# STATE OF CONNECTICUT *v.* JESSIE CAMPBELL III (SC 18072)

Rogers, C. J., and Palmer, Eveleigh, McDonald, Espinosa, Robinson and Vertefeuille, Js.*

*Syllabus*

Pursuant to statute ([Rev. to 1999] § 53a-54b [8]), a person who is convicted of, inter alia, the murder of two or more persons "at the same time or in the course of a single transaction" is guilty of capital felony.

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

A jury found the defendant guilty of, among other crimes, capital felony, murder and attempt to commit murder in connection with the shooting deaths of L, the mother of his son, and L's neighbor, D, and with the shooting of C, who survived but was gravely injured. The defendant had been having a conversation with L in the front yard of a home while D and C were sitting on the home's porch steps. When L bent down, the defendant pulled out a gun and shot her in the head. The defendant then ran at D and C, and shot each of them. After shooting D and C a second time, the defendant walked away. Prior to the defendant's trial, defense counsel filed a motion for a competency examination of the defendant, contending that the defendant's failure to speak with anyone on the defense team regarding the events surrounding the shooting or to discuss his character, background and history rendered him unable to assist in his own defense. The court-appointed evaluation team unanimously found that the defendant was competent, and, following a competency hearing at which various experts testified, including G on behalf of the evaluation team and two defense experts, Z and B, the court concluded that the defendant had not overcome the statutory (§ 54-56d [b]) presumption of competence. Thereafter, the jury returned a guilty verdict, and the trial court rendered judgment in accordance with the verdict, sentencing the defendant to death plus forty-five years of incarceration, from which the defendant appealed, raising claims as to both the guilt phase and the penalty phase of his trial. *Held*:

1. This court dismissed the defendant's appeal with respect to his claims challenging the penalty phase of his trial and the sentence of death, as those claims were not ripe; the record was insufficient to resolve the defendant's claim that, if he did not prevail on any of his penalty phase claims, he could suffer collateral consequences following resentencing, in accordance with this court's recent precedent abolishing the death penalty, relating to the conditions of his confinement, including possible statutory (§ 18-10b) administrative segregation for those convicted of capital felony, as the defendant had not yet been resentenced, and, thus, his eventual conditions of confinement were not yet known; furthermore, the proper vehicle by which the defendant may challenge his eventual conditions of confinement is by a petition for a writ of habeas corpus, and the defendant will have the opportunity to present evidence that is relevant to his claim before the habeas court, which is empowered to make factual findings on the basis of that evidence.
2. The defendant's claim that he was denied his constitutional due process right to be present during two unrecorded pretrial scheduling conferences was unavailing, as those scheduling conferences were not critical stages of the defendant's prosecution: the rules of practice establish that, in the absence of a judicial order to the contrary, a defendant is neither required nor entitled to be present at a scheduling conference, and, even if the defendant were correct that the trial court provided no reasons for setting the specific trial schedule despite the position of

defense counsel that that schedule did not afford them sufficient time to prepare, he offered no explanation as to how knowing the trial court's reasons for setting the schedule would have allowed him a fuller opportunity to defend his case.

3. The defendant could not prevail on his claim that the trial court's partial denial of his motion for a pretrial continuance and its denial of a second motion for another pretrial continuance deprived him of his due process right to a fair trial: the trial court did not abuse its discretion in granting only a fifteen day extension for jury selection, rather than the eight week extension the defendant requested, and a one week delay in the start of evidence, in connection with the first motion, the court having properly considered the relevant factors, including the age of the case, the effect of a delay on juror availability, and the stated opposition of family members of the victims; moreover, the court accorded significant weight to its doubts concerning the proffered reasons for the request, and, when the court questioned defense counsel about the need for such a continuance, counsel were unable to identify any specific area in which they were unprepared to go forward and identified no outstanding issues pertaining to evidence or material or expert witnesses; furthermore, even if this court concluded that the trial court had abused its discretion in denying the defendant's second motion for a two day continuance because of the death of a family member of one of his two defense counsel, the defendant's claim would fail because he had not established any harm on the basis of that denial.

4. The defendant could not prevail on his claim that the trial court's failure to excuse three particular jurors violated his right to an impartial jury under the federal and state constitutions; although the defendant contended that those three jurors offered only equivocal assurances of impartiality, the failure of defense counsel to challenge the jurors for cause or to exercise peremptory challenges that were available, as well as their affirmative acceptance of each of the three jurors, made it virtually impossible to conclude that the trial court had abused its discretion in failing to excuse those jurors, as that court reasonably would have concluded that counsel viewed the jurors as acceptable.

5. The trial court properly found that the defendant was competent to stand trial: it was not clearly erroneous for the court to credit the testimony of experts G and Z at the competency hearing, over that of B, as the court relied on the fact that G and the evaluation team, as well as Z, had performed competency evaluations following a strict protocol that was designed to focus on the goals of such an evaluation, namely, to measure a defendant's capacity to have a rational understanding of the charges and his ability to assist his attorneys, and also relied on the fact that B had not followed the same protocol because she had not been retained to and did not perform such an evaluation; furthermore, the trial court did not improperly interpret the defendant's burden to overcome the presumption of competence set forth in § 54-56d (b) to

require that he produce experts who could testify with certainty that his failure to communicate with defense counsel was not volitional, the court having considered the varying degrees of certainty offered by the various experts and having reasonably concluded that the testimony of G and Z provided greater support for the conclusion that the defendant had failed to prove by a preponderance of the evidence that he was not competent; moreover, the defendant could not prevail on his claim that the trial court's interpretation of § 54-56d (b) as requiring him to bear a different burden to rebut the presumption of competence than that which would have applied if the court had sua sponte raised the issue violated his right to equal protection, as the defendant offered no argument that the statute's differing allocation of the burden was not rationally related to a legitimate governmental objective and no explanation as to why this court should conclude that he was similarly situated to defendants whose competence was questioned sua sponte by the court, and, even if this court assumed that the defendant was similarly situated to other defendants, the legislature rationally could have decided that a different allocation of the burden was appropriate when a trial court has sua sponte called into question a defendant's competence.

6. The defendant could not prevail on his unpreserved claim that the phrases "at the same time" and "in the course of a single transaction" in § 53a-54b (8) were void for vagueness as applied to his conduct, as the defendant failed to demonstrate beyond a reasonable doubt that he had inadequate notice of the conduct that was prohibited by the statute; the statutory language was clear and unambiguous so as to put the defendant on notice that his actions were prohibited, and, in light of this court's prior interpretations of those exact phrases in two prior cases, the jury could have construed the fact that the defendant shot and killed multiple victims within seconds of each other as establishing that the murders occurred "at the same time," and logically could have inferred that the defendant shot L and D "in the course of a single transaction," inasmuch as he shot D and C after shooting and killing L with the intent to eliminate D and C as witnesses, which provided the logical nexus sufficient to render the killing of an eyewitness a part of the same transaction as the original murder.

7. Contrary to the defendant's claim, there was sufficient evidence to support his conviction of capital felony, murder and attempt to commit murder, and, accordingly, the trial court properly denied the defendant's motion for a judgment of acquittal: with respect to the crimes of murder and attempt to commit murder, there was sufficient evidence to establish beyond a reasonable doubt that the defendant had the conscious objective to cause the deaths of L, D and C, as the evidence established that the defendant shot each victim in the head at close range and fled from the scene without attempting to render aid to any of them; moreover, with respect to the defendant's intent to kill L, the state produced evidence that the defendant had been arrested two days prior to the

murders and charged with breach of the peace and violation of a protective order as to L, that he previously had been seen in possession of a gun that matched the description of the gun that C saw him use to shoot L, that he had used that gun two days prior to the murders to shoot at the house where he knew L had been staying, and that, on the night of the shooting, he took a taxicab directly to the scene of the murders and waited until L was in a vulnerable position to shoot her, and, with respect to the defendant's intent to kill D and C, the state produced evidence that they were in the immediate vicinity when the defendant shot L, that they began running when he discharged his weapon, that the defendant immediately chased them down and shot them, having observed that they had witnessed the shooting of L, and that the defendant shot both D and C a second time and shook C after shooting her a second time to verify that she was dead; furthermore, with respect to the crime of capital felony, the defendant could not prevail on his claim that, even if the evidence established that he had committed two murders, the evidence was insufficient to prove that he murdered two persons "at the same time or in the course of a single transaction" because the murders of L and D were not committed in the same instant by the same gunshot, and because the state's rationale that the defendant murdered D because she was an eyewitness to L's murder was not sufficient to satisfy the single transaction requirement of § 53-54b (8), this court having previously rejected those claims in the context of rejecting his claim that § 53a-54b (8) was void for vagueness.

8. The record did not support the defendant's contention that no reasonable juror could have found that he failed to meet his burden of establishing by a preponderance of the evidence his affirmative defense that he had acted under the influence of an extreme emotional disturbance: the defendant did not testify or present expert testimony regarding his state of mind at the time of the shooting, and the evidence the defendant did rely on, including that he and L had had a series of domestic disputes, that the shooting was sudden and unexplained, that he had a blank look on his face at the time of the shooting, that he behaved in a bizarre manner, was sweating, and appeared anxious, agitated and weird after the shooting, failed to establish his affirmative defense; moreover, much of that evidence could support a variety of inferences, including the inference that, although the defendant shot L because of the dispute they were having over their son, he was not under the influence of an extreme emotional disturbance at the exact time of the shooting.

9. The defendant could not prevail on his unpreserved claim that the admission of the autopsy reports of L and D, which were prepared by a medical examiner who did not testify at trial, violated his rights under the federal and state constitutions to confront his accusers; the state demonstrated beyond a reasonable doubt that the admission of the autopsy reports, even if erroneous, was harmless, as the reports were merely cumulative of overwhelming evidence, including testimony from eyewitnesses, a

treating physician, a first responder and another medical examiner, that L and D both died from gunshot wounds to the head.

10. This court declined to address the defendant's unpreserved claim that he was deprived of a fair trial when the trial court improperly failed to strike, sua sponte, evidence regarding the existence of a protective order issued against the defendant, which the trial court had admitted as relevant to a count in the information that the state later withdrew, and failed to instruct the jury to disregard that evidence, the defendant's claim having been evidentiary in nature rather than of constitutional dimension.

11. The trial court acted within its discretion in admitting evidence of the defendant's uncharged misconduct, specifically his conduct in firing three gunshots at the house where L was staying two days before the murders, to prove either motive, means to commit the charged crimes, or identity, and the court properly instructed the jury that such evidence could be used to prove means and identity: the evidence was highly relevant to establish motive, as the evidence tended to show that the defendant harbored hostility toward the intended victim, L, whom he knew was staying at the house; moreover, the evidence was highly relevant to establish means, in light of the temporal proximity between the prior misconduct and the charged conduct, and to establish both means and identity, in light of testimony linking the gun the defendant used to shoot at the house with the gun he used on the night of the murders; furthermore, the trial court properly determined that the probative value of the evidence outweighed its prejudicial effect, as a comparison and assessment of the viciousness of the uncharged conduct to the charged conduct demonstrated that the shooting at the house was less vicious than the shooting of the three victims in the head at close range, and as the probative value of the evidence, particularly as to the defendant's intent to kill L, was high.

12. The defendant could not prevail on his claim that the trial court improperly denied his motion to suppress two eyewitness identifications made by R, a taxicab driver who had driven the defendant on the night of the murders, as unreliable and the product of unnecessarily suggestive identification procedures, in violation of the defendant's right to due process, because, even if the identification procedures employed by the police were unnecessarily suggestive or unreliable under the totality of the circumstances, any error in their admission was harmless beyond a reasonable doubt: even if the state had been precluded from offering R's identifications, R still would have been permitted to testify that, on the night of the murders, he picked up a passenger, a young, African-American male from a home located at the defendant's address, that that person addressed a woman at that address as "mom," and that R drove him directly to the address where, approximately one hour later, the victims were murdered; moreover, notwithstanding R's testimony

regarding the taxi ride, the state's evidence against the defendant, including C's identification of the defendant as the shooter, was overwhelming.

13. The trial court's failure in its jury instruction on the affirmative defense of extreme emotional disturbance to include the defendant's requested language that the emotional disturbance need not have been spontaneous or sudden but may have simmered in the defendant's mind was harmless, this court having concluded that there was insufficient evidence to allow a rational juror to find that, at the time of the murders, the defendant was under the influence of an extreme emotional disturbance that had simmered over time: although the defendant's requested language was a correct statement of the law, the defendant presented no testimony, expert or otherwise, regarding his mental state at the time of or before the murders, and there was virtually no evidence in the record that his mental state was one that had been simmering over a period of time before the murders, as the majority of the evidence on which the defendant relied for the defense pertained to either his appearance on the night of the murders or his behavior during and after the murders; moreover, for the jury to have concluded, from only vague references in the record that suggested that the defendant and L were in a relationship characterized by domestic violence and that a protective order prevented the defendant from having contact with his son, that the defendant established that he had experienced a mental trauma that simmered in his mind over a period of time would have required the jury to engage in sheer speculation.

14. The defendant could not prevail on his claim that certain statements made by the prosecutor during closing and rebuttal arguments violated his due process right to a fair trial:

a. The defendant's claim that the prosecutor's remarks in her closing argument misstated the law concerning intent was unavailing, as those remarks, considered in the context of the entirety of her remarks regarding intent, were not improper; the prosecutor outlined multiple facts from which the jury could infer the defendant's intent to kill, and her reliance on the defendant's use of a gun to argue that the jury could infer that his intent was to kill was but one of the facts the prosecutor used to summarize the evidence, which also included the facts that the defendant brought the gun with him to L's home, hid the gun in his clothing, waited until L was in a vulnerable position before pulling the gun out of his pocket and shooting, aimed for her head, shot two of the victims twice, and fled the scene without rendering aid; furthermore, the prosecutor's action of taking a drink of water to demonstrate to the jury that it could infer that she intended to drink water did not improperly divert the jury from the issue of whether the defendant intended to kill the victims by suggesting to the jury that it could find the intent element satisfied if it found that the defendant intended to shoot the victims, as she was merely illustrating to the jurors the general principle that intent may be inferred from conduct.

b. The prosecutor did not improperly urge the jurors to draw speculative inferences for which there was no support in the record: the prosecutor's statement that the reason that the defendant went to the home of his girlfriend, J, to burn his clothing was to get rid of incriminating evidence was not improper speculation or a reference to facts not in evidence, as the jury reasonably could infer the defendant's state of mind from his actions, namely, that he desired to destroy any incriminating evidence; moreover, the prosecutor did not improperly speculate regarding possible explanations for the defendant's strange facial expressions that J witnessed after the shooting when the prosecutor suggested to the jurors that the defendant was trying to determine if he could trust J to tell her what he had done, as the prosecutor was offering the jurors a reasonable inference that they could draw from the circumstances; furthermore, the prosecutor's statement that the defendant may have taken his son to the hospital after the shooting to see if his victims were dead was not improper and was supported by a witness' testimony that the defendant told the witness that he had gone to the hospital to see if whomever he shot was dead; additionally, the prosecutor's statements offering possible explanations for why the defendant left the hospital before L's mother arrived, that he was nervous, and that a police officer may have come by were not improper, as those statements suggested reasonable inferences that the jury properly could draw from the evidence, namely, that the defendant was understandably anxious about the possibility of being apprehended while he was at the hospital, where he believed that at least one of his victims had been taken.

c. There was no merit to the defendant's claim that the prosecutor's use of the phrases "we know" and "you know" during her closing argument was improper on the ground that they conveyed to the jurors that the matter was undisputed, as the prosecutor merely used the phrases to introduce her statements marshaling the evidence for the jury; furthermore, the prosecutor did not improperly vouch for a witness when she summarized that witness' account of the shooting, which was the only testimony that the defendant shook C after he shot her to see if she was dead, as the prosecutor was simply marshaling the evidence and was not required to limit her argument to testimony that favored the defendant or to testimony that was undisputed; moreover, although the prosecutor's remark during rebuttal argument that "[m]urderers take risks" was improper, as the prosecutor should not have characterized the defendant as a murderer until he was found guilty of murder, the defendant could not establish prejudice because the evidence that the defendant shot and killed L and D was overwhelming, and the evidence that the defendant offered in support of his affirmative defense of extreme emotional disturbance, which, if established, would have resulted in a manslaughter rather than a murder conviction, was weak.

d. The defendant could not prevail on his claim that the prosecutor improperly commented on his failure to testify when she argued in her

rebuttal that he had failed to prove his affirmative defense of extreme emotional disturbance, and that those remarks improperly suggested that the jury, in determining whether he had met his burden of proving that affirmative defense, was permitted to consider only evidence offered by the defense: nothing in the prosecutor's comments on the defendant's failure to offer evidence indicating that the defendant ever had been prohibited from having contact with his son, that he wanted to have contact with his son, or if he ever visited with his son, constituted a comment, even indirectly, on the defendant's failure to testify but, rather, signaled to the jury gaps in the defendant's case as to his affirmative defense, which he bore the burden of proving; moreover, the prosecutor's remarks did not amount to an improper suggestion that the jury could not consider evidence that had been presented by the state but focused on the failure of the defendant to present evidence regarding what had caused the extreme emotional disturbance.

15. The defendant's unpreserved claim that the trial court improperly had failed to inquire about whether the defendant's right to counsel was jeopardized by a potential conflict of interest failed under the first prong of *State* v. *Golding* (213 Conn. 233), the defendant having failed to present an adequate record for review; although the defendant claimed that his defense counsel, S, owed an ongoing duty to an individual, W, at whose murder trial the defendant had been a cooperating state's witness, insofar as W was represented by the Hartford public defender's office, where S worked, the defendant failed to point to evidence in the record that conclusively established that W was represented by the Hartford public defender's office at any time and, particularly, at the time of the defendant's trial.

16. This court declined to address the defendant's claim that it should adopt the federal cumulative error doctrine, because, even if the court were to recognize that doctrine, the improprieties of the trial court in the present case would not justify relief under that doctrine.

Argued December 14, 2016—officially released January 26, 2018**

*Procedural History*

Substitute information charging the defendant with one count of the crime of capital felony, two counts of the crime of murder, and one count each of the crimes of attempt to commit murder, assault in the first degree, and criminal possession of a pistol or revolver, brought to the Superior Court in the judicial district of Hartford, where the state filed a notice of the aggravating factors

** January 26, 2018, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

that it intended to prove during the penalty phase of the proceedings; thereafter, the guilt phase was tried to the jury before *Mullarkey*, *J.*; verdict of guilty; subsequently, in the penalty phase of the proceedings, the court declared a mistrial, ordered a new penalty phase hearing and denied the defendant's motion to impose a sentence of life imprisonment without the possibility of release; thereafter, the state filed a revised notice of the aggravating factors that it intended to prove; subsequently, in the penalty phase of the proceedings with respect to the capital felony count, tried to a different jury before *Mullarkey*, *J.*, the jury found that the state had proven the existence of an aggravating factor and that the defendant had proven the existence of one or more mitigating factors by a preponderance of the evidence, and the jury found beyond a reasonable doubt that the aggravating factor outweighed the mitigating factors; thereafter, the court, *Mullarkey*, *J.*, rendered judgment of guilty and sentenced the defendant to death and to a consecutive term of imprisonment of forty-five years, from which the defendant appealed to this court. *Appeal dismissed in part; affirmed in part.*

*Ann M. Parrent*, assistant public defender, for the appellant (defendant).

*Matthew A. Weiner*, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, *Vicki Melchiorre*, supervisory assistant state's attorney, and *Dennis J. O'Connor*, former senior assistant state's attorney, for the appellee (state).

*Opinion*

ESPINOSA, J. The defendant, Jessie Campbell III, appeals, following a jury trial, from the judgment of conviction of capital felony in violation of General Statutes (Rev. to 1999) § 53a-54b (8), two counts of murder in violation of General Statutes § 53a-54a (a), attempt to commit murder in violation of General Statutes

§§ 53a-49 (a) (2) and 53a-54a (a), assault in the first degree in violation of General Statutes § 53a-59 (a) (1), and criminal possession of a pistol or revolver in violation of General Statutes (Rev. to 1999) § 53a-217c (a) (1).[1] He was subsequently sentenced to death plus forty-five years of incarceration. On appeal to this court, the defendant has raised a total of thirty-five claims, including twenty-one claims pertaining to the penalty phase. Prior to oral argument, this court directed the parties to address an additional issue: whether the defendant's penalty phase challenges had been rendered moot by this court's decision in *State* v. *Santiago*, 318 Conn. 1, 122 A.3d 1 (2015), which abolished the death penalty. We conclude that the defendant's claims challenging the penalty phase are not yet ripe. We address his remaining claims and affirm the judgment of conviction.

The jury reasonably could have found the following relevant facts. On August 26, 2000, at 131 Sargeant Street in Hartford, a shooting left two victims dead and a third victim gravely injured. That day, after completing her shift working as a line cook at the Olive Garden in Manchester, Carolyn Privette (Carolyn) took a bus to her home at 269 Sargeant Street. She arrived shortly after 9 p.m., ate dinner, and then watched television with her husband and children. Just before 10 p.m., she decided to take a short walk to visit her niece, Desiree Privette (Desiree), who lived at 131 Sargeant Street. When she arrived at Desiree's home a few minutes later, the defendant, who had been there for approximately one hour, was standing and talking with L,[2] just inside

[1] Unless otherwise noted, all subsequent references to §§ 53a-54b (8) and 53a-217c (a) (1) are to the 1999 revision of the General Statutes.

[2] L and her son were the subject of protective orders that had been issued against the defendant. In furtherance of our policy of protecting the privacy interests of the subjects of a criminal protective order, we refer to the protected persons and to members of their family only by their first initials. See, e.g., *Wendy V.* v. *Santiago*, 319 Conn. 540, 540 n.*, 125 A.3d 983 (2015).

the entrance gate to the front yard. Carolyn had known twenty year old L since L had been a child. She recognized the defendant as L's boyfriend and the father of L's young son. Desiree, who had not been expecting Carolyn, was at the house next door. L called for Desiree, who came over and greeted Carolyn with a hug. Carolyn and Desiree sat on the steps of the front porch, talking about their day, while the defendant and L continued their conversation at the front gate. Carolyn specifically recalled that L and the defendant were not speaking in raised voices—to all appearances, their conversation seemed to be an ordinary one.

After a short time, Desiree announced that she was going upstairs. Carolyn indicated that she would join her and asked L, who sometimes stayed overnight at Desiree's house, whether she would like to come with them. L took a few steps toward Carolyn and Desiree, stopped near a large bush by the front steps, and declined, stating that the defendant wished to continue talking. In the meantime, the defendant had also moved closer to the steps and was standing near L. As Carolyn and Desiree were beginning to stand up from the porch steps, L bent down as though to tie one of her shoes. At that moment, the defendant pulled a silver handgun out of his pocket, placed it to L's head and shot her. She tumbled over, landing partially under the bush by the stairs. The other two women began screaming and tried to escape, but the defendant ran at them with the gun. He next shot Desiree, who fell to the ground on the side of the walkway that led to the front steps. He then shot Carolyn, who was still on the steps. She instinctively raised her right hand up in front of her—the bullet went through her hand and hit her right arm. She fell, but started crawling on her hands and knees across the porch toward the front door. She "felt" something that prompted her to look back over her shoulder. She saw the defendant standing over her, looking at

her with a blank expression that she described as one the likes of which she had never seen before. He then shot her again, this time in the back of the head. Lying on the porch, Carolyn remained still, closed her eyes, held her breath and pretended to be dead, afraid that he would shoot her again. The defendant shook her to see if she was dead, then walked over to Desiree, who had not moved after she had fallen to the ground, and shot her a second time. The defendant then pulled a hood over his head and walked away, down a path along the side of the house.

First responders arrived shortly before 10:30 p.m., within minutes after the shooting—fewer than thirty minutes after Carolyn had left her home to visit Desiree. Officers from the Hartford Police Department (Hartford police) at the scene could smell gunpowder in the air. Desiree was pronounced dead at the scene. The autopsy later revealed that she had suffered four areas of trauma from the gunshots, one wound to the chin, a through and through wound to her right forearm, another through and through wound to her right breast, and one to the right side of her head. The autopsy report concluded that the cause of death was the gunshot wound to her head.

After quickly assessing the three victims and ascertaining that Desiree was not breathing, paramedics and emergency medical technicians at the scene focused their attention on L and Carolyn. Due to safety concerns for both the victims and the responders, the goal was to stabilize the victims as quickly as possible and remove them from the scene. L was breathing in agonal gasps, alerting responders that she was close to death. As soon as they secured her airway, they placed her in an ambulance and transported her to Saint Francis Hospital and Medical Center (hospital). Chassidy Milner, a paramedic, attended to Carolyn. Milner and her partner removed Carolyn from the scene after per-

forming a quick assessment. Milner rode in the rear of the ambulance beside Carolyn. When she asked Carolyn what her name was, Carolyn responded, "Jessie." Carolyn later explained that she knew she needed to tell the authorities who had "done that to those girls," before her own death, which she believed was imminent.

L fell into a coma and was taken off life support the next morning. The autopsy revealed that the cause of death was a gunshot wound to the right parietal area of her head, an area extending from the ear to the crown. Carolyn underwent surgery and survived, eventually testifying at the defendant's trial. Her injuries, however, were significant and long-term. She has substantial scarring on her head and right hand and she no longer has peripheral vision out of her right eye. After she was released from the hospital, she was placed in rehabilitative care, where she had to relearn how to use all of her motor skills, including how to walk again. She continues to suffer from severe, frequent headaches, muscle spasms and insomnia.

At approximately 11 p.m. on the night of the shooting, the defendant arrived at the Hartford home of his girlfriend, Jermyra Cortez. Cortez was inside when her cousin told her that the defendant was in the backyard. When she went outside to see him, the defendant was removing all of his clothes, except for his underwear and his Timberland boots, and was starting a fire to burn the clothing. He was sweating and appeared "scared, like he'd done something he ain't have no business doing." Cortez asked him if he had been smoking "dust."[3] The defendant responded that he had not. She described his eyes as "wide open" and "staring." She asked him why he was burning his clothes, where he had been and what he had done, but he did not answer

[3] "Dust" is a street name for phencyclidine, also known as PCP.

the questions and instead repeatedly shushed her. After ten minutes, Cortez left the defendant in the backyard and went to a nightclub with her mother.

At approximately 12:30 a.m., the defendant and his mother went to the home of J, L's mother. J was not home, but T, L's sister, was there, babysitting the son of L and the defendant. The defendant's mother left shortly after T answered the door. The defendant remained and asked T if she had seen L. She replied that she had not. The defendant asked T if she would braid his hair because he was planning to leave town the next day, but she declined and went back to bed.

After T went back to bed, the defendant took his son with him to the hospital, where L and Carolyn were still being treated. He arrived at the hospital sometime around 1 a.m. and went to the area outside the main entrance to the emergency department. He spoke to two nursing supervisors and asked them to tell J, who was working at the hospital that night, that he wanted to speak to her. He told them that he was J's son, and that his name was "Joshua." As he spoke to them, he was holding his sleeping son in his arms. He claimed that he wanted to speak to J because the "baby" was cold. When the nurses found J and brought her to speak to him, however, the defendant was no longer there. After leaving the hospital, the defendant returned his son to J's home.

Sometime after 1 a.m., the defendant went to the home of his friend, Heather Bolling, at Oakland Terrace in Hartford. Bolling was getting ready to go to a nightclub when the defendant arrived. She described the defendant as appearing "out of it" and "scared." He was wearing a jacket that appeared to be too small for him—it did not appear to be his. When she attempted to turn a light on, he told her to turn it off, and then, according to Bolling, he stated that he had "shot somebody or

somebody got shot." He also told her that he had just come from the hospital where he had gone to see if the person he had shot was dead. Using Bolling's cell phone, the defendant called his parents to ask for his grandmother's phone number. He then called his grandmother, who lived in Kalamazoo, Michigan.

Bolling went out, leaving the defendant in her home alone, but she returned after less than one-half hour because the club was not open that night. When she returned, she found the defendant in her bed, under the covers and crying. She described his appearance as "weird" and "bugged out." The defendant asked her what she would do if her son's father shot her and two of her friends—would she get revenge or call the police? Bolling responded that she would seek revenge. Later that morning, when Bolling read about the triple shooting in a newspaper, she brought the paper to the defendant and asked him if he did it. He denied it, but Bolling asked him to leave. He called his father, who came to pick him up at approximately 7 a.m. Bolling subsequently called the police.

Kanika Ramsey saw the defendant on Sunday, August 27, 2000, riding past her house on a bicycle. Ramsey, who was in a relationship with the defendant, lived in Windsor, in the house next to the defendant's grandfather. After she had seen him on the bicycle, the defendant phoned her and asked her to meet him outside. She went to his grandfather's house, and the defendant asked her if she had heard what happened. Ramsey responded that she had heard, and asked the defendant "who could have done this." The defendant said he did not know. His grandfather then called to him and said something to him that Ramsey could not hear. Immediately after hearing what his grandfather said, the defendant told Ramsey that he had to leave.

Two days later, the Hartford police received a tip that the defendant was in Kalamazoo, Michigan. They

obtained a warrant for his arrest, and he was apprehended that evening at the home of his grandmother, Lavel Campbell, and returned to Connecticut.

The defendant waived a probable cause hearing. Following a jury trial, he was convicted on all six counts of the amended information, which charged him with capital felony in violation of § 53a-54b (8), on the ground that he murdered L and Desiree at the same time or in the course of a single transaction, two counts of murder in violation of § 53a-54a (a), attempt to commit murder in violation of §§ 53a-49 (a) (2) and 53a-54a (a), assault in the first degree in violation of § 53a-59 (a) (1), and criminal possession of a pistol or revolver in violation of § 53a-217c (a) (1). The state alleged two aggravating factors in support of the death sentence: (1) in committing the capital felony, the defendant knowingly created a grave risk of death to another person, Carolyn; and (2) the defendant committed the offense in an especially heinous, cruel or depraved manner, in that he inflicted extreme psychological pain or suffering on Desiree, and was callous or indifferent to the extreme psychological pain or suffering that his conduct inflicted on Desiree. The jury found that the state had proven the first aggravating factor beyond a reasonable doubt. The jury also found, however, that the defendant had proven at least one nonstatutory mitigating factor. Because the jury was unable to agree whether the aggravating factor outweighed the mitigating factor, the trial court granted the state's motion for a mistrial and denied the defendant's motion to impose a life sentence.

At the second penalty hearing before a different jury, the state alleged a single aggravating factor: in committing the capital felony, the defendant knowingly created a grave risk of death to another person, Carolyn. At the end of the second penalty hearing, the jurors returned a special verdict finding that the state had proven the aggravating factor beyond a reasonable doubt, one or

more jurors had found that the defendant had proven at least one nonstatutory mitigating factor by a preponderance of the evidence, all jurors were persuaded, beyond a reasonable doubt, that the aggravating factor outweighed the mitigating factors, and death was the appropriate punishment. The trial court subsequently imposed a sentence of death on the capital felony count, twenty years incarceration on the attempt to commit murder count, twenty years incarceration on the assault in the first degree count, and five years on the criminal possession of a pistol or revolver count, all terms of incarceration to run consecutively. This appeal followed. Additional facts will be set forth as necessary.

