

to the petitioner's case, a change in the law provided no basis for a new trial because it was not newly discovered evidence; rather, he maintained, it was an issue more appropriate for appellate counsel to raise on appeal.

Stevenson filed the petitioner's appellate brief with this court on October 5, 2005. As previously noted in this opinion, Stevenson raised several claims in the petitioner's direct appeal, although she did not raise a *Crawford* claim.

At the underlying habeas trial, Stevenson testified as to her recollection of her handling of the petitioner's appeal during the following exchange with the petitioner's counsel:

"[The Petitioner's Counsel]: Okay. Do you think that the record would have been sufficient for [the Appellate Court to review] a *Crawford* claim 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)]?

"[Stevenson]: . . . I think so, yes. I always try to raise *Golding*, you know, to protect the client's right in case the trial counsel does not raise it . . . .

"[The Petitioner's Counsel]: Okay. And, and under your understanding of the, the *Golding* prongs, none of them wouldn't, would not have been met by the *Crawford* claim here. Is that right?

"[Stevenson]: I'm not sure I understand the question.

"[The Petitioner's Counsel]: You, do you know—do you recall what the prongs are for *Golding*?

"[Stevenson]: Again, my memory fails me, but, but there are four of them. . . . [Y]ou have to have the facts, et cetera—the first two are a little fuzzy, but definitely the third is, is the obstacle. For me, most of

the time it's, it has to raise a constitutional issue, but I'm fuzzy on the other three. I apologize.

"[The Petitioner's Counsel]: That's okay. Just to the extent that you recall it not meeting *Golding* wasn't a reason you rejected it. Would that be fair to say?

"[Stevenson]: No. I don't believe so, no. . . .

"[The Petitioner's Counsel]: Given the constraints that were placed on you with respect to the motion to review the materials in camera, why wouldn't you consider raising the *Crawford* claim in lieu of that one?

"[Stevenson]: To be honest, I do not know. Okay? It—if I didn't, it—was it error on my part? It may have been. I, I don't honestly recall expressly ruling it in or out. I think I was just more focused on the other issues that, that were really troublesome.

"[The Petitioner's Counsel]: Okay. So, it wasn't necessarily a conclusion that *Crawford* was a weaker claim than the others that you decided to brief?

"[Stevenson]: I don't think I put it that way in my mind as I was writing it. Again, I was more focused on the other issues then."

The habeas court found that neither Randolph nor Stevenson had performed deficiently by failing to raise a *Crawford* claim. As to Randolph's performance, the habeas court found "that it would be unreasonable to conclude that . . . Randolph rendered deficient performance by not seeking a new trial in the eleven day window between the release of *Crawford* and [the petitioner's] sentencing." The court noted that when *Crawford* was decided, it was unknown whether the new rule applied retrospectively or prospectively. Regarding Stevenson, the habeas court found that "Stevenson's review of the record led her to conclude that a *Crawford* claim was not properly preserved for appeal. . . . It

was reasonable under the circumstances of this case for Stevenson to not seek *Golding* review of a *Crawford* claim," given that, in 2022, "[t]he question of whether and to what extent unpreserved claims alleging violations of *Crawford* v. *Washington*, [supra, 541 U.S. 36], are subject to *Golding* review [was] currently pending before [our Supreme Court]. See *State* v. *Robles*, Docket No. SC 20452 (argued October 18, 2022)." (Citations omitted; footnote omitted; internal quotation marks omitted.) The habeas court further concluded that, "even if [it] were to assume that the first three *Golding* prongs have been satisfied, [the petitioner's] inability to cross-examine Marra was harmless error. [The petitioner] *himself*, not Marra, provided the critical facts needed to convict him in the attempted murder case through his correspondence to Marra and his phone conversation with Nobile. Therefore, [the petitioner] has failed to demonstrate that he would have prevailed on appeal had Stevenson raised a *Crawford* claim pursuant to *Golding* . . . ." (Emphasis in original.)

A

We first address the petitioner's claim with respect to Randolph. The petitioner claims that the habeas court's reasoning as to Randolph's failure to raise a *Crawford* claim "ignores that (1) the [United States] Supreme Court's then existing retroactivity rules made *Crawford* applicable to the petitioner's case, and (2) . . . Randolph testified that (a) he did not believe he would have been aware of a [United States] Supreme Court decision shortly after it was published, (b) he did not believe it was his job to litigate the *Crawford* issue after it arose for the petitioner, and (c) he did not believe he had any basis to file a motion for new trial because . . . *Crawford* . . . did not constitute new evidence." (Footnote omitted.) The petitioner contends that a reasonably competent attorney would have moved for a new trial pursuant to Practice Book § 42-53 on the ground

that the admission of Marra's statements through Nobile violated the petitioner's right to confrontation as set forth in *Crawford*. We conclude that the petitioner has failed to establish that Randolph performed deficiently.

To provide the proper context for the petitioner's claim, we start with a brief review of *Crawford*. Prior to *Crawford*, the United States Supreme Court had not distinguished between testimonial and nontestimonial statements for purposes of determining when the admission of hearsay statements of unavailable witnesses in criminal cases violated the confrontation clause of the sixth amendment. See *Crawford* v. *Washington*, supra, 541 U.S. 71–72 (Rehnquist, C. J., concurring in the judgment). Rather, under the previous test set in forth *Ohio* v. *Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), overruled in part by *Crawford* v. *Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), all such statements were admissible if they had "adequate indicia of reliability . . . [which] can be inferred . . . where the evidence falls within a firmly rooted hearsay exception . . . [or pursuant to] a showing of particularized guarantees of trustworthiness." (Internal quotation marks omitted.) Id., 66. The court in *Crawford* described this test as "unpredictable" because "[w]hether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them. . . . [T]he unpardonable vice of the *Roberts* test, however, is . . . its demonstrated capacity to admit core testimonial statements that the [c]onfrontation [c]lause plainly meant to exclude." (Citations omitted.) *Crawford* v. *Washington*, supra, 63. To satisfy the constitutional demand of confrontation prescribed by the sixth amendment, the court reformulated the test to distinguish between testimonial and nontestimonial statements, holding that testimonial evidence is not admissible under the sixth amendment, unless the witness is

unavailable and the defendant had a prior opportunity to cross-examine the witness. See id., 68. In the present matter, the petitioner argues that the standard adopted in *Crawford* "created a new basis to exclude evidence that might otherwise be admissible pursuant to the rules of evidence. At a new trial . . . [Marra] would have been 'unavailable' for purposes of cross-examination, and the *Crawford* rule would have excluded all his testimonial statements." (Citation omitted.)

Notably, in *Crawford*, the court declined "to spell out a comprehensive definition of 'testimonial' "; *Crawford* v. *Washington*, supra, 541 U.S. 68; however, the court observed that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. . . . Various formulations of this core class of testimonial statements exist: [1] ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially . . . [2] extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions . . . [and] [3] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial . . . . Regardless of the precise articulation, some statements qualify under any definition . . . . Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. . . .

"In sum, even if the [s]ixth [a]mendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers

fall squarely within that class." (Citations omitted; internal quotation marks omitted.) Id., 51–53. The court acknowledged the dissent's criticism that its "refusal to articulate a comprehensive definition in [*Crawford* would] cause interim uncertainty"; id., 68 n.10; but it reasoned that such a result "can hardly be any worse than the status quo. . . . The difference is that the [prior] test is *inherently*, and therefore *permanently*, unpredictable." (Citation omitted; emphasis in original.) Id.

The petitioner specifically contends that Randolph should have moved for a new trial pursuant to Practice Book § 42-53 and argued that Marra's out-of-court statements should not have been admitted under *Crawford*.[6] Even if the trial court had permitted such a motion weeks after the verdicts were returned,[7] a motion for a new trial must be filed with the trial court before sentencing. See *State* v. *Ramos*, 306 Conn. 125, 134, 49 A.3d 197 (2012) (under common law, trial court's jurisdiction over criminal case terminates once defendant begins serving sentence). Consequently, in order to raise a *Crawford* claim regarding Marra's statements, Randolph would have had to move for a new trial in the eleven days between the release of *Crawford* and the petitioner's sentencing. In this eleven day period, no court had further addressed or clarified the dividing

[6] Practice Book § 42-53 provides in relevant part: "(a) Upon motion of the defendant, the judicial authority may grant a new trial if it is required in the interests of justice. Unless the defendant's noncompliance with these rules or with other requirements of law bars his or her asserting the errors, the judicial authority shall grant the motion:

"(1) For an error by reason of which the defendant is constitutionally entitled to a new trial; or

"(2) For any other error which the defendant can establish was materially injurious to him or her . . . ."

[7] Practice Book § 42-54 provides: "Unless otherwise permitted by the judicial authority in the interests of justice, a motion for a new trial shall be made within five days after a verdict or finding of guilty or within any further time the judicial authority allows during the five-day period."

line between testimonial and nontestimonial statements. Nevertheless, the petitioner asserts that "a reasonably competent attorney in . . . Randolph's shoes would have argued that, under *Crawford*, Marra's testimonial statements should have been excluded and feel confident in having a strong argument given the postverdict developments in this case." We are not persuaded.

The petitioner's argument assumes that the application of *Crawford* to statements such as those made by Marra to Nobile was immediately clear. Such was not the case. In fact, our Supreme Court did not address the application of *Crawford* to statements made by an informant until four years later in *State* v. *Smith*, 289 Conn. 598, 622–27, 960 A.2d 993 (2008). Notably, by the time our Supreme Court decided *Smith*, the United States Supreme Court had further elaborated on the third category of testimonial statements in *Davis* v. *Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), and created a " 'primary purpose' " test to distinguish between nontestimonial and testimonial statements made to law enforcement. *State* v. *Smith*, supra, 623. Even then, our Supreme Court made clear that not all statements made by an informant are testimonial. See id., 625.

In *Smith*, a jailhouse informant had approached federal authorities offering incriminating statements made by the coconspirator about the defendant and subsequently agreed to wear a recording device and elicit further incriminating statements from the coconspirator. Id., 615. At the defendant's trial for, inter alia, murder and conspiracy to commit murder, the trial court admitted into evidence a recorded conversation between the informant and the coconspirator, and the jury found the defendant guilty on all of the charges. Id., 601–602. In his direct appeal to our Supreme Court, the defendant claimed that the informant's portion of

the conversation should have been excluded as testimonial statements pursuant to *Crawford*. Id., 613–14. The defendant sought review of his unpreserved *Crawford* claim pursuant to *State* v. *Golding*, supra, 213 Conn. 239–40. Although our Supreme Court ultimately concluded that the defendant could not prevail on the merits of his *Crawford* claim because any error by the trial court was harmless, the court assessed the testimonial nature of the informant's statements and concluded that some were testimonial and violated the defendant's right to confrontation. See id., 628–29.

At the outset of its analysis, the court in *Smith* observed that the defendant's claim involved an issue of first impression in Connecticut and noted that, "although the consensus among the federal and state courts that have considered this question is that an informant's portion of a recorded conversation with a defendant made in the course of an investigation is not testimonial in nature, the deciding factor in their determination is the purpose for which the statements are introduced. . . . When an informant's statements were used only to provide context for the incriminating statements of the other party, these federal and state jurisdictions have concluded that the informant's statements were neither hearsay nor considered testimonial statements for the purposes of the confrontation clause." (Citations omitted; internal quotation marks omitted.) Id., 624–25.

Our Supreme Court agreed with the "contextual approach" employed by those federal and state jurisdictions "to the extent that an informant's statements will be deemed nonhearsay and nontestimonial when the statements merely place the conversation in context and serve no substantive purpose." Id., 625–26. Applying this approach, the court in *Smith* concluded that some of the informant's statements were testimonial and others merely provided context for the coconspirator's

statements. See id., 626–28. Nevertheless, the court concluded that the defendant's claim failed under *Golding*'s fourth prong because the improper admission of those statements constituted harmless error. See id., 628–30.

On the basis of the court's analysis in *Smith*, it is unclear whether all of Marra's statements would be considered testimonial even today. Certainly, not all of Marra's statements fall squarely and undoubtedly within any of the three core categories of testimonial statements expressly recognized in *Crawford*, nor were they all used for hearsay purposes as observed in *Smith*. Given the recognized lack of clarity in how *Crawford* applied generally, and specifically as to the statements of government informants, a posttrial claim by Randolph, made within days of when *Crawford* was issued, would have tread new ground in an area in which the United States Supreme Court itself had just rewritten the law. As our Supreme Court noted shortly after *Crawford* was decided, "[t]he express distinction drawn by the United States Supreme Court in *Crawford* between testimonial and nontestimonial hearsay statements, for purposes of the confrontation clause, is a novel one." *State* v. *Rivera*, 268 Conn. 351, 364 n.13, 844 A.2d 191 (2004).

In essence, "the petitioner takes issue with his counsel's failure to assert a novel theory that [had] neither been presented to, nor accepted by, the courts of this state. As our Supreme Court has held, counsel's failure to advance novel legal theories or arguments does not constitute ineffective performance. . . . To conclude that counsel is obligated to recognize and to preserve previously undecided constitutional claims, the viability of which is purely speculative, would be to require criminal defense lawyers to possess a measure of clairvoyance that the sixth amendment surely does not demand. . . . Thus, the failure of counsel to pursue a novel constitutional argument does not constitute

ineffective assistance." (Citations omitted; internal quotation marks omitted.) *Davis* v. *Commissioner of Correction*, 198 Conn. App. 345, 358, 233 A.3d 1106, cert. denied, 335 Conn. 948, 238 A.3d 18 (2020). "Counsel . . . performs effectively when he elects to maneuver within the existing law, declining to present untested . . . legal theories." (Internal quotation marks omitted.) *Ledbetter* v. *Commissioner of Correction*, 275 Conn. 451, 462, 880 A.2d 160 (2005), cert. denied sub nom. *Ledbetter* v. *Lantz*, 546 U.S. 1187, 126 S. Ct. 1368, 164 L. Ed. 2d 77 (2006).

Accordingly, we agree with the habeas court's conclusion that Randolph did not render deficient performance in failing to raise a claim pursuant to *Crawford* shortly after that decision was issued.[8] See id., 461 ("while the failure to advance an established legal theory may result in ineffective assistance of counsel under *Strickland*, the failure to advance a novel theory never will" (internal quotation marks omitted)). Consequently, the petitioner's claim that Bansley rendered ineffective assistance of counsel by not raising the *Crawford* claim as to Randolph necessarily fails.

B

We next address the petitioner's claim that Stevenson provided ineffective assistance of counsel by failing to raise a *Crawford* claim on direct appeal. More specifically, the petitioner claims that the habeas court improperly concluded that Stevenson made a reasonable decision not to pursue this claim on appeal given

[8] Because we conclude that Randolph did not perform deficiently by failing to raise a *Crawford* claim, we need not address the prejudice prong under *Strickland*. See *Williams* v. *Commissioner of Correction*, 223 Conn. App. 745, 753, 310 A.3d 381 ("[i]t is well settled that courts may decide against a petitioner on either prong [of the test articulated in *Strickland* v. *Washington*, supra, 466 U.S. 687, and *Hill* v. *Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)], whichever is easier" (internal quotation marks omitted)), cert. denied, 349 Conn. 901, 312 A.3d 586 (2024).

the open question of whether review pursuant to *State* v. *Golding*, supra, 213 Conn. 239–40, applied to a *Crawford* claim and that the petitioner failed to demonstrate a reasonable probability of success on appeal, as the admission of Marra's statements would have constituted harmless error. We disagree with the petitioner.

The following legal principles inform our analysis of the petitioner's claim. "Under the performance prong [of *Strickland*], [a] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . . [Although] an appellate advocate must provide effective assistance, [she] is not under an obligation to raise every conceivable issue. A brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions. . . . [I]f the issues not raised by his appellate counsel lack merit, [the petitioner] cannot sustain even the first part of this dual burden since *the failure to pursue unmeritorious claims cannot be considered conduct falling below the level of reasonably competent representation.*" (Emphasis in original; internal quotation marks omitted.) *Cator* v. *Commissioner of Correction*, 181 Conn. App. 167, 176, 185 A.3d 601, cert. denied, 329 Conn. 902, 184 A.3d 1214 (2018).

In the present case, the petitioner did not preserve a challenge to the admission of Marra's statements at trial, presumably because *Crawford* had yet to be decided. Accordingly, to determine whether Stevenson rendered deficient performance in the petitioner's direct appeal by failing to raise an unpreserved *Crawford* claim pursuant to *Golding*, we must consider whether that unpreserved claim would have survived *Golding* review.

The second habeas court concluded that it "was reasonable under the circumstances of this case for Stevenson to not seek *Golding* review of a *Crawford* claim,

a type of review still not approved by the Supreme Court." In reaching that conclusion, the court failed to recognize that, in *State* v. *Greene*, 274 Conn. 134, 167, 874 A.2d 750 (2005), cert. denied, 548 U.S. 926, 126 S. Ct. 2981, 165 L. Ed. 2d 988 (2006), which was decided months before Stevenson filed her appellate brief in the petitioner's direct appeal, our Supreme Court had reviewed a defendant's unpreserved *Crawford* claim pursuant to *Golding*. In *Greene*, the defendant claimed that the admission of hearsay statements made by unavailable victims violated his right to confrontation under the sixth amendment to the United States constitution. Id., 165. Like the procedural history in the present appeal, the underlying criminal trial in *Greene* concluded before the release of *Crawford*. On appeal, the defendant in *Greene* conceded that his sixth amendment claim was not preserved at trial but asserted that his unpreserved claim nevertheless was reviewable pursuant to *Golding*. Id., 142. Our Supreme Court agreed that his unpreserved claim was reviewable under *Golding*'s first two prongs, as the record was adequate for review and the claim was of constitutional magnitude. See id., 167. Ultimately, however, the court rejected the defendant's claim on the merits under *Golding*'s third prong, concluding that no constitutional violation existed because the challenged statements were not testimonial in nature. See id., 171–72. In light of *Greene*, we disagree with the habeas court's reasoning as to the supposedly "open question" regarding *Golding* review of unpreserved *Crawford* claims. Instead, we conclude that Stevenson should have known that she could raise an unpreserved *Crawford* claim pursuant to *Golding*.

The respondent, the Commissioner of Correction, also argues that it would have been reasonable for Stevenson to conclude that Randolph had waived the *Crawford* claim by failing to object to the introduction of Marra's statements through Nobile. We disagree.

"[W]hen the law governing a defendant's constitutional claim has changed after the defendant's trial, counsel acting under binding precedent in effect at the time of the trial cannot make a knowing and intelligent waiver of rights affected by the later decision changing the law." *State* v. *Johnson*, 345 Conn. 174, 188–89, 283 A.3d 477 (2022).[9] Further, although the respondent is correct that *Johnson* had not been decided at the time of the petitioner's criminal trial, it would have been reasonable for Stevenson to have relied on *State* v. *Greene*, supra, 274 Conn. 134, in which trial counsel similarly did not object to the challenged testimony prior to the existence of a colorable claim under the confrontation clause. Consequently, we address whether there was a reasonable likelihood that the petitioner's unpreserved *Crawford* claim would have been successful on direct appeal to determine whether Stevenson performed deficiently in not raising such a claim and whether the petitioner was prejudiced by her failure to do so.

[9] Both the habeas court and the respondent rely on footnote 8 in *State* v. *Johnson*, supra, 345 Conn. 174, in positing that the question of whether *Golding* applied to a *Crawford* claim was still uncertain. Id., 185 n.8 ("The question of whether and to what extent unpreserved claims alleging violations of *Crawford* . . . are subject to *Golding* review is currently pending before this court. See *State* v. *Robles*, Docket No. SC 20452 (argued October 18, 2022)." (Internal quotation marks omitted.)). Further, the respondent asserts that "[t]he [court in] *Robles* . . . thereafter determined that it did not need to address the issue because, even if *Golding* applied, the state had proven that any *Crawford* violation was harmless. . . . Thus, the issue remains undecided." (Citation omitted.) We disagree with the respondent's reading of *Johnson* and *Robles*. Although the footnote in *Johnson*; see *State* v. *Johnson*, supra, 185 n.8; does indicate that the then pending appeal in *Robles* would address the application of *Golding* to unpreserved *Crawford* claims, the specific issue in *Robles* was whether the defendant had waived his *Crawford* claim by failing to raise it at trial. See *State* v. *Robles*, 348 Conn. 1, 8, 301 A.3d 498 (2023). As we conclude in the present case, consistent with our Supreme Court's conclusion in *Johnson* and *Greene*, the petitioner could not have waived his claim, given the unique circumstances in which the governing law changed after the case was tried, which was not the case in *Robles*. Moreover, as we stated previously, *Greene* dispels any uncertainty of whether *Golding* review applies to *Crawford* claims such as the petitioner's.

Our analysis is guided by well established principles. "[The *Golding* doctrine] permits a [petitioner] to prevail on [an unpreserved] claim of constitutional error . . . only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the [petitioner] 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. . . . [T]he first two [prongs of *Golding*] involve a determination of whether the claim is reviewable; the second two . . . involve a determination of whether the [petitioner] may prevail." (Internal quotation marks omitted.) *Cator* v. *Commissioner of Correction*, supra, 181 Conn. App. 177–78. "We are free to respond to the [petitioner's] claim by focusing on whichever *Golding* prong is most relevant, as the inability to meet any one prong requires a determination that the [petitioner's] claim must fail." (Internal quotation marks omitted.) *Williams* v. *Commissioner of Correction*, 226 Conn. App. 617, 634, 319 A.3d 242, cert. denied, 350 Conn. 912, 324 A.3d 143 (2024).

In the present case, the reviewability prongs are satisfied because the record is adequate for review and the petitioner's *Crawford* claim is of constitutional magnitude and alleges the violation of a fundamental right. As to the merits, we assume without deciding that all of the statements attributed to Marra were testimonial in nature and that their admission through Nobile violated the petitioner's constitutional right to confrontation.[10] We therefore turn to *Golding*'s fourth prong, which is dispositive of the petitioner's claim.

[10] In contrast to Randolph's situation as the petitioner's criminal trial counsel, by the time Stevenson had filed the direct appeal in this matter, courts had started to address whether statements made by unavailable informants violated the confrontation clause. See, e.g., *United States* v. *Casiano*, 133 Fed. Appx. 791, 794 (2d Cir. 2005); *United States* v. *Hendricks*,

The petitioner broadly asserts that, "[i]f Marra's statements and materials were excluded on confrontation grounds, the state's attempted murder case would have unraveled, and the sexual assault case would have been reduced to a credibility contest [between the petitioner and the victim]." The respondent contends that, aside from Marra's statements, there was other "damning evidence against the petitioner," such as the petitioner's own statements, Holeman's testimony, and information from Nobile's and Dillon's independent investigations, relevant to a harmless error analysis that would inform counsel's decision of what claims to raise. After carefully reviewing the record, we agree with the habeas court that, both with respect to the sexual assault case and the attempted murder case, any improper admission of Marra's statements constituted harmless error.

"[T]he test for determining whether a constitutional [error] is harmless . . . is whether it appears beyond a reasonable doubt that the [error] complained of did not contribute to the verdict obtained. . . . [Our Supreme Court] has held in a number of cases that when there is independent overwhelming evidence of guilt, a constitutional error would be rendered harmless beyond a reasonable doubt. . . . [W]e must examine the impact of the evidence on the trier of fact and the result of the trial. . . . If the evidence may have had a tendency to influence the judgment of the jury, it

395 F.3d 173, 184 (3d Cir. 2005); see also *United States* v. *Silva*, 380 F.3d 1018, 1020 (7th Cir. 2004) ("[t]his court has warned against the potential for abuse when police testify to the out-of-court statements of a confidential informant"). Although our Supreme Court did not address this issue until three years after the direct appeal was filed in *State* v. *Smith*, supra, 289 Conn. 622–27, because the habeas court in the present case did not address the issue, we decline to address the issue of whether *Crawford* would have still been a novel claim at the time of the direct appeal and instead address whether there was a reasonable likelihood that a *Crawford* claim relying on *Golding* review would have been successful on direct appeal to determine whether Stevenson performed deficiently in not raising such a claim.

cannot be considered harmless. . . . That determination must be made in light of the entire record [including the strength of the state's case without the evidence admitted in error]. . . . Additional factors that we have considered in determining whether an error is harmless in a particular case include the importance of the challenged evidence to the prosecution's case, whether it is cumulative, the extent of cross-examination permitted, and the presence or absence of corroborating or contradicting evidence or testimony." (Internal quotation marks omitted.) *State* v. *Tony O.*, 211 Conn. App. 496, 526, 272 A.3d 659, cert. denied, 343 Conn. 921, 275 A.3d 214 (2022).

We first turn to the attempted murder case. Marra was a significant figure in both the underlying criminal activity and Nobile's and Dillon's investigations. He provided the initial information regarding the petitioner's intent to harm the victim. Nevertheless, the confrontation clause would have limited the state's ability to present only Marra's testimonial statements as evidence and would not have affected its ability to present evidence regarding Marra's general involvement in the case. See *Crawford* v. *Washington*, supra, 541 U.S. 61 (confrontation clause applies only to testimonial statements). Mindful of this distinction between Marra's general involvement and his testimonial statements, we conclude that any improperly admitted testimonial statements were cumulative in light of all the other evidence presented at the criminal trial.

The only evidence containing Marra's statements admitted in the attempted murder case includes exhibit 14, the letter from Marra to Nobile offering information about the petitioner; exhibit 16, the transcript of Marra's phone conversation with the petitioner; exhibit 19, a letter dated August 13, 2002, from Marra to the petitioner asking for "Donna's" plate number; and the information that Nobile testified that Marra told him, including the code used by the petitioner and Marra in their

communications to identify the victim, her address, and her license plate number.

As to Marra's information about the code, the petitioner argues that, "[w]ithout Marra's explanation of the coded communications contained in the letters, the letters offered into evidence are not incriminating." The state, however, established the significance of the letters without Marra's explanation.

Both Dillon and Nobile testified that they independently ascertained the victim's address, license plate number, and her vehicle's make and model, and that the victim's identifying information appeared in the petitioner's letters. Indeed, Marra's statements to Nobile were unnecessary to decode the petitioner's rudimentary efforts to hide the identifying information about the victim in his communications with Marra. In exhibit 13, the letter from the petitioner to Marra dated September 9, 2002, the victim's address was written on the envelope, and the letter referenced a "white four-door Blazer." Given that both Nobile and Dillon knew the victim's identifying information, a plain reading of the letter made it apparent that the petitioner was conveying the victim's identifying information in those letters. Additionally, the encoding of the license plate "190RSD" as "[o]ne ninety Rose Soap Dish" in the letter was not complex, and the petitioner—not Marra—provided the explanation of his code in his recorded conversation with Marra. Thus, the petitioner's statements, not Marra's, provided a solution to the code, to the extent one was needed.

The only explanation of the "code" that originated solely from Marra was that "Donna" referred to the victim and that "Joe Black" referred to the petitioner. Although the information about the aliases was used to establish that the petitioner was writing the letters

and providing the victim's information, the state established through many different sources at trial that the petitioner was the author of the letters and that the letters contained the victim's identifying information. The petitioner referenced the letters he sent Marra during his recorded phone calls with Nobile and Marra, transcripts of which were admitted into evidence as exhibits 17 and 16, respectively. Further, Nobile's testimony that Joe Black symbolized death was based on Dillon's research suggesting that the alias was a reference to the movie, "Meet Joe Black." Similarly, the explanation of the alias "Donna" was unnecessary, given the testimony of Dillon and Nobile linking the identifying information in the letter to the victim, which removed any doubt about the identity of "Donna." Moreover, the petitioner's own affirmative reply to Nobile mentioning "Donna" during their phone call further confirmed this fact. Therefore, Marra's statements about the code were cumulative and unnecessary to the state's case, as there was an abundance of other evidence establishing the meaning of the letters.

Exhibit 14, the letter sent to Nobile from Marra in August, 2002, exhibit 19, the letter from Marra to the petitioner dated August 13, 2002, and Marra's verbal statements to Nobile and Dillon identifying the petitioner as someone who wanted a victim killed also were cumulative in light of the petitioner's own statements establishing that fact. As the habeas court concluded, "[the petitioner] himself, not Marra, provided the critical facts needed to convict him in the attempted murder case through his correspondence to Marra and his phone conversation with Nobile." In particular, letters from the petitioner to Marra, one postmarked August 8, 2002, and the other dated September 9, 2002, exhibits 12 and 13, respectively, demonstrate that the petitioner sent Marra the victim's identifying information when requested. The petitioner's statements made during his

recorded phone calls with Nobile, transcripts of which were admitted as exhibits 16 and 17, in which he acknowledged the identifying information in the letters sent to Marra, established a link between his correspondence with Marra and contracting with Nobile to be the assassin. Specifically, during his recorded phone call with Nobile on October 14, 2002, exhibit 17, the petitioner confirmed the price when prompted by Nobile, gave a time frame for the murder, and confirmed that the target was "Donna." Further, during their recorded phone call on October 18, 2002, exhibit 18, the petitioner discussed meeting with Nobile to give him some of the money. In addition, the evidence seized by law enforcement at the petitioner's residence, including Marra's contact information and information about the victim, further established the petitioner's relationship with Marra and his intent to kill the victim. Likewise, Holeman's testimony, despite the minor role that it played, provided confirmation of both Marra's relationship with the petitioner and the petitioner's intent to harm the victim.

Although the petitioner asserts in his reply brief that the state's closing argument demonstrates the state's reliance on Marra to prove the attempted murder charge, the record reflects otherwise. To be sure, Marra features prominently in the state's narration of events because he first alerted the state to the petitioner's interest in killing the victim and was the conduit who introduced Nobile to the petitioner. Nevertheless, during its closing argument, the state distinguished between Marra's involvement and Marra's statements by relying on Nobile's and Dillon's independent investigations and the petitioner's own statements and actions. For example, after describing the September 4, 2002 meeting, the prosecutor argued to the jury, "Nobile indicated that what they did is, they took this information and other information that they had gotten from

. . . Marra. The name of the victim, the address of the victim, and the other information regarding the victim and they tried to corroborate information. Because they weren't going to [accept] the word of . . . Marra." The state then explained the contents of the letters using information sourced independently by Nobile and Dillon. The prosecutor then argued that the state used the petitioner's own statements referring to the encoded information to demonstrate that "[the petitioner] shows full knowledge of what the plan is here." Consequently, we agree with the habeas court that the admission of Marra's statements with regard to the attempted murder case was harmless beyond a reasonable doubt because the petitioner's own statements and Dillon's and Nobile's independent investigations rendered Marra's statements of little value.

For these same reasons, the admission of Marra's statements in connection with the sexual assault case was harmless beyond a reasonable doubt. As discussed previously, Marra's statements about the attempted murder were cumulative of the other evidence presented. Further, evidence of the attempted murder was not the focus of the sexual assault case but was introduced primarily as consciousness of guilt evidence. The state relied on other ample evidence of the petitioner's guilt, including: (1) the victim's own testimony; (2) photos of the victim's injuries; (3) the corroboration of the victim's testimony by two witnesses; (4) the other extrinsic evidence introduced, including the victim's sweatpants with the broken drawstring; (5) the expert witness who testified that the forensic examination revealed that the victim's underwear contained the petitioner's DNA; and (6) Holeman's testimony that the petitioner described the sexual assault charge as a date that went too far. Thus, contrary to the petitioner's argument, the state's sexual assault case was based on much more evidence than Marra's statements and the

word of the victim. Against this backdrop, Marra's statements were insignificant to the overall strength of the state's case.

In sum, after a careful review of the record, we conclude that the petitioner's claim fails to satisfy *Golding*'s fourth prong due to the cumulative nature of Marra's statements and the other independent evidence of the petitioner's guilt. For this reason, we cannot conclude that Stevenson's strategic decision to forgo the *Crawford* claim was unreasonable. Moreover, even if we were to so conclude, it is clear that the petitioner was not prejudiced by Stevenson's failure to raise the *Crawford* claim because there was not a reasonable likelihood that it would have succeeded on appeal. For these reasons, the petitioner's claim that Bansley rendered ineffective assistance of counsel by not raising the *Crawford* claim as to Stevenson necessarily fails.

II

The petitioner's final claim is that Bansley rendered ineffective assistance in the first habeas by failing to argue that Randolph performed deficiently in failing to pursue a claim that the state had violated the petitioner's right to counsel pursuant to *Massiah* v. *United States*, supra, 377 U.S. 201, by using Marra to elicit incriminating statements from him. The following additional facts and procedural history, as set forth by this court in *State* v. *Santaniello*, supra, 96 Conn. App. 646, are relevant to the petitioner's *Massiah* claim.

"On July 29, 2003, the [petitioner] filed a 'request for discovery and production,' in which he requested that the state produce exculpatory information, books, papers or documents that the state intended to offer into evidence or which might be helpful to the defense, copies of the [petitioner's] criminal record, reports of experts, warrants related to the [petitioner], written or oral statements made by the [petitioner], statements of

coconspirators, names and addresses of all witnesses, statements of witnesses, felony or misdemeanor convictions of witnesses and any other relevant material and information.

"During jury voir dire on December 18, 2003, a discussion ensued related to the production of documents in which both [Randolph] and the state initially agreed that the court should conduct an in camera review of Marra's [D]epartment of [C]orrection file. The court then stated that it wanted the state to review the file first and to discuss the procedure with [Randolph]. The court explained that the state had a duty to conduct the initial review of these documents. The state agreed, and [Randolph] then told the court that he would 'indicate to the [c]ourt what it is in the file that would be of material benefit to the defense were it included in the file.' [Randolph] explained that he wanted the file reviewed for information that would benefit the [petitioner's] entrapment defense and for information indicating that Marra was an operative informant of the state on an ongoing basis. The court then, specifically to protect the record, told [Randolph] that he should make a precise written request as soon as possible as to what materials he believed might be in the state's possession and why they should be disclosed, to which [Randolph] responded: 'Certainly.' The court continued: 'I think that would be a good idea because in the event of an appeal, then there is no misunderstanding, no mistake. If you want something for truthfulness, something to establish the nature and extent of any relationship with the state, agency relationship now or ever, character evidence, whatever you want. Just put it in writing so the state knows what you want and so if I get involved in reviewing the materials, I can be aware of them.' [Randolph] then thanked the court and agreed that he would put his request in writing sooner rather than later. . . .

"On January 5, 2004, during oral argument on these motions, the court asked if [Randolph] still wanted the court to review the [D]epartment of [C]orrection documents in camera to assess whether there was 'a continuing relationship such that . . . any statements made at any [time would not be] admissible for any purpose.' [Randolph] responded: 'That's right.' The court stated that it wanted to hear further argument on these motions later in the day, and it then would determine if it needed to conduct an in camera review of documents. Later that day, [Randolph] agreed that the reason he was seeking disclosure and the court's review of these documents 'pertain[ed] to a claim that Marra at some point became an agent of the government and the statements ought to be suppressed . . . .' The court, again, explained that it was the duty of [the] state to review these documents first. [Randolph] expressly stated that the court was correct. He then stated: 'I think . . . [the prosecutor] as an officer of the court would probably disclose to me if there were [any material disclosable under *Giglio* v. *United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), or *Brady* v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)] in the records anyway. . . . So, I don't have any concern that [the prosecutor] go through the records rather than have . . . an in camera inspection at the outset. I would agree that [the prosecutor] should have an opportunity to do that.' Following a recess, the court explained for the record that it had spoken to both counsel in chambers concerning, among other things, these motions, and the court suggested that the prosecutor review the records for exculpatory information or anything related to an agency relationship that Marra had with the government and that it would be best to 'keep the court out of the loop at this point.' Both [Randolph] and the state expressly agreed. The court also stated that in light of this, it did not need to act

on the motion for disclosure of records at this time. Again, both [Randolph] and the state expressly agreed. In relation to the motion to suppress, [Randolph] stated that if nothing in the documents revealed an ongoing agency relationship between Marra and the government, then, for purposes of this case, the agency relationship began between September 4 and 18, 2002.

"During further discussion on these motions on January 8, 2004, the prosecutor explained that he had obtained the [D]epartment of [C]orrection documents on Marra and that he had some exculpatory material as well as other material that questionably could be disclosable. The court directed the prosecutor to turn over anything that he believed the [petitioner] was entitled to obtain and that if after meeting with [Randolph] there remained questionable documents, they should be brought to chambers so that the court could inspect them. Both [Randolph] and the state agreed.

"After a recess during which the state and [Randolph] met, the prosecutor affirmed that he had turned over to [Randolph] all documents that, even arguably, could be discoverable or related to the issue of agency. Thereafter, the [petitioner] did not renew his request that the court conduct an in camera review of documents or argue that some documents had not been turned over or that the court needed to take any further action on his motion for disclosure of records. . . . [I]t appears that the issue of disclosure and the necessity for an in camera inspection had been addressed fully at this time and that the court had nothing further upon which to act related to this motion or request.

"On January 12, [2004], several days after Marra's [D]epartment of [C]orrection documents had been turned over to the [petitioner], the court heard further oral argument on the [petitioner's] motion to suppress statements that he had made to Marra. . . . [T]he court

did not rule on this motion. Rather, the state and [Randolph] agreed on the admissibility of these statements, thereby rendering the motion moot.

"During the January 12, [2004], hearing, the [petitioner] agreed that for purposes of this case, Marra had not been acting as an agent of the government prior to September 4, 2002, and that any statements made prior to that date were admissible fully. The [petitioner] also agreed that the statements he made to Marra after September 4, 2002, were admissible as to the attempted murder information, with one exception. The [petitioner] did not agree that a September 9, 2002, letter written by the [petitioner] to Marra [(exhibit 13)] was admissible. The court then concluded that the parties had reached agreement on all but one of the statements sought to be suppressed, and it stated that it would make a ruling on the admissibility of that September 9, 2002 letter later in the day. Counsel did not object.[11]

"During the testimony of Nobile later that day, the state offered the September 9, 2002 letter into evidence, and [Randolph] specifically stated that he had no objection. The court, sua sponte, immediately explained to the jury that it would have further instructions for it at

[11] Specifically, the state contended that the letter in exhibit 13, although dated September 9, 2002, was responsive to the August 13, 2002 letter from Marra to the petitioner (exhibit 19) and, therefore, was elicited by Marra prior to September 4, 2002, and could not be suppressed pursuant to *Massiah*. Randolph initially was unwilling to concede this point because "[the letter] may have been in response to a telephone call from [Marra] subsequent to September 4, 2002." No such evidence was offered during the hearing or trial. Randolph agreed with the court's suggestion to think about the issue further and for the court to address the admissibility of exhibit 13 in the sexual assault case later. Randolph further agreed with the state that exhibit 13 would be admissible in the attempted murder case and could be presented as evidence at trial. Upon the prosecutor's informing the court of his intention to introduce exhibit 13 through Nobile, the court suggested that it would inform the jury that it would give specific instructions concerning the precise nature of the letter's admissibility in the court's closing instructions. Both Randolph and the state agreed.

a later time concerning how this and other letters could be treated by the jury and for what purposes they might be considered." (Footnote added; footnotes omitted.) Id., 664–68.

Specifically, at the close of the petitioner's criminal trial, the court instructed the jury that "[a]ny statements with the exception of state's exhibit 12 made by the [petitioner] to [Marra] or [Nobile] after September 4, 2002, the date [Marra] became a person cooperating with the government for purposes of this case, may not be considered by you at all in your evaluation of the charges of sexual assault in the first degree, burglary in the first degree, and kidnapping in the first degree in docket number CR-02-122734." Exhibit 12 was admitted solely as consciousness of guilt evidence. The court also instructed the jury that exhibit 13, the September 9, 2002 letter, could be considered only as consciousness of guilt evidence in the sexual assault case.[12]

At the second habeas trial, Randolph testified about his view of the viability of a *Massiah* challenge based on Marra's having acted as an agent of the government prior to September 4, 2002, during the following exchange between the petitioner's counsel and Randolph:

"[The Petitioner's Counsel]: Alright. So, if Tommy Marra was an informant working for the state at the time he approached [the petitioner], would that be a basis to try and exclude the information reportedly gleaned by [Marra] from [the petitioner]?"

"[Randolph]: I don't think it can be argued that he was an agent working for the state. The state did not

[12] It follows that the court accepted the state's argument that exhibit 13 was responsive to exhibit 19, the August 13, 2002 letter, and was elicited by Marra prior to September 4, 2002. See footnote 11 of this opinion. Randolph did not raise any objections to the admission of exhibit 13 or the court's instructions thereto.

prompt, apparently, [Marra] to do anything. He initiated contact, and so I do not think those facts go to, basically, the state breaching [the petitioner's] sixth amendment right to counsel, or his fifth amendment right."

In its memorandum of decision, the habeas court found that Randolph did not render ineffective assistance because he had raised the claim "to the extent that he was able to rely on [*Massiah*]." The court found that the petitioner's right to counsel in the attempted murder case did not attach until after the investigation into the attempted murder was concluded. With respect to the sexual assault case, in which the petitioner's right to counsel had attached prior to his involvement with Marra, the habeas court concluded that *Massiah* had limited application as delineated by the trial court.

In the present appeal, the petitioner claims that Randolph rendered ineffective assistance by not arguing that "the state . . . should be deemed to have had a tacit ongoing agreement with Marra, in which Marra would provide information about any criminal defendants available to him in exchange for the promise of a potential benefit . . . ." The petitioner asserts that, had Randolph not abandoned the *Massiah* challenge, this tacit ongoing agreement between Marra and the state would have provided a basis for the suppression of all evidence of the attempted murder plot in the sexual assault case, reducing the sexual assault case to a credibility contest between the petitioner and the victim. The respondent argues that the petitioner failed to present evidence that supports his claim.[13] We agree with the respondent.

[13] The respondent also contends on appeal that the record is inadequate to review the petitioner's claim that Marra had a preexisting agency relationship with law enforcement because the court relied on its determination that the petitioner's right to counsel had not yet attached in the attempted murder case. In response, the petitioner argues that this reliance means that "the habeas court necessarily rejected the petitioner's argument that Marra was a state agent at the time of his initial approach, because, otherwise, that would have also served as a basis to suppress the material and information

The record from the petitioner's criminal trial and the habeas trial is clear that Randolph made a tactical decision not to pursue the precise *Massiah* challenge raised by the petitioner in the present case. Counsel is presumed to have made a sound strategic decision when he elected not to pursue such a challenge, unless the petitioner rebuts that presumption with sufficient evidence that counsel's decision was objectively unreasonable. See *Williams* v. *Commissioner of Correction*, 142 Conn. App. 744, 752, 68 A.3d 111 (2013). The petitioner argues that Randolph's limited approach to challenging Marra's role as a government agent was objectively unreasonable because Marra, during all of his interactions with the petitioner, was acting as an agent of the state pursuant to an implicit understanding. We are not persuaded.

"In a line of cases extending from *Massiah* v. *United States*, [supra, 377 U.S. 201], through *United States* v. *Henry*, 447 U.S. 264, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980), to *Maine* v. *Moulton*, [474 U.S. 159, 106 S. Ct.

supplied by Marra . . . ." We conclude that the record is adequate to review the petitioner's *Massiah* claim.

With respect to the sexual assault case, the court found that, considering the limited use of the petitioner's statements to Marra, *Massiah* had limited application. Consequently, the court concluded that Randolph did not render ineffective assistance by raising *Massiah* in the manner that he did. On appeal, the petitioner alleges harm from the limited admission of the evidence in the sexual assault case and argues that the alleged tacit ongoing agreement between Marra and the state provided a basis for the suppression of all evidence of the attempted murder plot in the sexual assault case.

Although the habeas court did not make any factual findings as to the alleged agency relationship, it is well settled that, "to the extent that the resolution of [the issue of agency] calls for application of the controlling legal standard to the historical facts, it presents a . . . question of law . . . which [this court reviews] de novo. . . . Such a review is not limited to the facts the trial court actually found in its decision on the defendant's motion to suppress. Rather, [this court] may also consider undisputed facts established in the record, including the evidence presented at trial." (Citation omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Ashby*, 336 Conn. 452, 467–68, 247 A.3d 521 (2020).

477, 88 L. Ed. 2d 481 (1985)], the United States Supreme Court has held that a state violates the sixth amendment when, acting through an undisclosed agent, it deliberately elicit[s] incriminating statements from an accused after he ha[s] been indicted and his right to counsel has attached." (Internal quotation marks omitted.) *State* v. *Swinton*, 268 Conn. 781, 854–55, 847 A.2d 921 (2004). "The general nature of this constitutional duty is clear: [T]he [s]tate [has] an *affirmative obligation* to respect and preserve the accused's choice to seek [the] assistance [of counsel]." (Emphasis in original; internal quotation marks omitted.) *State* v. *Ashby*, 336 Conn. 452, 469, 247 A.3d 521 (2020).

In order to succeed on a claim that his sixth amendment right to counsel was violated pursuant to *Massiah*, the petitioner must prove the following: "(1) the [s]ixth [a]mendment right to counsel ha[d] attached; (2) the individual seeking information from the [petitioner was] a government agent acting without the [petitioner's] [counsel] being present; and (3) that agent deliberately elicit[ed] incriminating statements from the [petitioner]." (Internal quotation marks omitted.) Id., 465. Although there is no bright-line test for an agency relationship, our Supreme Court has provided guidance on determining whether such a relationship exists.

"The existence of an agency relationship . . . turns upon a number of factual inquiries into the extent of police involvement with the informant. Those inquiries include the following: whether the police have promised the informant a reward for his cooperation or whether he is self-motivated . . . whether the police have asked the informant to obtain incriminating evidence and placed him in a position to receive it . . . and whether the information is secured as part of a government initiated, [preexisting] plan." (Internal quotation marks omitted.) Id., 475. "[I]n the absence of any such

directive or promise, 'a trial court [correctly] may determine that an informant was not so much a government agent . . . as he was an entrepreneur who hoped to sell information to the government.' " Id., 524 (*Mullins*, *J.*, concurring in part and dissenting in part).

In the present case, the petitioner acknowledges that there is no evidence that the state expressly asked Marra to secure information from the petitioner. Nor is there any evidence that the state directly made any promise to Marra of a benefit if he did so. Instead, the petitioner argues that "Marra's long experience as a jailhouse informant, combined with his parallel meetings with other law enforcement personnel beyond those involved with the instant investigation, and his continued retention of the same attorney to represent him in his dealings with the state created a course of conduct from which can be inferred an implicit agency relationship between the state and Marra at the time he began providing information against the petitioner."

In particular, the petitioner relies on Nobile's testimony at the petitioner's criminal trial that he had previously accompanied another inspector to interview Marra about an unrelated homicide case, as well as Marra's documented involvement in *State* v. *Tomasko*, 242 Conn. 505, 700 A.2d 28 (1997), to demonstrate that Marra's role as a state informant was "enormous . . . ." In *Tomasko*, the defendant claimed that the state had failed to disclose audiotapes of police interviews with Marra, which the defendant argued suggested Marra's potential involvement in the victim's death. Id., 514. In resolving that claim, our Supreme Court discussed Marra's involvement with police, noting that "Marra [had] indicated that, commencing in October, 1985, he had been interviewed on several occasions by . . . various other police officials about a number of subjects"; id., 515; and that Marra "had been questioned about more than twenty homicides." Id., 516. At the underlying

habeas trial, Gailor confirmed the accuracy of the statements in *Tomasko* regarding Marra.