## I

## PENALTY PHASE CHALLENGES

After the defendant had been sentenced to death, this court abolished the death penalty. See *State* v. *Santiago*, supra, 318 Conn. 139–40. Prior to oral argument, we directed the parties to "be prepared to address at oral argument why the defendant's claims of error in the penalty phase of the proceedings should not be dismissed as moot in light of [*Santiago*] and *State* v. *Peeler*, 321 Conn. 375, [140 A.3d 811] (2016)." The defendant claims that the penalty phase issues are not moot because he will suffer collateral consequences if he is not allowed to challenge his prior death sentence. He contends that, unless he prevails on at least one of his penalty phase challenges, if this court affirms his conviction and remands the case to the trial court for resentencing, General Statutes § 18-10b, which governs the placement of those convicted of capital felony or murder with special circumstances, may require that he be housed in administrative segregation, which he contends constitutes an enhanced punishment.[4] The

[4] General Statutes § 18-10b provides in relevant part: "(a) The Commissioner of Correction shall place an inmate on special circumstances high security status and house the inmate in administrative segregation until a reclassification process is completed under subsection (b) of this section,

state responds that the question is controlled by this court's decision in *Peeler*, in which this court concluded that *Santiago* rendered the defendant's penalty phase challenges moot. *State* v. *Peeler*, supra, 377. In the alternative, the state contends that the defendant's claim relates to conditions of confinement, which have not yet been settled, as the defendant has not yet been resentenced. Additionally, there have been no factual findings as to how, if at all, the defendant's confinement, after resentencing, would differ from those of any

if . . . (2) the inmate is in the custody of the Commissioner of Correction for a capital felony committed prior to April 25, 2012, under the provisions of section 53a-54b in effect prior to April 25, 2012, for which a sentence of death is imposed in accordance with section 53a-46a and such inmate's sentence is (A) reduced to a sentence of life imprisonment without the possibility of release by a court of competent jurisdiction, or (B) commuted to a sentence of life imprisonment without the possibility of release.

"(b) The commissioner shall establish a reclassification process for the purposes of this section. The reclassification process shall include an assessment of the risk an inmate described in subsection (a) of this section poses to staff and other inmates, and an assessment of whether such risk requires the inmate's placement in administrative segregation or protective custody. If the commissioner places such inmate in administrative segregation pursuant to such assessment, the commissioner shall require the inmate to complete the administrative segregation program operated by the commissioner.

"(c) (1) The commissioner shall place such inmate in a housing unit for the maximum security population if, after completion of such reclassification process, the commissioner determines such placement is appropriate, provided the commissioner (A) maintains the inmate on special circumstances high security status, (B) houses the inmate separate from inmates who are not on special circumstances high security status, and (C) imposes conditions of confinement on such inmate which shall include, but not be limited to, conditions that require (i) that the inmate's movements be escorted or monitored, (ii) movement of the inmate to a new cell at least every ninety days, (iii) at least two searches of the inmate's cell each week, (iv) that no contact be permitted during the inmate's social visits, (v) that the inmate be assigned to work assignments that are within the assigned housing unit, and (vi) that the inmate be allowed no more than two hours of recreational activity per day. (2) The commissioner shall conduct an annual review of such inmate's conditions of confinement within such housing unit and the commissioner may, for compelling correctional management or safety reasons, modify any condition of confinement, subject to the requirements of subparagraphs (A) to (C), inclusive, of subdivision (1) of this subsection. . . ."

inmate who is similarly situated. Accordingly, the state argues, this court lacks any record of the facts that would be necessary to enable it to determine whether the defendant may be entitled to relief. We agree with the state's alternative claim and conclude that the defendant's penalty phase claims are not ripe. Moreover, we also conclude that, because the defendant's argument centers on a potential challenge to conditions of confinement, the proper vehicle for those claims is a petition for a writ of habeas corpus. Because we conclude that the defendant's penalty phase claims are not ripe, we do not resolve whether they have been rendered moot by *Santiago*.[5]

The doctrines of mootness and ripeness both implicate justiciability. *Janulawicz* v. *Commissioner of Correction*, 310 Conn. 265, 270, 77 A.3d 113 (2013). "Mootness implicates this court's subject matter jurisdiction, raising a question of law over which we exercise plenary review. . . . An issue is moot when the court can no longer grant any practical relief." (Citation omitted; internal quotation marks omitted.) *Burton* v. *Commissioner of Environmental Protection*, 323 Conn. 668, 677, 150 A.3d 666 (2016). "[T]he rationale behind the ripeness requirement is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . . . Accordingly, in determining whether a case is ripe, a . . . court must be satisfied that the case before [it] does not present a hypothetical injury or a claim contingent [on] some event that has not and indeed may never transpire." (Internal quotation marks omitted.) *Janulawicz* v. *Commissioner of Correction*, supra, 271.

[5] We emphasize that the defendant's penalty phase claims are not ripe only to the extent that they may be relevant to a potential challenge to the defendant's conditions of confinement. Insofar as the defendant's penalty phase claims seek to have his sentence of death reversed, those claims have been rendered moot by this court's decisions in *State* v. *Santiago*, supra, 318 Conn. 1, and *State* v. *Peeler*, supra, 321 Conn. 375.

For several reasons, the record is insufficient to resolve the defendant's claim that he will be subjected to more severe conditions of confinement unless this court resolves at least one of his penalty phase claims in his favor. The defendant conceded at oral argument that he has not yet been resentenced. Until that happens, we cannot say with certainty what the defendant's conditions of confinement may be. The defendant relies on § 18-10b (a) (2), which applies to an inmate "if . . . the inmate is in the custody of the Commissioner of Correction for a capital felony committed prior to April 25, 2012, under the provisions of section 53a-54b in effect prior to April 25, 2012, for which a sentence of death is imposed in accordance with section 53a-46a and such inmate's sentence is (A) reduced to a sentence of life imprisonment without the possibility of release by a court of competent jurisdiction . . . ." Following resentencing, the Commissioner of Correction (commissioner) will be required to determine whether the requirements of § 18-10b apply to the defendant. If the commissioner so determines, then it is unclear to what extent the requirements of § 18-10b would result in different conditions of confinement for the defendant. Specifically, we note that the statute requires the commissioner to "establish a reclassification process" that shall include "an assessment of the risk an inmate described in subsection (a) of this section poses to staff and other inmates, and an assessment of whether such risk requires the inmate's placement in administrative segregation or protective custody. . . ." General Statutes § 18-10b (b). There is no evidence in the record as to whether the commissioner has established a reclassification process pursuant to § 18-10b, or, if such a process has been established, of what it is comprised. The commissioner enjoys broad discretion in assigning classifications to inmates. See, e.g., *Anthony A.* v. *Commissioner of Correction*, 326 Conn. 668, 675, 166 A.3d

614 (2017) (noting commissioner's broad discretion in context of due process analysis); *Wheway* v. *Warden*, 215 Conn. 418, 431, 576 A.2d 494 (1990) (same). Consistent with that broad level of discretion, the statute appears to contemplate a highly individualized assessment before an inmate is reclassified. It is uncertain at this time, therefore, what the defendant's eventual conditions of confinement will be.

Additionally, there have been no factual findings as to what procedures and rules would otherwise apply to the defendant, findings that would be necessary to determine whether he has been or could be prejudiced by his prior death sentence. For instance, the record is devoid of any information as to whether there are other inmates who are similarly situated to the defendant and, if so, under what conditions they are confined and how those conditions differ, if at all, from the defendant's conditions of confinement. The defendant asserts that, because § 18-10b requires that inmates falling under its purview initially must be placed "on special circumstances high security status" and housed "in administrative segregation," his conditions of confinement will differ from inmates who are similarly situated. At oral argument, the defendant alluded to Eduardo Santiago, the defendant in *State* v. *Santiago*, supra, 318 Conn. 1, and suggested that Santiago's conditions of confinement will be superior to those of the defendant in the present case. There is no evidence in the record, however, as to what Santiago's conditions of confinement are, nor is there a finding that Santiago is an inmate similarly situated to the defendant. There is no evidence in the record regarding any procedures followed by the Department of Correction in classifying inmates for purposes of determining the appropriate conditions of confinement.

It is well established that the proper vehicle by which a defendant may challenge his conditions of confine-

ment is a petition for a writ of habeas corpus. See, e.g., *State* v. *Anderson*, 319 Conn. 288, 325, 127 A.3d 100 (2015). The present case illustrates perfectly why a habeas petition is the proper vehicle. In the habeas court, the defendant will have the opportunity to present any and all evidence that is relevant to his claim. That court is empowered to make factual findings on that evidence. This court is not. Accordingly, the defendant's appeal is dismissed with respect to his claims challenging the penalty phase and the sentence of death. See footnote 5 of this opinion.

## II

## RIGHT TO BE PRESENT DURING CRITICAL STAGES OF TRIAL

The defendant claims that he was denied his due process right to be present during critical stages of the trial, guaranteed by the fourteenth amendment to the United States constitution and article first, §§ 8 and 9, of the Connecticut constitution. Specifically, the defendant claims that he was guaranteed the right to be present at two unrecorded pretrial scheduling conferences, one held on November 25, 2003, and a second held on December 23, 2003.[6] The defendant contends that, because his attorneys had not had adequate time to prepare his defense, the scheduling conferences implicated his right to effective representation by fully prepared counsel. Therefore, he contends, those conferences were critical stages of his prosecution. The defendant has cited no authority to support his claim that scheduling conferences constitute critical stages of the prosecution. Indeed, Practice Book § 44-10 (a) (3) provides in relevant part: "Unless otherwise ordered by

[6] The defendant subsequently filed a motion for rectification of the trial court record, seeking to make a complete record of what transpired at the two unrecorded scheduling conferences. The trial court denied that motion following a hearing.

the judicial authority, a defendant need not be present . . . at *any conference*, except a disposition conference pursuant to Section 39-13." (Emphasis added.) Our rules of practice, therefore, establish that, in the absence of a judicial order to the contrary, the general rule is that a defendant is neither required nor entitled to be present at a scheduling conference. The defendant contends that his counsel's alleged lack of preparedness transformed those conferences into critical stages, thus entitling him to be present. We disagree.

"[A] criminal defendant has a constitutional right to be present at all critical stages of his or her prosecution. . . . Indeed, [a] defendant's right to be present . . . is scarcely less important to the accused than the right of trial itself. . . . Although the constitutional right to be present is rooted to a large extent in the confrontation clause of the sixth amendment, courts have recognized that this right is protected by the due process clause in situations when the defendant is not actually confronting witnesses or evidence against him. . . . In judging whether a particular segment of a criminal proceeding constitutes a critical stage of a defendant's prosecution, courts have evaluated the extent to which a fair and just hearing would be thwarted by [the defendant's] absence or whether his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge." (Citations omitted; internal quotation marks omitted.) *State* v. *Lopez*, 271 Conn. 724, 732, 859 A.2d 898 (2004).

The defendant has advanced only one argument in support of his contention that his presence at the scheduling conference had a reasonably substantial relation to his opportunity to defend against the charges. Namely, he claims that he was never offered an explanation of the trial court's *reasons* for setting the trial schedule, despite the position of defense counsel that the schedule did not afford them sufficient time to pre-

pare. We first observe that the defendant is incorrect in stating that the trial court provided no reasons for setting the specific trial schedule. As we describe in part III of this opinion, when the court denied the defendant's motions for continuances, it offered a detailed explanation in support of its scheduling determinations. Even if the defendant were correct, however, he offers no explanation as to how knowing the trial court's reasons for setting the schedule would have allowed him a fuller opportunity to defend his case. The scheduling conferences were not critical stages of the defendant's prosecution.

## III

## DENIAL OF CONTINUANCES

The defendant claims that the trial court's denial of his motions seeking continuances deprived him of his due process right to a fair trial.[7] He argues that, in

[7] The defendant also asserts that the denial of the motions for continuances deprived him of the effective assistance of counsel. The defendant asserts that his claim is reviewable on direct appeal because his claim is distinguishable from one relying on *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), because it does not require further evidentiary development. We disagree. The defendant has not proven that his defense counsel would have done anything different if they had been given more time for voir dire and trial preparation. He has not demonstrated that their performance was deficient, and such a showing would require the presentation of evidence. The defendant's ineffective assistance claim is precisely the type of collateral attack that is best resolved in a habeas action, where the defendant will have the opportunity to present evidence in support of his claim that his counsel's performance was deficient and that he was prejudiced by that deficient performance.

We also reject the defendant's contention that his claim presents a pure question of law, reviewable on direct appeal pursuant to *State* v. *Arroyo*, 284 Conn. 597, 643–45, 935 A.2d 975 (2007). That decision discussed a very narrow exception to the general rule that a habeas petition is the appropriate vehicle for a claim of ineffective assistance of counsel. Specifically, we observed in *Arroyo*: "On the rare occasions that we have addressed an ineffective assistance of counsel claim on direct appeal, we have limited our review to allegations that the defendant's sixth amendment rights had been jeopardized by the actions of the *trial court*, rather than by those of his counsel. . . . We have addressed such claims, moreover, only where

arriving at its ruling, the court focused only on the age of the case and did not accord sufficient weight to other factors. He further claims that the trial court's denial of those motions prejudiced his defense by not allowing his counsel sufficient time to persuade the defendant to discuss with them the events leading to his arrest, to develop a theory of the defense, and to prepare for effective and informed voir dire. According to the defendant, the denial of continuances forced his counsel to proceed despite being "unprepared," with the result that they were filing motions and preparing witnesses at the last minute. We conclude that the trial court did not abuse its discretion in denying the continuances.

The record reveals the following facts relevant to our resolution of this claim. The defendant was arraigned on September 5, 2000, at which time the court appointed Attorney David G. E. Smith of the Division of Public Defender Services (public defender's office) to represent him. One week later, Attorney Ronald Gold of the Office of the Chief Public Defender also filed an

the record of the trial court's allegedly improper action was adequate for review or the issue presented was a question of law, not one of fact requiring further evidentiary development." (Emphasis in original; internal quotation marks omitted.) Id., 644. Because the defendant's claim would require further evidentiary development—namely, to allow the defendant to present evidence that the denial of the continuances affected his counsel's ability to represent him—*Arroyo* is inapplicable to the present case.

The defendant also claims that the trial court's denial of his motions seeking continuances rendered his counsel ill-prepared to preserve his appellate rights. Accordingly, the defendant contends, even if this court concludes that one or more of his claims are unpreserved, we should address those claims. The defendant appears to suggest that had he been granted the continuances, his counsel would have preserved *all* appellate claims. The defendant offers no evidence to support this speculation. We further observe that the defendant's argument simply recasts an ineffective assistance of counsel claim in an attempt to secure review of unpreserved claims. Just as with any other collateral attacks that are based on ineffective assistance of counsel claims, the defendant's remedy for his claim that his counsel were ineffective for failing to preserve claims on appeal is to file a petition for a writ of habeas corpus.

appearance. The defendant filed his first motion for a continuance on January 5, 2004, requesting that jury selection, which had been scheduled to start on that day, be postponed until March 1, 2004. In support of the motion, he claimed that, because of their respective caseloads, trial schedules and other duties, Smith and Gold had had insufficient time to work together in preparation for the defendant's trial.

Specifically, the motion represented that Gold was defense counsel in the case of Robert Courchesne; see *State* v. *Courchesne*, 296 Conn. 622, 998 A.2d 1 (2010); which had concluded with a jury recommendation of a death sentence on December 17, 2003, nineteen days prior to the proposed January 5, 2004 start date for jury selection in the defendant's case. The defendant submitted that "nineteen (19) days between a verdict after a death penalty hearing and the start of jury selection in another death penalty trial does not allow counsel to recover both physically and emotionally from the first trial and to effectively prepare for the next trial." The defendant also emphasized that Gold's work on Courchesne's case was not yet finished—postverdict motions were due on January 12, 2004, and sentencing was scheduled for January 15, 2004. Gold also was counsel in two other pending capital cases. As for Smith, in 2003, he had served as counsel in five cases scheduled for jury trials, two of which were tried to verdict. Smith had served as counsel in six additional murder cases in 2003, including two capital felony cases.

During the hearing on the defendant's motion, Gold argued that the continuance was necessary to avoid prejudice to the defendant because he and Smith had not had the opportunity to confer regarding defense strategy. The state objected to the motion, reminding the court that the case had been pending for three and one-half years and that the state could potentially be prejudiced by further delay if witnesses were to become

unavailable. Several family members of the victims testified that they also opposed a continuance, emphasizing to the court their long wait and need for closure. L's father testified regarding his family's need to begin healing.

In its questions to Gold during the hearing, the court called into question the legitimacy of the reasons offered by Gold and Smith in support of the motion, stating its recollection that Judge Elliot N. Solomon, who was the presiding judge at the time, had informed the court that he had spoken with Gold during the summer of 2003 regarding the present case. According to the court, Judge Solomon stated that he had instructed Gold that he should use a hiatus in the Courchesne case between the guilt and penalty phases, from June until September, to begin preparing for this case. The court also expressed skepticism as to whether the defendant had established prejudice, asking Gold whether there were any material witnesses who had not been interviewed, any experts who had not responded, or any physical evidence that had not yet been tested. Gold did not respond affirmatively to any of those questions. The court further observed that the legal issues that would be involved in the case would pose no special problems for Gold, who was an expert in the area of death penalty law.

The trial court issued its ruling from the bench, granting in part the motion for continuance, extending the start of jury selection by fifteen days to January 20, 2004, and delaying the start of evidence by one week. The court grounded its partial denial of the continuance on the length of time that had already passed since the arraignment, the court's view that the case was not factually complex, the approaching, busy summer season and its likely effect on juror availability, as well as staffing shortages and parking issues at the court. The court rejected defense counsel's claim that they had

not had sufficient time to prepare the case for both the guilt and penalty phases because, in the court's view, preparation for the penalty phase was a "separate issue."

On Monday, January 26, 2004, the defendant orally requested a second continuance, because Gold's mother was dying and he was unable to be present in court. Although Smith was able to participate in voir dire, he explained to the court that, in compliance with the recommended guidelines of the American Bar Association (A.B.A.) for the defense of death penalty cases, the policy of the public defender's office was that, at all times during representation of a defendant in a capital case, two defense counsel should be present.[8] Accordingly, the defendant requested that jury selection be paused until Gold was able to participate. The court did not question that the public defender's office had such a policy, but did take issue with the public defender's interpretation of the A.B.A. standards, which the court read to require only that the defense team should consist of two attorneys, not that those two attorneys must both be present in court at all proceedings. The court indicated that it would not hold jury selection that day, and also observed that no jury selection had

[8] The A.B.A. guideline provides in relevant part: "The Legal Representation Plan should provide for assembly of a defense team that will provide high quality legal representation. . . . The defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1, an investigator, and a mitigation specialist." A.B.A., Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (February 2003) guideline 4.1 (a) (1), reprinted in 31 Hofstra L. Rev. 913, 952 (2003).

The policy of the Public Defender Services Commission provided: "It is the policy of the Public Defender Services Commission that two lawyers be appointed to represent any defendant charged with a capital felony when the state intends to seek the death penalty and that both lawyers should appear with and participate in the representation of the defendant at all contested pretrial proceedings, all voir dire proceedings, and all trial proceedings, unless such appearance by both lawyers is waived by the defendant after consultation with counsel."

been scheduled for Tuesday, January 27. The court further observed that weather forecasts predicted a snowstorm on Wednesday, but the court stated that, if the weather did not force the state courts to close, jury selection would go forward that day. Because of the storm, the chief court administrator ordered that jurors were not to be called in on that Wednesday.

The court learned on Thursday morning that Gold's mother had died the previous night. The defendant renewed his oral motion for a continuance until Gold was available. The court denied the motion, stating that it had already "lost" three days of voir dire that week and that it would delay jury selection no further. Jury selection proceeded that day without Gold. On Friday, January 30, 2004, Smith renewed his request for a continuance until Monday, February 2, 2004, explaining that, because Gold was attending his mother's funeral, he would again be unable to be present for jury selection. The court denied the motion, observing that Smith was present and qualified to handle jury selection on his own.

We first set forth the applicable standard of review for the defendant's claim that the court improperly denied the continuances. "There is no question but that the matter of a continuance is traditionally within the discretion of the trial judge which will not be disturbed absent a clear abuse." (Internal quotation marks omitted.) *State* v. *Williams*, 200 Conn. 310, 320, 511 A.2d 1000 (1986). "A reviewing court is bound by the principle that [e]very reasonable presumption in favor of the proper exercise of the trial court's discretion will be made. . . . Our role as an appellate court is not to substitute our judgment for that of a trial court that has chosen one of many reasonable alternatives. . . . Therefore, on appeal, we . . . must determine whether the trial court's decision denying the request for a continuance was arbitrary or unreasonabl[e]." (Internal

quotation marks omitted.) *State* v. *Breton*, 264 Conn. 327, 356–57, 824 A.2d 778, cert. denied, 540 U.S. 1055, 124 S. Ct. 819, 157 L. Ed. 2d 708 (2003).

"We have recognized that the factors to be considered by a trial court in ruling on a motion for a continuance include the likely length of the delay . . . the impact of delay on the litigants, witnesses, opposing counsel and the court . . . the perceived legitimacy of the reasons proffered in support of the request . . . [and] the likelihood that the denial would substantially impair the defendant's ability to defend himself . . . . There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." (Citation omitted; internal quotation marks omitted.) Id., 358.

As to the trial court's denial of the defendant's first motion for a continuance, the record demonstrates that the court was well within its discretion to partially deny the motion. It is significant that the court did allow the defendant a partial extension—fifteen days for jury selection, and a one week delay in the start of evidence. Moreover, the court relied on numerous factors in arriving at its ruling. It considered the age of the case, certainly, but also considered the effect of a delay on juror availability as well as the possible negative consequences to the state. The court appears to have accorded significant weight to its doubts concerning the legitimacy of the proffered reasons for the request for more time, noting that Judge Solomon had indicated that he informed Gold of his expectation that Gold would use the hiatus in the Courchesne case to begin working on the present case, and observing both that the case was an old one and that Gold was an expert in death penalty cases. The court also properly took account of the stated opposition of the family members

of victims, and considered staffing and parking limitations at the courthouse. When the court questioned defense counsel, they failed to identify any specific area in which they were unprepared to go forward, identifying no outstanding issues pertaining to evidence or material or expert witnesses. In summary, the court properly considered the relevant factors and based its ruling on its assessment of those factors.

As to the court's denial of the defendant's second motion for what would have been a two day continuance due to the death of Gold's mother, even if we were to conclude that the ruling constituted an abuse of discretion, the defendant's claim would fail because he has not established any harm on the basis of that denial. The only harm that the defendant alleges based on the denial of his second motion for a continuance is Smith's acceptance of two jurors on those days, whose impanelling the defendant now challenges. As we explain in part IV of this opinion, however, we reject the defendant's claim that the impanelling of those jurors violated the defendant's right to an impartial jury.

## IV

## RIGHT TO IMPARTIAL JURY

The defendant next claims that the trial court's failure to excuse three jurors who were accepted by the defendant violated the defendant's right to an impartial jury under the federal and state constitutions. The defendant contends that each of the three jurors offered only equivocal assurances of impartiality and, therefore, that the trial court abused its discretion by failing to excuse them, notwithstanding defense counsel's failure to challenge the jurors for cause, failure to exhaust peremptory challenges, and affirmative acceptance of each of the

three jurors.[9] We have long held that "even an improper denial of a challenge for cause provides cause for reversal *only* if 'the party [who makes the challenge] subsequently exhausts all of his or her peremptory challenges and an additional challenge is sought and denied.' " (Emphasis in original.) *State* v. *Kelly*, 256 Conn. 23, 31, 770 A.2d 908 (2001), quoting *State* v. *Esposito*, 223 Conn. 299, 313, 613 A.2d 242 (1992). In light of that established rule, it would defy all logic and run contrary to basic notions of fairness to conclude that the facts of the present case entitle the defendant to reversal of the judgment. That is, it is well established that the failure to exhaust peremptory challenges prevents this court from reversing a judgment on the basis of a subsequent denial of a challenge to a juror. It would therefore make no sense to reverse the judgment of conviction in the present case, where the defendant not only failed to exhaust peremptory challenges, but never challenged any of the three jurors at all, and, in fact, affirmatively accepted each juror. To the contrary, the actions of defense counsel make it virtually impossible to conclude that the trial court abused its discretion in failing to excuse the jurors, as it would reasonably have concluded that counsel viewed the jurors as acceptable. See *State* v. *Vitale*, 190 Conn. 219, 225, 460 A.2d 961 (1983) ("[u]nless all his peremptory challenges have been exercised before the completion of jury selection, it is presumed that no juror was permitted to serve

[9] The defendant takes issue with the applicable standard of review and argues that, because the trial judge subsequently acknowledged that he allowed a juror to be seated on the panel despite the judge's belief that the juror had concealed her opposition to the death penalty, no deference should be given to the trial judge's failure to preclude the jurors at issue in this appeal from being seated. We reject the defendant's argument, which appears to suggest that the judge was biased. Even if we agreed with that suggestion, the cited remarks would provide support for the conclusion that the judge's bias was in the defendant's favor. Because we reject the defendant's argument in favor of a different standard of review, we frame the issue as though the defendant had relied on the correct standard in making his argument.

whom the defendant regarded as biased or unsuitable, although he might have preferred others"). Accordingly, we reject the defendant's claim that the trial court abused its discretion in failing to excuse the jurors.

## V

## COMPETENCE TO STAND TRIAL

We next address the defendant's claim that the trial court improperly found him to be competent to stand trial before the guilt phase.[10] The defendant advances three arguments in support of his claim. First, he claims that the trial court improperly gave more weight to the determination of the court-appointed evaluation team than it did to the two experts produced by the defendant. The defendant's second and third claims are that the trial court improperly interpreted the defendant's burden to overcome the statutory presumption of competence. See General Statutes § 54-56d. That is, his second claim is that the court interpreted that burden in a manner that violated his right to due process, requiring him to produce experts who could testify at his competency hearing with certainty that his failure to communicate with his attorneys was not volitional.[11] Third, the defendant contends that, in violation of his right to equal protection, the court interpreted § 54-56d to require a burden different from the one that would apply if the court had sua sponte raised the issue of competence.

[10] The defendant also challenges the court's finding during the penalty phase, after a second competency hearing, that he was competent to stand trial. As we explain in part I of this opinion, we do not address the defendant's penalty phase challenges.

[11] In his brief, the defendant suggests that the trial court's purported misapplication of the governing legal standard rendered the court's ultimate determination that he was competent "clearly erroneous." Review for clear error, however, applies to a trial court's factual findings. That standard of review is not relevant to our consideration of the defendant's claims, which raise a legal question and are subject to plenary review. See, e.g., *State* v. *Skipwith*, 326 Conn. 512, 518, 165 A.3d 1211 (2017) (plenary review applies to questions of law).

The state responds that the trial court properly applied the governing legal standard and, therefore, that the court's determination that the defendant was competent did not constitute an abuse of discretion. We agree with the state.

## A

## Facts

We set forth the following additional relevant facts and procedural background. On April 7, 2004, defense counsel filed a motion for a competency examination. In the motion, counsel asserted that they had been unsuccessful in their attempts to persuade the defendant to discuss the events before, during and after the shooting. They contended that his failure to speak with them or with anyone else on the defense team regarding those events, as well as his failure to discuss his character, background and history, rendered him unable to assist in his own defense. In support of the motion, counsel also noted that, in preparation for trial, the defendant had met with Madelon Baranoski, a licensed clinical psychologist. The defendant told Baranoski that God had told him not to speak to counsel or to members of the defense team concerning the issues and events relevant to his defense. In light of that divine instruction, the defendant informed Baranoski, he would speak only to God about those issues. Defense counsel also relied on the defendant's reported academic "problems," which they suggested had led the defendant repeatedly and consistently to express the belief that, by not speaking to his attorneys, he was exercising his "right to remain silent."

The court granted the defendant's motion for a competency examination, and the clinical team from the Department of Mental Health and Addiction Services, Office of Court Evaluations (evaluation team or team), examined the defendant the next day, for approximately

two hours and forty minutes. The court held the competency hearing shortly thereafter, on April 16, 2004. The various experts testified that there were two alternatives for understanding the defendant's failure to communicate with his attorneys regarding the events surrounding the shooting: either he was choosing not to cooperate of his own volition, in which case he was competent; or he was prevented from being able to cooperate by some mental illness or disorder.

The court-appointed evaluation team unanimously found that, because the defendant had "the capacity to understand the proceedings against him and to assist in his defense," he was competent. At the competency hearing, the defendant presented the testimony of Betsy Graziano, a licensed clinical social worker, who was a member of the evaluation team and prepared the team's report following the evaluation. Graziano testified that the report was based on the evaluation team's interview of the defendant and its review of numerous other materials. The report identified those materials as including communications between the defendant and Baranoski, police reports, school records and evaluations, a psychological evaluation and a psychiatric consultation conducted when the defendant was a minor, and consultations with Joseph Coleman, director of mental health services at Walker Correctional Institution, where the defendant was at that time imprisoned. When questioned by the defendant, Graziano clarified that the team found that the defendant was able to assist in his defense, except for his failure to share his version of the events leading up to his arrest and his failure to provide defense counsel with information concerning his character, background and history.

As to the defendant's failure to share that information, Graziano further testified that, although the team was unable to determine with certainty that the defendant's failure to discuss this information was volitional,

the members of the team suspected that he was choosing not to cooperate with his attorneys, and they had no reason to believe that his failure to cooperate was due to a mental illness or disorder. Put another way, she stated, the evaluation team "felt pretty sure that [the defendant's failure to communicate] was not based on cognitive deficit or an irrational, psychotic process . . . ." When pressed to explain why the team concluded that it could not determine with certainty whether the defendant was choosing not to cooperate, Graziano explained that, although the team did not believe that the defendant was attempting to deceive the team members, it was apparent that he was attempting to control the interview, thus making it more challenging to discern his true motives.

The defendant also introduced the testimony of Howard Zonana, a psychiatrist in the Department of Psychiatry at Yale Medical School, who had been retained by the defense team to perform an independent evaluation of the defendant. Zonana disagreed with the evaluation team's conclusion that mental illness or disorder could be ruled out. Although he conceded that the defendant's conduct may be volitional, he questioned the logic of the team's conclusion and ultimately concluded that the defendant was not competent. Zonana had interviewed the defendant after Graziano testified in the competency hearing. He also reviewed substantially the same additional materials as those considered by the evaluation team and had viewed a videotape of the team's interview of the defendant.

Given the defendant's reticence and his intellectual limitations, Zonana stated that it was difficult to provide a precise diagnosis after a single interview that lasted only two hours. On the whole, however, he believed that the evidence supported the conclusion that the defendant may suffer from a mental disorder. Some of the particular traits that Zonana listed as supporting that

conclusion were the defendant's extreme guardedness around and suspicion of others, his anxiety, and his tendency to lapse into disorganized thought when placed under pressure. Although he conceded that the defendant had a basic understanding of the proceedings, Zonana expressed the opinion that the defendant "may" have an underlying thought disorder that could interfere with his capacity to understand those proceedings. By way of illustration, Zonana cited to the defendant's apparent confusion regarding the meaning of the evaluation team's finding that he was competent. Specifically, the defendant did not appear to comprehend that the court would make its finding independently of the evaluation team and appeared to believe instead that the matter was conclusively settled by the team's determination. Once the defendant arrived at that conclusion, Zonana was unable to persuade him that he was mistaken. Zonana also cited to the defendant's very "global" understanding of his right to remain silent, believing that it encompassed a right not to speak to his attorneys.