The petitioner argues, relying on *United States* v. *Brink*, 39 F.3d 419 (3d Cir. 1994), that, even in the absence of an express directive from law enforcement, these past interactions constituted evidence of the existence of a tacit agreement between law enforcement and Marra that would have supported a successful *Massiah* challenge as to all statements the petitioner made to Marra. In *Brink*, the United States Court of Appeals for the Third Circuit found evidence of an agency relationship where the record reflected that the inmate began to inform on other inmates in the hope of having his sentence reduced, the inmate received government training as an informant, and the inmate was told by a government agent that his cooperation would be reported to the United States Attorney and Attorney General. See id., 424. The court concluded that these facts could have led the informant to reasonably assume that the government was aware of his actions and would reward him. See id.

The present case is clearly distinguishable. Unlike in *Brink*, there is no indication that law enforcement provided any direction or instruction to Marra regarding the petitioner prior to September 4, 2002. Instead, the evidence in the present case is similar to that in *State* v. *Swinton*, supra, 268 Conn. 856, in which our Supreme Court rejected an almost identical *Massiah* claim to that made by the petitioner. In *Swinton*, the defendant claimed that a jailhouse informant "was acting as an agent throughout his interaction with the defendant because, based on his ongoing relationship with the state police, [the informant] had gathered information for the state 'in the hope and expectation of obtaining release from prison' and thus, the state 'created a situation in which incriminating statements were likely to be made.' " Id., 854. The court concluded that,

"[a]lthough [the informant] had been cooperating with the police in connection with a separate unrelated investigation and already had provided information with regard to that other investigation, this conduct did not transform him into an agent." Id., 856. The court also noted the trial court's findings that "there is no evidence whatsoever that the police had instructed [the informant] to gather information about this case, about crimes in general, or about any other case in particular, nor is there any evidence that the police had indicated to [the informant] that he would be rewarded in any way by providing information about crimes in general or about any other case in particular or about this case." (Internal quotation marks omitted.) Id., 857.

The same is true in the present case. The evidence from the petitioner's criminal trial was clear that Marra initiated contact with the state about the petitioner by sending a letter to Nobile. Furthermore, Dillon testified that he never asked Marra to collect information on the petitioner and that neither Nobile nor any other member of the Office of the Chief State's Attorney or law enforcement had done so. Marra's Department of Correction file, which was disclosed to Randolph during trial, reflects this lack of a preexisting relationship, as it exclusively contains voluntary interview statements signed by Marra and dated after September, 2002. The petitioner offered nothing to refute this evidence.

Further, although Marra clearly sought a benefit from working with the state, Nobile testified that, with respect to each of Marra's requests, the state neither promised nor provided Marra any benefit. See *State* v. *Lasaga*, 269 Conn. 454, 466, 848 A.2d 1149 (2004) (private citizen was not state agent when he neither was promised nor provided any benefit in exchange for information). Moreover, although the petitioner finds it significant that Marra was placed in a cell with a

pretrial detainee, there is no evidence that the placement was purposeful. Cf. *United States* v. *Brink*, supra, 39 F.3d 424 (finding that it was significant that, after inmate became informant for police, government placed informant in cell with pretrial detainee). To the contrary, Hall testified in the criminal proceeding that there were no records showing any request for Marra to be placed in the petitioner's cell.

Simply put, the evidence available to Randolph did not support the broad *Massiah* claim that the petitioner argues should have been made. Thus, we cannot conclude that Randolph's pursuit of his *Massiah* challenge as to the statements made by the petitioner to Marra was objectively unreasonable. Randolph raised a *Massiah* claim before the trial court to the extent he believed one was factually supported and was successful in suppressing the petitioner's statements made to Marra after September 4, 2002, in the sexual assault case, with the exception of exhibits 12 and 13, which were admitted solely as consciousness of guilt evidence. Although Randolph did not continue to pursue suppression of the petitioner's statements to Marra prior to September 4, 2002, we conclude that this decision was guided by professional judgment made after reviewing the relevant evidence, which included Marra's Department of Correction records that showed meetings with the state that occurred only after September, 2002, testimony from a Department of Correction employee explaining that there was no record of the petitioner being purposefully housed with Marra, the letter from Marra to Nobile offering information about the petitioner, and testimony by both Dillon and Nobile that reflected a lack of interaction with Marra prior to September 4, 2002. The decision to limit the *Massiah* challenge in light of this evidence therefore falls into the category of trial strategy that we consistently have declined to second-guess.

Consequently, we agree with the habeas court's conclusion that Randolph did not render deficient performance in failing to pursue a more expansive *Massiah* challenge. Accordingly, the petitioner's claim that Bansley rendered ineffective assistance of counsel by not raising a *Massiah* claim as to Randolph necessarily fails.

The judgment is affirmed.

In this opinion the other judges concurred.

FOUNDATION FOR THE ADVANCEMENT OF CATHOLIC SCHOOLS, INC., ET AL. *v.* THE MOST REVEREND LEONARD P. BLAIR ET AL.

(AC 46603)

Seeley, Westbrook and Prescott, Js.

Syllabus

The plaintiffs, a corporation and five members of its board of trustees, appealed from the trial court's judgment dismissing, for lack of subject matter jurisdiction, their declaratory judgment action that sought, inter alia, an interpretation of the corporation's bylaws governing the appointment of trustees to its board. The plaintiffs, who had commenced the action after certain appointments to the board were made by the named defendant, the former archbishop of the diocese of Hartford, claimed that the court erred in determining that exercising jurisdiction over the action would have violated the free exercise and establishment clauses of the first amendment to the United States constitution because adjudicating the dispute would have resulted in the excessive entanglement of government and religion. *Held*:

The trial court improperly granted the defendants' motion to dismiss for lack of subject matter jurisdiction on the basis of its determination that the plaintiffs' action asked the court to entangle itself in matters of religious doctrine and practice and church polity, as there was no first amendment barrier prohibiting the court from applying neutral principles of state law governing corporations to the secular language of the corporation's bylaws for the purpose of declaring the process to be followed in appointing board members and determining the validity of certain appointments to the board.

This court declined to adjudicate the defendants' alternative grounds for affirming the judgment, specifically, that the plaintiffs' lacked standing to

bring the action, because doing so would have required a resolution of disputed jurisdictional facts, which require an evidentiary hearing, and, thus, the case was remanded to the trial court for consideration of those standing claims and a hearing thereon.

Argued October 7, 2024—officially released February 25, 2025

Procedural History

Action for a declaratory judgment, inter alia, determining whether the appointment of certain trustees to the named plaintiff's board of trustees by the named defendant was in compliance with its bylaws and other governing documents, brought to the Superior Court in the judicial district of Hartford, where the trial court, *Noble, J.*, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiffs appealed to this court. *Reversed*; *further proceedings*.

James M. Moriarty, with whom, on the brief, was *Eric Henzy*, for the appellants (plaintiffs).

Hannah F. Kalichman, with whom, on the brief, was *Richard P. Colbert*, for the appellees (defendants).

Michael E. Roberts, former human rights attorney, filed a brief for the Commission on Human Rights and Opportunities as amicus curiae.

Opinion

SEELEY, J. The plaintiffs, Foundation for the Advancement of Catholic Schools, Inc. (FACS), and five members of its Board of Trustees (board),[1] appeal from the judgment of the trial court dismissing, for lack of subject matter jurisdiction, their complaint against the defendants, the Most Reverend Leonard P. Blair; Reverend Ryan M. Lerner; Reverend Michael Whyte; Reverend Jeffrey Romans; Reverend Daniel G. Keefe; and Matthew A. Byrne. On appeal, the plaintiffs claim that the court improperly dismissed their complaint for lack

[1] The five members are Brian A. Giantonio, Charles E. Hunt, Patricia A. Teufel, Nancy M. Palmisano, and Anita L. Schepker.

of subject matter jurisdiction after concluding that exercising jurisdiction over the action would violate the free exercise and establishment clauses of the first amendment to the United States constitution because adjudicating the dispute would result in the excessive entanglement of government and religion. We conclude that the trial court improperly determined that the first amendment bars adjudication of the plaintiffs' claims and, accordingly, reverse the judgment of the court.

The following undisputed factual and procedural history, as set forth by the court, *Noble*, *J.*, in its memorandum of decision dated June 15, 2023, dismissing the plaintiffs' complaint, is relevant to our resolution of this appeal. "This action arises from a dispute over [FACS'] bylaws, specifically, those governing the . . . authority to appoint members [to its board]. FACS is a Connecticut nonstock corporation incorporated in 1983 to promote Catholic education within the Archdiocese of Hartford (AOH) by raising funds and providing scholarships to students who want to attend an AOH school. . . . Pursuant to FACS' bylaws, the [board] consists of twenty-one members: fifteen lay members and six ex officio members compris[ed] of the sitting Archbishop of Hartford and certain other religious and lay representatives of the AOH. . . .

"Prior to 2005, the appointment of [the] members [of the board] was the sole prerogative of the archbishop. . . . In 2005, [FACS'] bylaws were amended to add a Governance Committee [(committee)] [that was] tasked with nominating a slate of candidates for open and vacant trustee positions. This slate of candidates would then be given to the archbishop to make appointments to the board. The current dispute arose in August, 2019, over whether the archbishop may appoint board members other than those nominated by the . . . committee. The plaintiffs claim that the archbishop may

only appoint trustees exclusively from the names nominated by the . . . committee. The defendants claim that the bylaws do not bind the archbishop to accept the nominations and, instead, the archbishop may reject the nominations put forth by the . . . committee and appoint trustees to the board not nominated by the . . . committee.

"The present action was commenced after certain appointments were made to the board by [then] Archbishop Leonard Blair[2] on July 8, 2020, and February 22, 2021. Between July 8, 2020, and February 22, 2021, Archbishop Blair appointed five new individuals to the board. . . . Archbishop Blair further communicated, [in letters dated July 10, 2020] to two board members whose terms had expired that the new board members appointed on July 8, 2020, had replaced them. . . . The plaintiffs have refused to accept these appointments, as the appointments were not made from the list of names provided by the . . . committee. [This] action was commenced [by service of process on October 6, 2021]. [The plaintiffs] fil[ed] . . . a complaint, writ, and summons on October 7, 2021.[3]

"In their motion to dismiss, the defendants argue[d] that the plaintiffs lack[ed] standing for four reasons . . . . On August 26, 2022, the court, sua sponte, raised

[2] It appears that, while this appeal was pending, Archbishop Blair was succeeded in office by Archbishop Christopher J. Coyne. Neither the plaintiffs nor any of the defendants have sought to substitute Coyne for Blair as a defendant. See Practice Book § 62-5 ("[a]ny change in the parties to an action pending an appeal shall be made in the court in which the appeal is pending"). In light of our conclusion that the trial court improperly rendered a judgment of dismissal and that this case should be remanded for further proceedings, the plaintiffs are ordered to seek substitution in the trial court upon remand.

[3] "The action seeks a declaratory judgment regarding the interpretation of the bylaws governing appointments to the board (count one) and a judicial determination invalidating the board appointments made by Archbishop Blair in July, 2021, and February, 2022 (count two)."

the issue of subject matter jurisdiction based upon the first amendment right to religious freedom. The court requested additional briefing on (1) whether it was deprived of subject matter jurisdiction by operation of the first amendment to the United States constitution and article first, § 3, of the constitution of Connecticut, (2) whether an evidentiary [hearing] needed to be held, and (3) whether § 7 of the 2005 bylaws mandates the archbishop to make appointments to the board . . . once nominations have been submitted to him. A hearing was held on November 29, 2022." (Citations omitted; footnote added; footnote in original; footnotes omitted.)

After both parties submitted supplemental briefing on the issue of subject matter jurisdiction, the court issued a memorandum of decision in which it concluded that, "[n]otwithstanding its formal status as a nonstock corporation . . . FACS is a religious organization with ecclesiastical doctrine and practices" and that "the court [could not] neutrally apply principles of corporate bylaw interpretation [in this case] without intruding upon the archbishop's religious decision-making authority." The latter conclusion was based on the court's determination that "the plaintiffs are seeking [a] declaratory judgment concerning the process by which trustees are appointed to FACS's board pursuant to its bylaws" and "[i]t is undisputed that the archbishop speaks for the AOH as an ecclesiastical authority and ultimately it is 'the archbishop who shall make appointments to the board.' " The court further concluded that adjudicating the plaintiffs' claims would entangle it in "matters of religious doctrine, religious practices and church polity," namely, "the religious context in which the archbishop appoints members to the board of a religious organization . . . ." Notably, the court reached this conclusion without referring to any specific doctrine, practice, or polity concerns that would be implicated by an adjudication of the plaintiffs' claims.

Thus, the court dismissed the plaintiffs' complaint on the ground that it lacked subject matter jurisdiction pursuant to the first amendment to the federal constitution and article first, § 3, of the Connecticut constitution, and, in light of that ruling, declined to address the issue of standing raised in the defendants' motion to dismiss. After the court rendered its judgment of dismissal, the plaintiffs filed this appeal.

The plaintiffs claim that the court improperly dismissed their complaint for lack of subject matter jurisdiction because FACS is not a religious organization, and that "[e]ven if FACS is a religious organization, the . . . court could have, and should have, decided the parties' straightforward corporate governance dispute pursuant to the neutral principles of law doctrine." They reason that, "[t]he mere fact that the archbishop ultimately makes trustee appointments to the board is not enough to require abstention and to compel dismissal, as it would give the archbishop a preferred position in our society." (Internal quotation marks omitted.) The plaintiffs claim further that "there is nothing in the record to support the conclusion that applying neutral principles of law would entangle the court in matters of religious doctrine and practices and church polity," because the plaintiffs are asking the court only "to declare the process to be followed in appointing . . . trustees [to the board]." The plaintiffs assert that they have not "question[ed] the archbishop's *religious* decision-making authority," nor have they "raise[ed] matters of *religious* doctrine or practices, as opposed to matters of *civil corporate governance and practices*," as their requested relief pertains "solely to matters of [the] corporate governance process based on [FACS'] bylaws." (Emphasis in original.)

The defendants counter that the court correctly decided that FACS is a religious organization and that subject matter jurisdiction is lacking because neutral

principles of law cannot be applied here. They argue that resolving these claims by relying only on neutral principles of law is impossible because "the archbishop exercised his religious discretion to appoint FACS board members" and "an examination of the religious reasoning of an ecclesiastical authority is off-limits for a secular court, regardless of whether the underlying dispute could ordinarily be decided by . . . neutral principles of contract or corporate law." They further argue that "the archbishop's decisions about who should have stewardship over school funding implicates Catholic doctrine, and his judgment as to who is best suited for a board seat at a religious organization like FACS cannot be reviewed by a secular court without calling into question his religious judgment as to how best to support the schools and their underlying doctrinal mission." As an alternative ground for affirming the court's decision, the defendants have set forth four reasons to support their claim that the plaintiffs lack standing.

Before we address the parties' claims on appeal, we first set forth the standard of review that applies to a court's dismissal of an action for lack of subject matter jurisdiction. "Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it. . . . A court does not truly lack subject matter jurisdiction if it has competence to entertain the action before it. . . . Once it is determined that a tribunal has authority or competence to decide the class of cases to which the action belongs, the issue of subject matter jurisdiction is resolved in favor of entertaining the action. . . . It is well established that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged. . . . *Hepburn* v. *Brill*, 348 Conn. 827, 838–39, 312 A.3d 1 (2024). [B]ecause [a] determination regarding a trial court's

subject matter jurisdiction is [primarily] a question of law, our review is plenary. . . . Moreover, [i]t is a fundamental rule that a court may raise and review the issue of subject matter jurisdiction at any time. . . . Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . . The subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." (Internal quotation marks omitted.) *Commission on Human Rights & Opportunities* v. *Travelers Indemnity Co.*, 228 Conn. App. 803, 809–10, 326 A.3d 557 (2024); see also *Karen* v. *Loftus*, 228 Conn. App. 163, 175–76, 324 A.3d 793, cert. denied, 350 Conn. 924, 325 A.3d 1094 (2024).[4]

I

We first address the plaintiffs' claim that the court improperly dismissed their action for lack of subject

[4] The amicus, the Commission on Human Rights and Opportunities, urges us to determine that "constitutional religion doctrines" do not impede a court's subject matter jurisdiction. We decline to do so because adopting that position would require us to overrule our own precedent in *Thibodeau* v. *American Baptist Churches of Connecticut*, 120 Conn. App. 666, 994 A.2d 212, cert. denied, 298 Conn. 901, 3 A.3d 74 (2010), a case in which this court affirmed the dismissal of an action for lack of subject matter jurisdiction on first amendment establishment clause grounds; id., 667–68; and in which our Supreme Court denied certification to appeal. See *Thibodeau* v. *American Baptist Churches of Connecticut*, 298 Conn. 901, 3 A.3d 74 (2010); accord *Abdelhak* v. *Jewish Press, Inc.*, 411 N.J. Super. 211, 235, 985 A.2d 197 (App. Div. 2009) (affirming dismissal for lack of subject matter jurisdiction on first amendment establishment clause grounds); *Hafif* v. *Rabbinical Council of Syrian & Near Eastern Jewish Communities in America*, 140 App. Div. 3d 1017, 1017, 34 N.Y.S.3d 160 (2016) (same). "It is axiomatic that we cannot overrule the decision made by another panel of this court in the absence of en banc consideration"; *State* v. *Freddy T.*, 200 Conn. App. 577, 589 n.14, 241 A.3d 173 (2020); and "that this court cannot overrule or reconsider the decisions of our Supreme Court." *State* v. *Corver*, 182 Conn. App. 622, 638 n.9, 190 A.3d 941, cert. denied, 330 Conn. 916, 193 A.3d 1211 (2018).

matter jurisdiction on the basis of its determinations that (1) FACS is a religious organization and (2) the plaintiffs' claims are "inextricably intertwined with the religious context in which the archbishop appoints members to the board of [FACS], a religious organization," such that the court could not "neutrally apply principles of corporate [law] without intruding upon the archbishop's religious decision-making authority." We need not decide whether FACS is a religious organization because, even if we assume, without deciding, that it qualifies as such, we conclude that the claims raised in the plaintiffs' action can be resolved by applying neutral principles of law.

The following legal principles concerning the religion clauses of the first amendment to the United States constitution are relevant to our resolution of this claim.[5] "The first amendment to the United States constitution protects religious institutions from governmental interference with their free exercise of religion. . . . The first amendment [also] prohibits the excessive entanglement of government and religion. . . . [T]he first amendment has been interpreted broadly to severely [circumscribe] the role that civil courts may play in resolving . . . disputes concerning issues of religious doctrine and practice. . . . Under both the free exercise clause and the establishment clause, the first

[5] The first amendment to the United States constitution provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

Although the court also cited to our state constitution in its memorandum of decision, it did not engage in any independent state constitutional analysis, nor have the defendants done so at any stage of the proceedings. Furthermore, our appellate courts have not yet had occasion to determine the extent to which the religion clauses of the state constitution prohibit a civil court from exercising jurisdiction. Therefore, we assume without deciding that the protections provided in the religion clauses of our state constitution are equivalent to those provided by the first amendment and limit our review to whether the plaintiffs' claims are prohibited by the federal constitution. See *Thibodeau* v. *American Baptist Churches of Connecticut*, 120 Conn. App. 666, 668 n.3, 994 A.2d 212, cert. denied, 298 Conn. 901, 3 A.3d 74 (2010).

amendment prohibits civil courts from resolving disputed issues of religious doctrine and practice. . . . Under [the] excessive entanglement analysis . . . claims requiring courts to review and to interpret religious doctrine and practices are barred by the first amendment." (Citations omitted; internal quotation marks omitted.) *Tilsen* v. *Benson*, 347 Conn. 758, 770–71, 299 A.3d 1096 (2023). "The establishment clause's preclusion against inquiring into religious matters has been described broadly as the 'ecclesiastical abstention doctrine . . . .' " Id., 772–73.

"Freedom of religion is guaranteed not only to individuals but also to churches, and church organizations, which have power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. . . . At least since [*Watson* v. *Jones*, 80 U.S. (13 Wall.) 679, 727, 20 L. Ed. 666 (1871)], the Supreme Court consistently has held that civil courts are prohibited by the first amendment from adjudicating disputes turning on church policy and administration or on religious doctrine and practice. . . . In short, [as a] general rule . . . religious controversies are not the proper subject of civil court inquiry, and . . . a civil court must accept the ecclesiastical decisions of church tribunals as it finds them." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Thibodeau* v. *American Baptist Churches of Connecticut*, 120 Conn. App. 666, 671–73, 994 A.2d 212, cert. denied, 298 Conn. 901, 3 A.3d 74 (2010).

"The constitution, however, does not immunize every church action from [judicial] review. . . . [C]hurches, their congregations and hierarchy exist and function within the civil community . . . [and] it is acknowledged that they are as amenable as other societal entities to rules governing property rights, torts and criminal conduct. . . . [Therefore] [i]f a court can resolve

the dispute by applying only neutral principles of law . . . judicial review may be permissible."[6] (Citations omitted; internal quotation marks omitted.) Id., 673; see also *Episcopal Church in the Diocese of Connecticut* v. *Gauss*, 302 Conn. 408, 424–25, 28 A.3d 302 (2011) (recognizing that church property disputes can "be resolved" without considering "doctrinal matters" based on "neutral principles of law by examining the deeds to church property, local church charters, state statutes governing the holding of church property and the constitution and canons of the general church for language concerning the ownership and control of church property," in accordance with "objective, well-established concepts of trust and property law" (internal quotation marks omitted)), cert. denied, 567 U.S. 924, 132 S. Ct. 2773, 183 L. Ed. 2d 653 (2012).

"Under the neutral principles approach, a court resolving a dispute arising in a religious context may be required to examine certain religious documents, such as a church constitution, but must take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts or to resolve a religious controversy . . . . [Our Supreme] [C]ourt has concluded that the neutral principles of law approach is preferable [to the hierarchical approach of

[6] "The 'neutral principles of law' approach was first mentioned approvingly by the United States Supreme Court in *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 89 S. Ct. 601, 21 L. Ed. 2d 658 (1969). In that case, the Supreme Court noted that 'there are neutral principles of law, developed for use in all property disputes, which can be applied without "establishing" churches to which property is awarded.' [Id., 449.] A year later, the Supreme Court upheld a Maryland court's application of the 'neutral principles of law' approach to a church-property dispute. [See] *Maryland & Virginia Eldership of Churches of God* v. *Church of God at Sharpsburg Inc.*, 396 U.S. 367, 90 S. Ct. 499, 24 L. Ed. 2d 582 (1970)." (Citation omitted.) *Ex parte Alabama-West Florida Conference of United Methodist Church, Inc.*, Docket No. SC-2023-0385, 2024 WL 1592375, *7 n.5 (Ala. April 12, 2024).

Watson v. *Jones*, supra, 80 U.S. 725–27],[7] because it provides the parties with a more level playing field, and the outcome in any given case is not preordained in favor of the general church, as happens in practice under the hierarchical approach. Moreover, as the [United States Supreme] [C]ourt explained in [*Jones* v. *Wolf*, 443 U.S. 595, 603, 99 S. Ct. 3020, 61 L. Ed. 2d 775 (1979)], the neutral principles approach is completely secular and relies exclusively on objective, well established concepts of trust and property law familiar to lawyers and judges." (Citation omitted; footnote added; internal quotation marks omitted.) *Tilsen* v. *Benson*, supra, 347 Conn. 773–74.

Although the neutral principles of law approach initially was applied by Connecticut courts to church property disputes, our Supreme Court recently has clarified that "the neutral principles of law doctrine *permits civil courts to decide disputes arising in religious contexts, so long as they may be resolved solely by a secular legal analysis* that does not implicate or [is] not informed by religious doctrine or practice."[8] (Emphasis added; internal quotation marks omitted.) Id., 774; see also *Serbian Eastern Orthodox Diocese for the United States & Canada* v. *Milivojevich*, 426 U.S. 696, 710, 96 S. Ct. 2372, 49 L. Ed. 2d 151 (1976) (recognizing first amendment principle commanding "courts to decide church property disputes without resolving underlying

[7] "[T]he hierarchical deference approach . . . provides that when a church property dispute has been resolved by the highest judicatory tribunal of a hierarchical church, civil courts must accept such a decision as final and binding." (Citation omitted.) *Heartland Presbytery* v. *Presbyterian Church of Stanley, Inc.*, 53 Kan. App. 2d 622, 633, 390 P.3d 581 (2017).

[8] Our Supreme Court also noted the lack of any authority "indicating that the recent sea changes to the United States Supreme Court's establishment clause jurisprudence [as set forth in *Kennedy* v. *Bremerton School District*, 597 U.S. 507, 142 S. Ct. 2407, 213 L. Ed. 2d 755 (2022)] affect the continuing vitality of the neutral principles of law doctrine, and [our courts] continue to follow it . . . ." *Tilsen* v. *Benson*, supra, 347 Conn. 775 n.8.

controversies over religious doctrine" (internal quotation marks omitted)); *Burri Law PA* v. *Skurla*, 35 F.4th 1207, 1212 (9th Cir. 2022) ("[t]he ecclesiastical abstention doctrine provides that a civil court may not adjudicate the correctness of an interpretation of canonical text or some decision relating to government of the religious polity" (internal quotation marks omitted)); *McRaney* v. *North American Mission Board of the Southern Baptist Convention, Inc.*, 966 F.3d 346, 348 (5th Cir. 2020) ("[t]he ecclesiastical abstention doctrine recognizes that the [e]stablishment [c]lause of the [f]irst [a]mendment precludes judicial review of claims that require resolution of 'strictly and purely ecclesiastical' questions"), cert. denied, U.S. , 141 S. Ct. 2852, 210 L. Ed. 2d 961 (2021); but see *Thibodeau* v. *American Baptist Churches of Connecticut*, supra, 120 Conn. App. 674–75 (cautioning that "the exception in cases where neutral principles of law may apply ought not swallow the first amendment rule"). Thus, pursuant to *Tilsen* and *Thibodeau*, disputes that arise in a religious context properly may be adjudicated by a court applying secular principles of law, so long as doing so does not require resolution of a strictly and purely ecclesiastical question of religious doctrine or practice or of church government.[9]

[9] "[M]atters of church government . . . constitute purely ecclesiastical questions." (Internal quotation marks omitted.) *McRaney* v. *North American Mission Board of the Southern Baptist Convention, Inc.*, supra, 966 F.3d 348. The term "church government" references the organizational structure that a church has adopted for the internal governance of its members. See, e.g., *Smith* v. *Church of God at Locust Valley*, 326 F. Supp. 6, 9 n.6 (D. Md. 1971) ("[w]ith regard to the generally recognized types of church polity, or forms of church government . . . [a]t least three kinds of internal structure, or polity, may be discerned; congregational, presbyterial, and episcopal" (citations omitted; internal quotation marks omitted)); *Elston* v. *Wilborn*, 208 Ark. 377, 378, 186 S.W.2d 662 (1945) ("[s]o far as we know, churches in the United States may be classified, as regards the form of church government, into four groups: papal, episcopal, presbyterial, and congregational"); *Thomas* v. *Lewis*, 6 S.W.2d 255, 257 (Ky. 1928) ("It may be that all classes of Christian churches may be brought under . . . three forms of church government. One is the prelatical form in which the governing power resides

Because the issue in the present case concerns a *corporate* governance dispute between church leaders and an allegedly religious organization, the question before this court is whether the underlying dispute "may be resolved solely by a secular legal analysis that does not implicate or [is] not informed by religious doctrine or practice." (Internal quotation marks omitted.) *Tilsen* v. *Benson*, supra, 347 Conn. 774. We therefore must review the plaintiffs' requested relief and the relevant language of FACS' bylaws to determine whether resolving this dispute requires an inquiry into purely ecclesiastical questions of religious doctrine or practice or the governance, administration or policies of a church.[10]

In the request for relief set forth in their complaint, the plaintiffs ask the court for a judgment pursuant to General Statutes § 52-29[11] declaring that (1) "while the archbishop has the authority to appoint trustees to the board, he may only do so from a slate of candidates

in prelates or diocesan bishops and the higher clergy. . . . Another is the Presbyterian form in which the governing power resides in assemblies, synods, presbyteries, and sessions. . . . Another is the independent or congregational form in which the body is self-governing, each single and local church administering its own government by the voice of the majority of its members.").

[10] The defendants argue that FACS' bylaws and certificate of incorporation are ecclesiastical documents. Regardless of whether these documents are considered ecclesiastical documents, precedent from both the United States Supreme Court and our Supreme Court establishes that a court may rely on religious documents under the neutral principles of law approach, as long as its analysis remains secular. See *Jones* v. *Wolf*, supra, 443 U.S. 604 ("The neutral-principles method . . . requires a civil court to examine certain religious documents, such as a church constitution . . . . In undertaking such an examination, a civil court must take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts"); accord *Episcopal Church in the Diocese of Connecticut* v. *Gauss*, supra, 302 Conn. 429 (under "neutral principles of law approach . . . courts are allowed to rely on secular, as well as religious documents, including idiosyncratic state statutes and common-law principles" (citation omitted)).

[11] General Statutes § 52-29 (a) permits the Superior Court to "declare rights and other legal relations on request for such a declaration, whether or not further relief is or could be claimed. . . ."

presented to him by the . . . committee"; (2) the board members appointed by the archbishop on July 8, 2020, and February 22, 2021, "were not appointed in compliance with the bylaws and are not validly members of the board"; and (3) the board members who were notified of their replacement by the archbishop in letters dated July 10, 2020, "have the right to hold office as trustees of the board and are entitled to the office of trustee of the board, until their respective successors, if any, are lawfully and validly appointed." Although the plaintiffs present a sanitized version of this request in their appellate brief, characterizing it as simply a request "to declare the process to be followed in appointing . . . trustees [to the board]"; (internal quotation marks omitted); their request clearly asks the trial court not only to interpret the bylaws to declare the relevant process for appointments to the board, but also to go a step further and to invalidate the appointments made by the archbishop as being of no force or effect pursuant to the bylaws.

The record establishes that FACS is a nonstock corporation that is subject to the statutory provisions that apply to all such entities.[12] See General Statutes § 33-1000 et seq. Nonstock corporations are governed by their bylaws, which consist of "the code or codes of rules adopted for the regulation or management of the affairs of the corporation"; General Statutes § 33-1002 (4); and are controlled by a board of directors, the members of which are authorized to exercise corporate power and to manage the activities, property and affairs of the corporation. See General Statutes § 33-1080. The makeup and procedures for electing a corporation's

[12] Significantly, FACS is not part of or within the hierarchy of the AOH. In contrast, FACS is an independently established nonstock corporation, which has permitted the archbishop to be on its board and has granted to him certain corporate authority relating to the appointment of members to the board.

board of directors are set forth in its bylaws or certificate of incorporation. See General Statutes §§ 33-1081 and 33-1082. Consequently, because adjudicating the plaintiffs' claims would require a court to determine what the procedure is for making appointments to the board under FACS' bylaws, we must examine the corporation's bylaws to determine whether it is possible to resolve the plaintiffs' claims by conducting an exclusively secular legal analysis. As stated previously in this opinion, if such a determination entails judicial resolution of a question of religious doctrine or practice, or of the governance, administration or policies of a church, it is prohibited. See *Tilsen* v. *Benson*, supra, 347 Conn. 774; *Thibodeau* v. *American Baptist Churches of Connecticut*, supra, 120 Conn. App. 672. If, however, the dispute can be resolved solely by relying on secular legal principles, no such prohibition applies, and the court must assume jurisdiction over the dispute. See *Tilsen* v. *Benson*, supra, 774.[13]

To start, article II, § 1, of FACS' bylaws establishes the corporation's "Board of Trustees," which is equivalent to the corporation's board of directors, as it is empowered to "exercise . . . all powers of the corporation." See General Statutes § 33-1002 (2) ("'[b]oard' or 'board of directors' means the group of persons vested

[13] In fact, several decades ago, in a declaratory judgment action concerning church property owned by a nonstock corporation, our Supreme Court recognized that "[t]he statutes governing nonstock corporations and the corporate provisions for government of the affairs of the corporation and the management and control of its corporate assets as set out in its articles of incorporation . . . seem to provide sufficient neutral principles of law to enable a civil court to exercise jurisdiction." *Clough* v. *Wilson*, 170 Conn. 548, 554, 368 A.2d 231 (1976). In *Clough*, our Supreme Court emphasized that disputes arising in religious contexts "should not be permitted to go unresolved *unless it is clearly apparent that it is beyond the powers of a civil court to adjudicate it*"; (emphasis added) id.; but affirmed the lower court's dismissal of the action because the plaintiffs failed to comply with the requirements of the rules of practice for requesting a declaratory judgment. See id., 555.

with management of the affairs of the corporation irrespective of the name by which such group is designated"). Article II, § 4, of FACS' bylaws, titled "Vacancies," provides that vacancies on the board "shall be filled by appointment by the Archbishop." Article V, § 7,[14] of FACS' bylaws provides for the creation and empowerment of a "Governance Committee," which is responsible for nominating "a slate of qualified candidates" for vacant or soon to be vacant board positions, "for submission to the Archbishop who shall make appointments to the board . . . ." See General Statutes § 33-1101 (providing that "a board of directors may create . . . committees" that exercise "the powers of the board of directors" but "may not . . . fill vacancies on the board of directors"). Although the parties do not dispute that article V, § 7, of FACS' bylaws is the controlling provision with respect to board appointments, the defendants argue that the court cannot interpret this provision without impermissibly inquiring into the archbishop's exercise of "his religious discretion to appoint FACS board members."

"Courts construe bylaws according to the general rules of contract construction or statutory construction." (Footnote omitted.) 8 W. Fletcher, Fletcher Cyclopedia of the Law of Corporations (2024) § 4195; see *In*

[14] Article V, § 7, of FACS' bylaws, titled "Governance Committee," provides: "The Governance Committee shall consist of persons appointed by the President in a number determined by the Trustees to be sufficient to conduct committee business. The Governance Committee shall be specifically responsible for the nomination, at least seven (7) days prior to the Annual Meeting, of a slate of qualified candidates for the trustee positions whose terms are to expire or are vacant. In compiling its slate of candidates, the Governance Committee shall solicit nominations from the Board of Trustees and shall include in its slate any person who is nominated by a Trustee at a duly called Board of Trustees meeting and who receives support from a majority of Trustees present at such meeting. The Governance Committee shall submit such slate of candidates to the President of the Corporation for submission to the Archbishop who shall make appointments to the Board of Trustees."

re Color Tile, Inc., 475 F.3d 508, 515 (3d Cir. 2007) ("[i]t is well established that [t]he rules of contract interpretation are generally applicable to the interpretation of bylaws" (internal quotation marks omitted)), quoting *IBJ Schroder Bank & Trust Co.* v. *Resolution Trust Corp.*, 26 F.3d 370, 374 (2d Cir. 1994), cert. denied, 514 U.S. 1014, 115 S. Ct. 1355, 131 L. Ed. 2d 213 (1995). Generally, the rules governing the interpretation of contracts and statutes require courts to defer to the plain and ordinary meaning of language, unless such language gives rise to ambiguity. See, e.g., *Harbour Pointe, LLC* v. *Harbour Landing Condominium Assn., Inc.*, 300 Conn. 254, 260, 14 A.3d 284 (2011) ("We accord the language employed in the contract a rational construction based on its common, natural and ordinary meaning and usage as applied to the subject matter of the contract. . . . Where the language is unambiguous, we must give the contract effect according to its terms." (Internal quotation marks omitted.)); *State ex rel. Dunn* v. *Connelly*, 228 Conn. App. 458, 486–87, 325 A.3d 1159 ("[p]ursuant to [the plain meaning rule codified in General Statutes] § 1-2z, [the court is] to go through the following initial steps [when interpreting a statute]: [f]irst, consider the language of the statute at issue . . . as applied to the facts of the case; second, if after the completion of step one, [the court] conclude[s] that, as so applied, there is but one likely or plausible meaning of the statutory language, [the court] stop[s] there" (internal quotation marks omitted)), cert. denied, 350 Conn. 933, 327 A.3d 386 (2024).

Read plainly, the relevant language in the bylaws concerning the procedure for appointments to the board is entirely secular and cannot reasonably be interpreted as implicating issues of religious doctrine or practice or of church government, policy or administration. Put another way, nothing in the pertinent bylaw provision indicates that an analysis of the claims raised

by the plaintiffs would require a court to go beyond the secular legal principles governing corporations and the interpretation of bylaws and to resolve impermissible ecclesiastical issues. Section 7 of article V of FACS' bylaws provides that "[t]he Governance Committee shall submit [the] slate of [nominated] candidates to the President of the Corporation for submission to the Archbishop who shall make appointments to the Board of Trustees." Given this plain and unambiguous language—stating that the committee "shall submit [the] slate of candidates," and the archbishop "shall make appointments to the Board"—we conclude that a civil court can adjudicate the plaintiffs' claims simply by interpreting the secular language of the bylaws without ever reaching issues of religious doctrine or practice or of church government, policy or administration. See *Vaccaro* v. *Shell Beach Condominium, Inc.*, 169 Conn. App. 21, 48, 148 A.3d 1123 (2016) ("[A] contract is unambiguous when its language is clear and conveys a definite and precise intent. . . . The court will not torture words to impart ambiguity where ordinary meaning leaves no room for ambiguity." (Internal quotation marks omitted.)), cert. denied, 324 Conn. 917, 154 A.3d 1008 (2017).

Appellate courts in other jurisdictions have reached similar conclusions when weighing analogous claims for declaratory relief in corporate governance disputes arising in a religious context, and we find their decisions instructive. For instance, in *Bookout* v. *Shelley*, Docket No. 02-22-00055-CV, 2022 WL 17173526 (Tex. App. November 23, 2022), the Texas Court of Appeals was faced with "an internecine battle for control of [a church]"; id., *1; in which the plaintiffs in the underlying action sought, inter alia, a declaratory judgment resolving "whether the [defendants] or [the plaintiffs] are the rightful directors of [the board of the corporation that operated the church]." Id., *7. The court in *Bookout*

determined that, on the basis of its "examination of the specific declaratory relief sought," "this cause of action is, at its core, a dispute over corporate governance, not religious or doctrinal matters," because "resolution of this cause of action does not turn on matters of an ecclesiastical or inherently religious nature but, rather, hinges on the interpretation and verification of corporate documents—including [the church's] bylaws and board minutes—and the [state law governing corporations] . . . ." Id.

Moreover, the court reasoned that, "[w]hile [the plaintiffs] seek a declaratory judgment that '[one of the plaintiffs, Jonathan Shelley] is the duly appointed and ordained [p]astor of [the church],' this determination turns on the antecedent issue of whether [the defendants] or the [plaintiffs are the] true board of directors [of the corporation operating the church]. If, as [the plaintiffs] claim, [the defendants] are not the duly elected members of [the corporation's] board, then the termination letter that they caused to be sent to [Shelley] would be of no force or effect, and since [Shelley's] original appointment as [the church's] pastor in 2019 is not in dispute, he would therefore continue to be 'the duly appointed and ordained [p]astor of [the church].' Thus . . . the trial court will not be required to involve itself in the inherently ecclesiastical process of determining whether the church members desire to sever their relationship with their pastor; rather, the court will only be required to resolve the antecedent issue of corporate governance, which, as noted above, can be accomplished by applying neutral principles of law to review and verify [the corporation's] organizational documents and corporate records, including board minutes." Id., *8. Accordingly, the Texas Court of Appeals held that the lower court was permitted to exercise jurisdiction over the matter given that "the resolution of this central issue will involve examining

and verifying corporate records and organizational documents and evaluating the credibility of witness testimony regarding corporate actions all of which can be done on a purely secular basis by applying neutral principles of law." Id., *7.

Similarly, in *Schwimmer* v. *Welz*, 56 App. Div. 3d 541, 542, 868 N.Y.S.2d 671 (2008), the plaintiffs requested a judicial declaration that they "are the lawful members of the [b]oard of [t]rustees of [a religious organization]." In that case, New York's intermediate appellate court reversed the trial court's determination that it lacked jurisdiction pursuant to the first amendment, stating: "On the record before us, we cannot conclude that the issues in this case are nonjusticiable. Membership on the [b]oard [of trustees] is not conditioned upon any religious criteria, and the issues raised with respect to the challenged status of the various individuals claiming to be [b]oard members concern only notice requirements, requisites for the conduct of [b]oard meetings and elections, and requirements for amending corporate documents. These questions can be determined by reference to [the religious organization's] secular bylaws, and in accordance with neutral principles of law, such as those set forth in [state law governing corporations] . . . . Although matters relating to the religious leadership of the community may explain why members of the [b]oard [of trustees] took certain actions, the case turns not on the motivations of the [b]oard members but on the actions they took as those actions relate to the relevant provisions of corporate governance and statute."[15] (Citations omitted.) Id., 543–44.

[15] See also *Jackson* v. *George*, 146 A.3d 405, 417 (D.C. 2016) (affirming trial court's determination that it had subject matter jurisdiction over dispute between former church congregants and church when trial court "did no more . . . than appl[y] neutral principles of law to resolve a dispute about whether the . . . [claimed] [board of trustees] had been duly elected in accordance with church bylaws" (internal quotation marks omitted)); *People ex rel. Muhammad* v. *Muhammad-Rahmah*, 289 Ill. App. 3d 740, 744–45,

The relief requested by the plaintiffs in the present case—the interpretation of FACS' bylaws and the invalidation of certain appointments to FACS' board as unauthorized by its bylaws—is akin to the relief requested by the plaintiffs in *Bookout* and *Schwimmer*, and, as in those cases, resolving the corporate governance dispute presented by the parties in the present case will require "examining and verifying corporate records and organizational documents and evaluating the credibility of

682 N.E.2d 336 (The trial court's determination that it lacked jurisdiction over a dispute between a religious corporation and its former corporate officer regarding removal of the plaintiff as president and chairman of the corporation's board of directors was reversed because "the court was not required to examine religious doctrine or practice to determine whether [the] plaintiff had been properly removed as president and chairman of the board of directors of the corporation. The corporation's bylaws and the statute under which it was organized clearly set forth the procedure for appointment and removal of directors, the notice requirements for directors' meetings, and other attendant corporate matters. These instruments constituted the rules which the members of the mosque chose to be bound by before the dispute arose. The allegations in [the] plaintiff's petition required the court to decide only whether those procedures had been complied with, and not whether the plaintiff was living as a good Muslim. . . . Accordingly, we hold that the trial court should have utilized the 'neutral principles of law' analysis in ruling on [the] plaintiff's petition, requiring only the application of objective [l]egal principles to the corporation's governing documents and the interpretation of [state law governing corporations], without reference or reliance upon Islamic religious doctrine."), appeal denied, 174 Ill. 2d 592, 686 N.E.2d 1172 (1997); *Esformes* v. *Brinn*, 52 App. Div. 3d 459, 462, 860 N.Y.S.2d 547 (2008) (first amendment did not deprive trial court of jurisdiction over action by members of religious organization challenging "validity of . . . elections [to corporation's board of directors] . . . in contravention of the [corporation's] bylaws"); *Johnson* v. *Antioch United Holy Church, Inc.*, 214 N.C. App. 507, 511, 714 S.E.2d 806 (2011) ("Whether [the] [d]efendants' actions were authorized by the bylaws of the church in no way implicates an impermissible analysis by the court based on religious doctrine or practice. . . . Rather, the claim in this case requires the trial court to apply neutral principles of law to determine whether, inter alia, [the] [d]efendants complied with [state law governing corporations]." (Citation omitted.)); *Masterson* v. *Diocese of Northwest Texas*, 422 S.W.3d 594, 608 (Tex. 2013) (trial court could exercise jurisdiction and apply neutral principles of law in property dispute between diocese and local church where property used by local church was held by nonprofit corporation because "the corporation has a secular existence derived from applicable Texas law and the

witness testimony regarding corporate actions, all of which can be done on a purely secular basis by applying neutral principles of law." *Bookout* v. *Shelley*, supra, 2022 WL 17173526, *7. In the present case, as in *Bookout*, granting the relief requested by the plaintiffs, if warranted, would not interfere with the religious decision-making of the archbishop, but simply would render any appointments he made to the board in his entirely secular capacity as a corporate officer for FACS to be of "*no force or effect*" if they were unauthorized by the bylaws or state law. (Emphasis added.) Id., *8. Certainly, as the court in *Schwimmer* recognized, a dispute over corporate governance, specifically the validity of appointments to and actions undertaken by a religious organization's board of directors, can be adjudicated by applying neutral principles of law if the issue "*turns not on the motivations of the* [*b*]*oard members but on the actions they took as those actions relate to the relevant provisions of corporate governance and statute.*" (Emphasis added.) *Schwimmer* v. *Welz*, supra, 56 App. Div. 3d 544.

The issues presented in this action do not concern why the archbishop selected certain individuals for the board but, rather, whether, under the bylaws and our General Statutes, which govern the validity of actions undertaken by FACS' corporate officers, he was authorized to appoint individuals who had not been nominated by the committee of FACS, which, as we have stated in this opinion, is not a part of the AOH. Consequently, although a court's resolution of the issues presented in the plaintiffs' action will have some practical effect on determining the identity of individuals who are selected to be members of the board of an alleged religious organization and, potentially, could result in the invalidation of appointments made by the archbishop, an

corporation's articles of incorporation and bylaws," and its bylaws governed issue presented).

adjudication of the underlying corporate governance dispute is permissible because it will require the court to resolve only the "*antecedent issue of corporate governance*, which . . . can be accomplished by applying neutral principles of law"; (emphasis added) *Bookout* v. *Shelley*, supra, 2022 WL 17173526, *8; to examine corporate records and witness testimony and ultimately decide whether the archbishop's appointments to the board were valid under FACS' bylaws and state law. See id., *7 (trial court properly could exercise jurisdiction and apply neutral principles of law to resolve underlying corporate governance dispute, even though "the outcome of this cause of action will, in essence, decide who has authority to manage and act on behalf of [a religious organization that operates a church] . . . [b]ecause the resolution of this cause of action does not turn on matters of an ecclesiastical or inherently religious nature but, rather, hinges on the interpretation and verification of corporate documents—including . . . bylaws and board minutes—and the [state law governing corporations]"). Simply put, the dispute in the present case is not a "religious controversy"; *Jones* v. *Wolf*, supra, 443 U.S. 608; rather, it is a corporate governance controversy that involves an alleged religious organization, FACS, and a religious figure, the archbishop.