As for the defendant's ability to assist in his defense, Zonana testified that he believed that the defendant was unable to communicate to defense counsel his state of mind at the time of the shooting. He noted that the evaluation team had been unable to resolve conclusively whether the defendant's lack of cooperation was volitional, but disagreed that it would be reasonable to conclude that the defendant was simply choosing not to communicate with counsel, which would require a conclusion that the defendant was malingering. That conclusion, Zonana explained, could not be reconciled with the defendant's refusal to cooperate fully with the medical professionals who had evaluated him and provided treatment to him over the years. As further evidence that the defendant was not malingering, Zonana observed that the defendant had made identical

representations to a variety of different persons, including the defendant's mother, and also noted that the defendant appeared to take pride in having been found competent by the evaluation team. In his report, Zonana concluded that, "[g]iven [the defendant's] intellectual deficits, head injuries,[12] and lack of clarity surrounding his psychiatric diagnosis I feel that he does not have the capacity to work with his attorneys."

Finally, the defendant presented the testimony of Baranoski, who had first been retained by the defense in 2001 to perform an evaluation of the defendant. She was never asked by the defense to conduct a competency evaluation of the defendant, and she did not perform one. On the basis of her meetings with the defendant over the years, however, Baranoski concluded that the defendant's failure to cooperate was not volitional and was entirely due to a psychiatric disorder. She met with the defendant twice in 2001, for a total of four hours. Although he initially cooperated, he became angry with her when she graduated from straightforward cognitive and organic testing to more nuanced, less structured tests. When she challenged him, the defendant began to provide very scripted responses with a large amount of religious content. The harder she pushed, the more agitated, pressured and disorganized his speech became. She characterized his speech at those times as so loose and disorganized that it constituted a "word salad." That is, she explained, he connected words in a manner that violated basic rules of syntax and did not make sense. After the second session, the defendant refused to see her.

Baranoski did not meet with the defendant again until March 20, 2004, at which time he agreed to see her. In

[12] The defendant reported to Zonana that he had suffered head injuries twice in the past, once during a motor vehicle accident and once when he was hit in the back of the head with a gun.

her desire to avoid another termination of their meetings, Baranoski was less confrontational when she resumed sessions with the defendant. She met with him five times, for a total of approximately twelve hours. During those sessions, he did not speak to her of the incidents surrounding the shooting and told her that he would speak only to God about them. She testified that the defendant showed signs of delusional thinking, likening himself to Jesus Christ, and proclaiming: "I am the living example of all those forces combined. I am the ruler, still the ruler. Going against me, you can't go against me"; and, "I am the power in this room. I love the prosecutor. I have respect and love for everyone. Even if you smack me, if you smack me I will turn." She stated that these statements and other, similar ones evidenced a psychotic process that was triggered by circumstances that challenged his capacity to manage his anxieties. On the basis of her interviews with the defendant, she concluded that his failure to discuss the incidents surrounding the shooting was caused by a psychiatric disorder.

The state introduced evidence of telephone conversations between the defendant and his mother, offered to prove that the defendant was malingering. Specifically, through the testimony of its witness, James Pollard, at the time an employee in the security division of the Department of Correction, the state introduced recordings of two telephone conversations that the defendant had with his mother on April 7 and 8, 2004. In its brief to this court, the state emphasizes two statements that the defendant made during the April 7, 2004 conversation and suggests that those statements support the theory that the defendant was malingering. First, in response to his mother's questions regarding the ongoing competency evaluations, the defendant replied that he would not tell "them" about his case because he "ain't no fool." In the same conversation,

he also indicated that he understood that, if he were found to be incompetent, the legal proceedings would "shut down."

We observe, however, that the majority of the defendant's remarks during the telephone conversations were not consistent with a theory that the defendant was malingering. For example, the defendant maintained with his mother the same position that he had stated to the evaluation team, namely, that he was declining to communicate because God had so instructed him. That is, the defendant told his mother that one of his attorneys had advised him not to remain silent during the competency evaluation. Notwithstanding that advice, the defendant informed his mother, if "the Lord" wanted him to remain silent, he would say nothing. When his mother responded by asking if his attorneys believed he was "crazy," the defendant laughed and asked her: "Did they think Jesus was crazy?"

In the April 8, 2004 telephone conversation, the defendant and his mother again discussed the evaluation proceedings. The defendant told her that he was having difficulty following the questions that the evaluation team was asking him. At one point during the conversation, when she advised him that he should just "shut down," he rejected that option, stating that he wanted to cooperate because he wanted to be evaluated. His mother pointed out that, if he cooperated, it would appear that he was competent to stand trial. He answered: "So be it. . . . Thank God I ain't insane." He stated that, in his view, either result—being found competent or incompetent—was good. If he were found to be incompetent, it would help his case, but if he were found to be competent, that would just show that "after all these years, with no education and no books, I can go up in front of a bunch of white people, uneducated and give them a definition of who I am, and they

can't even understand me because it's not meant for understanding."

The trial court issued its decision from the bench, finding that the defendant had not overcome the presumption of competence. The court summarized the following evidence that it had considered in arriving at that conclusion: the testimony of Graziano, Zonana and Baranoski, as well as their reports; the recordings of the two telephone calls that the defendant made to his mother; and the court's observations of the defendant in the courtroom. The court particularly noted its reliance on the testimony of the experts, stating that it gave less credence to Baranoski's testimony on the ground that she testified that she had not performed a formal competency evaluation of the defendant. The court instead relied on the testimony of both Graziano and Zonana. The court observed that Zonana had testified that the defendant's failure to communicate with counsel "may" be driven by a mental disorder, but that he had also conceded that the defendant's conduct may be volitional. By contrast, the court continued, Graziano had testified that the evaluation team did not believe that the defendant's failure to cooperate with defense counsel was "driven by a mental disorder" and that his behavior "may be volitional." On the basis of *all* of the sources it had considered, the court summarized, it concluded that the defendant had not met his burden to overcome the presumption of competence.

B

Analysis

Certain general principles guide our discussion of the defendant's three claims. "[T]he conviction of an accused person while he is legally incompetent violates due process . . . ." *Pate* v. *Robinson*, 383 U.S. 375, 378, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966). Section 54-56d (a) sets forth the required procedures and standards

governing the determination of a defendant's competence and provides a definition of "not competent": "A defendant shall not be tried, convicted or sentenced while the defendant is not competent. For the purposes of this section, a defendant is not competent if the defendant is unable to understand the proceedings against him or her or to assist in his or her own defense." Pursuant to § 54-56d (b), a "defendant is presumed to be competent. The burden of proving that the defendant is not competent by a preponderance of the evidence and the burden of going forward with the evidence are on the party raising the issue. The burden of going forward with the evidence shall be on the state if the court raises the issue. The court may call its own witnesses and conduct its own inquiry." This court has stated that § 54-56d "jealously guards" the right to due process, observing that the United States Supreme Court has arrived at that conclusion regarding other states' statutes that contain protections similar to those set forth in § 54-56d. *State* v. *Johnson*, 253 Conn. 1, 20 and n.22, 751 A.2d 298 (2000).

The trial court's ultimate determination of competency is reviewed for abuse of discretion. Id., 27 n.26; see also *State* v. *Connor*, 292 Conn. 483, 523–24, 973 A.2d 627 (2009) ("[T]he trial judge is in a particularly advantageous position to observe a defendant's conduct during a trial and has a unique opportunity to assess a defendant's competency. A trial court's opinion, therefore, of the competency of a defendant is highly significant." [Internal quotation marks omitted.]).

1

Credibility Determinations of the Trial Court

We first address the defendant's claim that the trial court improperly credited the evaluation team's finding that the defendant was competent, over the findings of Zonana and Baranoski that he was not. We observe

that the defendant's characterization of the trial court's ruling is not entirely accurate. In arriving at its conclusion that the defendant was competent, the court did not assign relative weight to the ultimate conclusions arrived at by the evaluation team, Zonana and Baranoski as to whether the defendant was competent. Instead, the court concluded that the defendant had failed to overcome the presumption of competence on the ground that both Graziano and Zonana testified that they had concluded that there was some level of uncertainty as to whether the defendant's failure to communicate with counsel was due to a mental disorder. To the extent that the defendant's brief may be understood to contend that the trial court improperly credited the testimony of Graziano and Zonana, over that of Baranoski, who testified without qualification that the defendant's failure to cooperate was due to a thought disorder, we address that claim. We conclude that the trial court's decision crediting the testimony of Graziano and Zonana was not clearly erroneous.

A trial court's credibility finding will be overturned only if the finding is clearly erroneous.[13] "A factual finding is clearly erroneous when it is not supported by any evidence in the record or when there is evidence to support it, but the reviewing court is left with the definite and firm conviction that a mistake has been made. . . . Simply put, we give great deference to the findings of the trial court because of its function to weigh and interpret the evidence before it and to pass upon the credibility of witnesses." (Citation omitted; internal quotation marks omitted.) *State* v. *Santiago*, 252 Conn. 635, 640, 748 A.2d 293 (2000). The mere fact

[13] The defendant relies on this court's decision in *Lapointe* v. *Commissioner of Correction*, 316 Conn. 225, 310–11, 112 A.3d 1 (2016), for the proposition that a less deferential application of the clearly erroneous standard of review is appropriate in reviewing the trial court's credibility findings. We disagree that *Lapointe* applies to the facts of the present case.

that the credibility finding pertains to the testimony of expert witnesses does not change the standard of review. See, e.g., *State* v. *Jarzbek*, 204 Conn. 683, 706, 529 A.2d 1245 (1987) ("[it] is in the sole province of the trier of fact to evaluate expert testimony, to assess its credibility, and to assign it a proper weight"), cert. denied, 484 U.S. 1061, 108 S. Ct. 1017, 98 L. Ed. 2d 982 (1988). "[W]hen a question of fact is essential to the outcome of a particular legal determination that implicates a defendant's constitutional rights, [however] . . . our customary deference to the trial court's factual findings is tempered by a scrupulous examination of the record to ascertain that the trial court's factual findings are supported by substantial evidence." (Internal quotation marks omitted.) *State* v. *Jackson*, 304 Conn. 383, 394, 40 A.3d 290 (2012).

As we already have explained, the trial court rested its decision finding the defendant competent in part on the fact that both Graziano and Zonana testified that there was at least some level of uncertainty as to whether the defendant's failure to communicate with defense counsel was due to a mental disorder. Specifically, Graziano testified that, although the evaluation team concluded that the defendant's failure to communicate with counsel was not due to a mental illness or disorder and that the team suspected that he was choosing not to cooperate, the team also stated in its report that the defendant's behavior "may" be volitional. Zonana's testimony represented almost a mirror image of the opinion of the evaluation team—while the team could not exclude with certainty the possibility that the defendant was incompetent, Zonana effectively testified that he could not conclusively rule out the possibility that the defendant's failure to cooperate was due to a mental disorder. He specifically stated that he did not know whether the defendant's lack of cooperation was due to an underlying thought disorder.

By contrast, Baranoski testified that it was her opinion that the defendant felt "compelled not to talk because of [his] psychiatric disorder." She thus rejected, without qualification, the suggestion that the defendant failed to communicate with his attorneys because he chose not to do so. The trial court, however, gave less weight to Baranoski's opinion than to the opinions of Zonana and Graziano. The reason offered by the trial court withstands scrutiny—Baranoski testified that, unlike the evaluation team and Zonana, she had not been retained to perform a competency evaluation, and she did not perform one. She further testified that, when evaluating a defendant for competency, examiners follow a strict protocol that is designed to focus on the two goals of such an evaluation—to measure a defendant's capacity to have a rational understanding of the charges and the proceedings, and his ability to assist his attorneys. Her testimony, accordingly, revealed that she did not follow the same protocol as that followed by the evaluation team and Zonana. Put simply, the trial court found the opinions of the experts who had actually performed competency evaluations of the defendant to have more persuasive weight than the opinion of the expert who did not. It was not clearly erroneous for the trial court to rely on that distinction in interview protocol in finding the opinions of Zonana and Graziano to be more credible than that of Baranoski.

2

Level of Certainty Required by Trial Court

The defendant's second contention is that the trial court improperly interpreted his burden to overcome the statutory presumption of competence under § 54-56d to require him to produce experts who could testify with certainty that his failure to communicate with his attorneys was not volitional. The defendant argues that

the trial court's demand for certainty is not reconcilable with the statutory language of § 54-56d (b), which requires him to demonstrate that he is not competent by a mere preponderance of the evidence. The state responds that the defendant has misconstrued the trial court's decision. Rather than requiring the defendant to produce experts who could testify with certainty that the defendant's conduct was not volitional in order to overcome the presumption of competency, the state argues that the court considered the varying degrees of certainty testified to by Graziano and Zonana, and concluded that, on balance, that testimony provided greater support for the conclusion that the defendant's conduct did not stem from a mental disorder and was volitional. We agree with the state.

The trial court began by noting its observations of the defendant in the courtroom. The court then turned to the evidence it had considered in arriving at its decision: "I have heard in this case direct testimony from licensed clinical social worker . . . Graziano [and] . . . Zonana [and] . . . Baranoski. I am familiar with all of them from years in the system. I have read the report of the team. I have read . . . Zonana's report. I have heard two of the [tele]phone calls that the defendant made. I have had opportunity to observe the defendant on an almost daily basis with a couple weeks off since January 5. I have heard testimony from . . . Graziano about [the other members of the evaluation team]. I have heard testimony from . . . Graziano about her conversations as well as her reviewing of things with . . . Coleman, [the director of mental health services] at the prison. . . . Zonana has also talked to [Coleman] and reported some of what's in those medical records.

"I'm particularly interested in the fact that independent examinations essentially by . . . Zonana as well as—and . . . Baranoski did not actually do an exami-

nation—competency examination as she just testified. But both . . . Zonana in his testimony and . . . Graziano in her testimony concerning the report indicate or used the word 'may.' Even . . . Zonana testified, [the] defendant's failure to communicate with counsel may very well be driven—may be driven by a mental disorder. And the team doesn't think it is but says it may be volitional. And Zonana went on to testify, not know if [the] defendant's lack of ability is volitional. In sum, based on all of these sources, presumption of competency on both prongs has not been overcome, and the trial will proceed."

A careful reading of the trial court's oral decision, particularly when considered in conjunction with the testimony and reports of Graziano and Zonana, supports the state's position. With respect to the evaluation team's conclusion, for instance, the trial court emphasized that the team did not believe that the defendant's failure to communicate with counsel was the result of a mental disorder. Graziano testified that the team was "able to determine . . . what *was not* the reason. . . . We felt pretty sure that it was not based on cognitive deficit or an irrational, psychotic process . . . ." (Emphasis added.) The team was less certain, though, as to what *was* the reason for the defendant's silence. When asked about that reason, the best that Graziano could say was that it "may" have been volitional. That testimony coincides with the evaluation team's report, which states that, on the basis of all of the information reviewed by the team, there was "no evidence of psychotic processes or delusional thinking, nor did the undersigned team observe any." The report concluded that "[t]he team is unable to determine the reason [the defendant] is not discussing the events that surround his arrest. However, we believe that it may be volitional, rather than driven by cognitive deficits or a psychotic process."

The trial court's characterization of Graziano's testimony and the team's report is reasonable and finds support in the record. Restated, the trial court's summary of Graziano's testimony was that the evaluation team could not state with certainty that the defendant's behavior was volitional, but the team believed that it probably was. The team could state with certainty, however, that his silence was *not* due to a cognitive deficit or an irrational, psychotic process. That testimony supports the trial court's conclusion that the defendant failed to overcome the presumption of competence in § 54-56d (b).

The court found that Zonana's testimony and report provided further support for the conclusion that the defendant had failed to overcome the presumption of competence. Specifically, the court found it significant that Zonana testified that the defendant's failure to communicate "may" be driven by a mental disorder, and also stated that he did not know whether the defendant's behavior was volitional. Zonana's testimony, which expressed varying levels of certainty regarding the connection between the defendant's behavior and a mental disorder, provides support for the court's ruling. Although he testified that the defendant's behavior "may very well" be driven by a mental disorder, Zonana also stated that he did not know whether the defendant had an underlying thought disorder that might affect his ability to understand the proceedings. He further stated that he was unable to make a diagnosis of the defendant due to the defendant's guardedness and also because his interview with the defendant lasted only for a couple of hours. Similarly, Zonana's report conveyed differing levels of uncertainty regarding a possible link between the defendant's behavior and any mental disorder. The report stated that Zonana was unable to "make a clear diagnosis based on the interview," and referenced that "lack of clarity" in closing, but also

expressed the view that it was not likely that the defendant was malingering, an opinion to which Zonana also testified.

The court's interpretation of the testimony of witnesses, including any decisions to credit part of a witness' testimony, is subject to review for clear error. Our review of the trial court's decision—particularly viewed in the context of the testimony and evidence offered during the competency hearing—persuades us that it was not clearly erroneous for the trial court to interpret the testimony of Graziano and Zonana to support the conclusion that the defendant had failed to prove by a preponderance of the evidence that he was not competent.

3

Allocation of Burden to Defendant To Prove Incompetence

Last, the defendant claims that the trial court interpreted § 54-56d to require him to bear a different burden than that which would have applied if the court had sua sponte raised the issue of competence, in violation of the defendant's right to equal protection. Specifically, the defendant's claim centers on the allocation in § 54-56d (b) of the burden to prove competence "on the party raising the issue," unless the court raises the issue of competence, in which case the state bears the burden to prove the defendant competent. See General Statutes § 54-56d (b). The defendant argues that the class of persons to which he belongs—defendants who raise the issue of their competence—is similarly situated to the class of defendants whose competence is raised by the court. The differing treatment accorded to those two classes, the defendant claims, violates his right to equal protection. Just as in cases in which the court raises the issue of a defendant's competence, the defendant argues, in the present case, in order to find him

competent, the trial court was required to make an affirmative finding that he had the "present ability to consult with his lawyer with a reasonable degree of rational understanding" and a "rational as well as factual understanding of the proceedings against him." (Internal quotation marks omitted.) *Dusky* v. *United States*, 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960). We reject the defendant's claim.

Although the defendant does not expressly claim that § 54-56d (b) is unconstitutional in violation of his right to equal protection, that is the effect of his argument. The burden allocation in the statute is clear. The trial court's interpretation of § 54-56d (b), which requires the defendant to prove that he was not competent by a preponderance of the evidence, is borne out by the plain language of the statute, which provides in relevant part: "A defendant is presumed to be competent. The burden of proving that the defendant is not competent by a preponderance of the evidence and the burden of going forward with the evidence are on the party raising the issue. . . ." General Statutes § 54-56d (b). It is undisputed that, in the present case, the defendant raised the issue of his competence to stand trial. Accordingly, pursuant to the plain language of § 54-56d (b), the defendant bore the burden to prove by a preponderance of the evidence that he was not competent. The defendant's claim, therefore, is more properly understood to challenge the facial validity of the statute itself, rather than the trial court's interpretation of it. In other words, the defendant claims that § 54-56d (b) violates his right to equal protection by, on the one hand, requiring him to rebut the presumption of competence if he raises the claim and, on the other hand, providing that, if the court raises the issue of a defendant's competence, "[t]he burden of going forward with the evidence shall be on the state . . . ." General Statutes § 54-56d (b).

"To establish an equal protection violation, one must demonstrate that the challenged provision treats persons who are similarly situated differently and, in doing so, impinges on a fundamental right or affects a suspect class of individuals. . . . If the provision does not interfere with a fundamental right or affect a suspect class of persons, it will survive a constitutional attack as long as the distinction is rationally related to some legitimate government interest." (Citation omitted.) *State* v. *Arias*, 322 Conn. 170, 185–86, 140 A.3d 200 (2016). In his single paragraph laying out his equal protection claim, the defendant concedes that rational basis review applies to his claim. He offers no argument, however, that the statute's differing allocation of the burden, depending on whether a defendant or the court has called a defendant's competence into question, is not rationally related to a legitimate government objective. Nor does he offer any explanation as to why we should conclude that he is similarly situated to defendants whose competence is questioned sua sponte by the court. He simply makes the bare assertion that the differing treatment violates his right to equal protection. Even if we assume, without deciding, that the defendant is similarly situated to other defendants, the legislature rationally could have decided that a different allocation of the burden is appropriate when the trial court has sua sponte called into question a defendant's competence.

## VI

## VAGUENESS

The defendant next seeks *Golding* review of his unpreserved due process claim that § 53a-54b (8) is void for vagueness as applied to his conduct.[14] See *State*

[14] The defendant also claims that § 53a-54b is impermissibly vague under the eighth amendment to the United States constitution, arguing that the statutory language is not sufficiently precise to provide a "principled basis" for distinguishing those cases in which the death penalty was assessed and those cases in which it was not. See *Bell* v. *Cone*, 543 U.S. 447, 459, 125 S. Ct. 847, 160 L. Ed. 2d 881 (2005). As we explain in part I of this opinion,

v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). At the time of the shooting, § 53a-54b (8) provided in relevant part: "A person is guilty of a capital felony who is convicted of . . . murder of two or more persons at the same time or in the course of a single transaction . . . ." The defendant contends that, although the statutory language makes clear that, in order for the state to satisfy its burden of proof under this provision, the state must do more than prove that he murdered two or more persons, the language is vague as to precisely *what* additionally is required. That is, the defendant claims that the phrases, "at the same time" and "in the course of a single transaction" are unconstitutionally vague. The state responds that any person of ordinary intelligence would understand that murdering two people within seconds of each other is a crime, and that doing so would make the crime fall within the meaning of the phrase "at the same time or in the course of a single transaction" in § 53a-54b (8). Therefore, the state argues, the defendant's claim fails under the third prong of *Golding*. We agree with the state.

The standard of review applicable to a defendant's unpreserved claim alleging constitutional error is well established. The defendant can prevail "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, 213 Conn. 239–40; see *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015) (modifying

however, the defendant's claims challenging the imposition of the death penalty are not ripe. Accordingly, we do not address this claim.

third prong of *Golding*). In the present case, the record is adequate for review, and the claim is of constitutional magnitude. Our inquiry, accordingly, turns to whether the defendant has demonstrated that the alleged constitutional violation existed and deprived him of a fair trial.

The following principles govern our consideration of the defendant's claim. The United States Supreme Court has stated that the vagueness doctrine prohibits "taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson* v. *United States*, U.S. , 135 S. Ct. 2551, 2556, 192 L. Ed. 2d 569 (2015). This court has explained: "A statute . . . [that] forbids or requires conduct in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process. . . . Laws must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly." (Internal quotation marks omitted.) *State* v. *Scruggs*, 279 Conn. 698, 709, 905 A.2d 24 (2006). "[A] statute is not void for vagueness unless it clearly and unequivocally is unconstitutional, making every presumption in favor of its validity. . . . To demonstrate that [a statute] is unconstitutionally vague as applied to him, the [defendant] therefore must . . . demonstrate beyond a reasonable doubt that [he] had inadequate notice of what was prohibited or that [he was] the victim of arbitrary and discriminatory enforcement. . . . If the meaning of a statute can be fairly ascertained a statute will not be void for vagueness since [m]any statutes will have some inherent vagueness, for [i]n most English words and phrases there lurk uncertainties. . . . Moreover, an ambiguous statute will be saved from unconstitutional vagueness if the core meaning of the terms at issue may be elucidated

from other sources, including other statutes, published or unpublished court opinions in this state or from other jurisdictions, newspaper reports, television programs or other public information . . . . [A] term is not void for vagueness merely because it is not expressly defined in the relevant statutory scheme." (Citations omitted; internal quotation marks omitted.) *State* v. *DeCiccio*, 315 Conn. 79, 87–88, 105 A.3d 165 (2014). The principles of the vagueness doctrine "apply not only to statutes defining elements of crimes, but also to statutes fixing sentences." *Johnson* v. *United States*, supra, 2557. Consistent with these principles, we review the language and purpose of § 53a-54b (8) to determine whether the defendant has demonstrated beyond a reasonable doubt that he had inadequate notice of the conduct that was prohibited by § 53a-54b (8).

We first consider whether the phrase "murder of two or more persons at the same time" is unconstitutionally vague as applied to the defendant. As applied to multiple murders, it is difficult to envision what other possible meaning the phrase "at the same time" *could* have if it were interpreted to exclude two murders that were committed within seconds of each other.[15] We have

[15] We reject the defendant's suggestion that the two murders were not committed "at the same time" because L and Desiree were killed by "distinct gunshots." Nothing in the language of the statute suggests that "at the same time" means "with the same bullet." Because we conclude that the murders need not be simultaneous and the victims need not have been killed by the same gunshot in order to fall within the ambit of § 53a-54b (8), we reject the defendant's claim that the trial court improperly referred to the plural, "murders," rather than using the singular, "murder," in its instructions to the jury on the elements of capital felony. The trial court's use of the plural was proper, as was its instruction that the jury needed to find that the murders occurred at "approximately the same time."

We also reject the defendant's claim that, because *State* v. *Ferguson*, 260 Conn. 339, 796 A.2d 1118 (2002), was decided after he committed the murders in the present case, we may not rely on our interpretation of § 53a-54b (8) in that case to resolve his claim in this appeal. Nothing about our reading of § 53a-54b (8) in *Ferguson* involved an "unexpected" or "indefensible" reading of § 53a-54b (8) that would preclude retroactive application. See *State* v. *Courchesne*, supra, 296 Conn. 724 ("[i]f a judicial construction of

interpreted this precise language in *State* v. *Ferguson*, 260 Conn. 339, 796 A.2d 1118 (2002), to encompass murders that occur close in time to each other. In that case, in connection with the murder of five persons, the defendant was charged with two counts of capital felony in violation of General Statutes (Rev. to 1995) § 53a-54b (8). Id., 341. The defendant claimed that his protection against double jeopardy was violated by his conviction of two separate counts of capital felony because all five murders were committed in the course of a single transaction, and thus amounted to a single violation of § 53a-54b (8). Id., 360, 362. We rejected that argument, reasoning that it would require us to read out of the statute the phrase "at the same time." Id., 361–62. Applying that statutory phrase to the facts of the case, we concluded that "the evidence established that the defendant committed two separate sets of multiple murders . . . ." Id., 362.

The facts of each of the two sets of multiple murders in *Ferguson* are instructive. Three of the defendant's victims were his tenants, with whom he had been engaged in a dispute over a late rental payment. Id., 342. On the day of the murders, the defendant traveled from his home in North Carolina to the rental property in Connecticut. Id., 343–44. One of the tenants was home when the defendant arrived at the rental property, and a friend of his was in the apartment with him. Id., 345. The defendant entered the apartment and shot both of them, then placed both bodies in the bathroom. Id. He waited in the apartment for approximately two hours, until the remaining two tenants arrived home from work with a friend. Id. When the three men entered the apartment, he shot and killed each of them. Id. This court rejected the defendant's double jeopardy

a criminal statute is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue, [the construction] must not be given retroactive effect" [internal quotation marks omitted]).

challenge on the ground that, "[i]f the defendant committed two independent sets of multiple murders, with the multiple murders of each set occurring 'at the same time,' he can be convicted of two counts of capital felony." Id., 361–62. On the basis of the evidence of the two sets of shootings, the court concluded exactly that, stating that "the defendant committed two separate sets of multiple murders . . . ." Id., 362. Each shooting, or set of murders, included victims who were murdered "at the same time." In each of these sets, the victims were shot within seconds of each other.

For purposes of interpreting the phrase "at the same time" in § 53a-54b, the two murders in the present case are indistinguishable from those in *Ferguson*. In both cases, the defendants shot and killed multiple victims within seconds of each other. The court in *Ferguson* construed those facts to establish that the murders occurred "at the same time." Accordingly, the statutory language was sufficiently clear to place the defendant on notice that his actions were prohibited by § 53a-54b (8).

The defendant also claims that the phrase "in the course of a single transaction" in § 53a-54b (8) is unconstitutionally vague as applied to his conduct. He argues that it is unclear whether that language was intended to include an instance in which a defendant kills the primary target, then murders a witness to escape detection. In *State* v. *Gibbs*, 254 Conn. 578, 602–604, 758 A.2d 327 (2000), however, this court relied on the plain language of the statute and interpreted the phrase "in the course of a single transaction" to encompass precisely this type of scenario. In *Gibbs*, the defendant, who was convicted of capital felony in violation of General Statutes (Rev. to 1991) § 53a-54b (8); id., 579–80; had murdered the first victim on the night of July 11, 1992, and did not murder the second victim until the following day. Id., 581–83. Due to the lapse of

time between the two murders, the state did not claim that the defendant had murdered the victims "at the same time." Instead, it argued that the defendant murdered the two victims "in the course of a single transaction . . . ." Id., 601. In rejecting the defendant's claim on appeal that the state was required to prove a temporal nexus in order to establish that he had murdered the two victims "in the course of a single transaction," this court engaged in a statutory construction analysis of that phrase. Id., 601–604. To constitute a single transaction, the court reasoned, there must be some " 'clear connection' " between the murders, so that they may be viewed as part of a " 'series of related but separate events . . . .' " Id., 603.

As for the nature of that clear connection, the court relied on *State* v. *Cobb*, 251 Conn. 285, 387–89, 743 A.2d 1 (1999), cert. denied, 531 U.S. 841, 121 S. Ct. 106, 148 L. Ed. 2d 64 (2000), for the principle that what is required is a "logical nexus" between the two events. *State* v. *Gibbs*, supra, 254 Conn. 604. In *Cobb*, the defendant had killed the victim after sexually assaulting her, in order to eliminate her as a witness. *State* v. *Cobb*, supra, 388–99. In *Gibbs*, this court expressly cited that particular connection as one that would satisfy the "logical nexus" requirement that the court read into the statutory phrase "in the course of a single transaction." *State* v. *Gibbs*, supra, 604. In summary, the court concluded, the connection between multiple murders "may be established by proof beyond a reasonable doubt that a defendant possessed a plan, motive or intent common to the murders."[16] Id., 606.

[16] The defendant challenges the trial court's instructions on the elements of capital felony because the court mistakenly charged that, in order to find that he murdered the victims "at the same time or in the course of a single transaction," the jury was required to find that there was a "plan, motive or *event* common to both murders." (Emphasis added.) That is, the court's instruction incorrectly substituted the word "event" for "intent." Viewing the erroneous language in the context of the overall charge; *State* v. *Aviles*, 277 Conn. 281, 309–10, 891 A.2d 935, cert. denied, 549 U.S. 840, 127 S. Ct.

An individual's decision to kill eyewitnesses to a murder is part of a larger plan to commit murder and escape the consequences. That logical nexus is sufficient to render the killing of the eyewitness or eyewitnesses a part of the same transaction as the original murder. The jury logically could have inferred that the defendant shot L and Desiree in the course of a single transaction on the basis of his having shot Desiree and Carolyn after shooting and killing L, with the intent to eliminate them as witnesses.