Indeed, the defendants concede that the plaintiffs' claims do not require resolution of doctrinal issues but argue, nonetheless, that because of the archbishop's status in the AOH, he exercises his "religious discretion" when making decisions as to board appointments, which constitutes a matter of church governance and the governance of a presumably religious organization that a civil court cannot review. This argument fails because the dispositive question is whether the bylaws authorize the board to limit the universe of individuals who may be appointed to the board by the archbishop

to only those individuals submitted for nomination by the committee. That question can be determined by applying secular legal principles.[16] A review of § 7 of article V of the bylaws reveals that the provision does not delineate the decision-making process that should be employed when making appointments to the board and, thus, does not address the decision-making process employed by any person, in any capacity. Instead, it merely establishes the role of the committee in the corporate procedure for making such appointments, without any reference at all to the qualitative reasoning that guides such decisions. As a result, the relief requested by the plaintiffs in this action requires a court to decide only what the process is for making appointments to the board according to the bylaws and whether certain board appointments were valid pursuant to the bylaws, without necessitating any inquiry whatsoever into the reasons behind *why* such appointments were made. Therefore, the defendants' assertion that granting the relief requested by the plaintiffs would improperly

[16] To be clear, the basis for the archbishop's appointments and whether those appointments can be based on religious reasons is not before this court. The archbishop undeniably serves as a source of religious authority for the AOH; however, as discussed previously in this opinion, nothing in the record supports the conclusion that his role as a corporate officer for FACS is a religious one. Given that, we cannot agree with the defendants' argument that, essentially, when the archbishop acts as a corporate officer for FACS, he does so in an inherently religious manner by virtue of his status. If we did conclude as much, on the basis of the archbishop's status alone, our holding would effectively accord a special status to certain corporate officers of nonstock corporations, which would be untenable with the principle that disputes arising in religious contexts should be resolved by a secular court as long as no resolution of religious doctrine or practice, or inquiry into the governance, administration or policies of a church is required. See *Clough* v. *Wilson*, supra, 170 Conn. 554; see also *Masterson* v. *Diocese of Northwest Texas*, supra, 422 S.W.3d 606 ("Properly exercising jurisdiction requires courts to apply neutral principles of law to nonecclesiastical issues involving religious entities *in the same manner as they apply those principles to other entities and issues*. Thus, courts are to apply neutral principles of law to . . . corporate formation, governance, and dissolution, even when religious entities are involved." (Emphasis added.)).

interfere with religious decision-making of the archbishop is unavailing.[17]

For these reasons, and because "every presumption favoring jurisdiction should be indulged"; (internal quotation marks omitted) *Commission on Human Rights & Opportunities* v. *Travelers Indemnity Co.*, supra, 228 Conn. App. 809; there is no first amendment barrier prohibiting the court from applying neutral principles of our state law governing corporations to the secular language of FACS' bylaws, for the purpose of declaring "the process to be followed in appointing board trustees," and determining the validity of certain appointments to the board, as requested by the plaintiffs.[18]

[17] We note that, contrary to the defendants' assertions, nothing in the record establishes that the archbishop's appointments to the board are in any way informed by religious doctrine or practice or otherwise involve an exercise of "religious decision-making." To be sure, the defendants' counsel conceded as much at oral argument before this court. When asked what specific evidence supports the assertion that the archbishop engages in a "religious decision-making" process while making appointments to the board, counsel stated: "There is nothing in the record that helps this court understand what his process is." Furthermore, neither party argued that an evidentiary hearing is necessary on this issue. Counsel further argued that, despite the absence of such evidence, the court is nevertheless prohibited from adjudicating the matter because an inquiry into the archbishop's religious decision-making process would necessarily be required. That logic ignores the reality that, in the absence of any evidence in the record supporting the assertion that the archbishop's role in making appointments to the board involves an exercise of religious discretion, any consideration of the archbishop's substantive reasoning for making such appointments at this stage would amount to the improper consideration of unsupported speculation. See *Finney* v. *Commissioner of Correction*, 207 Conn. App. 133, 144, 261 A.3d 778 (recognizing that "speculation cannot support the granting of a motion to dismiss"), cert. denied, 339 Conn. 915, 262 A.3d 134 (2021).

[18] The defendants cite to *Parish of St. Paul's Episcopal Church* v. *Kovoor*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-18-6037219-S (April 10, 2019), to support their argument; however, *Kovoor* and other cases that stand for the well established principle that church disputes concerning clergy members cannot be adjudicated by civil courts; see, e.g., *Gonzalez* v. *Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16–17, 50 S. Ct. 5, 74 L. Ed. 131 (1929); *Natal* v. *Christian & Missionary Alliance*, 878 F.2d 1575, 1578 (1st Cir. 1989); are irrelevant to the matter in the present case because we are not convinced by this record that the procedure for

Accordingly, we conclude that the trial court improperly dismissed the plaintiffs' complaint for lack of subject matter jurisdiction on the basis of its determination that the plaintiffs' action asks the court to entangle itself into matters of religious doctrine and practice and of church polity.

II

In light of our determination that the court's dismissal of the plaintiffs' action for lack of subject matter jurisdiction on first amendment grounds was improper, we must next address the defendants' alternative grounds for affirmance of the judgment. Specifically, the defendants argue, as they did in their motion to dismiss, that the plaintiffs lack standing to bring this action. In doing so, they assert four separate grounds for the plaintiffs' alleged lack of standing: (1) FACS lacked standing as to counts one and two because its board did not approve the underlying action, meaning it lacked the requisite corporate authority to initiate the action, (2) the individual plaintiffs lacked standing to bring count one because those plaintiffs have not met the statutory requirements for commencing a derivative action on FACS' behalf in that they did not make a demand prior to the initiation of litigation or explain why doing so would be futile, (3) the individual plaintiffs are not aggrieved and, thus, lacked standing to bring count one, and (4) the individual plaintiffs are not aggrieved as to count two and, thus, lacked standing to bring count two.

We decline to reach the issue of standing because doing so demands resolution of disputed jurisdictional facts, which requires an evidentiary hearing. See *307 White Street Realty, LLC* v. *Beaver Brook Group, LLC*, 216 Conn. App. 750, 772 n.13, 286 A.3d 467 (2022) ("[i]t

appointing board members pursuant to FACS' bylaws is either inherently religious or has been established as being "unmistakably of ecclesiastical cognizance." *Natal* v. *Christian & Missionary Alliance*, supra, 1577.

remains axiomatic . . . that in a case where the pleadings and submissions of the parties themselves necessarily raise a dispute about a fact that is central to the court's jurisdictional determination, the court has an independent duty, even in the absence of a parties' request, to hold an evidentiary hearing prior to resolving the factual dispute"). For example, these disputed facts include whether (1) FACS' board needed to or did approve the underlying action, (2) any pre-litigation demand was made by any of the individual plaintiffs, (3) any of the individual plaintiffs suffered an injury that is separate and distinct from that suffered by any of the other individual plaintiffs or by FACS, and (4) any of the individual plaintiffs are at risk of losing a position on the board due to the defendants' conduct. Because this court cannot make factual findings, the matter must be remanded to the trial court for consideration of the standing claims raised by the defendants and for a hearing thereon.

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

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ALEXANDER A. GARRISON (AC 43796)

Moll, Suarez, and Prescott, Js.

Syllabus

Convicted of assault in the first degree, the defendant appealed. He claimed, inter alia, that the trial court improperly denied his motion to suppress certain statements he made to police officers while he was in a hospital receiving treatment for injuries he sustained in a physical altercation that led to his arrest and conviction. This court reversed the judgment of conviction and remanded the case for a new trial without addressing the other claims the defendant raised in his appeal. On the granting of certification,

the state appealed to our Supreme Court, which determined that the defendant had not been in custody during any of his interactions with the police at the hospital and, therefore, his statements should not have been suppressed. The Supreme Court reversed the judgment of this court and remanded the case to this court with direction to consider the defendant's remaining claims on appeal, including his claim that the admission of his statements to the police violated his right to due process. *Held*:

The trial court did not improperly deny the defendant's motion to suppress his statements to the police officers, as the state sufficiently demonstrated that the statements, under the totality of the circumstances, were voluntary and, thus, their admission at trial did not violate his right to due process.

The trial court did not abuse its discretion in denying the defendant's motion for sanctions against the state for its failure to comply with certain of the court's discovery orders and its failure to disclose alleged impeachment evidence pursuant to *Brady* v. *Maryland* (373 U.S. 83) and *Giglio* v. *United States* (405 U.S. 150).

This court declined the defendant's request to exercise its supervisory authority over the administration of justice to direct trial courts to conduct a formal, on the record inquiry during pretrial hearings to ascertain whether the state has exercised due diligence in locating evidence favorable to defendants, as the defendant failed to demonstrate that this case presented the rare circumstance in which traditional constitutional, statutory and procedural limitations were inadequate to protect the rights of the defendant and the integrity of the judicial system.

Submitted on briefs October 7, 2024—officially released February 25, 2025

Procedural History

Information charging the defendant with the crimes of assault in the first degree and tampering with physical evidence, brought to the Superior Court in the judicial district of Tolland, where the court, *Bhatt*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the case was tried to the court, *Seeley*, *J.*; subsequently, the court, *Seeley*, *J.*, granted the defendant's motion for a judgment of acquittal as to the charge of tampering with physical evidence; judgment of guilty of assault in the first degree, from which the defendant appealed to this court, *Prescott*, *Suarez* and *Bishop*, *Js.*, which reversed the trial court's judgment and remanded the case for a new trial, from which the state, on the granting of certification, appealed to the

Supreme Court, which reversed this court's judgment and remanded the case to this court for further proceedings. *Affirmed.*

Erica A. Barber filed a brief for the appellant (defendant).

Matthew C. Gedansky, state's attorney, and *Sarah Hanna*, former senior assistant state's attorney, and *Jaclyn Preville*, supervisory assistant state's attorney, filed a brief for the appellee (state).

Opinion

PRESCOTT, J. This case returns to us on remand from our Supreme Court. In *State* v. *Garrison*, 213 Conn. App. 786, 278 A.3d 1085 (2022), rev'd, 350 Conn. 61, 323 A.3d 279 (2024), the defendant, Alexander A. Garrison, appealed from the judgment of conviction, rendered after a bench trial, of assault in the first degree in violation of General Statutes § 53a-59 (a) (1). On appeal, the defendant claimed, inter alia, that the trial court improperly denied his motion to suppress statements he made to police officers while at a hospital because those statements were the result of a custodial interrogation and he had not been advised of his rights pursuant to *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). *State* v. *Garrison*, supra, 789–90. We agreed with the defendant and further concluded that he was harmed by the admission of these statements. Id., 790. Accordingly, we reversed the judgment of conviction and remanded the case for a new trial without addressing the other claims raised by the defendant in his appeal. See id., 790 n.1.

After granting the state's petition for certification to appeal, our Supreme Court reversed the judgment of this court. *State* v. *Garrison*, 350 Conn. 61, 63, 323 A.3d 279 (2024). Specifically, it determined that the

defendant was not in custody during any of his interactions with the police at the hospital, and, therefore, his statements made at that time should not have been suppressed. Id. Our Supreme Court then ordered us to consider on remand the defendant's remaining appellate claims.

The remaining issues on appeal are whether the trial court improperly denied (1) the defendant's motion to suppress because, contrary to the determination of the court, his statements to the police were not voluntary, and therefore their admission at trial violated his right to due process, and (2) his motion for sanctions in which he claimed that the state had failed to comply with the court's discovery orders and its constitutional obligation to disclose impeachment evidence pursuant to *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). We are not persuaded by these claims and therefore affirm the judgment of conviction.[1]

The following facts, as recited by our Supreme Court, and procedural history are relevant to the defendant's remaining claims on appeal. "In June, 2018, the defendant visited his close friend, Timothy Murphy, and Murphy's cousin, William Patten, who lived together in an apartment located in Vernon. While drinking beer and whiskey, Murphy, Patten, and the defendant watched television, talked, and played their guitars in the living room of the apartment. Eventually, they moved the gathering outside in order to build a fire in a fire pit on the lawn outside of the apartment. As the evening went on, all three continued drinking beer and whiskey. After several hours of drinking around the fire, Patten

[1] In his principal appellate brief to this court, the defendant also claimed that the trial court improperly denied his motion to suppress because the police officers "did not electronically record the full custodial interrogation as required pursuant to General Statutes § 54-1o." The defendant, however, explicitly abandoned this claim in his reply brief and, thus, we need not address it.

and the defendant began arguing over the merits of football and mixed martial arts. The argument led to a physical altercation during which Patten and the defendant pushed one another and fell to the ground. Upon gaining an advantage over the defendant, Patten punched the defendant in the face, injuring his nose and ending the initial fight. Patten and the defendant got off the ground and returned to sitting around the fire. After a few minutes, the defendant, who was angry that Patten had punched him, attacked Patten from behind. The defendant stabbed Patten in his back, front shoulder area, and arm with a Smith & Wesson folding knife that he had been carrying in his waistband. Patten, who did not realize that he was being stabbed, pulled the defendant over his shoulder and kicked him away, which ended the second altercation.

"Patten then returned to the apartment and, realizing that he needed medical attention, walked to the nearby Rockville General Hospital (hospital). In order to obtain treatment for his injured nose, the defendant also walked to the hospital. The defendant arrived at the hospital at approximately 9:42 p.m. and was wheeled into an examining room, where a nurse evaluated him and provided medical care. Consistent with hospital policy, the defendant changed into a hospital gown, and hospital staff placed his clothes into bags. After performing basic assessments of the defendant's condition, the nurse 'determined that he was alert, awake, and oriented.' Although tests confirmed that the defendant's blood alcohol content measured 0.217, he was able to communicate effectively with the nurse and to respond appropriately to her questions, and he was calm and cooperative. The attending physician who was on duty briefly interacted with the defendant and left a note for the incoming attending physician that the defendant could be discharged once he was clinically sober.

"During the time that the defendant was at the hospital, he was questioned by and made statements to five different Vernon police officers. . . . Those police officers collectively questioned the defendant for approximately one hour; they were not all present at once with the defendant.

"The first interaction . . . was with [Detective Charles] Hicking. When Hicking entered the defendant's room, a nurse was present. Hicking asked the nurse for permission to speak with the defendant, and the nurse assented. The defendant then told Hicking his version of what had occurred that evening, and Hicking asked clarifying questions. The defendant told Hicking that he had stabbed the victim but that it was in self-defense. The interaction ended when nursing staff interrupted Hicking in order to perform their duties. Later, Hicking reentered the defendant's hospital room with another detective, but he did not interact with the defendant. Hicking was dressed in plain clothes, and his weapon was not visible to the defendant.

"The defendant's longest interaction was with [Thomas] Bugbee, a patrol officer, who first entered the defendant's hospital room at 10:13 p.m. During the approximately thirty minute interaction, Bugbee took the defendant's sworn statement. Specifically, the defendant told Bugbee, 'I don't flight, I fight,' 'I'm a peaceable person until you get in my face, then I'll fuck you up,' and 'I take shit from no one.' While the defendant gave his statement, medical personnel entered and exited the hospital room freely and tended to the defendant. At one point, medical personnel asked Bugbee if they could treat the defendant during the interview; at that time, Bugbee confirmed the defendant's desire to continue the interview in the presence of the staff. As the defendant continued to speak with Bugbee, a nurse inserted an intravenous (IV) catheter into the back of

the defendant's hand in order to draw blood. The defendant's IV was not attached to any machine or equipment while he spoke with Bugbee. After putting the defendant under oath and having him sign the statement, Bugbee left the room. At approximately 12:09 a.m., Bugbee reentered the defendant's room to speak with him again. During this brief conversation, Bugbee told the defendant that he was free to go, as far as the police were concerned, but that it was up to the hospital when he could actually leave. At 12:26 a.m., Bugbee repeated to the defendant that the police officers were done speaking with him and that he could leave as soon as the hospital released him. During all of these conversations, Bugbee was in uniform with his weapon visible and his badge displayed.

"After briefly reviewing the statement that the defendant had given to Bugbee, [David] Hatheway, a detective sergeant, entered the defendant's hospital room along with both Sergeant Christopher Pryputniewicz and Bugbee. Hatheway was wearing civilian clothes, but his badge and weapon were visible to the defendant. Hatheway interviewed the defendant about his version of events, during which the defendant described the stabbing and stated to the officers that he 'take[s] shit from no one.' During the interaction, the defendant gave the officers consent to seize and search his clothing, which the medical staff previously had placed into bags. After concluding the interview, Hatheway relayed his impressions to his superior officer and left the hospital.

"Finally, the defendant spoke with [Michael] Patrizz, who was the lead detective assigned to the case. Accompanied by Hicking, Patrizz entered the defendant's hospital room shortly after 12:30 a.m. and asked the defendant to again provide his version of the events. At that time, Patrizz was dressed in plain clothes with his weapon and badge visible to the defendant. The defendant told Patrizz that he had stabbed the victim in his

stomach area and upper chest area but that it was in self-defense. After approximately five to ten minutes, the defendant expressed annoyance at having to repeat his story and indicated a desire to stop speaking. At that point, Patrizz ended the interaction.

"During each interaction with the police officers, the defendant was never physically restrained. No officer asked the medical staff to prolong the defendant's treatment. Although the defendant was intoxicated, he 'was coherent, alert, oriented, and able' to understand his circumstances and to communicate effectively. Apart from his injured nose, medical examinations revealed no other medical concerns. After becoming clinically sober, the defendant was discharged from the hospital at 2:25 a.m. At no point during any of their interactions with the defendant at the hospital did the police advise the defendant of his *Miranda* rights.

"The police arrested the defendant the following day. The state charged the defendant with one count of assault in the first degree in violation of § 53a-59 (a) (1) and one count of tampering with physical evidence in violation of General Statutes § 53a-155." (Footnotes omitted.) *State* v. *Garrison*, supra, 350 Conn. 64–68.

The defendant subsequently moved to suppress the statements that he had made to the officers while he was at the hospital. The defendant asserted that the motion to suppress must be granted because (1) he was subjected to custodial interrogation by the officers and he had not yet been advised of his *Miranda* rights and (2) regardless of whether he was in custody at the time, his statements were not voluntary.

Over the course of three days, the trial court, *Bhatt*, *J.*, conducted an evidentiary hearing on the defendant's motion to suppress. Following the conclusion of the hearing, the court issued a memorandum of decision, concluding that the defendant was not in custody when

he made the challenged statements and that the challenged statements were voluntary. Accordingly, the court denied his motion to suppress.

The defendant subsequently elected a bench trial and asserted that he had acted in self-defense. The court, *Seeley*, *J.*, granted the defendant's motion for a judgment of acquittal regarding the charge of tampering with physical evidence, but found the defendant guilty of the assault charge after concluding that the state had disproven self-defense beyond a reasonable doubt. The court sentenced the defendant to ten years of incarceration, execution suspended after seven years, and five years of probation.

The defendant appealed from the judgment of the trial court to this court, claiming, among other things, that the statements he made to the police at the hospital were the result of a custodial interrogation and that, because he had not been advised of his *Miranda* rights before the statements were elicited, he was entitled to have the statements suppressed. See *State* v. *Garrison*, supra, 213 Conn. App. 807. This court unanimously concluded that "a reasonable person in the defendant's position would have believed that he was not at liberty to terminate the police questioning, that his freedom of movement was restricted by the police . . . and that [he] was in police custody to the degree associated with a formal arrest . . . ." (Citation omitted; internal quotation marks omitted.) Id., 827. This court further concluded that the questioning of the defendant by the police constituted interrogation for purposes of *Miranda* and, therefore, that evidence of the statements should have been suppressed. Id., 808, 827. After concluding that the admission of the statements obtained in violation of *Miranda* was not harmless beyond a reasonable doubt, this court reversed the defendant's judgment of conviction and remanded the case for a new trial. See id., 840–41.

Our Supreme Court granted the state's petition for certification to appeal limited to the following issues: (1) "Did the Appellate Court correctly conclude that the defendant was in custody when he spoke with investigating officers after admitting himself to the hospital?" And (2) "[i]f the answer to the first question is 'yes,' did the Appellate Court correctly conclude that the admission of the defendant's statements while in custody was not harmless beyond a reasonable doubt?" *State* v. *Garrison*, 345 Conn. 959, 959, 285 A.3d 52 (2022).

In a split decision, our Supreme Court reversed the judgment of this court, concluding that the trial court properly had determined, under the totality of the circumstances, that the defendant was not in custody during any of his interactions with the law enforcement officers at the hospital.[2] *State* v. *Garrison*, supra, 350 Conn. 85. Our Supreme Court then remanded the case to this court to consider the defendant's remaining issues on appeal. Id. Additional facts and procedural history will be set forth as necessary to resolve these claims.

I

The defendant claims that the court improperly denied his motion to suppress the statements because, contrary to the determination of the court, the defendant's statements to the police were not voluntary and, thus, their admission at trial deprived him of due process under the federal and state constitutions.[3] Specifically, the defendant contends that the state failed to

[2] In his dissenting opinion, Justice McDonald, joined by Justice Ecker, stated: "Because the Appellate Court's well reasoned opinion fully addresses both of the certified issues in this appeal, it would serve no useful purpose for me to repeat the discussion contained in that opinion. I therefore adopt the Appellate Court's opinion as the proper statement of the issues and the applicable law and reasoning concerning both issues." *State* v. *Garrison*, supra, 350 Conn. 87 (*McDonald*, *J.*, dissenting).

[3] The defendant has not raised a separate claim that the admission of his allegedly involuntary statements was prohibited under our state constitution.

establish that his statements were voluntary under the totality of the circumstances because the record supports a conclusion that he was extremely intoxicated while speaking to the police officers and that they used coercive tactics to overbear his will to such extent that his statements must be deemed involuntary. We are not persuaded.

The trial court made the following findings of fact with respect to this claim. "[T]he totality of circumstances . . . compels the conclusion that the defendant's various statements were voluntary and not the product of an overborne will brought about by coercive police activity. As noted, the video evidence is abundantly clear that the defendant's interactions with the police were nothing but consensual and he was eager to provide his version of events to the police. He repeatedly made spontaneous statements, going into detail, and had to be asked several times to clarify information and to slow down to enable officers to follow along. He was not restrained in any way and, even though intoxicated, his affect and manner did not reveal any deficits in any understanding or the ability to recall and relay information. Not once did he express a desire to speak to a lawyer or indicate an unwillingness to speak to the police, except at the very end of the night when he indicated to . . . Patrizz that he no longer wanted to discuss the events. Prior to that interaction, he had at one point summoned . . . Bugbee to his room because it was his mistaken belief that officers wished to speak to him further and he wanted to answer their questions. Unlike the defendant [in *Mincey* v. *Arizona*,

Because the defendant has not provided an independent state constitutional analysis asserting greater protection under the state constitution, we analyze his constitutional claim under the assumption that his constitutional right to due process is coextensive under the state and federal constitutions. See *State* v. *Washington*, 345 Conn. 258, 262 n.1, 284 A.3d 280 (2022); *State* v. *Robert S.*, 179 Conn. App. 831, 840 n.11, 181 A.3d 568, cert. denied, 328 Conn. 933, 183 A.3d 1174 (2018).

437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978)], he was not tied to any tubes, needles or breathing apparatus.[4] He signed a consent to search form, listened to . . . Bugbee's verbal recitation of the written statement and had the mental wherewithal to make changes to that statement. He thanked . . . Bugbee for writing down his version of events.

"He was not seriously wounded and was not in danger of losing consciousness at any point. He was not prohibited from communicating with medical staff at any point, nor were medical staff prohibited from tending to him. No officer or medical personnel had any difficulty communicating with the defendant, nor did he express any difficulty understanding them or communicating with them.

"It is true that the defendant was intoxicated during his interactions with the police. It is this intoxication that prohibited him from leaving the hospital until 2:20 a.m. Further, he was never given *Miranda* warnings. However, these two factors by themselves are insufficient to defeat a finding of voluntariness. The state has met its burden of proof." (Footnote added.)

We now turn to the legal principles that govern this claim. "Irrespective of *Miranda*, and the fifth amendment itself . . . any use in a criminal trial of an involuntary confession is a denial of due process of law. . . . The state has the burden of proving the voluntariness of the confession by a fair preponderance of the evidence. . . . [T]he test of voluntariness is whether an examination of all the circumstances discloses that the conduct of law enforcement officials was such as to

[4] Our Supreme Court observed that, "[a]lthough the defendant had an IV inserted into the back of his hand, there is nothing in the record to suggest that the officers took advantage of what could have been a coercive situation created by [the] physical restraint placed on the defendant for purposes of medical treatment." (Internal quotation marks omitted.) *State* v. *Garrison*, supra, 350 Conn. 75; see also id., 77–78.

overbear [the defendant's] will to resist and bring about confessions not freely self-determined . . . . The ultimate test remains . . . [i]s the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. . . . The determination, by the trial court, whether a confession is voluntary must be grounded upon a consideration of the circumstances surrounding it. . . . Factors that may be taken into account, upon a proper factual showing, include: the youth of the accused; his lack of education; his intelligence; the lack of any advice as to his constitutional rights; the length of detention; the repeated and prolonged nature of the questioning; and the use of physical punishment, such as the deprivation of food and sleep. . . . Under the due process clause of the fourteenth amendment, however, in order for a confession to be deemed involuntary and thus inadmissible at trial, there must be police conduct, or official coercion, causally related to the confession . . . . In other words, there must be an essential link between [the] coercive activity of the [s]tate, on the one hand, and a resulting confession by a defendant, on the other . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Christopher S.*, 338 Conn. 255, 280–81, 257 A.3d 912 (2021); *State* v. *Lueders*, 225 Conn. App. 612, 642–43, 317 A.3d 69, cert. denied, 349 Conn. 920, 321 A.3d 402 (2024); see also *State* v. *Madera*, 210 Conn. 22, 39–40, 554 A.2d 263 (1989).

"[T]here is considerable overlap between the factors that courts should consider in determining whether a defendant is in custody for *Miranda* purposes and the factors that courts should consider in determining whether a defendant's statements were voluntary." *State* v. *Jackson*, 304 Conn. 383, 421, 40 A.3d 290 (2012).

Finally, we note that "[w]hether a confession is involuntary because it was coerced rests upon factual determinations regarding the circumstances surrounding the defendant's [statements]. . . . Although the ultimate question of voluntariness is one of law over which our review is plenary, the factual findings underpinning that determination will not be overturned unless they are clearly erroneous. . . . As in other cases in which the factual findings implicate a defendant's constitutional rights and the credibility of witnesses is not the primary issue, we will, however, undertake a scrupulous examination of the record to ensure that the findings are supported by substantial evidence." (Internal quotation marks omitted.) Id., 419–20; *State* v. *Lueders*, supra, 225 Conn. App. 643–44.

On appeal, the defendant does not expressly assert that any of the court's factual findings are clearly erroneous. Instead, he argues that, because he was intoxicated at the time he made the challenged statements and the police used deceptive tactics by suggesting to him that they believed his claim of self-defense, the totality of the circumstances compels a conclusion that his statements were not voluntary. We disagree.

First, we emphasize that many of the determinations made by our Supreme Court in rejecting the defendant's claim that he was in custody for purposes of *Miranda* support a similar conclusion that his statements were voluntary under the totality of the circumstances. See, e.g., *State* v. *Jackson*, supra, 304 Conn. 420–21; *State* v. *Marrero-Alejandro*, 159 Conn. App. 376, 396, 122 A.3d 272 (2015), appeal dismissed, 324 Conn. 780, 154 A.3d 1005 (2017). The defendant was not restrained by the police in any manner and was "able to get up from his hospital bed and walk around the room." *State* v. *Garrison*, supra, 350 Conn. 75. The questioning was "neither prolonged nor aggressive" and the defendant

spoke to the officers "spontaneously, eagerly and immediately . . . ." (Internal quotation marks omitted.) Id., 74. Indeed, he thanked Bugbee for writing down his statement and made changes to the statement that he believed to be warranted. Id., 77. Moreover, the officers' interactions with the defendant were not prolonged but instead "were spaced out and totaled only about one hour . . . ." Id., 75. The police did not limit or otherwise condition the defendant's access to medical care on his compliance with their questioning. Id., 81. There is no evidence that he was deprived of food or water, or subject to the use of any other type of physical punishment. See, e.g., *State* v. *Adorno*, 45 Conn. App. 187, 191, 695 A.2d 6, cert. denied, 242 Conn. 904, 697 A.2d 688 (1997).

It is true that the defendant's blood alcohol level was elevated significantly during the time he was questioned. The court found, however, based in part on the testimony of the defendant's primary nurse, that the defendant was "alert, awake, and oriented . . . ." (Internal quotation marks omitted.) *State* v. *Garrison*, supra, 350 Conn. 79. Again, the defendant does not challenge as clearly erroneous this or any other factual finding. Moreover, as the court properly noted, intoxication alone may be insufficient to defeat a finding of voluntariness. See, e.g., *State* v. *Madera*, supra, 210 Conn. 42. The defendant's hospital records, which were admitted into evidence, state that he was alert and speaking coherently. The defendant was not so intoxicated that he suffered from any mania, slipped in and out of consciousness, or lacked an ability to understand the questions he was being asked.[5] See *State* v. *Richard S.*, 143 Conn. App. 596, 615–17, 70 A.3d 1110, cert. denied, 310 Conn. 912, 76 A.3d 628 (2013); *State* v.

[5] The defendant instead relies on facts not in evidence by citing to an exhibit that was marked for identification only during the hearing on the motion to suppress.

Russo, 3 Conn. App. 137, 144–46, 485 A.2d 1335 (1985); see, e.g., *State* v. *Andrews*, 313 Conn. 266, 322–23, 96 A.3d 1199 (2014) (trial court may consider defendant's emotional state, intoxication, and mental disease to determine whether confession is voluntary; court nonetheless found defendant's claim of being under influence of drugs and in need of prescription medication was not credible and, therefore, properly denied motion to suppress statement as involuntary); *Parsad* v. *Greiner*, 337 F.3d 175, 183–84 (2d Cir.) (court's findings, that defendant had consumed numerous alcoholic beverages but he was not in such state of intoxication that he could not understand what he was doing when he made pre-*Miranda* statements, were not clearly erroneous, and fact that defendant was alcoholic was insufficient to render such statements involuntary), cert. denied sub nom. *Parsad* v. *Fischer*, 540 U.S. 1091, 124 S. Ct. 962, 157 L. Ed. 2d 798 (2003).

Finally, it is important to recognize that the court did not make any finding that the law enforcement officers who spoke to the defendant used any coercive police tactics. The only allegedly deceptive tactic on which the defendant relies is Bugbee's statement to him that he believed his claim of self-defense and he was unlikely to be charged with a crime.[6] Our Supreme Court has recognized, however, that such vague, predictive statements regarding how a suspect may be charged or treated by prosecuting authorities are not inherently coercive. See *State* v. *Griffin*, 339 Conn. 631, 680–81, 262 A.3d 44 (2021), cert. denied, U.S. , 142 S. Ct. 873, 211 L. Ed. 2d 575 (2022). Moreover, even in circumstances in which the police used multiple deceptive and coercive tactics, our Supreme Court has been disinclined to conclude that such trickery necessarily

[6] In his principal appellate brief, the defendant noted that two other police officers acknowledged their "familiarity with deceptive police interrogation tactics."

requires a conclusion that the defendant's will was overborne. See id., 672–73; see also *State* v. *Pinder*, 250 Conn. 385, 423, 736 A.2d 857 (1999).

In sum, we conclude that the court properly concluded that the state sufficiently demonstrated that the defendant's statements to law enforcement officers at the hospital, under the totality of the circumstances, were voluntary. Accordingly, we conclude that their admission at trial did not violate the due process clause of the federal constitution. The defendant's claim that the court improperly denied his motion to suppress, therefore, fails.

II

The defendant next claims that the court improperly denied his motion for sanctions in which he claimed that the state failed to comply with the court's discovery orders and its constitutional obligation to disclose impeachment evidence pursuant to *Brady* v. *Maryland*, supra, 373 U.S. 87, and *Giglio* v. *United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). Specifically, the defendant asserts that the state improperly failed to disclose (1) that a condition of the victim's probation was that he consume no alcohol and (2) its agreement or understanding with the victim that the state did not intend to prosecute the victim for having violated his probation in exchange for the victim's cooperation in the prosecution of the defendant. He also asks this court to exercise its supervisory authority over the administration of justice to assure compliance with the state's discovery obligations. We are not persuaded by the defendant's arguments regarding this claim.

The following facts and procedural history are relevant to this claim. On the evening of the assault, the defendant knew that the victim was on probation and that a condition of his probation was to refrain from

using alcohol.[7] Nevertheless, they spent time together drinking alcohol inside the apartment and later around a firepit. The defendant told the police officers while at the hospital that he knew that a condition of the victim's probation was that he not consume alcohol and the defendant's statements in this regard are captured on the officers' body worn camera footage. The video was provided to the defendant's counsel in November, 2018, when the defendant first filed a discovery request.

On December 4, 2018, the defendant filed supplemental discovery requests seeking a variety of information and material relating to the victim, including any records of conviction and documents related thereto, probation, and Department of Correction records, and "[a]ny . . . treatment reports, evaluations, sentencing materials, or other evidence in the state's possession . . . relevant to any defenses of [the defendant] or impeachment of [the victim]." The state indicated that it would comply, and, on December 21, 2018, the court ordered it to do so to the extent the records were available.

After the case was placed on the firm jury list, the defendant filed, inter alia, a "Motion to Complete Discovery," a "Motion for In Camera Review of Sealed Documents," and a "Memorandum in Support of Subpoena Duces Tecum." In one or more of these filings and proceedings related thereto, the defendant made representations that indicated he was aware of the victim's conviction history and that one or more of the criminal incidences underlying the convictions involved the victim's using alcohol to the point of intoxication. The defendant also indicated that he knew that the

[7] The victim had been sentenced to three years of incarceration, execution suspended, and three years of probation on February 13, 2018. The conditions of his probation prohibited him from possessing or using drugs or alcohol.

conditions of the victim's probation included restrictions on his consumption of alcohol.

On May 20, 2019, the defendant filed a motion for sanctions in which he asserted that the state had violated the court's December 21, 2018 discovery order and had failed to comply with its constitutional disclosure obligations set forth in *Brady* and *Giglio*. Specifically, the defendant's counsel argued, among other things, that he had learned independently that a condition of the victim's probation was that he not consume alcohol and that he was exposed to up to three years of incarceration if found to be in violation of his probation. The defendant's motion for sanctions also indicated that the state had decided not to seek a warrant for a violation of probation against the victim. The defendant sought a dismissal of the prosecution or, alternatively, other forms of relief including, but not limited to, the admission into evidence at trial of various records pertaining to the victim's criminal and substance abuse history.

Following oral argument[8] on the defendant's motion for sanctions, the court issued a memorandum of decision denying the motion. With respect to the victim's condition of probation, the court concluded that the state had not disclosed it to the defendant during discovery. Nevertheless, it concluded that it was unnecessary to decide whether such facts were material within the meaning of *Brady* because the information had not been suppressed. As the court stated: "The defendant himself was aware of the fact that the [victim] was not permitted to consume any alcohol while on probation. He [said] as much during his interactions with the police [on] the night of the incident. Defense counsel was able to confirm this by obtaining public records that listed

[8] The defendant did not present any witnesses with respect to the motion but instead relied solely on an offer of proof and certain documents he had attached to his motion.

the [victim's] conditions of probation. At the very least, the defendant knew at the time of the filing of this motion, the essential facts permitting him to take advantage of [that] evidence. . . . [T]he information is now known, by whatever source, to the defense. Evidence in this matter has not yet commenced, and the defendant has not shown how he has been prejudiced by this untimely disclosure or how it will deprive him of a fair trial. There is no *Brady* violation." (Citation omitted; internal quotation marks omitted.)

With respect to the state's alleged failure to disclose an agreement with the victim not to seek a violation of probation warrant, the court stated: "[I]f there existed an agreement or understanding—express or implied—between the state, a probation officer, any law enforcement agency, the [victim] or his lawyer that related to any benefit, positive outcome or consideration offered, suggested or implied to the [victim] in order to secure his testimony against the defendant, the state would be obligated to disclose that information. There is no evidence that any such discussion has occurred between any of the relevant parties. The claim is denied."

In conclusion, the court determined that the "defendant has not demonstrated that the evidence sought, to the extent that it exists and is favorable, was disclosed in an untimely fashion and that the untimely disclosure has prejudiced him or deprived him of the right to a fair trial." The court did not explicitly address the defendant's claim that, even if the state's discovery conduct did not violate *Brady* and its progeny, sanctions still should be imposed on the state as a result of its noncompliance with the court's discovery order.[9]

[9] Practice Book § 40-5 provides: "If a party fails to comply with disclosure as required under these rules, the opposing party may move the judicial authority for an appropriate order. The judicial authority hearing such a motion may enter such orders and time limitations as it deems appropriate, including, without limitation, one or more of the following: (1) Requiring

The defendant, however, failed to seek an articulation from the court regarding that issue.

We turn then to the legal principles that govern the defendant's *Brady* claim. "In *Brady* [v. *Maryland*, supra, 373 U.S. 86], the United States Supreme Court held that [t]he defendant has a right to the disclosure of exculpatory evidence under the due process [clause] of . . . [the fourteenth amendment to] the United States constitution . . . . *State* v. *Floyd*, 253 Conn. 700, 736–37, 756 A.2d 799 (2000)." (Internal quotation marks omitted.) *State* v. *Andres C.*, 349 Conn. 300, 329, 315 A.3d 1014, cert. denied, U.S. , S. Ct. , L. Ed. 2d (2024). "In order to prove a *Brady* violation, the defendant must show: (1) that the prosecution suppressed evidence after a request by the defense; (2) that the evidence was favorable to the defense; and (3) that the evidence was material." (Internal quotation marks omitted.) *State* v. *Floyd*, supra, 736–37. "It is well established that [i]mpeachment evidence as well as exculpatory evidence falls within *Brady*'s definition of evidence favorable to an accused." (Internal quotation marks omitted.) Id., 737; see also *Giglio* v. *United States*, supra, 405 U.S. 153–54. "Whether the [defendant] was deprived of his due process rights due to a *Brady* violation is a question of law, to which we grant plenary review." (Internal quotation marks omitted.) *Morant* v. *Commissioner of Correction*, 117 Conn. App. 279, 284, 979 A.2d 507, cert. denied, 294 Conn. 906, 982 A.2d 1080 (2009); see also *State* v. *Andres C.*, supra, 329–30.

"[I]t is well established that evidence is not considered to have been suppressed within the meaning of

the noncomplying party to comply; (2) Granting the moving party additional time or a continuance; (3) Relieving the moving party from making a disclosure required by these rules; (4) Prohibiting the noncomplying party from introducing specified evidence; (5) Declaring a mistrial; (6) Dismissing the charges; (7) Imposing appropriate sanctions on the counsel or party, or both, responsible for the noncompliance; or (8) Entering such other order as it deems proper."

the *Brady* doctrine if the defendant or his attorney either knew, or should have known, of the essential facts permitting him to take advantage of [that] evidence. . . . *State* v. *Skakel*, 276 Conn. 633, 701, 888 A.2d 985, cert. denied, 549 U.S. 1030, 127 S. Ct. 578, 166 L. Ed. 2d 428 (2006); see also *State* v. *Guilbert*, [306 Conn. 218, 272, 49 A.3d 705 (2012)] (same); *Young* v. *Commissioner of Correction*, 219 Conn. App. 171, 189, 294 A.3d 29 (same), cert. denied, 347 Conn. 905, 297 A.3d 567 (2023). The rationale underlying this exception to the state's disclosure obligation under *Brady* is obvious: *Brady* is designed to assure that the defendant is not denied access to exculpatory evidence known or available to the state but unknown or unavailable to him. . . . It is not intended either to relieve the defense of its obligation diligently to seek evidence favorable to it or to permit the defense to close its eyes to information likely to lead to the discovery of such evidence. . . . Thus, evidence will not be deemed to have been suppressed by the state . . . if the [defendant] or the [defendant's] trial counsel reasonably was on notice of [its] existence but nevertheless failed to take appropriate steps to obtain it." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Reyes* v. *State*, 222 Conn. App. 510, 533–34, 306 A.3d 5 (2023), cert. denied, 348 Conn. 944, 307 A.3d 910 (2024); see also *State* v. *Giovanni P.*, 155 Conn. App. 322, 343, 110 A.3d 442, cert. denied, 316 Conn. 909, 111 A.3d 883 (2015).

As we noted previously, the defendant commented to the police on the night of the incident that he was aware of the victim's condition of probation that the victim was not to use alcohol. Additionally, in the defendant's May 20, 2019 memorandum of law in support of his motion for sanctions, he acknowledged that the victim had two prior convictions that resulted from conduct while he was intoxicated. The defendant's

memorandum of law further stated: "A condition of probation for his most recent . . . conviction is that he not possess drugs or alcohol." The defendant also represented that, five days earlier, he had received transcripts from the victim's sentencing proceeding during which the prosecutor requested, as a special condition of probation, that the victim not use or possess any drugs or alcohol. At the hearing on his motion for sanctions, the defendant acknowledged that he had all of the information he had sought and would be able to prepare for the trial. On the basis of these facts, the trial court, in denying his motion for sanctions, determined that the defendant was aware of the victim's condition of probation that he refrain from consuming alcohol. Accordingly, the court found that this information was not suppressed and, thus, a *Brady* violation did not exist.

In his appellate brief, the defendant contends that the evidence showed only that he suspected that the victim was not permitted to drink alcohol due to the condition of his probation. We disagree. The court determined that the defendant was aware of the victim's condition of probation prior to trial. On the basis of this undisputed factual finding that the defendant and his counsel were aware of the conditions of the victim's probation; see *State* v. *Skakel*, supra, 276 Conn. 702–703; *Reyes* v. *State*, supra, 222 Conn. App. 535–36; the court properly concluded that the defendant failed to establish a *Brady* violation.

The defendant also asserts that the state improperly failed to disclose its agreement or understanding with the victim that it did not intend to prosecute the victim for having violated his probation in exchange for his cooperation in the prosecution of the defendant. He further contends that, as a result, his decision to waive his right to trial by jury was unknowing and, therefore, involuntary. We disagree.

"[T]he *Brady* rule applies not just to exculpatory evidence, but also to impeachment evidence . . . which, broadly defined, is evidence having the potential to alter the jury's assessment of the credibility of a significant prosecution witness. . . . Thus, our case law has recognized that explicit agreements or understandings between a witness and the prosecutor or the police must be disclosed . . . but [a]n unexpressed intention by the state not to prosecute a witness does not." (Citations omitted; internal quotations omitted.) *Spearman* v. *Commissioner of Correction*, 164 Conn. App. 530, 578–79, 138 A.3d 378, cert. denied, 321 Conn. 923, 138 A.3d 284 (2016); see also *Gomez* v. *Commissioner of Correction*, 336 Conn. 168, 182, 243 A.3d 1163 (2020) (under *Brady* and its progeny, state may not suppress material, exculpatory evidence, including that which tends to undermine credibility of state's witnesses).

"The prerequisite of any claim under the *Brady*, *Napue* [v. *Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959)] and *Giglio* line of cases[10] is the existence of an undisclosed agreement or understanding between the cooperating witness and the state. . . . Normally, this is a fact based claim to be determined by the trial court, subject only to review for clear error. . . . [T]he burden is on the defendant to prove the existence of undisclosed exculpatory evidence." (Citation omitted;

[10] "Drawing from these cases, [our Supreme Court] has stated: [D]ue process is . . . offended if the state, although not soliciting false evidence, allows it to go uncorrected when it appears. . . . If a government witness falsely denies having struck a bargain with the state, or substantially mischaracterizes the nature of the inducement, the state is obliged to correct the misconception. . . . Regardless of the lack of intent to lie on the part of the witness, *Giglio* and *Napue* require that the prosecutor apprise the court when he knows that his witness is giving testimony that is substantially misleading. . . . A new trial is required if the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury." (Internal quotation marks omitted.) *State* v. *Smith*, 313 Conn. 325, 348–49, 96 A.3d 1238 (2014).

footnote added; internal quotation marks omitted.) *Brown* v. *Commissioner of Correction*, 228 Conn. App. 309, 314, 324 A.3d 144, cert. denied, 350 Conn. 927, 326 A.3d 250 (2024); see also *State* v. *Smith*, 313 Conn. 325, 348–49, 96 A.3d 1238 (2014) (same).

In the present case, the court specifically found that there was no evidence of any discussion between the state and the victim regarding an agreement or understanding, express or implied, pertaining to "any benefit, positive outcome, or consideration offered, suggested or implied to the [victim] in order to secure his testimony against the defendant . . . ." Stated differently, the defendant has not set forth any evidence demonstrating that the state agreed, in exchange for the victim's cooperation, not to prosecute the victim for violating his probation by consuming alcohol on the night of his stabbing. The defendant has not challenged this finding on appeal. In the absence of such an agreement or understanding, this argument must fail.

Next, the defendant argues that the court improperly failed to sanction the state following its violation of the court's discovery orders. "Practice Book § 40-5 gives broad discretion to the trial judge to fashion an appropriate remedy for noncompliance with discovery. . . . [T]he primary purpose of a sanction for violation of a discovery order is to ensure that the defendant's rights are protected, not to exact punishment on the state for its allegedly improper conduct. As we have indicated, the formulation of an appropriate sanction is a matter within the sound discretion of the trial court. . . . In determining what sanction is appropriate for failure to comply with [court-ordered] discovery, the trial court should consider the reason why disclosure was not made, the extent of prejudice, if any, to the opposing party, the feasibility of rectifying that prejudice by a continuance, and any other relevant circumstances. . . . As with any discretionary action of the trial court,

appellate review requires every reasonable presumption in favor of the action, and the ultimate issue is whether the trial court could reasonably conclude as it did. . . . In general, abuse of discretion exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors." (Citations omitted; internal quotation marks omitted.) *State* v. *Jackson*, 334 Conn. 793, 810–11, 224 A.3d 886 (2020); see also *State* v. *Hargett*, 196 Conn. App. 228, 256–58, 229 A.3d 1047 (2020), aff'd, 343 Conn. 604, 275 A.3d 601 (2022).

In denying the defendant's motion, the court did not expressly address his argument that sanctions against the state were warranted under our rules of practice for its failure to comply with the discovery orders. In declining to afford him any of the requested relief, the court implicitly denied this aspect of the defendant's May 12, 2019 motion for sanctions. In concluding that the court did not abuse its discretion, we first note that a trial court is not required to impose sanctions for every violation of a discovery order. See *State* v. *Billings*, 217 Conn. App. 1, 47, 287 A.3d 146 (2022), cert. denied, 346 Conn. 907, 288 A.3d 217 (2023). Additionally, the defendant's counsel admitted that, as of the hearing on his motion for sanctions, he was in possession of all the materials that he had sought and would be able to prepare fully for trial. On appeal, the defendant has failed to demonstrate that the decision not to impose sanctions on the state constituted an abuse of the court's discretion. Finally, this court does not presume error by the trial court. See *State* v. *Herman K.*, 212 Conn. App. 592, 605, 275 A.3d 1233, cert. denied, 344 Conn. 902, 277 A.3d 136 (2022); *State* v. *James K.*, 209 Conn. App. 441, 465, 267 A.3d 858 (2021), aff'd, 347 Conn. 648, 299 A.3d 243 (2023). For these reasons, we

reject the defendant's argument that the court improperly failed to impose sanctions on the state for violating its discovery order.