In summary, in light of this court's prior interpretations of the statute in *Ferguson* and *Gibbs*, the meaning of § 53a-54b (8) is not vague as applied to the defendant's conduct. To the contrary, as applied to his conduct, the statutory language is clear and unambiguous.[17]

108, 166 L. Ed. 2d 69 (2006); we conclude that it was not reasonably possible that the incorrect substitution misled the jury. The court also instructed the jury: "In order to prove that the murders occurred at the same time or in the course of a single transaction, the state must prove beyond a reasonable doubt that the murders occurred at approximately the same time or that the murders were related to a single course of conduct or plan carried out as a series of events with a clear connection." With the exception that the court's instruction omitted one of the possible connections—intent—it properly set forth the jury's required inquiry, consistent with this court's decision in *State* v. *Gibbs*, supra, 254 Conn. 603–605. If anything, accordingly, because the court's instruction omitted a possible connection on which the jury could have relied to find that the state had proven that the murders were committed in the course of a single transaction, the error benefited the defendant.

We also reject the defendant's claim that the trial court's capital felony instruction sanctioned a nonunanimous verdict. The defendant argues that the court's instructions, which charged the jury that in order to find him guilty of capital felony, "you must unanimously find that the state has proven beyond a reasonable doubt that the defendant murdered two persons, [L] and [Desiree], and those murders occurred at the same time or in the course of a single transaction." The defendant argues that the court's instruction suggested that the jurors need not be unanimous as to which of the two alternatives they had found. The defendant's argument lacks merit—nothing in the trial court's instruction sanctioned a verdict that was not unanimous. See *State* v. *Famiglietti*, 219 Conn. 605, 619–20, 595 A.2d 306 (1991).

[17] Because we conclude that the statutory language plainly and unambiguously applies to the defendant's conduct, we need not address the defendant's argument that the legislative history of § 53a-54b (8) supports his

## VII

## SUFFICIENCY OF THE EVIDENCE

The defendant claims that the evidence was insufficient to prove beyond a reasonable doubt that he committed capital felony, murder or attempt to commit murder, and that the trial court therefore improperly denied his motion for a judgment of acquittal as to those charges.[18] We disagree.

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

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

claim that the statute is unconstitutionally vague as applied to his conduct. See General Statutes § 1-2z.

[18] The defendant's motion for a judgment of acquittal also claimed that there was insufficient evidence to support his conviction of assault in the first degree in violation of § 53a-59 (a) (1) and criminal possession of a pistol or revolver in violation of § 53a-217c (a) (1). The defendant does not pursue those claims in this appeal.

the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . .

"Moreover, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . In evaluating evidence, the [finder] of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [finder of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Internal quotation marks omitted.) *State* v. *Ledbetter*, 275 Conn. 534, 542–43, 881 A.2d 290 (2005), cert. denied, 547 U.S. 1082, 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2006).

"Ordinarily, intent can only be inferred by circumstantial evidence; it may be and usually is inferred from the defendant's conduct. . . . Intent to cause death may be inferred from the type of weapon used, the manner in which it was used, the type of wound inflicted and the events leading to and immediately following the death." (Internal quotation marks omitted.) *State* v. *Diaz*, 237 Conn. 518, 541, 679 A.2d 902 (1996).

"Finally, [a]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [finder of fact], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of

guilty." (Internal quotation marks omitted.) *State* v. *Ledbetter*, supra, 275 Conn. 543.

The defendant challenges his conviction of murder and attempt to commit murder on the ground that there was insufficient evidence to prove beyond a reasonable doubt that he had the conscious objective to cause the deaths of L, Desiree and Carolyn. He relies on the absence of any explanation for his actions and the short duration of the shooting to argue that there was insufficient evidence of intent. He further contends that the evidence equally could have supported the finding that he had acted rashly, without fully realizing or intending the fatal consequences of his conduct, or that he was simply indifferent to the result.

The evidence of the defendant's intent to kill each of the three victims was overwhelming. One fact is relevant to all three victims, and that fact alone would be sufficient to support the jury's inference that he intended to kill all three. The defendant shot each victim in the head at close range. It is permissible to infer intent to kill from the type of weapon used and the manner in which it was used. See *State* v. *Diaz*, supra, 237 Conn. 541. The defendant used a gun. He fired at close range. He aimed for the head. He then fled the scene without attempting to render aid to any of them. The defendant's suggestion that there was insufficient evidence for the jury to conclude that he had more than a reckless state of mind when he shot each of the three victims runs counter to established principles governing the permissible inferences that a jury may draw regarding the intent to kill.

The state presented additional evidence as to each of the three victims that supports the jury's finding that the defendant intended to kill each of them. With respect to L, the state produced evidence that the defendant had been arrested on August 24, 2000—a mere two

days prior to the shooting—and charged with breach of the peace and violation of a protective order that had previously been issued against him as to L. As a result of that incident, a second protective order was issued against the defendant as to both L and their son. Testimony regarding the August 25, 2000 protective order was introduced into evidence.[19]

The state also produced evidence that, on multiple occasions, the defendant had been seen in possession of a gun that matched the description of the gun that Carolyn saw when he shot L. For instance, both J and Minerva Texidor, the mother of Cortez, testified that they had seen the defendant with a gun that matched the description of the one that he used during the August 26, 2000 shooting. That testimony is consistent with a finding that the defendant had planned the shooting in advance.

The state also produced evidence that the defendant had used the gun two days before the shooting, when he fired shots at 131 Sargeant Street, where he knew L was staying. Specifically, early in the morning of August 24, 2000, the defendant drove to 131 Sargeant Street, where he knew L had stayed the previous night, and—with a gun that matched the description of the gun used on the day of the shooting—fired three shots at a second story window in the building.

The state also established that, on the night of the shooting, the defendant traveled in a taxicab to 131 Sargeant Street directly from his home in Bloomfield. The state proved that he simply pulled the gun out of his pocket to shoot L, and that he waited to do so until L was in a vulnerable position, bending down to tie her shoe. From all of this evidence, the jury reasonably could have inferred that, with the intent to kill L, he brought the loaded gun with him from his home to

[19] The prior protective order was not introduced into evidence.

Sargeant Street, had it on his person immediately prior to the shooting, and concealed it until he saw the opportunity to shoot.

As to the defendant's intent to kill Desiree and Carolyn, some of the evidence produced by the state was relevant to prove his intent to kill as to both victims, such as that the two women were in the immediate vicinity when the defendant shot L, that they began screaming and running when he discharged the weapon, and that, after he shot L, the defendant immediately chased down and shot the two women who had just witnessed the shooting.

Other evidence produced by the state was relevant to show the defendant's intent to kill Desiree. After he shot L, the defendant next shot Desiree, which caused her to fall to the ground. Although the state's expert could not testify with a reasonable forensic probability whether the first shot killed Desiree, he indicated that it was more likely that it did not. Specifically, he testified that the likely trajectory of the first gunshot was that it passed through Desiree's forearm, through a superficial portion of her breast, and then through her chin. His opinion was based in part on the fact that there was no evidence, from the exit wound of her forearm, that her arm was resting against anything when the bullet came out of it. That suggested to the state's expert that, when her forearm was struck, Desiree still had physical control of it, something that would not be possible after the gunshot to her head.

After he shot Carolyn, the defendant walked back to where Desiree was lying on the ground, and shot her again, likely in the head. Regardless of whether the first shot killed Desiree, the defendant's decision to shoot her a second time establishes that his intent was to

kill her.[20] With respect to Carolyn, the state produced evidence that the defendant first shot her through her forearm, which she had raised in front of her body. He walked over and stood immediately behind her to shoot her a second time, in the back of the head. Then, as she was lying on the porch pretending to be dead, he shook her to verify that she was dead. This evidence is more than sufficient to establish his intent to kill Carolyn.

The defendant also argues that the evidence was insufficient to establish beyond a reasonable doubt the elements of capital felony. He contends that, even if the evidence proved that he committed two murders, it was not sufficient to prove that he murdered two persons "at the same time or in the course of a single transaction . . . ." General Statutes (Rev. to 1999) § 53a-54b (8). The defendant relies on two arguments that he has advanced—and we have rejected—in support of his claim that § 53a-54b is void for vagueness.

First, the defendant reads the phrase, "at the same time," to require the state to prove that two victims were murdered in precisely the same instant, by the same gunshot. Because the defendant shot L and Desiree within seconds of each other, with distinct gunshots, rather than simultaneously with the same gun-

[20] Because we conclude that the defendant's intent to kill Desiree at the time that he fired the first shot at her may be inferred from the fact that he shot her a second time within seconds after the first shot, we need not address the defendant's argument that the evidence was insufficient because it was possible that the defendant killed Desiree with the first shot, at which time, he contends, he was acting with a reckless intent, and not with the intent to kill. The defendant produced no evidence, however, that he acted with a reckless intent when he shot Desiree the first time. As we have explained, the state produced overwhelming evidence to the contrary, proving that he methodically and efficiently chased the two eyewitnesses down and shot each of them twice, shooting each of them in the head. The defendant cannot rely on speculation to prevail on a claim that the state produced insufficient evidence of his intent to kill the victims.

shot, he argues that there was insufficient evidence that the murders were committed "at the same time." As we explain in part VI of this opinion, we reject that interpretation of § 53a-54b (8).

Second, he argues that the evidence was insufficient to establish that the murders were committed "in the course of a single transaction." That alternative, the defendant contends, was intended by the legislature to encompass scenarios in which a defendant had formulated a plan to kill multiple victims. The defendant claims that the state's rationale, which is that it proved that he murdered Desiree because she was an eyewitness to L's murder, is not sufficient to satisfy the single transaction requirement of § 53a-54b (8). As we explain in part VI of this opinion, the defendant's argument cannot be reconciled with this court's decision in *State* v. *Gibbs*, supra, 254 Conn. 602–604, which interpreted § 53a-54b (8) to encompass a scenario in which a defendant killed a second victim to escape detection. Because we have rejected the interpretations of § 53a-54b (8) on which the defendant relies to argue that the evidence was insufficient to prove beyond a reasonable doubt the elements of capital felony, the defendant cannot prevail on this claim.

## VIII

## ESTABLISHMENT OF AFFIRMATIVE DEFENSE OF EXTREME EMOTIONAL DISTURBANCE AS A MATTER OF LAW

The defendant also contends that no reasonable jury could have found that he failed to meet his burden to establish his affirmative defense that he acted under the influence of an extreme emotional disturbance. In order for us to agree with the defendant, we would have to conclude that he had established his defense as a matter of law. The record does not support that conclusion.

The defendant bore the burden to demonstrate by a preponderance of the evidence "that he had caused the death of the victim[s] under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse measured from the viewpoint of a reasonable person in the defendant's situation under the circumstances as the defendant believed them to be." (Internal quotation marks omitted.) *State* v. *Crespo*, 246 Conn. 665, 676–77, 718 A.2d 925 (1998), cert. denied, 525 U.S. 1125, 119 S. Ct. 911, 142 L. Ed. 2d 909 (1999). As the state points out, however, the defendant did not testify or present expert testimony regarding his state of mind at the time of the shooting. Instead, the defendant relies on the following to support his claim that he established his affirmative defense as a matter of law. There was evidence that the defendant and L had a series of domestic disputes over the custody of their son. The shooting was sudden and unexplained. On cross-examination, Carolyn agreed with defense counsel's description of the defendant as having a "blank" look on his face when he shot her, as if he "wasn't there." After the shooting, the defendant behaved in a bizarre manner. Cortez observed that he was sweating and not responding to her questions, and she described his eyes as wide open and staring. Bolling recalled that the defendant's hair was messy, and she described him as appearing "out of it." She also stated that, when she returned from the nightclub, the defendant appeared "weird" and "bugged out." When the defendant appeared at the hospital with his son, he repeatedly told the nurses who conversed with him that the baby was cold, even though the baby appeared to be comfortably sleeping, and the defendant appeared to be anxious and agitated.

The evidence relied on by the defendant falls far short of what would be required to allow us to conclude that *no* reasonable jury could conclude that he failed to

establish his affirmative defense by a preponderance of the evidence. Many of the facts relied on by the defendant could support a variety of inferences, including the inference that, although he shot L because of the dispute they were having over their son, he was not under the influence of extreme emotional disturbance at the exact time of the shooting.

## IX

## ADMISSION OF AUTOPSY REPORTS

The defendant next argues that, because the medical examiner who created the autopsy reports did not testify at trial, the admission of those reports violated his rights under the federal and state constitutions to confront his accusers. In particular, the defendant argues that, under *Crawford* v. *Washington*, 541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), and its progeny, autopsy reports are testimonial in nature and therefore admissible under the confrontation clause only when "the declarant is unavailable, and . . . the defendant has had a prior opportunity to cross-examine." Because we conclude that the admission of the autopsy reports was harmless, we need not resolve whether their admission into evidence implicated the confrontation clause.

The record reveals the following facts relevant to this claim. Arkady Katsnelson, an associate medical examiner for the state, completed the autopsies of L and Desiree. At the guilt phase of the trial, however, because Katsnelson had recently retired, the state called H. Wayne Carver II, the state chief medical examiner, to testify as an expert in the field of forensic pathology. Through Carver's testimony, the state admitted Katsnelson's autopsy reports without objection from the defendant. Carver concluded that both L and Desiree suffered gunshot wounds to the head. The defendant does not challenge Carver's testimony or con-

clusions, but solely the admission of the autopsy reports.

"It is well established that a violation of the defendant's right to confront witnesses is subject to harmless error analysis . . . ." (Citation omitted.) *State* v. *Smith*, 289 Conn. 598, 628, 960 A.2d 993 (2008). A defendant "can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40; see *In re Yasiel R.*, supra, 317 Conn. 781 (modifying third prong).

The defendant's claim fails under the fourth prong of *Golding*. The state has demonstrated beyond a reasonable doubt that the admission of the autopsy reports—an issue subject to harmless error review—was harmless, even *if* erroneous. The autopsy reports were merely cumulative. The state presented overwhelming evidence that Desiree and L both died from gunshot wounds to the head. First, Anthony Morgan, the emergency room surgeon who treated Carolyn and L, testified that L had suffered a gunshot wound to the brain and died of her injuries. Second, James Garrow, one of the paramedics who responded to the scene of the shooting, testified that L had a gunshot wound to the head with visible blood and brain matter, and that Desiree appeared to have suffered gunshot wounds to the face. Third, on the basis of photographs of the victims, Carver independently concluded that both L

and Desiree suffered gunshot wounds to the head. Finally, eyewitness testimony further corroborated that both victims died of gunshot wounds to the head. Carolyn testified that she saw the defendant shoot L in the head. Christopher Shand, who lived on Sargeant Street across from the scene of the shooting, looked out a window in his home after hearing gunshots. He testified that he witnessed a man shoot a woman while she was on the ground. Diana Thomas, who also lived on Sargeant Street, testified that she heard gunshots and then looked out her window to see Desiree lying on the ground with a man standing next to her. Thomas then saw the man shoot another woman, who was on the steps of 131 Sargeant Street.

In light of this overwhelming evidence, any error was harmless. The defendant's claim fails under the fourth prong of *Golding*.

## X

## FAILURE TO STRIKE AND TO INSTRUCT JURY TO DISREGARD EVIDENCE RELEVANT TO WITHDRAWN COUNT

The defendant next seeks *Golding* review of his evidentiary claim that the trial court improperly failed to act, sua sponte, to strike certain evidence and to instruct the jury to disregard that evidence. Specifically, the court had admitted evidence, on the ground that it was relevant to count seven of the information, that, on the day of the shooting, the defendant possessed a pistol or revolver and that he knew that he was subject to a protective order issued by a court "in a case involving the use, attempted use or threatened use of physical force against [L], in violation of [§ 53a-217c (a) (5)]." The evidence that was admitted, over the defendant's objections, was offered by the state to prove the existence of a protective order that had been issued against the defendant on August 25, 2000. Subsequent to the

admission of that evidence, the state withdrew count seven of the information. That evidence concerned a domestic dispute between the defendant and L that occurred on August 24, 2000, and his resulting arrest on charges of breach of the peace and violation of an existing protective order. See footnote 19 of this opinion. As a result of the incident, a second protective order—the one relied on by the state for purposes of count seven of the information—was issued. The trial court grounded its ruling that the evidence was admissible on the relevance of that evidence to count seven of the information. The defendant contends that, because the state subsequently withdrew count seven, the court was obligated, sua sponte, to strike the evidence and to instruct the jury to disregard it. The defendant concedes that the issue is unpreserved, but argues that he is entitled to *Golding* review because the claim is of constitutional dimension and the trial court's failure to act sua sponte on this evidentiary matter deprived him of a fair trial. The defendant argues that the trial court has a duty to exclude irrelevant evidence, regardless of whether a party has objected to that evidence. If we accepted the defendant's argument, we would accede to the transformation of virtually every evidentiary challenge grounded on relevance into a constitutional one. That we will not do. The issue is not preserved, and we decline to address it.

## XI

## ADMISSION OF UNCHARGED MISCONDUCT EVIDENCE

The defendant next challenges the trial court's ruling that permitted the admission of evidence of certain uncharged misconduct, as well as the court's instruction to the jury regarding the purpose of that evidence. The defendant's claim centers on testimony that he fired three gunshots at the house at 131 Sargeant Street two

days before the conduct with which he was charged in the present case. The defendant contends that the trial court improperly admitted the evidence for the purpose of establishing motive, and that it improperly instructed the jury that it could consider the evidence for the purpose of motive or identity. Assuming, without deciding, that the defendant preserved his claims, we reject them.[21]

The jury reasonably could have found the following facts relevant to our resolution of the defendant's claim. Shortly before 2 o'clock in the morning of August 24, 2000, Kanika Ramsey was a passenger in a vehicle driven by the defendant. The defendant pulled in front of 131 Sargeant Street, reached across Ramsey's body, pointed a gun out of the open passenger window and fired three shots at a second floor window—striking it—before driving away. Cleopatra Isaac, who lived in the second floor apartment of 131 Sargeant Street, heard her five year old daughter cry and say that her window was broken. When Isaac went into her daughter's room, she observed three holes in the window, a piece of metal on the floor, and a hole in a wall. Isaac immediately called the police to report the incident. Later that morning, Detective Mark R. Fowler of the Hartford police responded to the complaint and, upon viewing the three holes in the windows, concluded that they were possible bullet holes.

The state offered the following additional testimony that would have permitted the jury to find that when the defendant fired the gun out of his vehicle at 131 Sargeant Street, he was aware that L was likely in the building at that time and that the gun he used was the

[21] The state argues that the defendant's evidentiary claim is unpreserved and not reviewable because "(1) before the trial court, he did not properly object to the evidence he challenges on appeal, and (2) on appeal, he does not challenge the alternative basis on which the trial court admitted the evidence."

same one he used during the August 26, 2000 shooting. As to the defendant's awareness of L's presence in the building, Isaac testified that Desiree lived on the third floor of 131 Sargeant Street. J, L's mother, testified that L was staying with Desiree at that address on August 23 and 24, 2000, and that she believed the defendant knew that fact. Regarding the gun used during both the August 24 and 26 shootings, Ramsey testified that the gun used by the defendant during the August 24 shooting was silver, had a white handle, and was "round where the bullets go." Her description of the gun was generally consistent with descriptions other witnesses gave of a gun in the defendant's possession. For example, Carolyn described the gun used during the August 26, 2000 shooting as silver. J testified that she previously had seen the defendant with a silver revolver with a pearl handle. Approximately one month before the charged shooting, Texidor saw the defendant with a silver gun with a "little wheel where the bullets go."

The following procedural facts are also relevant to our resolution of this issue. When the state called Isaac as a witness, defense counsel objected to the proposed testimony on the ground that the prior uncharged misconduct was irrelevant and prejudicial, and that the state had not established any exception to the general prohibition against the admissibility of such misconduct evidence. The state countered that Isaac's testimony was relevant to establish motive. The court ruled that Isaac's testimony would not be unduly prejudicial, but did not rule that the evidence was relevant to establish motive, merely stating that relevancy was "going to have to be established by tying it up" with further witness testimony about the incident.

In its final charge, the trial court did not instruct the jury that it could consider the evidence of the August 24 shooting as relevant to motive. Instead, the court instructed the jury that "[e]vidence concerning the

shooting of the house of 131 Sargeant Street prior to the date of the events charged in this information, if you believe such evidence, can be used both concerning the defendant's knowledge or possession of the means that might have been useful or necessary for the commission of the crimes charged and as evidence of the identity of the person who committed the crimes charged."

"Our standard of review on such matters is well established. The admission of evidence of prior uncharged misconduct is a decision properly within the discretion of the trial court. . . . [E]very reasonable presumption should be given in favor of the trial court's ruling. . . . [T]he trial court's decision will be reversed only where abuse of discretion is manifest or where an injustice appears to have been done." (Internal quotation marks omitted.) *State* v. *Colon*, 272 Conn. 106, 333, 864 A.2d 666 (2004), cert. denied, 546 U.S. 848, 126 S. Ct. 102, 163 L. Ed. 2d 116 (2005).

In general, "evidence of prior misconduct is inadmissible to prove that a criminal defendant is guilty of the crime of which the defendant is accused." (Internal quotation marks omitted.) *State* v. *Beavers*, 290 Conn. 386, 399, 963 A.2d 956 (2009). Section 4-5 (a) of the 2000 edition of the Connecticut Code of Evidence prohibits the admission of "[e]vidence of other crimes, wrongs or acts of a person . . . to prove the bad character or criminal tendencies of that person." Prior misconduct evidence is admissible, however, for some purposes that are distinct from the purpose of proving that a defendant has a bad character or criminal tendencies. Specifically, such evidence "is admissible . . . to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony." Conn. Code Evid. (2000) § 4-5 (b).

Prior misconduct evidence is admissible if it is "relevant and material to at least one of the circumstances encompassed by the exceptions" and if the probative value of the evidence outweighs any prejudicial effect. (Internal quotation marks omitted.) *State* v. *Pena*, 301 Conn. 669, 673–74, 22 A.3d 611 (2011). "Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . One fact is relevant to another if in the common course of events the existence of one, alone or with other facts, renders the existence of the other either more certain or more probable . . . . Evidence is irrelevant or too remote if there is such a want of open and visible connection between the evidentiary and principal facts that, all things considered, the former is not worthy or safe to be admitted in the proof of the latter. . . . Evidence is not rendered inadmissible because it is not conclusive. All that is required is that the evidence tend to support a relevant fact even to a slight degree, so long as it is not prejudicial or merely cumulative." (Internal quotation marks omitted.) Id., 674.

The trial court would have been well within its discretion to admit the prior misconduct evidence as relevant and material to prove any of the three purposes mentioned in the record: (1) motive; (2) means; or (3) identity. Motive is one of the express exceptions to the general bar against prior misconduct evidence. See Conn. Code Evid. (2000) § 4-5 (b). "Evidence of prior misconduct that tends to show that the defendant harbored hostility toward the intended victim of a violent crime is admissible to establish motive." *State* v. *Lopez*, 280 Conn. 779, 795, 911 A.2d 1099 (2007). In the present case, the misconduct evidence tended to show that the defendant harbored hostility toward the intended victim. See id. (concluding that trial court properly admitted prior misconduct evidence for purpose of establishing motive in murder case where defendant

had threatened two victims with gun two to three weeks before shooting them). Indeed, Ramsey's testimony about the August 24, 2000 shooting established that just two days before shooting L, Desiree and Carolyn at 131 Sargeant Street, the defendant fired three shots at that address, knowing that L was staying there. Thus, the evidence was highly relevant to motive and admissible on that ground.[22]

The prior misconduct evidence also was relevant to establish means. Although means is not enumerated as an exception to the prior misconduct bar in § 4-5 of the 2000 edition of the Connecticut Code of Evidence, the exceptions listed therein are "intended to be illustrative rather than exhaustive." Conn. Code Evid. (2000) § 4-5 (b), commentary. A court is not precluded "from recognizing other appropriate purposes for which other crimes, wrongs or acts evidence may be admitted, provided the evidence is not introduced to prove a person's bad character or criminal tendencies . . . ." Conn. Code Evid. (2000) § 4-5 (b), commentary. Establishing means is one such alternative, appropriate purpose for which prior misconduct evidence may be admissible. See *State* v. *Pena*, supra, 301 Conn. 675 (upholding trial court's ruling admitting prior misconduct evidence because it demonstrated that defendant possessed means to commit charged conduct).

Indeed, "[e]vidence indicating that an accused possessed an article with which the particular crime charged may have been accomplished is generally relevant to show that the accused had the means to commit the crime . . . . The state does not have to connect a

[22] We reject the defendant's claim that the prior misconduct evidence was not admissible as motive evidence because it lacked a causal connection to the charged conduct. This court has never imposed such a requirement. See, e.g., *State* v. *Pena*, supra, 301 Conn. 675 (upholding trial court determination that prior misconduct evidence about possession of firearm was relevant to charged shooting, without requiring causal connection).

weapon directly to the defendant and the crime. It is necessary only that the weapon be suitable for the commission of the offense." (Internal quotation marks omitted.) Id. For example, in *Pena*, prior misconduct evidence that established that the defendant possessed "a black pistol approximately three months prior to the shooting" was relevant where "the victim [of the charged conduct] had died from a gunshot wound, and eyewitness testimony also established that the defendant had displayed a black pistol during his dispute with the victim." Id. This court observed that the prior misconduct evidence "supported the inference that the defendant had access to the type of weapon that was used to kill the victim." Id.

In the present case, the prior misconduct evidence is highly relevant means evidence. As we have explained, the state presented evidence that the description of the gun used in the August 24, 2000 shooting was consistent with the description of the gun he used during the August 26, 2000 shooting. Both Ramsey and Carolyn described the gun as silver. Ramsey's description of the gun also matched the description given by other witnesses of a gun in the defendant's possession in the months that preceded both shootings. We emphasize that in order to establish relevance, the state need not have demonstrated that the weapon used in the uncharged conduct was in fact the same as the one used in the charged conduct. It is sufficient that the state established that the gun the defendant possessed *could have been* used as a means to accomplish the charged offense. See id. Given the close proximity in time between the prior misconduct and the charged conduct, and in light of the supporting testimony of other witnesses about the defendant's gun, that threshold is met in the present case. Ramsey's testimony was relevant to establish means, and, therefore, the trial court did not abuse its discretion by charging the jury

that it could consider the prior misconduct evidence for that purpose.

The trial court also properly instructed the jury that it could consider the prior misconduct evidence to establish identity.[23] Identity is one of the exceptions recognized in § 4-5 (b) of the 2000 edition of the Connecticut Code of Evidence to the general bar against prior misconduct evidence. "Evidence of other crimes or misconduct of an accused is admissible on the issue of identity where the methods used are sufficiently unique to warrant a reasonable inference that the person who performed one misdeed also did the other. Much more is required than the fact that the offenses fall into the same class. The device used must be so unusual and distinctive as to be like a signature." (Internal quotation marks omitted.) *State* v. *Ibraimov*, 187 Conn. 348, 354, 446 A.2d 382 (1982).

[23] The defendant claims that, because the state did not argue that the prior misconduct evidence was relevant to prove identity, the trial court improperly instructed the jury that it could consider the misconduct evidence for that purpose. This argument lacks merit. Although the state proffered the prior misconduct evidence on the ground that it was relevant to prove motive, the trial court's ruling was provisional in nature. The court ruled that relevance was "going to have to be established by tying it up" with additional witness testimony. The trial court's initial ruling aligns with § 1-3 (b) of the Connecticut Code of Evidence, which provides that, "[w]hen the admissibility of evidence depends upon connecting facts, the court may admit the evidence upon proof of the connecting facts or subject to later proof of the connecting facts."

We also reject the defendant's suggestion that the trial court was somehow barred from instructing the jury that the prior misconduct evidence was relevant to prove identity and means, rather than motive, on which the state had relied. The court was well within its discretion to determine the purpose for which the evidence was relevant. The defendant's reliance on *State* v. *Cutler*, 293 Conn. 303, 314–15, 977 A.2d 209 (2009), and *State* v. *Ruffin*, 48 Conn. App. 504, 506–507, 710 A.2d 138, cert. denied, 245 Conn. 910, 718 A.2d 18 (1998), for this argument is misplaced. Neither of those decisions forbids a trial court to instruct the jury to consider evidence for purposes other than those for which it was offered. Both cases merely involved a trial court's instruction that limited the jury's consideration of prior misconduct evidence to the purposes for which it was relevant. See *State* v. *Cutler*, supra, 315; *State* v. *Ruffin*, supra, 508.

The state always has the burden to prove identity as an element of the offense, and the prior misconduct testimony was relevant to that purpose. Ramsey's testimony tends to show that the defendant possessed a silver gun shortly before the charged conduct. Carolyn testified that the defendant used a silver gun. A silver gun is important identity evidence that is highly relevant. Many courts would consider the defendant's silver gun a signature device. See *State* v. *Collins*, 299 Conn. 567, 584 n.17, 10 A.3d 1005 (citing cases that "have concluded that, in the context of uncharged misconduct, a defendant's use of the same gun to commit the charged offense constitutes a 'signature' for purposes of the identity exception"), cert. denied, 565 U.S. 908, 132 S. Ct. 314, 181 L. Ed. 2d 193 (2011). Although this court has not expressly adopted that position, we review the trial court's ruling under the deferential, abuse of discretion standard. Giving every "reasonable presumption . . . in favor of the trial court's ruling" we cannot conclude that "an injustice appears to have been done." (Internal quotation marks omitted.) *State* v. *Colon*, supra, 272 Conn. 333.

For prior misconduct evidence to be admissible, it must not only be relevant and material, but also more probative than prejudicial. *State* v. *Pena*, supra, 301 Conn. 673–74. "[T]he trial court's discretionary determination that the probative value of evidence is not outweighed by its prejudicial effect will not be disturbed on appeal unless a clear abuse of discretion is shown. . . . [E]very reasonable presumption should be given in favor of the trial court's ruling." (Internal quotation marks omitted.) Id., 676. Our review persuades us that the trial court properly determined that the balancing test favored admitting the evidence.[24] The prejudicial

[24] Because we conclude that the trial court balanced the prejudice and probative value of the prior misconduct evidence, we need not address the defendant's argument to the contrary.

impact of uncharged misconduct evidence is assessed in light of its relative "viciousness" in comparison with the charged conduct. See *State* v. *Collins*, supra, 299 Conn. 588 ("uncharged misconduct evidence has been held not unduly prejudicial when the evidentiary substantiation of the vicious conduct, with which the defendant was charged, far outweighed, in severity, the character of his prior misconduct" [internal quotation marks omitted]). It is beyond debate that, by comparison, shooting at the home where the defendant believed L to be staying is less vicious than shooting the three victims in the head at close range. By contrast, the probative value of the evidence, particularly as to the defendant's intent to kill L, was high. Accordingly, the trial court acted within its discretion in admitting the prior misconduct evidence.

## XII

## ADMISSION OF EYEWITNESS IDENTIFICATIONS

The defendant claims that the trial court improperly denied his motion to suppress the eyewitness identifications made by Richard Davieau. The defendant claims that those identifications were unreliable and the product of unnecessarily suggestive identification procedures, in violation of the defendant's right to due process. Because we conclude that any error was harmless beyond a reasonable doubt, we need not resolve whether the identifications were unreliable and the product of unnecessarily suggestive identification procedures.

In reviewing the trial court's denial of the defendant's motion to suppress Davieau's identifications, "[w]e review the record in its entirety and are not limited to the evidence before the trial court at the time of the ruling . . . ." (Internal quotation marks omitted.) *State* v. *Edwards*, 299 Conn. 419, 439 n.16, 11 A.3d 116 (2011). Our review of the record reveals the following addi-

tional relevant facts. In August, 2000, Davieau worked as a taxicab driver for Diamond Cab, which had its offices in Bloomfield. On August 26, 2000, at 8:48 p.m., Davieau picked up a fare at 27 Ledyard Avenue in Bloomfield—an African-American male in his late teens or early twenties. After the young man got into the backseat, but before Davieau drove away, a woman came to the front door of the house and told the young man that he had a telephone call. The young man addressed the woman as "Mom" and told her to tell the caller that he was in the bathroom. Because the lighting was dark and Davieau only glanced quickly over his shoulder at the young man to ask where he was going, Davieau did not get a "good look" at him. Davieau dropped the young man off at 131 Sargeant Street in Hartford at 8:59 p.m.

A "few hours" later, Davieau received a call from dispatch at Diamond Cab directing him to report to the Bloomfield office. When he arrived there, he was met by Detective Jack Leitao of the Hartford police. Leitao asked Davieau some questions about the fare he had dropped off at 131 Sargeant Street, then asked Davieau to meet him at the Hartford police station. At the police station, Leitao showed Davieau a photographic array with eight numbered photographs. Leitao asked Davieau if anyone in the array was the person he had picked up at Ledyard Avenue that night. He instructed Davieau to take his time and to try to "narrow down and identify the person . . . he picked up on that date." Leitao further testified that, although they did not provide witnesses with a written advisement, as a practice, the Hartford police always informed an eyewitness that the suspect may or may not be in the photographic array. Because he was not "100 percent" certain, the best that Davieau was able to do was narrow the photographs down to two that he believed most resembled the person who was in the back of his cab that night—

photographs number six and seven in the array. Photograph number six was a photograph of the defendant.

Leitao asked Davieau to return to the police station that evening to view a second photographic array. The second array included a more recent photograph of the defendant, who was the only person whose photographs were included in both photographic arrays. Davieau was able to narrow down the photographs to two that he believed most closely resembled his fare that night, photographs number four and seven. Photograph number four in the second array was a photograph of the defendant.

The defendant moved to suppress both of the identifications made by Davieau on the ground that the procedures employed by the Hartford police were unnecessarily suggestive and that the resulting identifications were unreliable in violation of his right to due process. At the suppression hearing, the defendant contended that the procedure employed by Leitao, using a simultaneous photographic array rather than showing the defendant the photographs sequentially, was impermissibly suggestive. Ruling from the bench during trial, the court denied the motion to suppress on the ground that the procedures followed by Leitao comported with federal and state constitutional requirements. In a memorandum of decision filed on December 2, 2004, the court relied on then existing precedent to conclude that the procedures employed were not unnecessarily suggestive, and also concluded that, under the totality of the circumstances, the identifications were reliable.

Although many aspects of the procedures employed by the Hartford police in conducting the eyewitness identification in the present case subsequently have been called into question, and even subsequently repudiated; see, e.g., General Statutes § 54-1p (c) (1) and (2) (requiring police to present photographs in " '[p]hoto

lineup' " sequentially and requiring that procedure be double-blind); *State* v. *Ledbetter*, 185 Conn. 607, 613, 441 A.2d 595 (1981) (observing that inclusion of only defendant's photograph in both arrays was suggestive because "by emphasizing the defendant it increases the risk of misidentification"); we need not resolve whether the identification procedures employed were unnecessarily suggestive or unreliable under the totality of the circumstances. Even if we assume, without deciding, that they were, any error was harmless beyond a reasonable doubt. See *State* v. *Artis*, 314 Conn. 131, 135, 101 A.3d 915 (2014) (overruling *State* v. *Gordon*, 185 Conn. 402, 441 A.2d 119 [1981], cert. denied, 455 U.S. 989, 102 S. Ct. 1612, 71 L. Ed. 2d 848 [1982], and holding that "improper admission of [eyewitness identification] evidence is subject to harmless error analysis").

In comparison to the other evidence offered by the state in the present case, Davieau's identifications of the defendant were of little consequence. We first observe that, even if the state had been precluded from offering Davieau's eyewitness identification testimony, he still would have been permitted to testify that, on August 26, 2000, at 8:48 p.m., he picked up a young, African-American male at 27 Ledyard Avenue—the defendant's home address. Davieau also would have been permitted to testify that the young man addressed the woman who came to the front door of the home at Ledyard Avenue as "mom." Finally, he would have been permitted to testify that he dropped the young man off at 131 Sargeant Street in Hartford eleven minutes later, at 8:59 p.m.

The fact that Davieau subsequently "identified" the defendant in two photographic arrays adds little to the import of his testimony. More important, even without Davieau's testimony regarding the taxi ride that the defendant took to 131 Sargeant Street on the night of the shooting, the state's evidence against him was over-

whelming. Most notable, Carolyn identified him as the shooter as soon as she was physically able, when she was being driven to the hospital in an ambulance. Carolyn's identification of the defendant was particularly compelling because she knew him. Other witnesses, including Shand and Thomas, largely corroborated Carolyn's testimony regarding the details of the shooting. In the months preceding the shooting, numerous witnesses had seen the defendant in possession of a gun similar to the one used in the shooting. He had a history of domestic violence against L and a protective order as to L had been issued against him one day prior to the shooting. On the day before the protective order was issued, the defendant had fired a weapon at 131 Sargeant Street, knowing that L was staying there. After he shot the victims, he burned his clothing at the home of Cortez. He later told Bolling that he had shot someone, had gone to the hospital to see if the person he had shot was dead, and asked Bolling what she would do if her son's father had shot her and two of her friends. Finally, the defendant fled to Kalamazoo, Michigan. In light of this evidence, even if the eyewitness identification testimony of Davieau was admitted improperly, any error was harmless beyond a reasonable doubt.

## XIII

## TRIAL COURT'S EXTREME EMOTIONAL DISTURBANCE INSTRUCTION

The defendant next claims that the trial court's instruction on his affirmative defense of extreme emotional disturbance was improper, in that the court failed to instruct the jury pursuant to his revised supplemental request to charge that "the emotional disturbance need not necessarily have been a spontaneous or sudden occurrence, and indeed, may have 'simmered' in the defendant's mind for a long period of time . . . ." The state responds that, because the court's instruction did

not suggest that the emotional disturbance must arise from a sudden occurrence, it was not reasonably probable, or even reasonably possible, that the jury was misled by the omission of the requested language. The state also argues that, because the defendant failed to prove the affirmative defense, any error was harmless.[25] Because we conclude that there was not sufficient evidence to allow a rational juror to find that, at the time of the shooting, the defendant was under the influence of an extreme emotional disturbance that had simmered over time, we conclude that any error was harmless.

"The standard of review for claims of instructional impropriety is well established. [I]ndividual jury instructions should not be judged in artificial isolation . . . but must be viewed in the context of the overall charge. . . . The pertinent test is whether the charge, read in its entirety, fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . Thus, [t]he whole charge must be considered from the standpoint of its effect on the [jurors] in guiding them to the proper verdict . . . and not critically dissected in a microscopic search for possible error. . . . Accordingly, [i]n reviewing a constitutional challenge to the trial court's instruction, we must consider the jury charge as a whole to determine whether it is reasonably possible that the instruction misled the jury. . . . In other words, we must consider whether the instructions [in totality] are sufficiently correct in law, adapted to the issues and

[25] The parties disagree as to whether the defendant's instructional challenge is properly before us, and each has offered arguments as to whether the defendant preserved the claim. We determine, however, that even if we assume, without deciding, that the instructional challenge is properly before us, the defendant cannot prevail on the merits. It is therefore unnecessary for us to detail in this opinion the complex procedural posture and attendant arguments regarding preservation raised by both parties. We also decline to address the defendant's request that we overrule our decision in *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011).

ample for the guidance of the jury. . . . A challenge to the validity of jury instructions presents a question of law over which [we have] plenary review." (Citation omitted; internal quotation marks omitted.) *State* v. *Santiago*, 305 Conn. 101, 190–91, 49 A.3d 566 (2012), superseded in part on other grounds, 318 Conn. 1, 122 A.3d 1 (2015). When a challenge to criminal jury instructions is not of constitutional dimension, an erroneous instruction is "reversible error when it is shown that it is . . . reasonably probable . . . that the [jurors] were misled." (Internal quotation marks omitted.) *State* v. *Aviles*, 277 Conn. 281, 310, 891 A.2d 935, cert. denied, 549 U.S. 840, 127 S. Ct. 108, 166 L. Ed. 2d 69 (2006).

The defendant concedes that this court has applied the "reasonably probable" standard to review challenges to jury instructions on the affirmative defense of extreme emotional disturbance on the ground that such claims are not of constitutional magnitude. See id. The defendant nonetheless claims that, because this is a capital case, the eighth amendment to the United States constitution dictates that any error that deprives the jury of the option of finding the defendant guilty of a lesser offense is constitutional in dimension. See *Herrera* v. *Collins*, 506 U.S. 390, 399, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993). Accordingly, the defendant contends that the "reasonably possible" constitutional standard applies to his claim, rather than the "reasonably probable" nonconstitutional standard. Because we conclude that the defendant cannot prevail under either standard, it is not necessary for us to resolve which one applies.

The rules governing a request to charge are well established. "A request to charge which is relevant to the issues of the case and which is an accurate statement of the law must be given. A refusal to charge in the exact words of a request will not constitute error if the requested charge is given in substance." *State* v.

*Casey*, 201 Conn. 174, 178, 513 A.2d 1183 (1986). This court has stated that "a defendant is entitled to a requested instruction on the affirmative defense of extreme emotional disturbance only if there is sufficient evidence for a rational juror to find that all the elements of the defense are established by a preponderance of the evidence." *State* v. *Person*, 236 Conn. 342, 353, 673 A.2d 463 (1996).

The trial court's instructions set forth in substance the basic elements of the affirmative defense of extreme emotional disturbance, but failed to include language in the defendant's revised supplemental request to charge that "the emotional disturbance need not necessarily have been a spontaneous or sudden occurrence, and indeed, may have 'simmered' in the defendant's mind for a long period of time . . . ."[26] Section 53a-54a (a) sets forth the defense and provides in relevant part that,

[26] The trial court instructed the jury: "Our statute on the affirmative defense of extreme emotional disturbance, insofar as it applies in this case, provides that, [in] any prosecution for murder, quote, it shall be an affirmative defense that the defendant acted—acted under extreme—excuse me—under the influence of extreme emotional disturbance, for which there was a reasonable explanation or excuse, the reasonable[ness] of which is to be determined from the viewpoint of the person—of a person in the defendant's situation under the circumstances as the defendant believed them to be, end quote. This statute, then, means that, when a person is charged with murder, the jury may, under appropriate circumstances, find him guilty of the lesser included offense of manslaughter in the first degree by reason of extreme emotional disturbance, rather than guilty of murder.

"This affirmative defense of extreme emotional disturbance is a defense to the charge of murder. But it does not result in a verdict of not guilty. It results instead in a verdict of guilty of extreme emotional disturbance, manslaughter, in the first degree with a firearm. Thus, it reduces the crime of murder to the crime of extreme emotional defense manslaughter in the first degree with a firearm. This affirmative defense relates to the defendant's state of mind at the time, if you find that he killed the victims [L] and [Desiree]. If you have simultaneously found that the state has so proven beyond a reasonable doubt those murders. You will recall that one of the elements of the crime of murder is that the actor intended to cause the death of another person. Extreme emotional disturbance does not negate, it does [not] wipe out that intent. It serves merely to explain reasonably the circumstances leading to the formation of that intent. Its purpose is to

"in any prosecution under this subsection, it shall be an affirmative defense that the defendant committed the proscribed act or acts under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime." We have explained that, pursuant to § 53a-54a (a), there are two elements of the affirmative defense. The defendant must prove that "(1) [he] committed the offense under the influence of extreme emotional disturbance; and (2) there was a reasonable explanation or excuse for [his] extreme emotional disturbance." *State* v. *Forrest*, 216 Conn. 139, 148, 578 A.2d 1066 (1990).

render the actor less culpable, less blameworthy, because his intentional acts were caused by extreme emotional disturbance."

After the court instructed the jury that the defendant bore the burden to prove the affirmative defense of extreme emotional disturbance by a preponderance of the evidence, it gave the jury guidelines for determining whether the defendant had met his burden: "There are two elements to this affirmative defense: One, the defendant was exposed to an extremely unusual and overwhelming state, that is, more than mere annoyance or unhappiness, and the defendant had an extreme emotional reaction to the state, as a result of which, there was a loss of self-control, and his reason was overborne by intense feelings such as, passion, anger, distress, grief, excess agitation, or other similar emotions. You should give consideration to whether the intensity of these feelings was such that the defendant's usual intellectual controls failed, and that his normal rational thinking no longer prevailed at the time of the act. It is used in this affirmative defense, the word, quote, extreme, unquote, means the greatest degree of intensity. Away from the norm. Away from the normal or usual state for the defendant.

"If you find the defendant acted under extreme emotional disturbance, I have defined that term for you, you must also find in order for the affirmative defense to be established that there was a reasonable explanation or excuse for this disturbance, the reasonable in which—the reasonableness of which is to be determined from the viewpoint of the defendant's situation under the circumstances that the defendant believed them to be. The reasonableness of the defendant's conduct under extreme emotional disturbance is to be

The language requested by the defendant is a correct statement of the law. In *State* v. *Elliott*, 177 Conn. 1, 7, 411 A.2d 3 (1979), this court observed that the affirmative defense of extreme emotional disturbance, as set forth in § 53a-54a (a), "is a considerably expanded version of the common-law defense of heat of passion or sudden provocation." We explained: "It is evident from a reading of § 53a-54a (a) that the defense does not require a provoking or triggering event; or that the homicidal act occur immediately after the cause or causes of the defendant's extreme emotional disturbance; or that the defendant have lost all ability to reason. . . .

"Before the enactment of the present Penal Code in this state, to establish the 'heat of passion' defense a defendant had to prove that the 'hot blood' had not had time to 'cool off' at the time of the killing. . . . A homicide influenced by an extreme emotional disturbance, in contrast, is not one which is necessarily committed in the 'hot blood' stage, but rather one that was brought about by a significant mental trauma that caused the defendant to brood for a long period of time and then react violently, seemingly without provocation." (Citation omitted; footnote omitted.) Id., 7–8.

The "simmering" language that the trial court omitted in the present case is related to both elements of the affirmative defense. With respect to the first element, the language makes it clear to the jury that, although the defendant must prove that he was under an extreme emotional disturbance at the time of the homicide, he is not limited to proving that the disturbance came on suddenly—he may instead prove that the disturbance was one that "simmered" in his mind over an extended period of time. The fact that the extreme emotional disturbance was one that "simmered" in the defendant's

determined from the viewpoint of the defendant's situation under the circumstances as he believed them to be."

mind for a long period of time, in turn, provides guidance to the jury with respect to the second element because it clarifies that the "reasonable explanation" for the extreme emotional disturbance need not be an event or trauma that immediately preceded the homicide. Indeed, consistent with the principles we discussed in *State* v. *Elliott*, supra, 177 Conn. 1, the standard Connecticut criminal jury instructions include the following language in the instruction for the affirmative defense of extreme emotional disturbance, which is virtually identical to the language requested by the defendant in his revised supplemental request to charge: "While the emotional disturbance need not necessarily have been a spontaneous or sudden occurrence, and indeed, may have 'simmered' in the defendant's mind for a long period of time, the disturbance must actually have influenced (his/her) conduct at the time of the killing." (Footnotes omitted.) Connecticut Criminal Jury Instructions 5.2-1, available at http://jud.ct.gov/JI/Criminal/Criminal.pdf (last visited January 12, 2018).

Because the requested instruction was an accurate statement of the law, the trial court should have given it.[27] See *State* v. *Aviles*, supra, 277 Conn. 315 (defen-

[27] We observe, however, that nothing in the trial court's instructions suggested that the defendant was required to prove that his extreme emotional disturbance resulted from a sudden trigger. The present case is therefore distinguishable from *State* v. *Elliott*, supra, 177 Conn. 4, in which the court incorrectly charged the jury on the " 'heat of passion' " defense, rather than the extreme emotional disturbance defense.

The defendant argues that, notwithstanding the absence of language in the trial court's charge to the jury that ruled out a "simmering" extreme emotional disturbance, remarks in the prosecutor's closing argument suggested that the defendant was required to prove a heat of passion defense. Specifically, in rebuttal, the prosecutor noted that Carolyn had testified that, immediately prior to the shooting, L and the defendant were not "screaming," "yelling," or "arguing." We disagree with the defendant that this observation rules out a "simmering" extreme emotional disturbance defense. Carolyn's testimony, as recounted by the prosecutor, was directly relevant to the point that the prosecutor was making at the time—she was arguing that the defendant was not under an extreme emotional disturbance *at the time of*

dant's requested instruction that extreme emotional disturbance could develop over time is accurate statement of law and properly should have been given upon request). Despite this conclusion, we need not resolve whether it was reasonably possible that the jury was misled into believing that the defendant could not satisfy his burden by proving that his extreme emotional disturbance was one that had simmered in his mind over a long period of time prior to the shooting. Because there was not sufficient evidence presented at trial to allow a rational juror to find that the defendant had proven that any extreme emotional disturbance he suffered was one that had simmered over a period of time, any error was harmless.

The defendant claims that the following evidence established that, at the time of the shooting, he was under the influence of an extreme emotional disturbance that had simmered in his mind over a long period of time.[28] He and L had a relationship characterized by a history of domestic disputes over the custody of their

*the shooting*. She cited to his calm demeanor immediately prior to the shooting as evidence of the lack of extreme emotional disturbance at the time.

We also observe that defense counsel made a very similar point during closing argument, stating: "You can't speculate, but you can consider all those things, and you know that something happened in his mind, which snapped. And that was described by [Carolyn]. Because he went from being—having a conversation with [L], to all of a sudden pulling out a gun." Defense counsel's reliance on this piece of evidence to argue that the defendant must have been under the influence of an extreme emotional disturbance at the time of the shooting belies the claim that the state's reliance on the same piece of evidence rendered it likely that the trial court's omission of the "simmering" language misled the jury.

[28] In addition to evidence adduced at trial, the defendant also points to the trial court's observation, when it determined to give the instruction, that at the competency hearing, questions had been raised regarding the defendant's mental status. Because evidence at the competency hearing was not presented before the jury at trial, however, that evidence is not relevant to the question of whether the defendant established his defense of extreme emotional disturbance, and we do not consider it.

son, as evidenced by a protective order that had been issued against the defendant as to L and their son on August 25, 2000. The protective order was issued as a result of his arrest in connection with a domestic dispute involving L and their son. Also, two days prior to the shooting, he drove by 131 Sargeant Street and shot at the house with his gun.

Carolyn agreed with defense counsel's description of the defendant during the August 26, 2000 shooting as having had a "blank" look on his face, as though he "wasn't there," when the defendant shot her the second time. After the shooting, when he was burning his clothing in Cortez' backyard, Cortez was prompted by his bizarre appearance and behavior to ask him if he had been "smoking dust." He appeared "anxious" and "guarded" when at the hospital. Later, when he was at Bolling's home, she found him in her bed, under the covers and crying, when she returned home after going out for a short period of time. She described his appearance as "weird" and "bugged out."

In closing argument, defense counsel also relied on the various missteps the defendant committed on the night of the shooting to argue that he was under the influence of extreme emotional disturbance at the time. For example, defense counsel highlighted the following evidence. The defendant took a taxicab to 131 Sargeant Street that night and did not try to conceal his identity. He committed the murders in an open area and then did not run, but walked away from the scene. He burned his clothing in a highly visible area in Cortez' backyard, and took off most of his clothes, even though he did not know whether Cortez was home to provide him with replacement clothing afterward.

We emphasize that, in our review of the evidence, we need not resolve whether it would have been sufficient to support a jury finding that the defendant was

under the influence of an extreme emotional disturbance at the time of the shooting. Because the defendant's specific claim of error centers on the failure to include the "simmering" language in the extreme emotional disturbance instruction, our question is much more narrow—was there sufficient evidence in the record to allow a rational juror to find that the defendant was under the influence of an extreme emotional disturbance that had simmered in his mind over a period of time prior to the shooting? In other words, was there sufficient evidence of "simmering"?

The vast majority of the evidence relied on by the defendant goes to the first element of the affirmative defense, which is whether he was under the influence of an extreme emotional disturbance at the time of the shooting. In *State* v. *Elliott*, supra, 177 Conn. 9–10, we set forth three criteria intended to guide fact finders in determining whether a defendant has established the first element of the defense, explaining that "the jury must find that: (a) the emotional disturbance is not a mental disease or defect that rises to the level of insanity as defined by the Penal Code; (b) the defendant was exposed to an extremely unusual and overwhelming state, that is, not mere annoyance or unhappiness; and (c) the defendant had an extreme emotional reaction to it, as a result of which there was a loss of self-control, and reason was overborne by extreme intense feelings, such as passion, anger, distress, grief, excessive agitation or other similar emotions. Consideration is given to whether the intensity of these feelings was such that his usual intellectual controls failed and the normal rational thinking for that individual no longer prevailed at the time of the act. In its charge, the trial court should explain that the term 'extreme' refers to the greatest degree of intensity away from the norm for that individual."

In *State* v. *Forrest*, supra, 216 Conn. 148, this court clarified that "[w]hen we adopted the three criteria set forth in *Elliott*, we did not rewrite § 53a-54a, nor did we substitute our own 'elements' for those specified by the legislature. We merely interpreted the meaning of the phrase 'extreme emotional disturbance,' and as we explained in *Elliott*, enumerated 'understandable guidelines' for 'instructing a jury' in determining the presence or absence of that mental condition. . . . These guidelines also serve to focus the presentation of evidence on three factual bases that we have deemed essential to support the inference that a defendant suffered from extreme emotional disturbance at a particular time. They are neither conclusive nor exclusive, however, for '[i]n the final analysis . . . the ultimate determination of the presence or absence of extreme emotional disturbance [is] one of fact for the trier, aided by expert testimony of both sides, but left to its own factual determinations.' " (Citation omitted.)

The majority of the evidence on which the defendant relies pertains either to his appearance on the night of the shooting or his behavior during and after the shooting. For example, all of the following—Carolyn's impression that he had a blank expression on his face when he shot her, testimony that he appeared "anxious" when he was standing outside the emergency room of the hospital, Bolling's testimony that he appeared "weird" and "bugged out," and Cortez' suspicion that the defendant was under the influence of drugs—pertain to his appearance on the night of the shooting. As to his behavior during and after the shooting, the defendant points to the following—taking a taxicab to the murder scene and failing to conceal his identity; shooting the victims in the front yard of the home and walking unhurriedly away; stripping down to his underwear and burning his clothing in an open area where he could be seen; crying under Bolling's bedcovers. All

of this evidence is relevant to the first element of the affirmative defense of extreme emotional disturbance because it provided at least some support toward jury findings that "(a) the emotional disturbance is not a mental disease or defect that rises to the level of insanity as defined by the Penal Code; (b) the defendant was exposed to an extremely unusual and overwhelming state, that is, not mere annoyance or unhappiness; and (c) the defendant had an extreme emotional reaction to it, as a result of which there was a loss of self-control, and reason was overborne by extreme intense feelings, such as passion, anger, distress, grief, excessive agitation or other similar emotions." *State* v. *Elliott*, supra, 177 Conn. 9.

None of that evidence, however, demonstrated that the defendant was under the influence of an extreme emotional disturbance that had simmered in his mind for a long period of time. As to that particular question, in fact, the defendant relies on evidence that is at best slim. He presented no testimony, expert or otherwise, regarding his mental state at the time of or before the shooting. More important, for purposes of our resolution of his claim on appeal, there is virtually no evidence in the record that his mental state was one that had been simmering over a period of time before the shooting. This dearth of testimony regarding the defendant's mental state stands in stark contrast to the evidence typically presented in support of an affirmative defense of extreme emotional disturbance. See *State* v. *Crespo*, supra, 246 Conn. 678 (testimony of forensic psychiatrist and clinical psychologist that defendant was subject to long-term and immediate stress factors at time of murder); *State* v. *Person*, supra, 236 Conn. 346–47 (defendant testified as to state of mind at time of murder); *State* v. *Patterson*, 229 Conn. 328, 334–35, 641 A.2d 123 (1994) (testimony of three psychiatrists, clinical psychologist and family members describing defen-

dant's deterioration in two years prior to murder); *State* v. *Blades*, 225 Conn. 609, 625, 626 A.2d 273 (1993) (testimony of family members, work supervisor, primary care physician and psychiatrist regarding defendant's history of substance abuse and response to stressors); *State* v. *Casey*, supra, 201 Conn. 177–78 (evidence that dispute that precipitated defendant's murder of victim was one that had been ongoing for years, testimony of clinical psychologist that defendant's behavior was consistent with that of someone in " 'transient, disassociative state,' " and testimony of defendant regarding memory lapses); *State* v. *Elliott*, supra, 177 Conn. 3 (psychiatrist testified to defendant's overwhelming fear of victim and other long-term stressors). The defendant thus relied on circumstantial evidence to carry his burden of proof.

Of course, the mere fact that a defendant relies solely on circumstantial evidence does not mean he will be unable to produce sufficient evidence to allow a rational juror to find that he proved his affirmative defense. See, e.g., *State* v. *Asherman*, 193 Conn. 695, 728, 732–33, 478 A.2d 227 (1984) (holding that extreme emotional disturbance instruction was warranted on basis of testimony of witnesses regarding defendant's bizarre behavior and appearance after murder, as well as brutal nature of murder itself, which "appeared to have been perpetrated by someone who was mentally or emotionally agitated probably while under the influence of mind altering drugs"), cert. denied, 470 U.S. 1050, 105 S. Ct. 1749, 84 L. Ed. 2d 814 (1985). In the present case, however, the evidence in the record would not have been sufficient to allow a rational juror to find that the defendant had suffered from a mental trauma that simmered in his mind over a long period of time.

In support of that claim, the defendant merely relies on vague references in the record that suggested that he and L were in a relationship characterized by domestic violence, taken together with the fact that, two days

prior to the shooting, he shot at 131 Sargeant Street and was arrested for violating a protective order. As to the possible "reasonable explanation" for the defendant's extreme emotional disturbance, defense counsel merely stated in his closing argument that "[p]erhaps" it was "being told he could not see his son. Perhaps being arrested [two] day[s] before." As the state pointed out in its closing argument, however, the defendant failed to produce or point to any evidence that he wanted to have contact with his son and had made efforts toward achieving that goal.

To conclude from this evidence that the defendant established that he had experienced a mental trauma that simmered in his mind over a period of time would have required the jury to engage in sheer speculation. We also are mindful of the problematic policy concerns implicated by the defendant's sole reliance on his history of violence against L to prove his affirmative defense of extreme emotional disturbance. That is, the defendant claims that he has established that his alleged extreme emotional disturbance simmered because the courts previously had found sufficient basis for the issuance of a protective order against him as to L and because he had shot at the house where he knew she was staying. It would be troubling indeed if a defendant were entitled to rely on his history of domestic violence against one of his victims as the sole basis to prove his affirmative defense that, at the time of the homicides, he was under the influence of an extreme emotional disturbance that had simmered over a period of time.

For the foregoing reasons, we reject the defendant's claim that he was prejudiced by the trial court's failure to include the "simmering" language in the court's instructions on the affirmative defense of extreme emotional disturbance.[29]

[29] The defendant's remaining instructional challenges—that, in its instructions, the trial court improperly marshaled the evidence in favor of the state's theories of intent and consciousness of guilt; that the court improperly

## XIV

## PROSECUTORIAL IMPROPRIETIES

The defendant next claims that numerous statements made by the prosecutor during closing and rebuttal arguments were improper and violated his due process right to a fair trial.[30] In addition, the defendant claims that one set of remarks by the prosecutor during closing argument improperly commented on his failure to testify. We address each alleged impropriety in turn. We conclude that only one of the prosecutor's remarks was improper and that the impropriety was harmless beyond a reasonable doubt.

We initially observe that the defendant acknowledges that he objected to some, but not all, of the alleged improprieties. We nonetheless review all of the defendant's claims because, under settled law, "a defendant who fails to preserve claims of prosecutorial [impropriety] need not seek to prevail under the specific requirements of *State* v. *Golding*, [supra, 213 Conn. 239–40], and, [therefore], it is unnecessary for a reviewing court to apply the four-pronged *Golding* test." (Internal quotation marks omitted.) *State* v. *Payne*, 303 Conn. 538, 560, 34 A.3d 370 (2012).

The principles governing our review of the defendant's claims are well established. "In analyzing claims

refused to instruct the jury that, if the evidence in the case reasonably permitted two conclusions, one consistent with guilt, the other with innocence, the jury must draw the inference consistent with innocence; and that the trial court improperly gave an acquit first instruction—are without merit, and we decline to address them or the preservation arguments raised by the parties with respect to each instructional challenge.

[30] The defendant originally had also claimed that the alleged prosecutorial improprieties rendered his conviction insufficiently reliable to serve as the basis for a death sentence. As we explain in part I of this opinion, the issue of whether the defendant's penalty phase challenges are moot is not ripe. Accordingly, we address only the defendant's claim that the alleged prosecutorial improprieties violated his due process right to a fair trial.

of prosecutorial impropriety, we engage in a two step analytical process. . . . The two steps are separate and distinct. . . . We first examine whether prosecutorial impropriety occurred. . . . Second, if an impropriety exists, we then examine whether it deprived the defendant of his due process right to a fair trial. . . . In other words, an impropriety is an impropriety, regardless of its ultimate effect on the fairness of the trial. Whether that impropriety was harmful and thus caused or contributed to a due process violation involves a separate and distinct inquiry." (Citations omitted.) *State* v. *Fauci*, 282 Conn. 23, 32, 917 A.2d 978 (2007).

"[O]ur determination of whether any improper conduct by the state's attorney violated the defendant's fair trial rights is predicated on the factors set forth in *State* v. *Williams*, [204 Conn. 523, 540, 529 A.2d 653 (1987)], with due consideration of whether that [impropriety] was objected to at trial." (Internal quotation marks omitted.) *State* v. *Warholic*, 278 Conn. 354, 362, 897 A.2d 569 (2006). Those factors include "the extent to which the [impropriety] was invited by defense conduct or argument . . . the severity of the [impropriety] . . . the frequency of the [impropriety] . . . the centrality of the [impropriety] to the critical issues in the case . . . the strength of the curative measures adopted . . . and the strength of the state's case." (Citations omitted.) *State* v. *Williams*, supra, 540. If, however, the defendant's claim is that the prosecutorial impropriety "infringed a specifically enumerated constitutional right, such as the fifth amendment right to remain silent or the sixth amendment right to confront one's accusers," the burden is not on the defendant to prove prejudice. *State* v. *Payne*, supra, 303 Conn. 563. Instead, if "the defendant meets his burden of establishing the constitutional violation, the burden is then on the state to prove that the impropriety was harmless beyond a reasonable doubt." Id.

"[T]he touchstone of due process analysis in cases of alleged prosecutorial [impropriety] is the fairness of the trial, and not the culpability of the prosecutor. . . . The issue is whether the prosecutor's conduct so infected the trial with unfairness as to make the resulting conviction a denial of due process. . . . In determining whether the defendant was denied a fair trial [by virtue of prosecutorial impropriety] we must view the prosecutor's comments in the context of the entire trial." (Internal quotation marks omitted.) *State* v. *Stevenson*, 269 Conn. 563, 571, 849 A.2d 626 (2004). Mindful of these governing principles, we now turn to the defendant's claims.