Finally, the defendant asserts, as an independent basis for reversal, that we should exercise our supervisory authority to assure the state's compliance with its disclosure obligations. Specifically, he contends that we should "direct trial courts to conduct a formal inquiry on the record with prosecutors during pretrial hearings to ascertain whether the state has exercised due diligence in locating favorable evidence and whether such evidence has been disclosed to the defense." We conclude that the use of our supervisory authority over the administration of justice is not warranted in the present case.

"It is well settled that [a]ppellate courts possess an inherent supervisory authority over the administration of justice. . . . Under our supervisory authority, we have adopted rules intended to guide the lower courts in the administration of justice in all aspects of the criminal process. . . . The exercise of our supervisory powers is an extraordinary remedy to be invoked only when circumstances are such that the issue at hand, [although] not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole." (Citation omitted; internal quotation marks omitted.) *State* v. *Langston*, 346 Conn. 605, 637, 294 A.3d 1002 (2023), cert. denied, U.S. , 144 S. Ct. 698, 217 L. Ed. 2d 391 (2024); see also *State* v. *Moore*, 169 Conn. App. 470, 487, 151 A.3d 412 (2016) (supervisory powers are not last bastion of hope for every untenable appeal or form of free-floating justice untethered to legal principle), appeal dismissed, 334 Conn. 275, 221 A.3d 40 (2019).

The defendant has failed to demonstrate that this case presents the rare circumstance in which traditional constitutional, statutory, and procedural limitations are inadequate to protect the rights of the defendant and the integrity of the judicial system. See *State* v. *Lockhart*, 298 Conn. 537, 576, 4 A.3d 1176 (2010); see also *State* v. *Jose V.*, 157 Conn. App. 393, 408–409, 116 A.3d 833, cert. denied, 317 Conn. 916, 117 A.3d 854 (2015). We conclude, therefore, that this case does not merit the extraordinary remedy requested by the defendant.

The judgment is affirmed.

In this opinion the other judges concurred.

ELM CITY LOCAL, CACP *v.* CITY OF NEW HAVEN
(AC 47260)

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

Syllabus

The plaintiff union appealed from the judgment of the Superior Court denying its application to vacate an arbitration award in favor of the defendant city. The plaintiff claimed that the court improperly concluded that the arbitration panel did not exceed its powers when it determined that the defendant had just cause to terminate the employment of one of the plaintiff's members, an officer with the defendant's police department. *Held*:

The trial court properly concluded that the arbitration award conformed to the parties' submission to the arbitration panel, the arbitration panel having decided an issue that the parties had given it the authority to decide.

This court declined to review the plaintiff's claim that the trial court improperly refused to vacate the award because the arbitration panel's reliance on a certain expert opinion constituted a manifest disregard of the law, as the plaintiff abandoned that claim in the Superior Court and failed to adequately brief it before this court.

Argued January 7—officially released February 25, 2025

Procedural History

Application to vacate an arbitration award, brought to the Superior Court in the judicial district of New

Haven and tried to the court, *Stewart*, *J.*; judgment denying the application, from which the plaintiff appealed to this court. *Affirmed.*

Alexander T. Taubes, for the appellant (plaintiff).

Floyd J. Dugas, with whom was *Rebecca Goldberg*, for the appellee (defendant).

Opinion

CLARK, J. The plaintiff union, Elm City Local, CACP, appeals from the judgment of the Superior Court denying its application to vacate an arbitration award (application) in favor of the defendant, the city of New Haven. On appeal, the plaintiff claims that the court improperly concluded that the arbitration panel did not exceed its powers when it determined that the defendant had just cause to terminate the employment of Jason Santiago, one of the plaintiff's members, with the New Haven Police Department (department). In particular, the plaintiff claims that the court should have vacated the arbitration award because (1) the award failed to conform to the parties' submission, and (2) the arbitration panel manifestly disregarded the law. We affirm the judgment of the court.

The following facts, as found by the arbitration panel or as are otherwise undisputed in the record,[1] and procedural history are relevant to this appeal. On December 25, 2019, Santiago, who was then an officer with the department, was called to the scene of a disabled vehicle on Lombard Street in New Haven. When he arrived, accompanied by two fellow officers, Santiago encountered Officer Michael Hinton, who was also an employee of the department, Luis Rivera, and Julie

[1] On January 12, 2024, the plaintiff filed a certificate with this court pursuant to Practice Book § 63-4 (a) (3), stating that no transcripts were necessary for this appeal. Any transcripts of the arbitration hearings and of proceedings in the Superior Court are thus not part of the record on appeal.

Cruz. Rivera and Cruz were arguing, and one of Santiago's fellow officers escorted Cruz away from Rivera. Rivera said: "Don't touch her, don't fucking touch her." Santiago told Rivera to relax, and Rivera responded: "You relax." Santiago said that he had "had enough of this guy," turned Rivera around, and attempted to handcuff him. Rivera began to resist, and a brief struggle ensued during which Santiago twisted Rivera's leg in a "pain compliance technique." Eventually, Rivera was handcuffed. Santiago then kicked Rivera in the groin while he lay handcuffed on his stomach.

After he kicked Rivera, Santiago, assisted by Hinton, lifted Rivera up by his left ponytail. As soon as Rivera got to his feet, the officers' body worn camera footage recorded a sound that resembled spitting. Santiago then punched Rivera in the face, and Rivera fell to the ground. Hinton said: "Bro why you spit." Santiago pointed his finger in the area of Rivera's left ear and said: "That's assault second on a police officer." Rivera directed a series of expletives at the officers and spat blood on the road. At some point, a woman named Jessica Morales arrived at the scene, and Santiago asked her if she was Rivera's wife, to which she answered that she was. Santiago then asked who Cruz was, and said: "Who are you to him . . . you're the side chick, huh?"

Rivera was arrested, and Assistant State's Attorney Jennifer Lindade was assigned to prosecute the case. After Lindade reviewed footage of the incident, she wrote to the department's internal affairs division to express "serious concerns about the force used against [Rivera]." The department then opened an internal affairs investigation, which was conducted by Detective Jessica Stone and Sergeant Christopher Fennessey.

In the course of the investigation, Stone interviewed Officer David Acosta, a use of force trainer with the

department. Acosta reviewed video footage of the incident and told Stone that, in his view, Santiago's kick to Rivera's groin, as well as his decision to pull Rivera by his hair, violated the department's use of force policy. He further concluded that Santiago had been justified in punching Rivera in the face. Stone and Fennessey ultimately found, in line with Acosta's conclusions, that Santiago had acted unreasonably when he kicked Rivera in the groin and pulled his hair, but that he had acted reasonably when he punched Rivera in the face. They accordingly concluded that Santiago had violated department policy.

Chief Otoniel Reyes then ordered a *Loudermill* hearing.[2] At the hearing, Santiago did not take responsibility or express remorse for his actions, which caused Reyes concern that he might engage in such conduct again. Reyes recommended to the New Haven Police Commission that Santiago be terminated from his employment,[3] and Santiago was subsequently discharged.

Santiago then filed a grievance pursuant to the collective bargaining agreement between the plaintiff and the defendant, which provided that officers shall not be terminated except for "just cause." After exhausting preliminary steps with the department and the defendant, the plaintiff filed a request for mediation and arbitration with the State Board of Mediation and Arbitration (board) in the Connecticut Department of Labor. Five remote hearings were held before a three member

[2] " '[A] tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story' before termination. *Board of Education* v. *Loudermill*, [470 U.S. 532, 546, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985)]. The opportunity to present one's 'side of the story' is generally referred to as a *Loudermill* hearing." *AFSCME, Council 4, Local 2663* v. *Dept. of Children & Families*, 317 Conn. 238, 243 n.3, 117 A.3d 470 (2015).

[3] In New Haven, the New Haven Police Commission has the authority to terminate officers; the police chief does not.

panel of the board between November, 2020, and February, 2021. The parties' joint submission to the arbitration panel stated: "1. Did the [defendant] have just cause to terminate [Santiago]? 2. If not, what shall the remedy be?"

Several witnesses, including Acosta, testified before the arbitration panel. In the period between his interview with Stone and his testimony before the arbitration panel, Acosta had been disciplined by Reyes. Acosta's subsequent testimony to the arbitration panel differed markedly from the conclusions he had provided to Stone during the department's internal affairs investigation. Before the arbitration panel, Acosta testified that Santiago's decision to pull Rivera's hair might be justified if Santiago was not actually bearing or pulling Rivera's weight. He further testified that he did not have an opinion on whether Santiago was justified in kicking Rivera in the groin because he would need to know more about Santiago's state of mind and how he had perceived the totality of the circumstances.

Following Acosta's testimony, the defendant hired Eric Daigle, an attorney and former state trooper, to review the matter. After reviewing the video footage of the incident and other exhibits, Daigle prepared a report, which was submitted to the arbitration panel, opining in relevant part that the kick to Rivera's groin, hair pulling, punch, and reference to Cruz as a "side chick" all violated department policies. Daigle was permitted to testify before the arbitration panel over the plaintiff's objection. On June 24, 2021, the arbitration panel issued an award in favor of the defendant, finding that "[t]he [defendant] had just cause to terminate [Santiago]."

On July 22, 2021, the plaintiff filed its application in the Superior Court, seeking to vacate the arbitration

award pursuant to General Statutes § 52-418.[4] In its application, the plaintiff claimed in relevant part[5] that vacatur of the award was warranted under § 52-418 (a) (4) because the arbitrators had exceeded their powers by relying on impermissible "after-acquired evidence," namely, Daigle's opinion that Santiago's actions had violated department policies. The plaintiff further claimed that the arbitration panel had "exceeded its authority under the issue submission" and acted with "manifest disregard of the law." The parties filed briefs, and the plaintiff, in its brief, did not iterate its claim that the arbitration panel had manifestly disregarded the law.

On December 18, 2023, the court, *Stewart, J.*, denied the plaintiff's application. In its memorandum of decision, the court explained that a party can prevail on a claim under § 52-418 (a) (4) that an arbitration panel exceeded its powers by establishing that either (1) the

[4] General Statutes § 52-418 provides in relevant part: "(a) Upon the application of any party to an arbitration, the superior court for the judicial district in which one of the parties resides . . . or, when the court is not in session, any judge thereof, shall make an order vacating the award if it finds any of the following defects: (1) If the award has been procured by corruption, fraud or undue means; (2) if there has been evident partiality or corruption on the part of any arbitrator; (3) if the arbitrators have been guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been prejudiced; or (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made. . . ."

[5] The plaintiff also claimed that vacatur of the award was warranted under § 52-418 (a) (2), evident partiality or corruption on the part of any arbitrator, because a member of the arbitration panel had not disclosed that he was related by marriage to a legislative cosponsor of Connecticut's "Police Accountability Bill," by which we assume the plaintiff meant No. 20-1 of the 2020 Public Acts, titled "An Act Concerning Police Accountability," which the legislature passed during a special session in July, 2020. The court concluded that the plaintiff had failed to adduce sufficient evidence to support a claim of evident partiality, and the plaintiff does not challenge that conclusion on appeal.

arbitration award fails to conform to the parties' submission, or (2) the arbitration panel manifestly disregarded the law. See, e.g., *Blondeau* v. *Baltierra*, 337 Conn. 127, 155, 252 A.3d 317 (2020). The court concluded that the plaintiff had abandoned any claim pertaining to the arbitration panel's alleged manifest disregard of the law because, although the plaintiff had invoked that ground for vacatur in its application, it had failed to brief it. The court further concluded that the arbitration award conformed to the parties' submission, because the submission asked, "[d]id the [defendant] have just cause to terminate [Santiago]," and the award stated that "[t]he [defendant] had just cause to terminate [Santiago]." Having concluded that the award conformed to the submission, the court declined to review whether it was proper for the arbitration panel to rely on Daigle's expert opinion, reasoning that to conduct such an inquiry would be to "undertak[e] a de novo review that is not permitted." This appeal followed.

We begin with the relevant legal principles. "Judicial review of arbitral decisions is narrowly confined. . . . [T]he law in this state takes a strongly affirmative view of consensual arbitration. . . . Arbitration is a favored method to prevent litigation, promote tranquility, and expedite the equitable settlement of disputes. . . . Where the submission does not otherwise state, the arbitrators are empowered to decide factual and legal questions and an award cannot be vacated on the grounds that . . . the interpretation of the agreement by the arbitrators was erroneous. Courts will not review the evidence nor, where the submission is unrestricted, will they review the arbitrators' decision of the legal questions involved. . . . In other words, [u]nder an unrestricted submission, the arbitrators' decision is considered final and binding; thus courts will not review the evidence considered by the arbitrators nor will they

review the award for errors of law or fact." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *DiTullio* v. *LM General Ins. Co.*, 210 Conn. App. 347, 358–59, 270 A.3d 99 (2022). "A submission is unrestricted when . . . the parties' arbitration agreement contains no language restricting the breadth of issues, reserving explicit rights, or conditioning the award on court review." (Internal quotation marks omitted.) *Board of Education* v. *Waterbury Teachers Assn., CEA-NEA*, 196 Conn. App. 463, 473 n.8, 230 A.3d 746 (2020). In the present case, the court concluded, and the parties do not dispute, that the submission to the arbitration panel was unrestricted. See also, e.g., *Connecticut State Police Union* v. *Dept. of Public Safety*, 86 Conn. App. 686, 690, 862 A.2d 344 (2004) (submission that asked "[w]as the [plaintiff] terminated for just cause" and, "[i]f not, what shall be the remedy consistent with the [union] [c]ontract" was unrestricted (internal quotation marks omitted)), cert. denied, 274 Conn. 901, 876 A.2d 11 (2005).

"We have, however, recognized certain grounds for vacating an award even when the parties have committed a particular question to the authority of an arbitrator, including that: (1) the award rules on the constitutionality of a statute . . . (2) the award violates clear public policy . . . or (3) the award contravenes one or more of the statutory proscriptions of § 52-418." (Internal quotation marks omitted.) *Ahmed* v. *Oak Management Corp.*, 348 Conn. 152, 176, 302 A.3d 850 (2023), cert. denied, U.S. , 144 S. Ct. 2520, 219 L. Ed. 2d 1200 (2024). Relevant to this appeal, subdivision (4) of § 52-418 (a) provides that an arbitration award shall be vacated "if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made." "[A] claim that the arbitrators have

'exceeded their powers' may be established under § 52-418 in either one of two ways: (1) the award fails to conform to the submission, or, in other words, falls outside the scope of the submission; or (2) the arbitrators manifestly disregarded the law." *Harty* v. *Cantor Fitzgerald & Co.*, 275 Conn. 72, 85, 881 A.2d 139 (2005).

"The standard for reviewing a claim that the award does not conform to the submission requires what [our Supreme Court has] termed in effect, de novo judicial review. . . . The de novo label in this context means something very different from typical de novo review because review under this standard and in this setting is limited to a comparison of the award to the submission. Our inquiry generally is limited to a determination as to whether the parties have vested the arbitrators with the authority to decide the issue presented or to award the relief conferred." (Internal quotation marks omitted.) *ARVYS Protein, Inc.* v. *A/F Protein, Inc.*, 219 Conn. App. 20, 31, 293 A.3d 899, cert. denied, 347 Conn. 905, 297 A.3d 198 (2023).

"In determining whether an arbitrat[ion] [panel] has exceeded the authority granted under the contract, a court cannot base the decision on whether the court would have ordered the same relief, or whether or not the arbitrator[s] correctly interpreted the contract. The court must instead focus on whether the [arbitrators] had authority to reach a certain issue, not whether that issue was correctly decided. Consequently, as long as the arbitrator[s] [are] even arguably construing or applying the contract and acting within the scope of authority, the award must be enforced. The arbitrator[s'] decision cannot be overturned even if the court is convinced that the arbitrator[s] committed serious error. . . . Moreover, [e]very reasonable presumption and intendment will be made in favor of the award and of the arbitrator[s'] acts and proceedings. Hence, the burden rests on the party challenging the award to

produce evidence sufficient to show that it does not conform to the submission. . . .

"Such a limited scope of judicial review is warranted given the fact that the parties voluntarily bargained for the decision of the arbitrator[s] and, as such, the parties are presumed to have assumed the risks of and waived objections to that decision. . . . It is clear that a party cannot object to an award which accomplishes precisely what the arbitrators were authorized to do merely because that party dislikes the results." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Comprehensive Orthopaedics & Musculoskeletal Care, LLC* v. *Axtmayer*, 293 Conn. 748, 755–56, 980 A.2d 297 (2009).

With respect to a claim that an arbitration panel manifestly disregarded the law, our Supreme Court has explained that "[a]n award that manifests an egregious or patently irrational application of the law is an award that should be set aside pursuant to § 52-418 (a) (4) because the arbitrator[s] ha[ve] exceeded [their] powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made. We emphasize, however, that the manifest disregard of the law ground for vacating an arbitration award is narrow and should be reserved for circumstances of an arbitrator's extraordinary lack of fidelity to established legal principles. . . .

"In *Garrity* [v. *McCaskey*, 223 Conn. 1, 612 A.2d 742 (1992)], we adopted the test enunciated by the United States Court of Appeals for the Second Circuit in interpreting the federal equivalent of § 52-418 (a) (4). . . . The test consists of the following three elements, all of which must be satisfied in order for a court to vacate an arbitration award on the ground that the arbitration panel manifestly disregarded the law: (1) the error was

obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator; (2) the arbitration panel appreciated the existence of a clearly governing legal principle but decided to ignore it; and (3) the governing law alleged to have been ignored by the arbitration panel is well defined, explicit, and clearly applicable." (Internal quotation marks omitted.) *Alexson* v. *Foss*, 276 Conn. 599, 613–14, 887 A.2d 872 (2006). "This standard of proof has rarely, if ever, been met in Connecticut." *State* v. *Connecticut State Employees Assn., SEIU Local 2001*, 287 Conn. 258, 280, 947 A.2d 928 (2008).

With these principles in mind, we turn to the plaintiff's claims.

I

The plaintiff first claims that the court improperly concluded that the arbitration award conformed to the parties' submission. We are not persuaded.

The submission to the arbitration panel asked: "1. Did the [defendant] have just cause to terminate [Santiago]? 2. If not, what shall the remedy be?" The arbitration award read: "The [defendant] had just cause to terminate [Santiago]." Notwithstanding this apparently clear correspondence between the award and the submission, the plaintiff nonetheless insists that, because the submission was written in the past tense—"[*d*]*id* the [defendant] have just cause to terminate [Santiago]"—the arbitration panel was "unambiguously" barred from considering any evidence that the defendant did not consider at the time it made its termination decision, including Daigle's opinion on whether the conduct for which Santiago was terminated violated department policies. As such, the plaintiff argues, when the arbitration panel relied in part on Daigle's opinion in concluding that the defendant had just cause to terminate Santiago's employment, it answered the question

of "whether Santiago's conduct could theoretically justify termination based on a new expert's opinion," rather than the question that, in the plaintiff's view, the parties actually posed in their submission, "whether the [defendant] had just cause based on the evidence it actually considered . . . ."

Of course, the parties' submission to the arbitration panel did not ask whether the defendant had just cause to terminate Santiago's employment "based on the evidence it actually considered . . . ." It only asked whether the defendant had just cause to terminate Santiago's employment. The arbitration panel, therefore, was asked to determine only whether there existed facts and circumstances constituting "just cause" to terminate Santiago's employment under the parties' collective bargaining agreement. Nothing in the text of the submission constrained the arbitration panel, in arriving at its determination, to considering only certain expert opinions about the relevant facts and circumstances at issue. Had the parties intended to impose such a constraint on the arbitration panel, they could have done so clearly and explicitly in their submission, provided that the collective bargaining agreement permitted it. See, e.g., *AFSCME, Council 4, Local 2663* v. *Dept. of Children & Families*, 317 Conn. 238, 253, 117 A.3d 470 (2015) ("[h]ad [the parties] intended to limit the arbitrator's consideration to specific conduct, specific evidence, or a specific state of mind, they could have limited the scope of the submission if the agreement permitted such a limitation"); *Asselin & Vieceli Partnership, LLC* v. *Washburn*, 194 Conn. App. 519, 530, 221 A.3d 875 (2019) ("it is well established that [i]t is the province of the parties to set the limits of the authority of the arbitrators, and the parties will be bound by the limits they have fixed" (internal quotation marks omitted)), cert. denied, 334 Conn. 913, 221 A.3d 449 (2020).

This court's holding in *Middlebury* v. *Teamsters Local Union No. 677*, 57 Conn. App. 223, 748 A.2d 340 (2000), is instructive. In *Middlebury*, this court affirmed a judgment confirming an arbitration award in favor of the town of Middlebury, which had discharged the chief mechanic in the town garage for insubordination and theft. Id., 224. The parties' submission to the arbitrators had asked whether the town had just cause to terminate the mechanic, and the arbitrators had determined that the town had just cause to do so. Id., 227. On appeal, the union argued that the award did not conform to the submission because the arbitrators had improperly considered additional evidence of pretermination misconduct that the town had not relied upon to support the mechanic's discharge. Id., 225–26. This court disagreed, concluding that, because the submission was unrestricted, "our review is limited to a comparison of the award with the submission . . . ." (Citation omitted.) Id., 226–27. This court then compared the language of the award to that of the submission and concluded that, because the award conformed to the submission, the judgment upholding the arbitration award must be affirmed. Id., 227.

In this case the plaintiff, like the union in *Middlebury*, claims that the arbitration award fails to conform to the submission because the arbitration panel considered evidence that was not considered by the defendant when it discharged Santiago. As in *Middlebury*, the submission to the arbitration panel in this case was unrestricted. Thus, in this case, we, like the court in *Middlebury*, are limited to comparing the award to the submission and may not retroactively fashion limits on the arbitrators' authority that the parties did not include in their submission. Indeed, the plaintiff's claim in this case is even weaker than that of the union in *Middlebury*, because the plaintiff does not contend that the arbitration panel improperly considered evidence of

additional misconduct, but only that it improperly considered a new expert opinion about the same underlying misconduct that the defendant considered when it terminated Santiago's employment. Because the arbitration panel concluded that the defendant had just cause to terminate Santiago's employment, which directly answered the first question that the parties had posed in their submission, it decided an issue that the parties had given it the authority to decide. See, e.g., *Burr Road Operating Co. II, LLC* v. *New England Health Care Employees Union, District 1199*, 162 Conn. App. 525, 537 n.4, 131 A.3d 1238 (2016); *Connecticut State Police Union* v. *Dept. of Public Safety*, supra, 86 Conn. App. 690–91. The plaintiff's claim that the court improperly concluded that the award conformed to the submission therefore fails.[6]

II

The plaintiff also claims that the court improperly refused to vacate the award because the arbitration panel's reliance on Daigle's expert opinion constituted a manifest disregard of the law. We decline to review this claim, both because the plaintiff abandoned it in the Superior Court and because the plaintiff has failed to adequately brief it before this court.

"It is well established that an appellate court is under no obligation to consider a claim that is not distinctly

[6] The plaintiff's reliance on our Supreme Court's decision in *AFSCME, Council 4, Local 1565* v. *Dept. of Correction*, 298 Conn. 824, 6 A.3d 1142 (2010) (*AFSCME*), to support its argument that the award fails to conform to the submission is misplaced. In *AFSCME*, the court held that an arbitrator violated public policy when she relied upon a discharged correction officer's acceptance of accelerated rehabilitation as evidence of the officer's alleged misconduct. Id., 827–28. *AFSCME*, therefore, did not involve a claim that the arbitrator's award failed to conform to the submission. Rather, it involved a challenge to the arbitrator's decision on public policy grounds—a separate basis for vacatur that the plaintiff does not assert and that involves the application of a different legal standard. See, e.g., id., 835–38. *AFSCME* is thus inapposite to the plaintiff's claim.

raised at the trial level. . . . [B]ecause our review is limited to matters in the record, we [also] will not address issues not decided by the trial court. . . . The requirement that [a] claim be raised distinctly means that it must be so stated as to bring to the attention of the court the precise matter on which its decision is being asked. . . . The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court . . . to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Remillard* v. *Remillard*, 297 Conn. 345, 351–52, 999 A.2d 713 (2010).