A

Remarks on Intent

The defendant first claims that the prosecutor misstated the law concerning intent, distorting the state's burden of proof. Specifically, the defendant claims that the prosecutor improperly argued that the defendant's use of a gun was *conclusive* proof of his intent and used examples to describe to the jury the process of inferring the defendant's intent from his conduct. The state responds that the prosecutor's remarks merely urged the jury to infer the defendant's intent from all of the applicable circumstances, including the fact that the defendant used a gun. We agree with the state that the remarks were not improper.

The defendant focuses on the following language in the prosecutor's closing argument: "Intent to kill, ladies and gentlemen, when you're that close, you can't have any other intent. Your intent is to kill. And when you aim for a vital part of the body, your intent is to kill."

The challenged statements must be considered in context. We set forth the entirety of the prosecutor's remarks regarding intent: "The judge is going to charge

you on intent. A person acts intentionally with respect to a result when his conscious objective is to cause such result. Unless someone states his intention, you infer his intention from his conduct. That is the way we do things in life. If I walk over—which one's mine, this one? If I walk over and pick up this glass and take a drink of water, you can all infer that my intention was to take a drink of water. I could have said, I'm going to drink water now, and taken a drink, but you infer it from my conduct. That is the way we do things in life. None of us can see inside someone's brain. That is the way you infer someone's conduct. And that is the jury's job. You are supposed to make reasonable inferences and infer what his conduct was at the time of the crimes.

"I submit to you that there are many facts here from which you can infer his intent to kill these women: Number one, he brought [a] gun with him to 131 Sargeant Street; number two, he hid that gun in his clothing; number three, he waited until the first victim [L] was within an especially vulnerable position before he used that gun, bending down to tie her shoe with the side of her head perfectly in line for him to pull the gun out of his pocket and shoot her; number [four], he then approached [Carolyn], firing—again, she puts up her hand. Where does that tell you the bullet is headed? She thinks that bullet is headed toward her head. She falls down. He then either shoots Desiree or shoots Carolyn again when she's on her hands and knees, and walks up to her, stands over her, makes eye contact with her, and shoots her in the back of the head.

"*Intent to kill, ladies and gentlemen, when you're that close, you can't have any other intent. Your intent is to kill. And when you aim for a vital part of the body, your intent is to kill.* You can also infer his intent to kill from the fact that he fled the scene without rendering aid to his victims. Now, I know that sounds

silly, but if this was an accidental shooting or a reckless shooting, you would expect the person to stop and render aid: Oh, my God, I can't believe I just shot you. I'm so sorry. Let me call an ambulance. No, that wasn't the case here. Three separate targets, three separate human targets. Two of whom were shot twice, and because this was a revolver, required five separate trigger pulls. One, two, three, four, five. Five separate acts by the defendant were required to cause these injuries. And he didn't stand—he was standing still when he shot [L]. He had to move toward his other two targets to shoot them. No accident. No reckless conduct. Intentional, purposeful, planned conduct." (Emphasis added.)

The defendant's focus on the emphasized language misrepresents the prosecutor's argument. Rather than relying solely on the defendant's use of a gun to argue that the jury could infer that his intent was to kill, the prosecutor outlined multiple facts from which the jury could draw that inference: he brought the gun with him; he hid the gun in his clothing; he waited until L was in a vulnerable position before pulling the gun out of his pocket and shooting; he aimed for the head; he shot two of the victims twice; and he fled the scene without rendering aid. The prosecutor's argument merely summarized the evidence that supported the state's case—that the defendant intended to kill all three victims. By focusing only on the highlighted language, the defendant ignores the remaining remarks, which clarify that the prosecutor was merely summarizing all of the pieces of evidence from which the jury could infer intent, including evidence that he fired a gun at each of the victims from close range. Viewed in context, the remarks were not improper.

The defendant also claims that in the prosecutor's remarks on intent, she used an example that improperly diverted the jury from the real issue, whether the defen-

dant intended to kill the victims, and suggested that the jury could find the intent element satisfied if it found that the defendant intended to shoot the victims. The defendant cites to the following remarks: "If I walk over and pick up this glass and take a drink of water, you can all infer that my intention was to take a drink of water. I could have said, I'm going to drink water now, and taken a drink, but you infer it from my conduct. That is the way we do things in life. None of us can see inside someone's brain. That is the way you infer someone's conduct. And that is the jury's job. You are supposed to make reasonable inferences and infer what his conduct was at the time of the crimes."

Again, we consider the remarks in the context of the entirety of the prosecutor's remarks on intent. The example the prosecutor used—of inferring from her act of drinking water that she intended to drink water—was simply to illustrate to the jurors the general principle that intent may be inferred from conduct. That principle is one that is well established. See, e.g., *State* v. *Hedge*, 297 Conn. 621, 657, 1 A.3d 1051 (2010) ("[D]irect evidence of the accused's state of mind is rarely available. . . . Therefore, intent is often inferred from conduct . . . and from the cumulative effect of the circumstantial evidence and the rational inferences drawn therefrom." [Internal quotation marks omitted.]) The remarks were not improper.

B

Invitations to Jury To Draw Speculative Inferences

The defendant next claims that the prosecutor improperly urged the jury to draw speculative inferences for which, the defendant claims, there was no support in the record. The defendant points to several instances of this alleged impropriety: a reference to "incriminating" physical evidence; speculation as to whether the defendant believed he could trust those he

sought out after the shooting; and speculation as to both his purpose in taking his son to the hospital and his reason for leaving the hospital before J arrived.[31] The state responds that these arguments properly urged the jury to draw inferences from the evidence in the record. We agree with the state.

The defendant claims that the following statement improperly constituted speculation regarding the existence of "incriminating" physical evidence that had not been presented to the jury. Specifically, the defendant relies on the prosecutor's statement that the reason that the defendant had gone to Cortez' home after the shooting and burned his clothing was in order to "get rid of his clothing, which, obviously, must have had incriminating evidence on it . . . ." Defense counsel objected to the remark on the ground that there was no evidence in the record that the police had recovered any incriminating evidence from the remnants of the defendant's burned clothing. We agree with the prosecutor's response, that the jury reasonably could infer the defendant's state of mind from his actions, namely, that he desired to destroy any incriminating evidence. The remark did not constitute improper speculation or reference to facts not in evidence.

[31] The defendant also takes issue with the prosecutor's response, in her rebuttal, to defense counsel's remarks in closing argument that suggested that Desiree had fallen to the ground when she sustained the gunshot wound to her chin, and, therefore, she was already dead when he shot her the second time. This argument was in support of the defendant's theory that he did not have the requisite intent to kill when he fired the first shot, which he claims killed Desiree, and he cannot be held liable for having that intent when he fired the second shot because she was already dead at that point. First, as we explain in footnote 20 of this opinion, we conclude that the defendant's intent at the time that he fired the first shot may be inferred from the fact that he shot her twice. Accordingly, the question of which shot killed her was not relevant to his intent. Second, the prosecutor did not speculate but merely stated that the evidence was inconclusive as to which shot killed Desiree, and that the answer to the question did not have any bearing on the defendant's intent.

The defendant also claims that the prosecutor improperly speculated regarding possible explanations for the defendant's observed, strange facial expressions after the shooting, as testified to by various witnesses, including Cortez. Specifically, the prosecutor addressed Cortez' testimony that the defendant's eyes were "wide open" and "staring." The prosecutor suggested that the jurors could ask themselves "whether this look reflected whether or not he was trying to decide whether or not to trust her enough to tell her what he [had] done." A reasonable reading of the prosecutor's remarks is that she was offering the jurors one possible reasonable inference that they could draw from the circumstances—that the defendant was staring at Cortez because he was trying to determine whether he could trust her. Defense counsel offered a different explanation in his closing argument, premised on a different set of inferences: the defendant's facial expressions were a sign of his extreme emotional disturbance. The state reasonably and properly presented alternative inferences that the jury could draw from that testimony.

We similarly conclude that the prosecutor's statements regarding the defendant's possible reasons for taking his son to the hospital with him after the shooting, and for leaving before J arrived, were not improper. First, regarding the defendant's reason for going to the hospital, the prosecutor offered the following: "Why do you think that is, ladies and gentlemen? Because he's there to check on the status of his victims to see if they're dead or alive." The prosecutor's remark was supported by evidence in the record—Bolling testified that the defendant had told her that before he went to her house, he had gone to the hospital to see if "whoever" he had shot was dead. The argument properly asked the jury to draw an inference from evidence that was in the record. Second, as to the defendant's reason for leaving the area outside the emergency department

entrance before J arrived, the prosecutor offered this possible explanation for the jury's consideration: "Did he get nervous because they took too long? Did a police officer happen by? Did he overhear some conversation from people in the emergency room that would have led him to believe . . . ." Once again, the prosecutor's remarks suggested reasonable inferences that the jury properly could draw from the evidence, namely, that having shot the three victims, the defendant understandably would be anxious about the possibility of being caught while he was at the hospital where he believed that at least one, and perhaps more, of the victims had been taken. The remarks were not improper.

C

Prosecutor's Suggestion that Disputed Matters Were Resolved and Opinion Regarding Defendant's Guilt and Credibility of Witnesses

The defendant next claims that the prosecutor improperly suggested that certain disputed facts had been resolved and also expressed her opinion as to his guilt and the credibility of the state's witnesses. Specifically, the defendant claims that the prosecutor improperly used the phrases "you know" and "we know" to introduce the state's version of the evidence, vouched for the credibility of Diana Thomas by adopting her account of events, despite the fact that Thomas' testimony conflicted with that of other witnesses to the shooting, and referred to the defendant as a murderer and to the shooting as murders.[32]

[32] The defendant also takes issue with the prosecutor's statement in closing argument that Desiree likely put her hand up in front of her as the defendant shot her the first time. The defendant claims this statement referred to facts not in evidence. As we explained in part VII of this opinion, that fact was in evidence. Carver, the state's expert, testified that the likely trajectory of the first bullet fired at Desiree was through her forearm, which she was likely holding out in front of her, then her breast, and finally her chin.

The defendant identifies multiple instances in which the prosecutor used the phrases "we know" and "you know" during her closing argument. Without providing any analysis of the specific context and circumstances in which the prosecutor used these phrases, the defendant contends that their use was improper because those phrases conveyed the opinion that the matter was undisputed. The defendant suggests that these phrases are categorically improper and effectively suggests that we should adopt a per se rule that their usage establishes prosecutorial impropriety. We disagree. As the state points out, with one exception, the prosecutor used these phrases to introduce her discussion of specific evidence for the jury's consideration. For example, when discussing the defendant's use of the gun, the prosecutor stated: "We know he had it with him at the moment in time when he was talking to [L] and he had it concealed . . . in his clothing. And we know that he had with him enough ammunition to reload. And we know that the gun was fully loaded initially, because he fired five times without having to reload." The prosecutor merely used the phrases to introduce her statements marshaling the evidence for the jury. Used in this manner, the phrases were not improper.

The defendant also claims that the prosecutor improperly vouched for Thomas by summarizing her account of what Thomas observed on the night of the shooting. Specifically, Thomas was the only witness who testified that the defendant shook Carolyn after he shot her the second time. The prosecutor stated: "She's on her hands and knees crawling into the door at the time, and he puts the gun to the back of her head and kills her. He then shook her. That is the testimony of Diana Thomas. He shook her. He's only shaking her for one reason; to see if she was dead. He wasn't shaking her to say, are you all right? He's shaking her to see if she is dead. Carolyn is playing dead." The defendant

suggests that it was improper for the prosecutor to recount Thomas' recollection that she saw the defendant shake Carolyn because Carolyn did not claim that he had shaken her. The prosecutor is not required to limit her argument to the testimony that favors the defendant or to testimony that is undisputed. The prosecutor was simply marshaling the evidence, and her statements were not improper.

The defendant next points to the prosecutor's statement during rebuttal: "So, ladies and gentlemen, you have all those things to look at. Fleeing the scene, destroying evidence, checking on the status of his victims, [to] see if they're dead or alive—oh, and by the way, [defense counsel] says, well, why would he take that risk? Murderers take risks, ladies and gentlemen. He needed to know if these people were going to be able to be sticking around to be witnesses or whether he had successfully accomplished his task. Murderers take risks."

The defendant claims that these remarks improperly characterized him as a murderer, despite the fact that he had not yet been convicted. He contends that the stigma is significant because he had asserted an affirmative defense of extreme emotional disturbance, which, if established, would have resulted in a conviction of manslaughter rather than capital felony.

This court repeatedly has held comments such as these to be improper. We have explained: "It is no part of a [prosecutor's] duty, and it is not his right, to stigmatize a defendant. He has a right to argue that the evidence proves the defendant guilty as charged in the indictment, but for the [prosecutor] himself to characterize the defendant as a cold-blooded killer is something quite different. No [defendant] on trial for murder can be officially characterized as a murderer or as a cold-blooded killer, until he is adjudged guilty of murder

or pleads guilty to that charge." (Internal quotation marks omitted.) *State* v. *Thompson*, 266 Conn. 440, 472, 832 A.2d 626 (2003); see also *State* v. *Couture*, 194 Conn. 530, 561–64, 482 A.2d 300 (1984) (prosecutor's remarks characterizing defendants as " 'murderous fiends' " and " 'utterly merciless killers' " were improper), cert. denied, 469 U.S. 1192, 105 S. Ct. 967, 83 L. Ed. 2d 971 (1985).

Even if the prosecutor's comments were improper, the defendant would not be able to establish prejudice. The evidence that the defendant shot and killed L and Desiree was overwhelming. By contrast, as we explain in part XIII of this opinion, the evidence that the defendant offered in support of his affirmative defense of extreme emotional disturbance was weak, at best. Accordingly, this claim fails.

D

Prosecutor's Comment on Defendant's Failure To Testify

The defendant next claims that the prosecutor improperly commented on his failure to testify when she argued in her rebuttal that he had failed to prove his affirmative defense of extreme emotional disturbance. The defendant claims that the same remarks also improperly suggested that the jury, in determining whether he had met his burden of proving extreme emotional disturbance, was permitted to consider only evidence offered by the defense. Specifically, the prosecutor pointed out that the defense had failed to offer any evidence that "[the defendant] had ever previously been prohibited from having contact with his son. . . . They provided you with no information indicating he even wanted to have contact with his son. They provided you with no information as to how often he ever visited his son, if at all. . . . And we know that when he got his protective order, he certainly didn't make any complaints to the judge, so you have no information

telling you that this was an extremely unusual and overwhelming state." Nothing in these remarks constitutes a comment—even indirectly—on the defendant's failure to testify. The prosecutor's remarks simply pointed out to the jury gaps in the defendant's case as to his affirmative defense of extreme emotional disturbance, which he bore the burden to prove. For the same reason, we disagree with the defendant that the prosecutor's remarks suggested to the jury that it was limited to evidence offered by the defense in evaluating the defendant's extreme emotional disturbance defense. The mere fact that the state pointed to the defendant's failure to close gaps in the evidence does not amount to an improper suggestion that the jury could not consider evidence that had been presented by the state. The remarks focused on the failure of the defendant to present evidence regarding what had caused the extreme emotional disturbance and, therefore, were not improper.[33]

## XV

## DEFENSE COUNSEL CONFLICT OF INTEREST

The defendant seeks *Golding* review of his claim that the trial court improperly failed to make any inquiry

[33] The defendant also claims that the prosecutor improperly referred to facts not in evidence in a misleading manner. During his closing argument, in support of the defendant's defense of extreme emotional disturbance, defense counsel referred to the protective order that was issued as a result of the defendant's arrest two days prior to the shooting. He also referenced a previously issued protective order, one that had not been introduced into evidence, for the proposition that the relationship between the defendant and L "had issues going on." At that point, the prosecutor objected, arguing: "There was no testimony indicating that protective order was issued [as] to [L]. That could be involving a totally different person." The defendant now claims that it was improper for the prosecutor to suggest in her objection that the defendant could have had a protective order issued against him as to another, unidentified person. Even if we were to conclude that the prosecutor's comment was improper, it was invited by defense counsel's reference to facts not in evidence. The prosecutor's remark, moreover, merely stated, accurately, that there had been no testimony that the protective order related to L.

into whether his right to counsel was jeopardized by a potential conflict of interest. The defendant claims that his interests were in conflict with the interests of another criminal defendant, Troy Westberry, who was represented by the Hartford public defender's office, which is where Smith, one of the defendant's attorneys, worked. The defendant argues, therefore, that the trial court should have inquired regarding any ongoing duty that Smith owed to Westberry that potentially could conflict with the duty that Smith owed to the defendant. Because the defendant has failed to present an adequate record for review, his claim fails on the first prong of *Golding*. See *State* v. *Golding*, supra, 213 Conn. 239.

The following additional facts are relevant to our resolution of this claim. In May, 2000, the defendant testified as an eyewitness for the state in the murder prosecution of Westberry for a drive-by shooting on Albany Avenue in Hartford. The prosecutor in that case was Vicki Melchiorre, who was lead counsel for the state in the present case. On January 5, 2004, the defendant filed a motion to disqualify Melchiorre and the entire Hartford Office of the State's Attorney from prosecuting the present case.[34] In that motion, the defendant argued that Melchiorre was a potential mitigation witness in the penalty phase because she would be able to testify as to the defendant's cooperation in the Westberry trial. The defendant raised two additional reasons in support of his claim that Melchiorre should be disqualified. Specifically, he stated that, during the Westberry trial, Melchiorre held meetings with both the defendant and L at the same time, despite having actual or constructive knowledge of a protective order barring the defendant from having contact with L. The defen-

[34] The defendant has appealed from the trial court's denial of his motion to disqualify the prosecutor. Because, however, the defendant's claim is that the court's refusal to disqualify the prosecutor relates to the penalty phase, we do not address that claim. See part I of this opinion.

dant also contended that Melchiorre was biased against him as a result of personal knowledge that she gained about him during the Westberry trial.

During the hearing on the motion, the court gave the defendant the opportunity to make an offer of proof in support of his claim that Melchiorre should be disqualified. In response, the defendant asserted that he needed information from Melchiorre, such as the details of the housing that had been provided to him after the Westberry trial as part of the witness protection and relocation services and the number of meetings with Melchiorre at which L was present with the defendant. When the court inquired in what capacity the defendant sought to have Melchiorre testify for the defense, the defendant responded that she would be able to offer mitigation evidence by testifying as to his cooperation in the Westberry case. The trial court denied the motion to disqualify on the basis of its conclusion that the defendant had failed to demonstrate a compelling need to place Melchiorre on the witness stand.

The defendant claims that the information that he presented during the hearing on the motion to disqualify Melchiorre should have alerted the trial court of the need to inquire as to whether Smith owed conflicting duties to Westberry and the defendant. The defendant claims that, if the court had so inquired, it would have discovered that Smith was an assistant public defender with the Hartford public defender's office, both at the time that the defendant testified at the Westberry trial on May 11, 2000, and during the course of his representation of the defendant. The defendant asserts that the court also would have discovered that Westberry was represented by an assistant public defender, Kevin Barrs, whose trial strategy included impeaching the defendant's credibility. Although the defendant originally claimed that the record demonstrated that Barrs was a member of the Hartford public defender's office,

he later conceded in his reply brief that the record demonstrates only that Barrs was an assistant public defender who appeared in the case, which was being prosecuted in the Hartford judicial district. The defendant suggests that we may infer from Barrs' appearance in the case that he worked with the Hartford public defender's office. The state, however, points to evidence in the record that demonstrates that, at least at the time of the defendant's trial, Barrs was with the public defender's office in New London. The record, therefore, is unclear as to whether—and if so, when—Barrs was a member of the Hartford public defender's office. The record also reflects that Westberry's trial occurred in 2000. Westberry's direct appeal was rejected by the Appellate Court before the commencement of the defendant's case. See *State* v. *Westberry*, 68 Conn. App. 622, 792 A.2d 154, cert. denied, 260 Conn. 923, 797 A.2d 519 (2002). Finally, although the record reflects that Westberry filed a habeas petition, nothing in the record confirms whether the Hartford public defender's office represented Westberry in that habeas action.

The defendant's claim that Smith had a conflict of interest rests on the contention that Smith owed an ongoing duty to Westberry on the basis that Westberry was represented by the Hartford public defender's office, where Smith worked. Because the defendant has failed to point to evidence in the record that conclusively establishes that Westberry was represented by the Hartford public defender's office at any time, and, particularly, at the time of the defendant's trial, he has failed to present an adequate record for review, and his claim fails on the first prong of *Golding*. See *State* v. *Golding*, supra, 213 Conn. 239.[35]

[35] The defendant also alleges that the trial judge's actual and apparent bias and inappropriate behavior required him to recuse himself sua sponte and that the failure to do so denied the defendant of due process. Virtually all of the defendant's claims are predicated on the trial judge's alleged bias and inappropriate behavior during the penalty phase. As we have explained

## XVI

## CUMULATIVE ERROR

Finally, we observe that it is unnecessary to address the defendant's claim that this court should adopt the federal cumulative error rule. We recently explained that doctrine, observing that "[f]ederal case law in which the cumulative unfairness doctrine . . . has required reversal of a conviction essentially seems to fall into one or more of the following categories: (1) the errors directly related to and impacted an identified right essential to a fair trial, i.e., the right to a presumption of innocence or the right to present witnesses in one's own defense; (2) at least one of the errors was so significant as to render it highly doubtful that the defendant had received a fair trial and the remaining errors created the additional doubt necessary to establish that there was serious doubt about the fairness of the trial, which is necessary to reverse a conviction; or (3) the errors were pervasive throughout the trial." (Citation omitted; internal quotation marks omitted.) *Hinds* v. *Commissioner of Correction*, 321 Conn. 56, 95, 136 A.3d 596 (2016). In the present case, just as in *Hinds*, we conclude that, "even if we were to recognize the cumulative error doctrine as articulated in the federal courts . . . the trial improprieties in the present case would not justify relief under that doctrine." Id.

The appeal is dismissed with respect to the defendant's claims regarding the penalty phase and the sentence of death; the judgment is affirmed in all other respects.

In this opinion the other justices concurred.

in part I of this opinion, the defendant's challenges to the penalty phase are not ripe, and we do not address them. To the extent that the defendant's brief may be construed also to allege that judicial bias infected the guilt phase, we deem that issue to be inadequately briefed and decline to address it.

# STATE OF CONNECTICUT *v.* ROBERT CUSHARD (SC 19708)

Palmer, McDonald, Robinson, D'Auria and Vertefeuille, Js.

*Syllabus*

Convicted of the crimes of robbery in the first degree, assault in the first degree, and burglary in the first degree, the defendant appealed to the Appellate Court, claiming that, because his initial waiver of the right to counsel was not knowing and voluntary, he was deprived of his right to counsel under the sixth amendment to the federal constitution and, consequently, was entitled to automatic reversal of his judgment of conviction, notwithstanding a subsequent, valid waiver of the right to counsel. In October, 2012, the trial court, after canvassing the defendant, granted his motion to represent himself. At the next court date, the defendant claimed that he had not received all discovery materials from the state and, subsequently, sent a letter to the prosecutor asking for assistance obtaining certain records. During his next court appearance, which concerned the letter, the trial court denied the defendant's request to have the public defender assist him in obtaining the records because the defendant had elected to represent himself. During that same court appearance, the court also granted the state's motion to take a biological sample from the defendant for DNA testing. In February, 2013, prior to trial, the court conducted a second, more thorough canvass concerning the defendant's decision to represent himself. Following that canvass, the defendant reiterated his desire to represent himself, and the court found that the defendant had knowingly and voluntarily waived his right to counsel. On appeal from the judgment of conviction, the Appellate Court agreed with the defendant that the October, 2012 canvass was inadequate and that the trial court had abused its discretion in allowing him to represent himself. The Appellate Court concluded, however, that the initial, inadequate waiver of the assistance of counsel was subject to a harmless error analysis and that the lack of counsel between the initial waiver and the second waiver, which the defendant did not contest the validity of, was harmless beyond a reasonable doubt. Accordingly, the Appellate Court affirmed the judgment of the trial court. On the granting of certification, the defendant appealed to this court. *Held* that, even if the defendant's initial waiver of the right to counsel following the October, 2012 canvass was inadequate, the Appellate Court properly applied harmless error review to the defendant's claim and correctly concluded that any error by the trial court was harmless beyond a reasonable doubt in light of the defendant's adequate waiver following the February, 2013 canvass: there was no merit to the defendant's claim that reversal is always required when there has been an inadequate waiver of the right to counsel, as there is a critical distinction between

the total deprivation of counsel at trial and the deprivation of counsel during pretrial proceedings, a reviewing court can focus its analysis concerning the proper remedy when there is a subsequent, valid waiver by determining the impact on the trial of the period during which the defendant had not validly waived his right to counsel, and the defendant's approach would prevent the trial court from ever remedying an earlier, inadequate waiver; furthermore, the defendant's lack of counsel from October, 2012 to February, 2013, was not structural error that required reversal without a more detailed analysis of prejudice, as neither the decisions that the defendant or the trial court made in that time nor the lack of counsel's assistance in preparing for trial necessarily rendered his trial a fundamentally unfair or unreliable method for determining guilt, and the impact on the trial due to the lack of counsel's assistance during that time could be determined from a review of the record; moreover, the defendant's lack of counsel between October, 2012 and February, 2013, was harmless beyond a reasonable doubt, as the court's few rulings on motions during that time did not contribute to the verdict given that there was no evidence that the state failed to meet its discovery obligations and no DNA evidence was introduced at trial, and any harm resulting from the lack of counsel for trial preparation or the failure to obtain evidence for use at trial was attributable to the defendant's decision in February, 2013, to continue representing himself, despite being fully warned of the dangers of doing so.

Argued October 18, 2017—officially released April 17, 2018

*Procedural History*

Substitute information charging the defendant with one count of the crime of assault in the first degree and two counts each of the crimes of robbery in the first degree and burglary in the first degree, brought to the Superior Court in the judicial district of Litchfield, where the court, *Ginocchio*, *J.*, granted the defendant's motion to represent himself; thereafter, the case was tried to the jury; verdict and judgment of guilty of one count of assault in the first degree, two counts of robbery in the first degree, and one count of burglary in the first degree, from which the defendant appealed to the Appellate Court, *Lavine*, *Beach* and *Mihalakos*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

*Daniel J. Krisch*, assigned counsel, for the appellant (defendant).

*James M. Ralls*, assistant state's attorney, with whom, on the brief, were *David S. Shepack*, state's attorney, and *Dawn Gallo*, supervisory assistant state's attorney, for the appellee (state).

*Opinion*

D'AURIA, J. In this certified appeal, we consider whether the defendant is entitled to a new trial following an allegedly inadequate waiver of the right to counsel. The defendant, Robert Cushard, was charged with crimes stemming from the robbery of an antiques dealer in New Hartford. Several months before his trial, the defendant moved to discharge his appointed public defender and to represent himself. The trial court granted the motion after canvassing the defendant about his decision. About four months later, the trial court canvassed the defendant a second time about whether he wanted to represent himself, and the defendant maintained that he did. After a trial, a jury found him guilty of certain crimes in connection with the robbery, and the trial court rendered judgment consistent with the verdict.

The defendant appealed from the judgment of conviction to the Appellate Court, claiming in part that his initial waiver of the right to counsel was not knowing and voluntary because the first canvass was inadequate and that he was thus deprived of his sixth amendment right to counsel. He argued that a new trial was mandated as a remedy for this alleged sixth amendment violation without the need to show any harm. The Appellate Court agreed that the first canvass was deficient but declined to grant a new trial. *State* v. *Cushard*, 164 Conn. App. 832, 840, 137 A.3d 926 (2016). Instead, the Appellate Court concluded that the error in the first canvass was subject to harmless error analysis. Id., 855.

According to that court, reversing the judgment was unnecessary because the defendant's lack of counsel before trial was harmless inasmuch as he was canvassed a second time, before trial, and maintained his choice to represent himself; therefore, the defendant had failed to identify any harm flowing from his earlier, inadequate waiver of the right to counsel that rendered his trial fundamentally unfair. Id., 855–57.

We do not consider whether the defendant had knowingly and voluntarily waived the right to counsel after the first canvass because we agree with the Appellate Court that any error in the court's acceptance of his waiver of the right to counsel following that canvass was subject to harmless error review and was harmless beyond a reasonable doubt as a result of the second, adequate canvass. We therefore affirm the judgment of the Appellate Court.

The record contains the following facts, which the jury reasonably could have found, and additional procedural history. The robbery at issue occurred on August 2, 2011. The defendant had arranged to sell some items to the victim, an antiques dealer with whom he had previously done business. Shortly after arriving at the dealer's store, the defendant grabbed a wrench that was in the store, hit the dealer over the head, and threatened to stab him with a sharp object (apparently an awl). The defendant demanded money from the dealer, who reached into his pocket and handed the defendant about $600 to $800 in cash, along with his driver's license and credit cards. The defendant took the money and fled the store. The dealer, bleeding and dizzy from the blow to the head, was taken to the hospital for treatment. The attack caused him to permanently lose all hearing in his right ear and partial hearing in his left ear. He also has difficulty with his balance and has lost much of his senses of smell and taste.

Two days after the robbery, on August 4, 2011, the defendant was arrested and charged in connection with the crime. He was arraigned the following day. During the arraignment, the court appointed Christopher Cosgrove, a public defender, to represent the defendant. The state summarized the factual basis for the charges, and the trial court set bond. The defendant was unable to post the bond, so he remained incarcerated.

Several months later, in December, 2011, Cosgrove moved for a competency evaluation of the defendant; see General Statutes § 54-56d; explaining that his interactions with the defendant led him to question whether the defendant could participate in his own defense. The trial court granted the motion and ordered an evaluation. Following the evaluation results, the court found the defendant incompetent to stand trial but that he was capable of being restored to competency and ordered treatment. In April, 2012, the trial court heard evidence regarding the status of the defendant's competency and treatment. Relying on a follow-up evaluation of the defendant, the court determined that he was competent to stand trial and had simply been unwilling to cooperate in the evaluations and proceedings. The defendant does not challenge on appeal any finding related to his competency.

About five months after being declared competent, the defendant, on his own, filed two motions: a motion to represent himself and a motion for a speedy trial. The defendant attached two letters that Cosgrove had sent to him. Cosgrove's letters recounted that the defendant demanded to go to trial as quickly as possible but had refused to speak with Cosgrove about his case or to cooperate in preparing a defense. The letters also expressed Cosgrove's concern that the defendant's recalcitrance hindered Cosgrove's ability to prepare for trial, and they explained that the defendant could hire

a different attorney or represent himself if he did not want to work with Cosgrove.[1]

The trial court canvassed the defendant concerning his motion to represent himself on October 10, 2012 (October, 2012 canvass). When asked about the basis for his motion, the defendant replied that he wanted to go to trial, that Cosgrove did not know the "circumstances of [his] case," that he and Cosgrove had not discussed the case in the past year, and that he did not feel he was "getting a fair shake" and was being "bamboozled." When asked whether he wanted to respond, Cosgrove replied: "I think the motion . . . speaks for itself. I can tell you that [the defendant] has expressed this to me on a number of occasions, both in person and in writing." The trial court then questioned the defendant about his preparedness to represent himself, his understanding of the dangers of doing so, and his knowledge that he could keep Cosgrove as his counsel. The court also warned the defendant that he would be expected to question witnesses, know the law that applied to his case, and understand proper courtroom procedure. The state also described the

[1] The first letter from Cosgrove was dated in May, 2012, about one month after the defendant had been declared competent to stand trial. In the letter, Cosgrove explained that he understood that the defendant simply wanted to go to trial but that Cosgrove was unwilling to go forward until he could prepare for trial, noting that the defendant had refused to assist him. Cosgrove then advised the defendant: "You can always hire a private attorney, if you can afford one, or you could ask the judge to allow you to represent yourself, if that's what you want. He is not going to appoint you another public defender. I will try to visit you [next week], and you can decide how you want to handle that. There is an awful lot of work that goes into a trial, and we need to talk about it."

The second letter was dated one month later, in June, 2012. In this letter, Cosgrove expressed his understanding that the defendant desired to have a trial date but, again, reiterated that Cosgrove could not proceed to trial until he had prepared the case, which required the defendant's cooperation. Cosgrove then wrote: "You can, of course, ask the judge to let you represent yourself, if you insist on not talking to me, and he might even allow it. In the meantime, please try to work with me."

charges facing the defendant and the maximum punishment for each offense.

At the end of the canvass, the trial court granted the defendant's motion to represent himself. The court concluded, however, that the defendant's speedy trial motion was not ripe because he could not show that the state had failed to prosecute its case with reasonable diligence. The defendant replied that he wanted the trial to begin as soon as possible and did not want to come to court again for any purpose other than jury selection. The court set a new court date of January 8, 2013.

At the January 8, 2013 court date, the court held a hearing on the status of the case. The defendant claimed that he had not received all discovery materials from the state. The prosecutor explained that she had arranged to provide another set of materials to the defendant, but she also represented that the materials had previously been provided to Cosgrove. Cosgrove, who was present at the hearing but not representing the defendant, told the court that he had in turn given the defendant copies of the discovery materials with the contact information of the victim redacted, as required by a protective order. The defendant then explained that he had lost some of the materials when he was previously moved from one jail cell to another.

The parties were back in court on January 17, 2013, in response to a letter the defendant had sent to the prosecutor asking for help in preparing for trial. The defendant explained to the court that he wanted help gathering hospital records because the hospital had told him it would not release any records without a subpoena and suggested that he should contact an attorney to help him with that. The defendant reiterated that he did not want Cosgrove to represent him but asked that Cosgrove help him gather the records from the

hospital. The trial court replied that the defendant had elected to represent himself, that it was therefore his responsibility to know the proper procedure for issuing a subpoena, and that Cosgrove would not be appointed to simply track down documents for the defendant. The trial court also expressed a number of concerns about the defendant's decision to represent himself. Among other concerns, the court reminded the defendant that he had no experience in selecting a jury and that the consequences of a conviction could be serious. The court also reiterated to the defendant that presenting a case at a criminal trial was complex, required skill and knowledge of the relevant procedural rules, and that the defendant would be held to the same standard of any attorney presenting a case. The defendant was undeterred by the court's warnings and expressed confidence in his ability to represent himself. Also, during this hearing, the trial court granted a motion by the state to take a biological sample from the defendant for DNA testing.

At a pretrial court appearance a few weeks later, on February 6, 2013, the trial court conducted a second, more thorough canvass concerning the defendant's decision to represent himself (February, 2013 canvass). Throughout the February, 2013 canvass, the defendant reiterated his desire to represent himself despite the court's explanation of his right to have an attorney assist with his defense and the court's repeated warnings about the risks of self-representation. The court found that the defendant had knowingly and voluntarily waived his right to counsel and concluded that the defendant would be allowed to represent himself at trial. The defendant does not claim on appeal that his waiver after the February, 2013 canvass was inadequate.

The defendant represented himself at jury selection the following week and throughout the guilt phase of the trial, which took place the following month in

March, 2013. The jury found him guilty of one count each of assault in the first degree and burglary in the first degree, and two counts of robbery in the first degree.[2] The jury found the defendant not guilty of a separate count of burglary in the first degree. The defendant elected to have Cosgrove represent him during the sentencing proceedings. The trial court sentenced the defendant to a total effective sentence of thirty years incarceration followed by ten years of special parole.

On appeal, the Appellate Court affirmed the judgment of conviction. *State* v. *Cushard*, supra, 164 Conn. App. 834–35. Although the court concluded that the October, 2012 canvass was inadequate, it also concluded that this error was nevertheless subject to harmless error review. Id., 851–52. It determined that the defendant had, before his trial, validly waived his right to counsel after the February, 2013 canvass and that the defendant's lack of counsel between the October, 2012 canvass and the February, 2013 canvass was harmless beyond a reasonable doubt. Id., 856–57.

We thereafter granted the defendant's petition for certification to appeal from the judgment of the Appellate Court. *State* v. *Cushard*, 321 Conn. 926, 138 A.3d 286 (2016).

I

The sixth amendment to the United States constitution guarantees a criminal defendant facing incarceration the right to assistance of counsel for his defense. U.S. Const. amend VI; see *State* v. *Leconte*, 320 Conn. 500, 505 n.2, 131 A.3d 1132 (2016) (sixth amendment applicable to states through due process clause of four-

[2] Specifically, the defendant was convicted of one count each of assault in the first degree in violation of General Statutes § 53a-59 (a) (1) and burglary in the first degree in violation of General Statutes § 53a-101 (a) (2), and two counts of robbery in the first degree in violation of General Statutes § 53a-134 (a) (1) and (3).

teenth amendment to federal constitution). This right attaches after the initiation of criminal proceedings, such as the filing of the information charging the defendant with one or more crimes, and applies during any "critical stage" of the prosecution. (Internal quotation marks omitted.) *Kirby* v. *Illinois*, 406 U.S. 682, 689–90, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972).

The defendant also has a corresponding right to decline the assistance of counsel and instead represent himself. Although courts "harbor no illusions that a defendant's decision to waive counsel and [to] proceed [self-represented] generally will lead to anything other than disastrous consequences . . . [the] values informing our constitutional structure teach that although [a defendant] may conduct his own defense ultimately to his own detriment, his choice must be honored out of that respect for the individual which is the lifeblood of the law." (Internal quotation marks omitted.) *State* v. *Connor*, 292 Conn. 483, 507–508, 973 A.2d 627 (2009); see also *McKaskle* v. *Wiggins*, 465 U.S. 168, 174, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984) (right to self-representation recognizes autonomy of accused).

Because the rights to counsel and self-representation cannot be exercised at the same time, a defendant choosing to represent himself necessarily must waive his right to counsel. *Faretta* v. *California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); *State* v. *Henderson*, 307 Conn. 533, 546, 55 A.3d 291 (2012). Although "a defendant has an absolute right to self-representation, that right is not self-executing." (Internal quotation marks omitted.) *State* v. *Webb*, 238 Conn. 389, 429, 680 A.2d 147 (1996). Before a defendant may give up his right to counsel and represent himself, the trial court must be satisfied that his waiver of counsel is knowingly and voluntarily made. Id.; see also *Faretta* v. *California*, supra, 835; *State* v. *Henderson*, supra, 546. A waiver is validly made when the record estab-

lishes that the defendant is (1) aware of the right to counsel, including appointed counsel if he is indigent, (2) possesses the intellectual capacity to appreciate the consequences of his decision to represent himself, (3) comprehends the nature of the proceedings, the charges against him, and the possible range of punishments, if convicted, and (4) aware of the detriments of declining the help of an attorney. See Practice Book § 44-3; see also *State* v. *Connor*, supra, 292 Conn. 509 (noting that § 44-3 provides means of obtaining waiver of constitutional right to counsel but is not source of substantive rights and so its provisions must be interpreted coextensively with constitutional requirements). Although these requirements are met usually by a canvass of the defendant in open court, "the court may accept a waiver of the right to counsel without specifically questioning a defendant on each of the factors listed in . . . § [44-3] if the record is sufficient to establish that the waiver is voluntary and knowing." (Internal quotation marks omitted.) *State* v. *Connor*, supra, 510. The state bears the burden of demonstrating a valid waiver. Id., 508.

In the present case, the defendant claims that he had not validly waived his right to counsel after the October, 2012 canvass for three principal reasons. He claims that the record does not establish that he was aware of (1) his right to retain his own attorney if he did not want Cosgrove to represent him, (2) the nature of the charges against him or the essential factual circumstances underlying those charges, and (3) the mandatory minimum sentences accompanying certain charges. The Appellate Court agreed with the defendant and determined that the first waiver was deficient such that the trial court had abused its discretion by permitting the defendant to represent himself following the October, 2012 canvass. *State* v. *Cushard*, supra, 164 Conn. App. 845–52. The Appellate Court determined, however, that the trial court's error was reviewable for harmless error

and that it was harmless beyond a reasonable doubt. Id., 852.

We need not decide whether the defendant's waiver of counsel following the October, 2012 canvass was adequate. Upon reviewing the record, we are instead persuaded that, even if we assume the defendant's waiver following the October, 2012 canvass was inadequate, the Appellate Court properly applied harmless error review and concluded that any error by the trial court in accepting the defendant's waiver after the October, 2012 canvass was harmless beyond a reasonable doubt.

II

Because we assume that the trial court improperly granted the defendant's October, 2012 request to represent himself, we address the proper remedy. Most constitutional violations do not require automatic reversal of a conviction but must instead be reviewed to determine whether they were harmless. *Rose* v. *Clark*, 478 U.S. 570, 576–79, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986); *State* v. *Ayala*, 324 Conn. 571, 590, 153 A.3d 588 (2017). "[T]he [harmless error] doctrine is essential to preserve the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." (Internal quotation marks omitted.) *Arizona* v. *Fulminante*, 499 U.S. 279, 308, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). To find a constitutional violation harmless, the reviewing court must be convinced "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman* v. *California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

Some violations, however, so undermine the integrity of the proceedings that they cannot be reviewed for harmlessness. Id., 23 and n.8; *State* v. *Ayala*, supra, 324 Conn 591. These so-called structural errors tend to "by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless." *Satterwhite* v. *Texas*, 486 U.S. 249, 256, 108 S. Ct. 1792, 100 L. Ed. 2d 284 (1988). "These are structural defects in the constitution of the trial mechanism, which defy analysis by [harmless error] standards." (Internal quotation marks omitted.) *Arizona* v. *Fulminante*, supra, 499 U.S. 309. Instead, structural errors require reversal of the defendant's conviction and a new trial. See *Satterwhite* v. *Texas*, supra, 256–57. Constitutional violations have been found "to be structural, and thus subject to automatic reversal, only in a very limited class of cases." (Internal quotation marks omitted.) *Neder* v. *United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).

Determining whether an error is structural requires a review of the nature of the right at issue and the effect of its denial on the proceeding. An error is generally structural when it affects the "framework within which the trial proceeds"; *Arizona* v. *Fulminante*, supra, 499 U.S. 310; such that "the error always results in fundamental unfairness." *Weaver* v. *Massachusetts*, U.S. , 137 S. Ct. 1899, 1908, 198 L. Ed. 2d 420 (2017). In these instances of structural error, "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment [following such a trial] may be regarded as fundamentally fair." (Internal quotation marks omitted.) *Arizona* v. *Fulminante*, supra, 310. For instance, the failure to give a reasonable doubt instruction to jurors that comports with constitutional requirements renders the outcome of their deliberations entirely unre-

liable. *Sullivan* v. *Louisiana*, 508 U.S. 275, 281–82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

In addition, an error may be deemed structural when "the effects of the error are simply too hard to measure . . . ." *Weaver* v. *Massachusetts*, supra, 137 S. Ct. 1908. In these instances, the error so significantly impacts the proceeding that attempting to discern harm would require guesswork about how the trial may have proceeded in the absence of the error. Such a review would be entirely speculative. "Because the [state] will, as a result, find it almost impossible to show that the error was 'harmless beyond a reasonable doubt' . . . the efficiency costs of letting the [state] try to make the showing are unjustified." (Citation omitted.) Id.; see also *Satterwhite* v. *Texas*, supra, 486 U.S. 256 ("[s]ince the scope of a violation such as a deprivation of the right to conflict-free representation cannot be discerned from the record, any inquiry into its effect on the outcome of the case would be purely speculative"); *Holloway* v. *Arkansas*, 435 U.S. 475, 491, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978) ("an inquiry into a claim of harmless error . . . would require, unlike most cases, unguided speculation"); *State* v. *Lopez*, 271 Conn. 724, 738, 859 A.2d 898 (2004) (structural error is "necessarily unquantifiable and indeterminate" [internal quotation marks omitted]).

In contrast, an error is usually subject to harmless error review when it does not pervade or undermine the fairness of the trial. See *Arizona* v. *Fulminante*, supra, 499 U.S. 307–308. An error subject to review for harmlessness usually occurs during a distinct portion of the trial, and, thus, "its scope is readily identifiable." *Holloway* v. *Arkansas*, supra, 435 U.S. 490. "[T]he reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury." Id. "[I]f the [state] can prove beyond a reasonable

doubt that a constitutional error did not contribute to the verdict, the error is harmless and the verdict may stand." *Satterwhite* v. *Texas*, supra, 486 U.S. 256.

The denial of the right to counsel specifically can constitute structural error if the violation "pervade[s] the entire proceeding . . . ." Id. For example, denial of counsel for the entirety of the defendant's trial is considered structural error. See id., 257; *Gideon* v. *Wainwright*, 372 U.S. 335, 344–45, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); see also *Holloway* v. *Arkansas*, supra, 435 U.S. 489–91 (structural error found when appointed counsel had conflict of interest in representing codefendants throughout entire proceeding).

The denial of counsel only during pretrial proceedings may also rise to the level of structural error if the court or the defendant made decisions affecting the fundamental fairness of the defendant's trial. Thus, for instance, in *Hamilton* v. *Alabama*, 368 U.S. 52, 53–55, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961), the United States Supreme Court found the denial of counsel at an arraignment to be structural error when state law provided that defenses not pleaded at arraignment were irrevocably waived and could not be raised at trial. In *White* v. *Maryland*, 373 U.S. 59, 60, 83 S. Ct. 1050, 10 L. Ed. 2d 193 (1963), the Supreme Court also found structural error when a defendant did not have counsel at an arraignment and entered a guilty plea that was later revoked but was, as permitted by state law, used against the defendant at his trial. In these instances, "the deprivation of the right to counsel affected—and contaminated—the entire criminal proceeding." *Satterwhite* v. *Texas*, supra, 486 U.S. 257.

For most pretrial denial of counsel claims, however, an alleged violation is usually not considered structural and is subject to harmless error review. In those instances, courts may review the record to determine

whether anything occurred during the pretrial proceedings that ultimately harmed the defendant at trial. Courts have concluded, for instance, that the lack of counsel at arraignment is generally not a structural error when "the arraignment involved no necessary or inevitable impact on the subsequent criminal proceedings . . . ." *United States* v. *Owen*, 407 F.3d 222, 227 (4th Cir. 2005), cert. denied, 546 U.S. 1098, 126 S. Ct. 1026, 163 L. Ed. 2d 867 (2006).

Nor is reversal of a judgment of conviction mandated when counsel is denied during a pretrial hearing in which a victim identifies the defendant as her assailant because the extent of the harm is discrete and discernable from a review of the record. *Moore* v. *Illinois*, 434 U.S. 220, 232, 98 S. Ct. 458, 54 L. Ed. 2d 424 (1977). The denial of counsel during a preliminary hearing to determine whether the state had probable cause to hold the defendant for a crime also does not mandate reversal because the court can look at the record to determine whether anything transpired that impacted the outcome of the trial. See *Coleman* v. *Alabama*, 399 U.S. 1, 10–11, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (1970). According to the United States Supreme Court, "the lack of counsel at a preliminary hearing involves less danger to the integrity of the truth-determining process at trial than the omission of counsel at the trial itself or on appeal." (Internal quotation marks omitted.) *Adams* v. *Illinois*, 405 U.S. 278, 282–83, 92 S. Ct. 916, 31 L. Ed. 2d 202 (1972).

Following the United States Supreme Court's decision in *Coleman*, this court applied harmless error review in *State* v. *Brown*, 279 Conn. 493, 506–509, 903 A.2d 169 (2006), when the defendant was denied the assistance of counsel for a probable cause hearing. The defendant in *Brown* failed to retain an attorney by the prescribed date of the probable cause hearing. Id., 499. At the hearing, the court asked the defendant whether

he wanted to have an attorney appointed to represent him or to proceed without an attorney. Id., 500. The defendant agreed to go ahead unrepresented but was not otherwise warned or canvassed concerning his decision to represent himself. Id., 499. At the conclusion of the hearing, the trial court found probable cause to prosecute, and the defendant was later convicted after a trial. Id., 498.

On appeal to this court, the defendant claimed that allowing him to proceed self-represented violated his sixth amendment right to counsel and required reversal of his conviction, but this court disagreed. Id., 498–99. Although we agreed that the trial court's decision to allow the defendant to proceed unrepresented during the hearing violated his right to counsel, we nevertheless concluded that this was "the type of error that properly may be subject to harmless error analysis." Id., 509. This court concluded that the error was appropriate for harmless error review because any harm would be "discernible upon appeal"—a reviewing court could look to what transpired at the probable cause hearing and determine whether anything that did or did not occur had some irreparable and harmful impact on the defendant's trial. Id., 510–11. According to this court, the record would reveal possible prejudice at trial resulting from the probable cause hearing, "such as inadequate examination or cross-examination of witnesses at the probable cause hearing that resulted in [the] unavailability [of] evidence for use at trial, loss of an opportunity to impeach witnesses at trial, or the hindrance of full preparation or presentation of the defendant's case at trial." Id., 510. Looking to the record, this court determined that nothing during the probable cause hearing pervaded the entirety of the proceeding; nor did the hearing impact the trial in some indeterminate manner. Id., 510–11. Consequently, we concluded that harmless error review was appropriate and, upon

reviewing the record of the probable cause hearing and the trial, found that the lack of counsel was harmless. Id., 509, 513.

III

Turning to the present case, the defendant asserts that waiving his right to counsel after an inadequate canvass, under any circumstances, is not amenable to harmless error review and requires automatic reversal of his conviction and a new trial. We disagree. As in *Brown*, we examine the nature of the claimed constitutional error, which we have assumed for this analysis, to determine whether the error contaminated the fundamental fairness of the entire criminal proceedings and, therefore, is structural, or may properly be reviewed for harmless error. Because we determine initially that nothing transpired in the present case that created some "necessary or inevitable impact" on the fundamental fairness of the criminal trial; *United States* v. *Owen*, supra, 407 F.3d 227; we review the record to determine whether the constitutional error contributed to the outcome of the defendant's trial and conclude that the error was harmless beyond a reasonable doubt.

A

As an initial matter, we reject the defendant's threshold argument that reversal is always required any time there is an inadequate waiver of the right to counsel, irrespective of when the defendant was deprived of counsel and whether that deprivation impacted the trial. According to the defendant, "[n]o Connecticut case—before this one—has held that an inadequate canvass of the waiver of counsel was harmless error." He urges us to "reaffirm a bright line rule" that an invalid waiver of the right to counsel is a structural error that must always result in reversal and a new trial for the defendant. We disagree.

The defendant's argument contradicts our decision in *Brown*, which conducted a harmless error review following an invalid waiver of counsel for a pretrial hearing and concluded that the deprivation of counsel during the probable cause hearing in that case was harmless beyond a reasonable doubt. *State* v. *Brown*, supra, 279 Conn. 511–13; see also *Coleman* v. *Alabama*, supra, 399 U.S. 11 (remanding case for harmless error determination). The defendant's position fails to distinguish between the total deprivation of counsel at trial and the deprivation of counsel during pretrial proceedings—a distinction that, as we have already explained, is critical. Compare *Gideon* v. *Wainwright*, supra, 372 U.S. 344–45, with *Coleman* v. *Alabama*, supra, 10–11.

The defendant's argument that his conviction should be automatically reversed does not account for the impact that a subsequent, valid waiver of the right to counsel has on determining whether reversal is required. We agree that reversal is required when a defendant represents himself at trial after an invalid waiver and the trial court does *not* obtain a subsequent, valid waiver. See, e.g., *Gideon* v. *Wainwright*, supra, 372 U.S. 344. In that instance, the remedy of a new trial is required because a reviewing court cannot determine from the record whether the defendant knowingly and voluntarily proceeded without counsel during his trial. But there is no such ambiguity in the record about a defendant's decision to proceed to trial without counsel when the trial court has conducted a subsequent, intervening canvass and then the defendant validly waives his right to counsel. Reversal is not automatically required under those circumstances, and a reviewing court may instead focus its analysis concerning the proper remedy by determining the impact on the trial of the period during which the defendant had not validly waived his right to counsel. See *State* v. *Webb*, supra, 238 Conn. 431 (concluding that defendant's

first waiver of right to counsel was adequate but noting that "no conceivable harm resulted . . . prior to a more searching canvass and the reassertion of his waiver of counsel"); see also *People* v. *Crampe*, 17 N.Y.3d 469, 483, 957 N.E.2d 255, 932 N.Y.S.2d 765 (2011) (second canvass of defendant before trial following earlier, inadequate canvass at suppression hearing was sufficient to show "that [the] defendant's decision to defend himself *at trial* was knowing, voluntary and intelligent" [emphasis in original; internal quotation marks omitted]).

We are further persuaded that reversal is not *always* mandated in cases of an inadequate waiver of the right to counsel because of the incongruous relationship between the claimed error and the remedy demanded. Specifically, the defendant's claim of automatic structural error would mean that, under these circumstances, any trial following an inadequate canvass and waiver was doomed for reversal, notwithstanding that such a sanction cannot restore what the defendant claims he lost.

In the present case, the defendant might not have validly waived his right to counsel after the court's October, 2012 canvass, but, after the February, 2013 canvass, he persisted in asserting his right to represent himself and does not claim any error regarding either that later waiver or any other ruling at his trial. According to the defendant, however, the improper acceptance of a waiver after an invalid canvass is an error that may never be cured—either by a later canvass or by retaining counsel—and must result in reversal. Instead, he apparently claims that, in every instance of an inadequate waiver, the only solution would be to proceed with the defendant's trial and then, if it results in a conviction, reverse the judgment on appeal and remand the case for a new trial. The illogic of such a result itself defeats the defendant's argument. Because

any trial after an invalid canvass regarding the right to counsel would be destined for reversal on appeal and then a retrial, the defendant's proposed rule would turn the initial trial into a futile exercise. In fact, the defendant's proposed rule would prevent the trial court from ever identifying and remedying its earlier error, even if it recanvasses the defendant just hours after the initial, invalid canvass, leading to a result contrary to our decision in *Brown*, which applied harmless error review following an inadequate waiver. *State* v. *Brown*, supra, 279 Conn. 509–10; see also *State* v. *Webb*, supra, 238 Conn. 431 (concluding initial waiver of right to counsel was adequate, but noting that, if waiver was inadequate, there was "no conceivable harm" in "brief period" before second canvass and waiver). We perceive no cogent reason for disturbing our prior case law and adopting a rule mandating such a preordained waste of resources and delay in resolving a case.

We therefore reject the defendant's assertion that reversal is always required in cases of an inadequate waiver of the right to counsel. Rather, to determine if the error in the present case was structural, we must perform an initial review of the record to determine whether the absence of counsel had any impact on the subsequent trial that irretrievably eroded its fundamental fairness. See *United States* v. *Owen*, supra, 407 F.3d 227; *State* v. *Brown*, supra, 279 Conn. 509–11.

B

We therefore focus our initial review on the effect of the lack of counsel during the period in which the defendant had not adequately waived this right—the four months between the trial court's October, 2012 canvass and the February, 2013 canvass—to determine whether the alleged error was structural in this case or may be reviewed for harmlessness. See *State* v. *Brown*, supra, 279 Conn. 509–11. We conclude that the denial

of counsel during this period was not structural error because it did not infect and contaminate the entire criminal proceedings and may therefore be reviewed for harmlessness.

The present case does not fall into the category of sixth amendment violations, discussed previously, requiring reversal because of the total deprivation of counsel during trial. The defendant represented himself without a valid waiver only during the pretrial stage of the criminal proceedings between the October, 2012 canvass and the February, 2013 canvass. Prior to the October, 2012 canvass, the defendant was represented by Cosgrove. During the October, 2012 canvass, the defendant asserted his desire to represent himself, and we have presumed his waiver of the right to counsel following that canvass was not adequate. During the February, 2013 canvass, however, the defendant validly waived his right to counsel. Thus, although the defendant did not have counsel at his trial, that was a result of his own decision following the court's February, 2013 canvass. Although the defendant questions whether his waiver following the February, 2013 canvass can cure any harm from his earlier, invalid waiver, he makes no claim that his second waiver following the February, 2013 canvass was constitutionally inadequate or improperly deprived him of counsel at trial.

Nothing occurred during the period in which the defendant was unrepresented that necessarily rendered his trial a fundamentally unfair or unreliable method for determining guilt. During this period, the trial court held two pretrial hearings. Unlike the defendants in *Hamilton* and *White*, however, the defendant in the present case did not make any decisions that infected the entire trial, for example, by irrevocably waiving any defenses or making any irrevocable admissions of guilt. See *White* v. *Maryland*, supra, 373 U.S. 60; *Hamilton* v. *Alabama*, supra, 368 U.S. 55. Nor were any decisions

made by the trial court at these hearings that irreversibly impacted or undermined the fundamental fairness of the subsequent trial. Under these circumstances, the inadequate waiver did not amount to structural error. See *State* v. *Brown*, supra, 279 Conn. 509–11; see also *United States* v. *Owen*, supra, 407 F.3d 227. Instead, as in *Brown*, we may review the record of these hearings and the trial to determine whether anything transpired to harm the defendant and to contribute to the result at trial. Additionally, we may look to the record to determine whether having representation at those hearings might have prevented any harm that arose.

As for the defendant's concerns about the lack of counsel's assistance in preparing for trial generally—locating witnesses, obtaining additional discovery, filing motions, etc.—we are not persuaded that the lack of counsel's assistance for these tasks during the four months at issue inevitably pervaded and contaminated the fairness of "the entire criminal proceeding," such that reversal would be required without a harmless error analysis.[3] *Satterwhite* v. *Texas*, supra, 486 U.S. 257. Certainly, the defendant might have benefitted from assistance during these four months, but this was not the defendant's only opportunity for trial preparation. He was not required to accomplish his pretrial preparation entirely within this time period. These same activities could have otherwise been accomplished by the defendant, acting on his own or with the help of counsel, either before the defendant relinquished counsel in October, 2012 or after he was properly canvassed in February, 2013. Although the lack of counsel's assistance for trial preparation during these four months

[3] For the purposes of addressing the defendant's argument, we assume that the time between the two court hearings, when there were otherwise no court proceedings, constituted one of the "critical stages" of the prosecution, giving rise to the right to the assistance of counsel. (Internal quotation marks omitted.) *Maine* v. *Moulton*, 474 U.S. 159, 170, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985).

might have harmed the defendant's case, it did not do so in a manner that necessarily eroded the fairness of the entire criminal proceedings, including the trial. A review of the record will allow us to determine whether the defendant would have benefitted from having counsel during this period, whether a lack of counsel's assistance to prepare the case deprived the defendant of a meaningful opportunity to prepare his case, and whether this deprivation, or, instead, some intervening circumstance, contributed to the outcome of the trial.

The defendant argues that we should nevertheless deem the error in the present case structural because the harm resulting from the absence of counsel is too speculative for harmless error review. He asserts that counsel's absence "gives rise to myriad, unknowable harms . . . ." According to the defendant, an attorney representing him during the four months in question "might have filed unfiled motions, found unfound witnesses, obtained unobtained discovery, challenged unchallenged evidence, asked unasked questions, raised unraised defenses, and so on." Consequently, the defendant maintains that the lack of counsel potentially impacted the outcome of the trial in an unknowable way, undermining the fairness of his trial and turning any harmless error analysis into a wholly speculative inquiry.

We disagree, however, that these concerns alone elevate the error in the present case to the level of structural error. To the extent that the defendant speculates that counsel during the relevant time period might have located some evidence or raised arguments that are now irretrievably lost, his proposed remedy of a new trial will not resolve this concern. A new trial would not make irretrievable evidence retrievable once again, and the defendant has made no claim that this error requires a judgment of acquittal. In these circum-

stances, the remedy the defendant seeks would not alleviate the hypothetical harm he has claimed.

For all these reasons, we conclude that any error in the present case is not structural, requiring reversal without a more detailed analysis of prejudice. As a result, we will proceed to determine whether the state has established that any error was harmless.

C

Applying a harmless error analysis, we, like the Appellate Court, are persuaded "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman* v. *California*, supra, 386 U.S. 24; see *State* v. *Brown*, supra, 279 Conn. 513.

We first observe that the extent to which the verdict could be attributed to the defendant's self-representation at trial is not the result of his earlier, invalid waiver. Having been fully warned of the consequences of a conviction, the dangers of self-representation, and the benefits of having counsel, the defendant nevertheless made a knowing and voluntary choice to proceed to trial as his own representative after the February, 2013 canvass. His self-representation at trial, and any harm that flowed from that decision, thus resulted from his own voluntary actions.

We therefore look to whether the lack of counsel between the October, 2012 and February, 2013 canvasses contributed to the verdict against the defendant. We are persuaded that the lack of counsel was harmless beyond a reasonable doubt.

During this period, the trial court held two hearings. At the first hearing, on January 8, 2013, the parties and the court discussed the status of the state's production of discovery. The defendant also moved to recuse the trial judge, and the court denied that motion. A week and one-half later, on January 17, 2013, the trial court held another hearing in response to a letter the defen-

dant had sent to the prosecutor asking for help in obtaining materials from a hospital. The defendant asked that Cosgrove be appointed for the limited purpose of helping him subpoena hospital records. The trial court denied the request. The court explained that the defendant had elected to represent himself, and, as a result, it was his responsibility to learn the proper procedures for obtaining documents rather than using the public defender's office in piecemeal fashion. The trial court also questioned the defendant again about his choice to represent himself and further warned him of the dangers of doing so. The court then granted a request by the state to obtain a DNA sample from the defendant for testing against some of the objects allegedly used during the robbery.

Our review of the record satisfies us that these hearings did not contribute to the verdict. The trial court issued few rulings on motions, and none of those rulings was of significance to the subsequent trial. The trial court denied the defendant's motion to recuse, but there is no contention or indication that the motion otherwise should have been granted or that it might have been granted had counsel been representing the defendant. There is also no indication that the trial court harbored any bias against the defendant during the trial because of the motion. To the contrary, the record reflects that the trial court was concerned with protecting the defendant's rights and discouraged him from representing himself at trial because of the severe disadvantages of doing so.

The trial court also granted a motion to allow the state to collect a DNA sample from the defendant, but the state did not use DNA evidence against the defendant at his trial. The record establishes only that police sent the wrench and the sharp object used in the robbery for DNA testing, but the results were not entered into evidence. In fact, the defendant highlighted the

absence of any DNA evidence during his closing argument.