It is also well established that "[w]e are not required to review claims that are inadequately briefed. . . . We consistently have held that [a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. We do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited. . . . [A]ssignments of error which are merely mentioned but not briefed beyond a statement of the claim will be deemed abandoned and will not be reviewed by this court." (Internal quotation marks omitted.) *Clelford* v. *Bristol*, 150 Conn. App. 229, 233, 90 A.3d 998 (2014).

As we have discussed previously in this opinion, the court concluded that the plaintiff had abandoned its

manifest disregard claim by failing to brief it. The plaintiff does not challenge this conclusion. Indeed, in its principal appellant's brief, the plaintiff does not even acknowledge that the court deemed this claim abandoned. In its reply brief, the plaintiff argues for the first time that, abandonment notwithstanding, we should review its manifest disregard claim because it involves "a pure issue of law, on a matter of great public importance, affecting the right of a police officer to earn and make a living . . . ." Regardless of whether we construe this argument as a request for plain error review or for the exercise of our supervisory authority over the administration of justice to review unpreserved claims, it is unavailing, because neither request may be made for the first time in a reply brief. See, e.g., *Grimm* v. *Grimm*, 276 Conn. 377, 393–94 n.19, 886 A.2d 391 (2005), cert. denied, 547 U.S. 1148, 126 S. Ct. 2296, 164 L. Ed. 2d 815 (2006); *Perry* v. *State*, 94 Conn. App. 733, 740 n.5, 894 A.2d 367, cert. denied, 278 Conn. 915, 899 A.2d 621 (2006). We therefore decline to review the plaintiff's claim that the arbitration panel manifestly disregarded the law because the plaintiff abandoned this claim in the Superior Court.

Even if we were to overlook the plaintiff's abandonment of its manifest disregard claim in the Superior Court, the plaintiff has also abandoned that claim before this court by virtue of inadequate briefing. Although the plaintiff's principal appellate brief summarily avers—in a section heading—that the arbitration panel "manifestly disregarded the law," nowhere in this brief does the plaintiff set forth the legal elements of a manifest disregard of the law claim, let alone attempt to explain how they apply in the present case. This court has deemed more robust briefing to be inadequate. See, e.g., *Fraser Lane Associates, LLC* v. *Chip Fund 7, LLC*, 221 Conn. App. 451, 474, 301 A.3d 1075 (2023) (defendant abandoned its claim of manifest disregard when

it cited "no legal authority other than a case detailing the elements of manifest disregard" and "provided only a cursory explanation of why those elements are met"). It is only in its reply brief that the plaintiff argues that the elements of manifest disregard are satisfied. It is well settled, however, that "we consider an argument inadequately briefed when it is delineated only in the reply brief." (Internal quotation marks omitted.) *Manere* v. *Collins*, 200 Conn. App. 356, 359 n.1, 241 A.3d 133 (2020); see also *State* v. *Elson*, 311 Conn. 726, 766, 91 A.3d 862 (2014) ("to receive review, a claim must be raised and briefed adequately in a party's principal brief, and the failure to do so constitutes the abandonment of the claim"). We therefore also decline to review the plaintiff's claim that the arbitration panel manifestly disregarded the law because the plaintiff has abandoned that claim before this court.

The judgment is affirmed.

In this opinion the other judges concurred.

JOHN M. LALLI, JR., ET AL. *v.*
CITY OF NEW HAVEN
(AC 47153)

Suarez, Clark and Bear, Js.

Syllabus

The plaintiffs, all retired police officers who had previously worked for the defendant city, appealed from the trial court's judgment for the defendant on their complaint alleging, inter alia, breach of a collective bargaining agreement between the defendant and a union governing the defendant's police force. On appeal, the plaintiffs, former members of the union, claimed that the court improperly determined that the plaintiffs, as retirees and not active employees, were not entitled to retroactive wages pursuant to the terms of the collective bargaining agreement. *Held*:

The trial court properly determined that the defendant did not breach the terms of the collective bargaining agreement, as the agreement unambiguously provided that, to be eligible for retroactive wages, a member of the

union must be an active employee on the date of distribution, and all but one of the plaintiffs had retired prior to the first distribution date.

Argued January 8—officially released February 25, 2025

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Wilson, J.*; judgment for the defendant, from which the plaintiffs appealed to this court. *Affirmed.*

William J. Ward, for the appellants (plaintiffs).

Claire M. McNamara, for the appellee (defendant).

Opinion

BEAR, J. The plaintiffs, thirty-seven retired New Haven police officers,[1] appeal from the judgment of the trial court rendered in favor of the defendant, the city of New Haven. On appeal, the plaintiffs claim that the court improperly determined that the defendant did not breach the terms of a 2016 collective bargaining agreement by determining that the plaintiffs, as retirees and not active employees, were not entitled to retroactive wages. We disagree and, accordingly, affirm the judgment of the court.

The following facts, as set forth by the court in accordance with the terms of a stipulation of facts between the parties, and procedural history are relevant. "Each of the plaintiffs are former members of the union governing the defendant's police force. The terms of

[1] The complaint named as plaintiffs John M. Lalli, Jr., Steven Manware, Michael Wuchek, Jeffrey Goodwin, Jason Salgado, Craig Miller, Roy Davis, Huey Young, Darcia Siclari, Elvin Rivera, Elisa Tuzzoli, Douglas Harkins, David Runlett, Elsa Berrios, Hector Valentin, Brian Jackson, Dennis O'Connell, Tammi Means, David Rivera, Mary Helland, Lucille Roach, Brendan Hosey, Curtis Williams, Leslee Witcher, Dietrich Hernandez, Peter McKoy, Garry Monk, Odino Rasile, Michael Torre, Terrence McNeil, John Palmer, Jon Young, Jeffrey Suchy, Steven Teague, Jason Minardi, Michael MastroPetre, and Arpad Tolnay.

employment were set forth in a collective bargaining agreement [(agreement)] between the defendant and the union. The [agreement] that was in effect on July 1, 2011, expired on June 30, 2016 [(2011 agreement)]. The defendant and the union were unable to negotiate a new [agreement] prior to June 30, 2016. Pursuant to General Statutes § 7-475, the plaintiffs were required to continue to work at the rate of pay detailed in the 2011 [agreement] until a new [agreement] was ratified. Ratification of a new [agreement], effective for the period from July 1, 2016, to June 30, 2022, occurred on September 16, 2019 [(2016 agreement)]. All the plaintiffs retired after June 30, 2016; however, thirty-four of the thirty-seven police officers retired prior to the ratification of the 2016 [agreement]. The three plaintiffs who retired after the ratification of the 2016 [agreement] were Dennis O'Connell, Mary Helland, and Garry Monk. These three plaintiffs retired when the terms and conditions of the ratified 2016 [agreement] were known to them.

"The 2016 [agreement] provides the following language regarding eligibility for retroactive wages: 'In order to be eligible for these payments, members must be an active employee on the date of distribution.' . . . For the time period from July 1, 2016, to June 30, 2022, the language of the 2016 [agreement] provides for retroactive wage increases as follows: 'A. The wage schedules on June 30, 2016 shall be increased by two and one-quarter (2.25%) percent to be effective and retroactive to July 1, 2016. B. The wage schedules on June 30, 2017 shall be increased by two (2%) percent to be effective and retroactive to July 1, 2017. C. The wage schedules on June 30, 2018 shall be increased by two (2%) [percent] to be effective and retroactive to July 1, 2018. D. Effective July 1, 2019 the wage schedules on June 30, 2019 shall be increased by two and one-quarter (2.25%) percent to be effective and retroactive to July

1, 2019.' . . . The 2016 [agreement] provides for the retroactive wages to be paid as follows: one-third of the retroactive amount to be paid on November 14, 2019, one-third of the retroactive amount to be paid on July 1, 2020, and the final third to be paid in July of 2021.

"The defendant did not make payments on November 14, 2019, to any of the plaintiffs for retroactive wages identified for periods of time they were still employed as police officers for the defendant, with the exception of O'Connell, who did not retire until November 19, 2019, and received a wage increase on November 15, 2019, consistent with the 2016 [agreement]. The defendant also did not pay the plaintiffs for any difference in wages relating to sick leave, time allowed, and vacation payout, which the plaintiffs believe were impacted by the retroactive wage increase as contained in the 2016 [agreement]. The plaintiffs also have not received any increase in pension benefits that they believe were impacted by the retroactive wage increase found within the 2016 [agreement]. Lastly, the parties also stipulated to the definition of 'retroactive' as 'applying to a period prior to enactment.' " (Citations omitted; footnote omitted.)

The plaintiffs filed a complaint alleging, inter alia, breach of contract.[2] The parties entered into a stipulation of facts. In a November 27, 2023 memorandum of decision, the court held that "[t]he 2016 [agreement] unambiguously requires that a union member be an active employee on the date of distribution in order to receive retroactive wage payments. The thirty-four

[2] The complaint also alleged unjust enrichment. The court rejected this claim, determining that the plaintiffs asserted the claim under the theory of negligent misrepresentation and that it "does not consider this contention because the plaintiffs allege no negligent misrepresentation claim and have not explained how this theory relates to their claim of unjust enrichment beyond this bare assertion." On appeal, the plaintiffs' brief focuses on the court's rejection of their breach of contract claim.

plaintiffs that retired prior to the ratification of the 2016 [agreement] are not entitled to retroactive wages, as they were not 'active employees' on the dates of distribution. The plaintiffs Helland and Monk retired after the ratification but prior to the distribution date of the first payment. Accordingly, they also do not meet the requirements set out to receive retroactive wage payments. O'Connell, who also retired after the ratification, was eligible for a portion of the retroactive wages as evidenced by receiving the first payment; however, he lost his eligibility when he retired on November 19, 2019, prior to the distribution dates for the two additional retroactive wage payments. Accordingly, the court concludes that the defendant is not liable for retroactive payments or any further distributions to the plaintiffs . . . ." This appeal followed.

On appeal, the plaintiffs claim that the court improperly determined that they were not entitled to retroactive wage payments pursuant to the 2016 agreement. Specifically, they contend that "[s]imply because they retired prior to the enactment of the 2016 [agreement] does not mean the [defendant] can ignore the stipulated meaning of retroactive and refuse to pay money earned by these police officers during the retroactive period under that agreement" and that, "when employees retire within the effective dates of a contract that provides retroactive wages for periods worked under an expired contract, those retired employees are entitled to said retroactive wages." We are not persuaded.

We begin with the following relevant legal principles and standards. "Principles of contract law guide our interpretation of collective bargaining agreements."[3]

[3] "The elements of a breach of contract action are the formation of an agreement, performance by one party, breach of the agreement by the other party and damages." (Internal quotation marks omitted.) *Rosenthal* v. *Bloomfield*, 178 Conn. App. 258, 263, 174 A.3d 839 (2017).

(Internal quotation marks omitted.) *Russo* v. *Waterbury*, 304 Conn. 710, 720, 41 A.3d 1033 (2012). "[T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms. . . . [When] there is definitive contract language, the determination of what the parties intended by their . . . commitments is a question of law [over which our review is plenary]." (Internal quotation marks omitted.) *Fiorillo* v. *Hartford*, 212 Conn. App. 291, 301–302, 275 A.3d 628 (2022).

The 2016 agreement provides for the distribution of one third of the retroactive wage payments to be paid, respectively, on November 14, 2019, July 1, 2020, and in July, 2021. It further provides that, "[i]n order to be eligible for these payments, members must be an active employee on the date of distribution."

In support of their argument, the plaintiffs rely on the meaning of the word "retroactive," as stipulated by the parties to be defined as "applying to a period prior to enactment."[4] (Internal quotation marks omitted.) The

[4] The plaintiffs also argue that § 7-475, which provides that, "[i]n the event an agreement expires before a new agreement has been approved by the municipal employer and the employee organization, the terms of the expired agreement shall remain in effect until such time as a new agreement is reached and approved," cannot "be interpreted to mean that if an employee retires between contracts with a municipality, he should not receive retroactive wages specifically identified for periods of time he was still an employee of said municipality." The language of § 7-475, however, is not at issue; rather, the question presented is whether the court properly determined that the defendant did not breach the terms of the agreement between the parties.

The plaintiffs additionally argue that the defendant must recalculate the impact that the retroactive wage increase would have on pension benefits. The parties had agreed in the stipulation that, if the trial court found the defendant liable for any or all retroactive wage payments to the plaintiffs,

definition of the word retroactive, however, does not, by itself, entitle the plaintiffs to retroactive wage payments. Rather, the 2016 agreement requires that an individual be an "active employee" on the date of distribution in order to receive the retroactive wage payments distributed on those dates.

The agreement uses the adjective "active" to precede the term "employee" thereby indicating *current* employment status. See *Garcia* v. *Hartford*, 292 Conn. 334, 343, 972 A.2d 706 (2009) ("[T]he adjectives that precede the term employee in . . . the agreement—'fulltime, permanent' and 'probationary'—indicate *current* employment status. A retiree undoubtedly would not have either a full-time, permanent or a probationary status." (Emphasis in original.)). Additionally, "[w]e ordinarily look to the dictionary definition of a word to ascertain its commonly approved usage. . . . Webster's Third New International Dictionary (1993), for example, defines the term employee as '1: *one employed* by another [usually] in a position below the executive level and [usually] for wages 2: in labor relations: any worker *who is under wages or salary* to an employer and who is not excluded by agreement from consideration as such a worker . . . .' . . . See also Black's Law Dictionary (8th Ed. 2004) (defining employee as '[a] person who works in the service of another person [the employer] under an express or implied contract of hire, under which the employer has the right to control the details of work performance'). These definitions

only then will the defendant be required to recalculate pension benefits owed. Because we affirm the judgment of the trial court, the plaintiffs cannot prevail on this argument.

The plaintiffs further argue that there is no evidence to support (1) a claim that they could have anticipated that the defendant would fail to pay them retroactive wages and (2) the defendant's assertion in the trial court that the plaintiffs were cherry picking contractual language. These arguments have no bearing on the interpretation of the language of the contract and therefore we will not review them further.

make it evident that . . . the currency of the relationship is paramount." (Citations omitted.) Id., 345; see also *Allied Chemical & Alkali Workers of America, Local Union No. 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 167–68, 92 S. Ct. 383, 30 L. Ed. 2d 341 (1971) ("An 'employee,' according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone . . . means someone who works for another for hire. . . . The ordinary meaning of 'employee' does not include retired workers; retired employees have ceased to work for another for hire." (Citations omitted; emphasis omitted.)).

Therefore, according to the terms of the 2016 agreement, only active employees, which term does not include retirees, on the date of distribution can receive retroactive wage payments. The 2016 agreement provides for three dates of distribution: November 14, 2019, July 1, 2020, and July, 2021. Thirty-four of the thirty-seven plaintiffs retired prior to the ratification of the 2016 agreement and under the provisions of the 2011 agreement and were not entitled to retroactive wage payments under the 2016 agreement. The plaintiffs Helland and Monk retired after the ratification of the 2016 agreement but before the first distribution date. The thirty-four plaintiffs in addition to Helland and Monk all retired prior to the first distribution date of November 14, 2019, and were not active employees as of that distribution date or any subsequent distribution dates and, therefore, were not entitled to receive any retroactive wage payments. The remaining plaintiff, O'Connell, retired on November 19, 2019, and therefore was entitled to and received the first distribution of retroactive wage payments on November 14, 2019, but was not eligible for the remaining retroactive wage payments because he was retired as of the second and third distribution dates. Because the defendant's actions regarding

the distribution of the retroactive wage payments to the plaintiffs did not violate the terms of the 2016 agreement, we conclude that the court properly found for the defendant on the plaintiffs' breach of contract claim.

The judgment is affirmed.

In this opinion the other judges concurred.

STEPHEN MARKS *v.* GLT DEVELOPMENT CORPORATION ET AL.
(AC 47097)

Moll, Seeley and Prescott, Js.

Syllabus

The plaintiff appealed from the trial court's judgment granting the motion to strike filed by the defendant general contractor, G Co., with respect to a count of the complaint alleging negligence for an injury that occurred on May 24, 2020. The plaintiff claimed that the court improperly determined that the action was time barred pursuant to statute (§ 52-584). *Held*:

The trial court properly concluded that the plaintiff's negligence claim against G Co. was time barred because it correctly determined, in accordance with Executive Order Nos. 7G and 10A, issued during the COVID-19 pandemic, that the two year limitation period set forth in § 52-584, which had been suspended for a period of time during the pandemic, began to run on March 1, 2021, and expired on March 1, 2023, and it was undisputed that the plaintiff commenced the action on March 24, 2023.

Argued February 4—officially released February 25, 2025

Procedural History

Action to recover damages for, inter alia, personal injuries sustained as a result of the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Saadi*, *J.*, granted the motion to strike filed by the named defendant with respect to the first count of the plaintiff's complaint; thereafter, the court, *Gould*, *J.*, granted the motion for judgment filed by the named

defendant, and the plaintiff appealed to this court. *Affirmed.*

James V. Sabatini, for the appellant (plaintiff).

Kenneth J. Bartschi, with whom, on the brief, was *Karen L. Dowd*, for the appellee (named defendant).

Opinion

MOLL, J. In this personal injury action, which arose during the COVID-19 pandemic, the plaintiff, Stephen Marks, appeals from the judgment of the trial court granting the defendant GLT Development Corporation's motion to strike on statute of limitations grounds.[1] This appeal involves the question of how to calculate, in connection with the plaintiff's negligence claim arising from an accident that occurred on May 24, 2020, the statute of limitations set forth in General Statutes § 52-584.[2] The operability of that statute was suspended as a result of Governor Ned Lamont's Executive Order No. 7G, effective March 19, 2020, and that suspension subsequently was lifted on March 1, 2021, by Governor Lamont's Executive Order No. 10A. The plaintiff claims that the court incorrectly concluded that the two year limitations period began to run on March 1, 2021, and expired on March 1, 2023. The plaintiff argues instead

[1] AC Electric, LLC, also was named as a defendant in the complaint. AC Electric, LLC, is not participating in this appeal. Accordingly, we refer to GLT Development Corporation as the defendant.

[2] General Statutes § 52-584 provides: "No action to recover damages for injury to the person, or to real or personal property, caused by negligence, or by reckless or wanton misconduct, or by malpractice of a physician, surgeon, dentist, podiatrist, chiropractor, advanced practice registered nurse, hospital or sanatorium, shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of, except that a counterclaim may be interposed in any such action any time before the pleadings in such action are finally closed."

that he was entitled to a suspension of 347 or 348 days,[3] representing the total number of days that the suspension was in effect, notwithstanding the fact that the plaintiff's cause of action did not exist when the suspension began. That is, the plaintiff contends that the proper calculation of his limitations period is effectively two years *plus* 347 or 348 days. The defendant argues to the contrary that the court properly concluded that the statute of limitations began to run on March 1, 2021, and expired on March 1, 2023. We agree with the defendant and, accordingly, affirm the judgment of the trial court.

The complaint alleges, inter alia, the following facts. The plaintiff hired the defendant to perform certain home improvement services at his home. As the general contractor, the defendant hired a subcontractor, AC Electric, LLC, to perform the electrical work. See footnote 1 of this opinion. The plaintiff alleges that, on or about May 24, 2020,[4] as a result of the defendant's failure to restore electrical power to the garage door, he crushed and nearly severed multiple fingers when he attempted to open the door manually.

On March 24, 2023, the plaintiff commenced this action against the defendant.[5] See footnote 1 of this opinion. On June 20, 2023, as to the one count of negligence directed to it (i.e., count one), the defendant filed a motion to strike on, inter alia, statute of limitations

[3] The plaintiff's appellate brief variously refers to the total number of suspended days as 347 or 348. This discrepancy has no effect on our analysis or on the outcome of this appeal.

[4] The parties do not dispute that the relevant occurrence date is May 24, 2020.

[5] "[U]nder the law of our state, an action is commenced not when the writ is returned but when it is served upon the defendant." (Footnote omitted; internal quotation marks omitted.) *Rocco* v. *Garrison*, 268 Conn. 541, 549, 848 A.2d 352 (2004). The trial court found that the defendant received abode service on March 24, 2023, a finding that the plaintiff does not dispute.

grounds.[6] Following additional briefing and a hearing on the motion, on August 28, 2023, the court, *Saadi*, *J.*, granted the defendant's motion to strike, concluding that the two year limitations period commenced on March 1, 2021, and expired on March 1, 2023. On September 18, 2023, the defendant filed a motion for judgment with respect to count one, which the court, *Gould*, *J.*, granted on October 25, 2023, over the plaintiff's objection. This appeal followed.

We briefly set forth our standard of review and additional legal principles relevant to our resolution of this claim. Our review of a trial court's granting of a motion to strike is plenary. *American Progressive Life & Health Ins. Co. of New York* v. *Better Benefits, LLC*, 292 Conn. 111, 122, 971 A.2d 17 (2009). In addition, our Supreme Court has held that the usual principles of statutory construction apply to the interpretation of executive orders. *Mills* v. *Hartford HealthCare Corp.*, 347 Conn. 524, 544, 298 A.3d 605 (2023).

Accordingly, our analysis begins with the language of the executive orders at issue, the relevant provisions of which are as follows. Executive Order No. 7G, dated March 19, 2020, provides in relevant part: "I hereby suspend, for the duration of this public health and civil preparedness emergency, unless earlier modified or terminated by me, all statutory . . . (2) . . . statutes of limitation . . . including, but not limited to, the following . . . e. All statutes of limitations provided in Chapter 926 of the General Statutes[7] . . . .

* * *

"Unless otherwise specified herein, this order shall take effect immediately and shall remain in effect for

[6] Although a statute of limitations ordinarily is raised as a special defense, "[i]f all of the facts pertinent to the statute of limitations are pleaded in the complaint and the parties agree that they are true . . . a motion to strike would be allowed." *Girard* v. *Weiss*, 43 Conn. App. 397, 415, 682 A.2d 1078, cert. denied, 239 Conn. 946, 686 A.2d 121 (1996).

[7] Section 52-584 is set forth in Chapter 926 of the General Statutes.

the duration of the public health and civil preparedness emergency, unless earlier modified by me." (Footnote added.) Executive Order No. 10A, dated February 8, 2021, provides in relevant part: "[T]he provisions of Executive Order No. 7G, Section 2, dated March 19, 2020 . . . as they relate to the following, shall expire on March 1, 2021 . . . b. all statutory time requirements . . . including, but not limited to . . . iii. All statutes of limitations provided in Chapter 926 of the Connecticut General Statutes . . . ."

Applying the foregoing clear and unambiguous provisions of Executive Order Nos. 7G and 10A to the present action, we conclude that the court properly determined that the limitations period set forth in § 52-584 began to run on March 1, 2021, and expired on March 1, 2023. The plaintiff's argument that Executive Order No. 7G contains language to support the proposition that the suspension created thereby was intended to give a limitations credit of the *total* number of suspended days to a claimant who did not yet have a cause of action as of March 19, 2020, is without merit.

In short, because the plaintiff alleges that his accident occurred on May 24, 2020, at a time when Executive Order No. 7G had already gone into effect, the two year limitations period applicable to the plaintiff's claim began to run on the day the suspension was lifted, i.e., March 1, 2021, and expired on March 1, 2023. As it is undisputed that the plaintiff's action was commenced on March 24, 2023; see footnote 5 of this opinion; the trial court properly concluded that the plaintiff's negligence claim against the defendant is time barred.

The judgment is affirmed.

In this opinion the other judges concurred.