Besides these motions, the hearings also addressed discovery. The state indicated it had already produced discovery to Cosgrove and was reproducing discovery directly to the defendant. There is no indication that the state failed to meet its discovery obligations prior to trial. Nor is there any indication that the timing of discovery hindered the defendant's ability to present his case at trial. Presumably, if needed, the defendant could have requested more preparation time, but he insisted on proceeding to trial as quickly as possible, even after the February, 2013 canvass, during which the court further informed him of his rights and the dangers of presenting his own defense.

The defendant also asked the court to allow Cosgrove to assist him in obtaining records from third parties, and the court denied that request because the defendant had opted to represent himself. Although the defendant could have benefitted from counsel's assistance in subpoenaing documents if he had chosen to be represented by counsel, he nevertheless chose to forgo that assistance when he validly waived his right to counsel after the February, 2013 canvass. Notably, the defendant declined the assistance of counsel after the February, 2013 canvass despite having encountered difficulty in obtaining discovery and being made aware that Cosgrove could not assist him in obtaining evidence unless he opted for representation. Consequently, to the extent the defendant failed to obtain evidence in his favor for use at trial, this was ultimately attributable to his February, 2013 decision to represent himself.

The defendant also argues that, apart from these hearings, counsel could have assisted him during the four months at issue by filing additional motions as well as by conducting additional pretrial investigation and general trial preparation. We disagree that the defen-

dant's lack of counsel to perform these tasks during this period ultimately impacted the outcome of the trial. First, by the time of the October, 2012 canvass, Cosgrove had already filed a number of critical motions on the defendant's behalf, including motions to suppress evidence, for disclosures and discovery, for notice of any uncharged misconduct, and for a bill of particulars. The defendant himself filed an additional motion to suppress certain statements he gave to the police. The defendant has not identified any other motions that might have been filed during this period or areas of investigation he might have pursued if he had counsel during these four months. Second, it is unlikely that counsel would have been of much assistance to the defendant in either filing additional motions or preparing for trial during this period because the defendant previously had refused to cooperate with Cosgrove and expressed a desire to go to trial as quickly as possible, despite Cosgrove's protestations that the defendant's lack of cooperation left him unable to prepare for trial. Third, any motions not filed or investigation not conducted during this four month period could have been performed after the February, 2013 canvass had the defendant elected to have counsel assist him at that point. We emphasize again, however, that any harm resulting from the lack of counsel for trial preparation is attributable to the defendant's intervening decision to continue representing himself, despite being fully warned of the dangers of doing so.

For these reasons, we are convinced beyond a reasonable doubt that the lack of the assistance of counsel between October, 2012 and February, 2013, did not contribute to the verdict against the defendant, even if we assume the absence of counsel during this time resulted from a constitutionally inadequate waiver.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

# MEADOWBROOK CENTER, INC. *v.* ROBERT BUCHMAN (SC 19878)

McDonald, Robinson, D'Auria, Kahn and DiPentima, Js.

*Syllabus*

Pursuant to the rules of practice (§ 11-21), "[m]otions for attorney's fees shall be filed with the trial court within thirty days following the date on which the final judgment of the trial court was rendered."

The plaintiff nursing care facility sought to recover damages from the defendant for, inter alia, breach of contract. The trial court rendered judgment for the plaintiff, and the defendant appealed to the Appellate Court, which reversed the trial court's judgment and remanded the case with direction to render judgment for the defendant. Thirty-five days after the trial court rendered judgment as directed, the defendant filed a motion for a statutory (§ 42-150bb) award of attorney's fees, claiming that he had successfully defended an action based on a consumer contract providing for attorney's fees to a commercial party. The trial court denied the defendant's motion, concluding that it was untimely under Practice Book § 11-21. The defendant appealed from the trial court's denial of his motion to the Appellate Court, which concluded that the thirty day deadline set forth in § 11-21 was directory rather than mandatory in nature and, therefore, that the trial court improperly had failed to exercise its discretion to determine whether to permit the defendant's untimely filing. The Appellate Court reversed the trial court's denial of the defendant's motion for attorney's fees and remanded the case with direction to conduct a hearing on that motion. On the granting of certification, the plaintiff appealed. *Held*:

1. The Appellate Court properly construed the thirty day deadline set forth in Practice Book § 11-21 as a directory provision that afforded the trial court discretion to entertain the defendant's untimely motion for attorney's fees; the use of the word "shall" does not invariably create a plain and unambiguous mandatory duty, the thirty day deadline set forth in § 11-21 was directory in nature, as that rule did not specifically invalidate or otherwise penalize untimely motions and was phrased in affirmative terms, and depriving trial courts of discretion to forgive relatively minor or nonprejudicial delays, even when there is good cause and no prejudice to the nonmoving party, would raise the specter of abridging the legal right created by the legislature through § 42-150bb, especially in view of the fact that the legislature did not provide a time limitation in that statute.
2. The plaintiff could not prevail on its claim that, even if the trial court had discretion to entertain an untimely motion, the defendant's motion for attorney's fees was barred as a matter of law, and, accordingly, the

Appellate Court properly remanded the case to the trial court for a hearing on that motion; this court, having adopted the excusable neglect standard governing consideration of untimely filings in federal courts, determined that the trial court might reasonably exercise its discretion to consider the defendant's untimely motion for attorney's fees, as the plaintiff made no claim of prejudice or bad faith, the defendant's five day delay in filing was relatively minor, and the record revealed that the delay may have resulted from confusion following the Appellate Court's prior order remanding the case to the trial court with direction to render judgment for the defendant.

Argued November 17, 2017—officially released April 17, 2018

*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 Hartford, and tried to the court, *Hon. Robert J. Hale*, judge trial referee, who, exercising the powers of the Superior Court, rendered judgment in favor of the plaintiff, from which the defendant appealed to the Appellate Court, *Gruendel*, *Bear* and *Schaller*, *Js.*, which reversed the trial court's judgment and remanded the case with direction to render judgment in favor of the defendant; thereafter, the court, *Robaina*, *J.*, rendered judgment for the defendant; subsequently, the court, *Wahla*, *J.*, rendered judgment denying the defendant's motion for attorney's fees and costs, from which the defendant appealed to the Appellate Court, *Lavine*, *Mullins* and *Bishop*, *Js.*, which reversed the trial court's judgment and remanded the case for further proceedings, and the plaintiff, on the granting of certification, appealed to this court. *Affirmed.*

*Daniel J. Klau*, with whom was *Edward M. Rosenthal*, for the appellant (plaintiff).

*Juri E. Taalman*, with whom, on the brief, was *Timothy Brignole,* for the appellee (defendant).

*Opinion*

ROBINSON, J. The principal issue in this certified appeal is whether the thirty day deadline provided by Practice Book § 11-21,[1] which governs motions for attorney's fees, is directory rather than mandatory, thus affording a trial court discretion to entertain untimely motions. The plaintiff, Meadowbrook Center, Inc., a nursing facility, appeals, upon our grant of its petition for certification,[2] from the judgment of the Appellate Court reversing the judgment of the trial court, which denied as untimely a motion filed by the defendant, Robert Buchman, seeking an award of attorney's fees pursuant to General Statutes § 42-150bb.[3] *Meadowbrook*

[1] Practice Book § 11-21 provides: "Motions for attorney's fees shall be filed with the trial court within thirty days following the date on which the final judgment of the trial court was rendered. If appellate attorney's fees are sought, motions for such fees shall be filed with the trial court within thirty days following the date on which the appellate court or supreme court rendered its decision disposing of the underlying appeal. Nothing in this section shall be deemed to affect an award of attorney's fees assessed as a component of damages."

[2] We granted the plaintiff's petition for certification for appeal, limited to the following issue: "Did the Appellate Court properly rule that the time limitation . . . governing motions for attorney's fees [set forth] in Practice Book § 11-21 is directory and not mandatory?" *Meadowbrook Center, Inc.* v. *Buchman*, 324 Conn. 918, 154 A.3d 1007 (2017).

[3] General Statutes § 42-150bb provides: "Whenever any contract or lease entered into on or after October 1, 1979, to which a consumer is a party, provides for the attorney's fee of the commercial party to be paid by the consumer, an attorney's fee shall be awarded as a matter of law to the consumer who successfully prosecutes or defends an action or a counterclaim based upon the contract or lease. Except as hereinafter provided, the size of the attorney's fee awarded to the consumer shall be based as far as practicable upon the terms governing the size of the fee for the commercial party. No attorney's fee shall be awarded to a commercial party who is represented by its salaried employee. In any action in which the consumer is entitled to an attorney's fee under this section and in which the commercial party is represented by its salaried employee, the attorney's fee awarded to the consumer shall be in a reasonable amount regardless of the size of the fee provided in the contract or lease for either party. For the purposes of this section, 'commercial party' means the seller, creditor, lessor or assignee of any of them, and 'consumer' means the buyer, debtor, lessee or personal representative of any of them. The provisions of this section shall

*Center*, *Inc.* v. *Buchman*, 169 Conn. App. 527, 529, 151 A.3d 404 (2016). On appeal, the plaintiff claims that (1) the thirty day deadline provided by Practice Book § 11-21 is mandatory and that, therefore, the Appellate Court improperly concluded that the trial court was required to exercise discretion in deciding whether to entertain the defendant's untimely motion, and (2) even if the trial court had discretion to entertain an untimely motion for attorney's fees, the defendant's motion in the present case was barred as a matter of law. We disagree and, accordingly, affirm the judgment of the Appellate Court.

The Appellate Court's opinion sets forth the following undisputed facts and procedural history relevant to our consideration of the issues presented in this appeal. "The plaintiff . . . brought an action against the defendant based on contract and promissory estoppel relating to its care of the defendant's mother. The admission agreement executed by the plaintiff and the defendant, as a responsible party, contained a clause providing for the responsible party to pay the cost of collection, including reasonable attorney's fees, in the event an overdue account is referred to an agency or attorney for collection. Following a trial to the court, *Hon. Robert J. Hale*, judge trial referee, judgment was rendered for the plaintiff in the sum of $47,561.15 with attorney's fees to be decided postjudgment.

"On appeal, however, [the Appellate Court] reversed the judgment and remanded the case to the trial court with direction to render judgment in favor of the defendant. *Meadowbrook Center*, *Inc.* v. *Buchman*, 149 Conn. App. 177, 212, 90 A.3d 219 (2014). The order from [the Appellate Court] was dated April 8, 2014. Thereafter, on April 30, 2014, the court, *Robaina*, *J.*, rendered judg-

apply only to contracts or leases in which the money, property or service which is the subject of the transaction is primarily for personal, family or household purposes."

ment for the defendant. The defendant then submitted a bill of costs on May 16, 2014, and, on June 4, 2014, the thirty-fifth day after judgment, the defendant filed a motion for attorney's fees and costs. On January 29, 2015, the court, *Wahla*, *J.*, conducted a hearing on the defendant's motion in which he claimed attorney's fees of $74,918.70 and costs of $1337.38. On April 7, 2015, the court issued its decision denying the defendant's motion for attorney's fees on the basis that the motion was not timely. Rejecting the defendant's argument that attorney's fees pursuant to § 42-150bb are a component of damages and, therefore, not subject to the time limits of Practice Book § 11-21, the court stated: 'Because I conclude that attorney's fees were not a component of damages, the defendant's motion for attorney's fees and costs [is] not timely, hence I am constrained to agree with the plaintiff. The defendant's motion is hereby denied.'

"Following the court's ruling, the defendant filed a motion for reconsideration and reargument on April 17, 2015. In this motion, the defendant argued, inter alia, that the court incorrectly had failed to rule whether the time limit set forth in Practice Book § 11-21 is mandatory or directory. The defendant alleged that he had raised this issue in his memorandum of law in support of attorney's fees and at the hearing on his motion. In response, the plaintiff urged the court [not to] consider the defendant's motion as 'the defendant wants to rehash the same arguments that he already made which were unpersuasive.' By order dated May 12, 2015, Judge Wahla denied the defendant's motion for reconsideration and reargument without comment." *Meadowbrook Center*, *Inc.* v. *Buchman*, supra, 169 Conn. App. 529–30.

The defendant appealed from the judgment of the trial court denying his motion for attorney's fees to the Appellate Court, claiming that the deadline contained in Practice Book § 11-21 "was directory and, therefore,

the [trial] court should have exercised its discretion to permit a filing that was five days late" and that, ultimately, the trial court "should have awarded attorney's fees in light of the mandate of § 42-150bb and the fact that the defendant's delay in filing was reasonable and minimal." Id., 531. Guided by this court's interpretation of Practice Book § 2-47 (a), which concerns the scheduling of attorney grievance hearings, in *Statewide Grievance Committee* v. *Rozbicki*, 219 Conn. 473, 595 A.2d 819 (1991), cert. denied, 502 U.S. 1094, 112 S. Ct. 1170, 117 L. Ed. 2d 416 (1992), the Appellate Court determined that "the purpose of the timing provision in Practice Book § 11-21 is procedural and intended to facilitate the progress of the case since the timing of such a motion does not go to the essence of the right to reasonable attorney's fees. Second, the purpose of the timing provision in [Practice Book] § 11-21 is to avoid a long period of delay between judgment and a request for attorney's fees.

"In light of the public policy of § 42-150bb to balance the equities between commercial contractors and consumers, the mandate of the statute that attorney's fees be awarded to a consumer who successfully defends a consumer contract claim, we conclude that the timing provision of Practice Book § 11-21 is directory and not mandatory. To hold to the contrary would rigidly exalt form over substance and, in the case of a minor failure to adhere to the rule's timing requirement, would prevent the court from fulfilling the public policy driven mandate of the statute." (Footnote omitted.) *Meadowbrook Center, Inc.* v. *Buchman*, supra, 169 Conn. App. 538. The Appellate Court then concluded that the trial court had improperly failed to "exercise its discretion to determine whether strict adherence to the [thirty day deadline set forth in Practice Book § 11-21] would 'work surprise or injustice.' Practice Book § 1-8." *Meadowbrook Center, Inc.* v. *Buchman*, supra, 169 Conn.

App. 540. Accordingly, the Appellate Court reversed the judgment of the trial court and remanded the case "with direction to conduct a hearing on the defendant's motion for attorney's fees . . . ." Id. This certified appeal followed. See footnote 2 of this opinion.

On appeal, the plaintiff claims that (1) the Appellate Court improperly concluded that the thirty day deadline set forth in Practice Book § 11-21 is directory, and (2) even if that deadline is directory, remand to the trial court is not necessary in the present case because the defendant's untimely motion was barred as a matter of law.

I

We begin with the plaintiff's claim that the Appellate Court's interpretation of Practice Book § 11-21 as directory, thus affording trial judges discretion to entertain motions for attorney's fees filed beyond the thirty day deadline, is "incompatible with the plain meaning of the rule's text" and "contrary to the clear purpose" underlying its adoption by the judges of the Superior Court—namely, responding to "a troubling Appellate Court decision, which [had] held that a five month delay in filing a motion for attorney's fees was reasonable . . . ." See *Oakley* v. *Commission on Human Rights & Opportunities*, 38 Conn. App. 506, 516–18, 662 A.2d 137 (1995), aff'd, 237 Conn. 28, 675 A.2d 851 (1996). The plaintiff argues that the Appellate Court improperly followed *Statewide Grievance Committee* v. *Rozbicki*, supra, 219 Conn. 473, which had applied principles of statutory construction to a rule of practice, and contends that, "[i]n contrast to legislators, who occasionally use the terms 'shall' and 'may' loosely and in statutory contexts that justify interpreting 'shall' as directory, the judges of the Superior Court know the difference between 'shall' and 'may.' When they use the term 'shall' in [the rules of practice], they must be

presumed to use the term in its mandatory sense." The plaintiff emphasizes that a rule of practice setting a deadline for motions for attorney's fees pursuant to statutes that do not contain their own deadlines, such as § 42-150bb, would not undermine the purpose of such statutes. Finally, the plaintiff contends that our analysis of Practice Book § 11-21 in *Traystman, Coric & Keramidas, P.C.* v. *Daigle*, 282 Conn. 418, 922 A.2d 1056 (2007) (*Traystman*), and the decision of the Appellate Court in *Cornelius* v. *Rosario*, 167 Conn. App. 120, 143 A.3d 611 (2016), "strong[ly] impl[y] . . . that the filing deadline is mandatory."

In response, the defendant disagrees with the plaintiff's reading of *Traystman* and contends that the Appellate Court properly construed Practice Book § 11-21 as directory rather than mandatory. The defendant argues that the judges of the Superior Court promulgated Practice Book § 11-21 to provide structure and guidance to the trial courts, which previously had exercised wide and "amorphous" discretion under *Oakley* v. *Commission on Human Rights & Opportunities*, supra, 38 Conn. App. 516–17, in determining whether a motion for attorney's fees had been filed within "a reasonable time." Citing *Statewide Grievance Committee* v. *Rozbicki*, supra, 219 Conn. 473, and observing that rules of practice are interpreted in the same manner as statutes, the defendant relies on our jurisprudence construing statutory deadlines, such as *Electrical Contractors, Inc.* v. *Ins. Co. of the State of Pennsylvania*, 314 Conn. 749, 104 A.3d 713 (2014), and contends that the relatively brief deadline contained in Practice Book § 11-21, which lacks any penalty for noncompliance, is directory insofar as it is designed "to secure order, system, and dispatch in the proceedings." Relying on Practice Book § 1-8, the defendant further emphasizes that a strict reading of the thirty day deadline in Practice Book § 11-21 would have the impermissible effect of abrogating

the substantive right to attorney's fees provided by § 42-150bb. We agree with the defendant and conclude that the Appellate Court properly construed Practice Book § 11-21 as a directory provision that afforded the trial court discretion to entertain the untimely motion for attorney's fees in the present case.

We begin with the standard of review. "The interpretive construction of the rules of practice is to be governed by the same principles as those regulating statutory interpretation. . . . The interpretation and application of a statute, and thus a Practice Book provision, involves a question of law over which our review is plenary. . . . In seeking to determine [the] meaning [of a statute or a rule of practice, we] . . . first . . . consider the text of the statute [or rule] itself and its relationship to other statutes [or rules]." (Citation omitted; internal quotation marks omitted.) *Disciplinary Counsel* v. *Elder*, 325 Conn. 378, 386, 159 A.3d 220 (2017); see, e.g., *Disciplinary Counsel* v. *Parnoff*, 324 Conn. 505, 514, 152 A.3d 1222 (2016); *State* v. *Heredia*, 310 Conn. 742, 755–56, 81 A.3d 1163 (2013); see also *State* v. *Cook*, 183 Conn. 520, 521–22, 441 A.2d 41 (1981) (seminal case). "If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence . . . shall not be considered. . . . When [the provision] is not plain and unambiguous, we also look for interpretive guidance to the . . . history and circumstances surrounding its enactment, to the . . . policy it was designed to implement, and to its relationship to existing [provisions] and common law principles governing the same general subject matter . . . . We recognize that terms [used] are to be assigned their ordinary meaning, unless context dictates otherwise." (Internal quotation marks omitted.) *Wiseman* v. *Armstrong*, 295 Conn. 94, 100, 989 A.2d 1027 (2010). Put

differently, we follow the "clear meaning" of unambiguous rules, because "[a]lthough we are directed to interpret liberally the rules of practice, that liberal construction applies only to situations in which 'a strict adherence to them [will] work surprise or injustice.' " *Pitchell* v. *Hartford*, 247 Conn. 422, 432, 722 A.2d 797 (1999), quoting Practice Book § 1-8.

We now turn to the text of Practice Book § 11-21, which provides: "Motions for attorney's fees *shall be filed with the trial court within thirty days* following the date on which the final judgment of the trial court was rendered. If appellate attorney's fees are sought, motions for such fees *shall be filed with the trial court within thirty days* following the date on which the appellate court or supreme court rendered its decision disposing of the underlying appeal. Nothing in this section shall be deemed to affect an award of attorney's fees assessed as a component of damages." (Emphasis added.)

As a threshold matter, we disagree with the plaintiff's argument that Practice Book § 11-21 is plain and unambiguous, precluding resort to extratextual materials, with respect to whether the Superior Court judges' use of the word "shall" in connection with the thirty day deadline creates a mandatory obligation, thus depriving the trial court of discretion to permit a late filing. See *Stewart* v. *Tunxis Service Center*, 237 Conn. 71, 77, 676 A.2d 819 (1996) ("if a statutory time period is mandatory in nature, a showing of prejudice is not necessary to a conclusion that a failure to comply with the time period will invalidate the untimely action"). Seeking guidance from the statutory interpretation process, "our past decisions have indicated that the use of the word shall, though significant, does not invariably create a mandatory duty. . . . Indeed, we frequently have found statutory duties to be directory, notwithstanding the legislature's use of facially obligatory language such as

shall or must. . . . We therefore look to other relevant considerations, beyond the legislature's use of the term shall, to ascertain the meaning of the statute.

"Our prior cases have looked to a number of factors in determining whether such requirements are mandatory or directory. These include: (1) whether the statute expressly invalidates actions that fail to comply with its requirements or, in the alternative, whether the statute by its terms imposes a different penalty; (2) whether the requirement is stated in affirmative terms, unaccompanied by negative language; (3) whether the requirement at issue relates to a matter of substance or one of convenience; (4) whether the legislative history, the circumstances surrounding the statute's enactment and amendment, and the full legislative scheme evince an intent to impose a mandatory requirement; (5) whether holding the requirement to be mandatory would result in an unjust windfall for the party seeking to enforce the duty or, in the alternative, whether holding it to be directory would deprive that party of any legal recourse; and (6) whether compliance is reasonably within the control of the party that bears the obligation, or whether the opposing party can stymie such compliance." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Electrical Contractors, Inc.* v. *Ins. Co. of the State of Pennsylvania*, supra, 314 Conn. 757–59.

"The first two factors are addressed to the statutory text. A reliable guide in determining whether a statutory provision is . . . mandatory is whether the provision is accompanied by language that expressly invalidates any action taken after noncompliance with the provision. . . . By contrast, where a statute by its terms imposes some other specific penalty, it is reasonable to assume that the legislature contemplated that there would be instances of noncompliance and did not intend to invalidate such actions. . . . Furthermore, a requirement stated in affirmative terms unaccompanied

by negative words . . . generally is not viewed as mandatory." (Citations omitted; internal quotation marks omitted.) Id., 759.

In the present case, the language of Practice Book § 11-21 does not specifically invalidate or otherwise penalize motions filed beyond the thirty day deadline. "This lack of a penalty provision or invalidation of an action as a consequence for failure to comply with the statutory directive is a significant indication that the statute is directory." (Internal quotation marks omitted.) Id., 760. It also is phrased in affirmative terms, rather than using negative words such as "no later than." See *Stewart* v. *Tunxis Service Center*, supra, 237 Conn. 72 n.1 and 78 (General Statutes § 31-300, requiring Workers' Compensation Commission to send written copy of award " '[a]s soon as may be after the conclusion of any hearing, *but no later than one hundred twenty days* after such conclusion' " has "negative terminology [that] suggests that [legislature] intended [it] to be mandatory" [emphasis altered]). Finally, that the language of the rule only uses the word "shall," and does *not* also contain the "more permissive" word "may," further suggests that the use of the word "shall" therein is directory. See, e.g., *Lostritto* v. *Community Action Agency of New Haven, Inc.*, 269 Conn. 10, 20, 848 A.2d 418 (2004) (holding that 120 day limitation on service of apportionment complaint under General Statutes § 52-102b [a] is mandatory because, inter alia, "when the legislature opts to use the words shall and may in the same statute, they must then be assumed to have been used with discrimination and a full awareness of the difference in their ordinary meanings" [internal quotation marks omitted]); *State* v. *Reddy*, 135 Conn. App. 65, 72–74, 42 A.3d 406 (2012) (General Statutes § 29-38c [d], providing that court " 'shall hold a hearing to determine whether the seized firearms should be returned to the person named in the warrant or should

continue to be held by the state,' " was mandatory because legislature used word "may" in same statute to describe remedies, and use of word " 'shall' " was in conjunction with "substantive action verb 'hold,' " in reference to court's obligation, and used "negative terminology" of "not later than fourteen days").

"The next factor we consider in determining whether a statute is mandatory or directory is whether the prescribed mode of action is the essence of the thing to be accomplished, or in other words, whether it relates to a matter of substance [as opposed to] a matter of convenience. . . . If it is a matter of substance, the statutory provision is [generally held to be] mandatory. If, however, the legislative provision is designed to secure order, system and dispatch in the proceedings, it is generally held to be directory . . . ." (Internal quotation marks omitted.) *Electrical Contractors, Inc.* v. *Ins. Co. of the State of Pennsylvania*, supra, 314 Conn. 760–61. In the context of the rules of practice, this factor requires us to consider the purpose of the rule, including the history of its promulgation. See *State* v. *Pare*, 253 Conn. 611, 624–25, 755 A.2d 180 (2000) (considering history of Practice Book § 42-31, including change from "may" to "shall" for consistency with Rule 31 [d] of Federal Rules of Criminal Procedure, to conclude that polling of criminal jury pursuant to timely request by either party is mandatory).

In examining the history and purpose of Practice Book § 11-21, we turn to our decision in *Traystman*, supra, 282 Conn. 432–33, in which we concluded that a trial court had improperly granted a request for attorney's fees pursuant to § 42-150bb because the defendant had made that request in a bill of costs under Practice Book § 18-5 (a), rather than by motion pursuant to Practice Book § 11-21. See id., 429–30 (noting that "costs to be included in a bill of costs generally are of a type that may be granted automatically by the court clerk,"

as contemplated under General Statutes § 52-257, but "the determination of a reasonable attorney's fee pursuant to § 42-150bb requires the exercise of the trial court's discretion and is not subject to automatic assessment by the clerk"). Although *Traystman* does not resolve the question presented by this case;[4] see id.,

[4] The plaintiff argues that *Traystman*, supra, 282 Conn. 418, "strongly implied that [Practice Book] § 11-21 establishes a mandatory filing deadline," citing, in its reply brief, commentary on the rule by several distinguished practitioners relying on *Traystman* for the proposition that "[t]he failure to file a timely motion for attorney's fees is *fatal*." (Emphasis added.) W. Horton et al., 1 Connecticut Practice Series: Superior Court Civil Rules (2017-2018 Ed.) § 11-21, author's comments, p. 600. We disagree. We acknowledge the presence of some language in *Traystman* suggesting that a timely motion is a mandatory precondition to the award of attorney's fees under Practice Book § 11-21, in particular the statement that the "trial court improperly granted the defendant's request for attorney's fees because he failed to file a *timely* motion for attorney's fees pursuant to Practice Book § 11-21." (Emphasis added.) *Traystman*, supra, 428. Despite rejecting the defendant's argument in *Traystman* that the trial court had properly awarded attorney's fees "despite his failure to request [them] within the thirty day time limit provided by Practice Book § 11-21," we nevertheless did not resolve in that case whether Practice Book § 11-21 is mandatory or directory, insofar as the trial court in that case had "expressly concluded that Practice Book § 11-21 did *not* apply to a request for attorney's fees pursuant to § 42-150bb, and indicated that it had concluded that it was authorized to award such fees in a proceeding on a bill of costs when it stated that it would not address the plaintiff's claim to the contrary because the plaintiff had not provided any authority in support of that claim. *Thus, the trial court saw no need to consider whether the time limits provided by* [*Practice Book*] *§ 11-21 are mandatory or directory, or to exercise its discretion to excuse compliance with those time limits*." (Emphasis altered.) Id., 432–33. Accordingly, we specifically stated that, "under these circumstances, it would be inappropriate for this court to review the action of the trial court as if it had treated the portion of the defendant's bill of costs requesting attorney's fees pursuant to § 42-150bb as the effective equivalent of a motion for attorney's fees pursuant to [Practice Book] § 11-21 and had exercised its discretion to excuse compliance with the rule's timing requirement." Id., 433.

Thus, we similarly disagree with the plaintiff's reliance on *Cornelius* v. *Rosario*, supra, 167 Conn. App. 135, in which the Appellate Court held that the trial court had improperly awarded a defendant attorney's fees because his "motion for attorney's fees and costs *was not filed within thirty days* of the denial of the motion to open or within thirty days of the notice of the denial of the motion to reargue the motion to open, as required by

433; we observed therein that "fundamentally, Practice Book § 11-21 provides a specific postjudgment procedure for seeking statutory attorney's fees." Id., 430. Citing the commentary to Practice Book § 11-21,[5] we stated that the judges of the Superior Court adopted the rule "apparently in response to concerns raised by the Appellate Court's decision in *Oakley* v. *Commission on Human Rights & Opportunities*, [supra, 38 Conn. App. 517]," which had concluded that postjudgment motions for attorney's fees under General Statutes § 4-184a "must be filed within a reasonable time of the entering of the final judgment, and that the determination of whether such a motion has been filed within a reasonable time is a matter within the discretion of the trial court."[6] (Internal quotation marks omitted.)

Practice Book § 11-21." (Emphasis added.) The Appellate Court also rejected the defendant's claim that "the trial court improperly declined to award attorney's fees for the fees initially incurred at the trial court" on the ground that the motion was untimely under § 11-21 because it was filed more than thirty days after summary judgment was rendered in favor of the defendant, despite the fact that the plaintiff took an appeal in the meantime. Id., 135–36. The Appellate Court's decision in *Cornelius* simply concerned what events triggered the thirty day filing period, and, as in *Traystman*, supra, 282 Conn. 430–32, upon which the Appellate Court relied in *Cornelius*; see *Cornelius* v. *Rosario*, supra, 137–38; the question of whether § 11-21 is a mandatory or directory provision simply was not at issue.

[5] The commentary to Practice Book § 11-21 indicates that it "limits the time period within which postjudgment motions for [attorney's] fees may be filed and is aimed principally at statutory [attorney's] fees but, where appropriate, may be applied in situations where [attorney's] fees are founded upon an enforceable provision in a contract. The rule applies to final judgments in the trial court and to final dispositions rendered by the [A]ppellate [C]ourt and the [S]upreme [C]ourt. The rule does not apply to [attorney's] fees that are assessed as damages. See generally *Oakley* v. *Commission on Human Rights & Opportunities*, [supra, 38 Conn. App. 506]." Practice Book (1999) § 11-21, commentary.

[6] In *Oakley* v. *Commission on Human Rights & Opportunities*, supra, 38 Conn. App. 515, the Appellate Court rejected a claim that the trial court lacked jurisdiction to entertain a motion for attorney's fees pursuant to § 4-184a (b), governing administrative appeals, which was filed nearly five months after the final judgment was rendered. Like § 42-150bb, § 4-184a (b) lacks a statutory deadline for fee motions. In so concluding, the Appellate Court described as "important" arguments about the "the strong public

*Traystman*, supra, 431. "It is reasonable to conclude that the rule requiring motions for attorney's fees to be filed within thirty days of a final judgment was adopted in recognition of the fact that a determination of reasonable attorney's fees requires the trial court to have fresh familiarity with the nature and conduct of the case that is not required for an automatic award of costs pursuant to provisions such as those contained in § 52-257." Id., 431–32; see *Oakley* v. *Commission on Human Rights & Opportunities*, 237 Conn. 28, 30, 675 A.2d 851 (1996) (recognizing "legitimacy" of concerns over "substantial delay in the filing of a motion for attorney's fees," but stating that "the concern is one that cannot be addressed through the process of appellate review but requires a change in the appropriate provisions either of the General Statutes or of the Practice Book"). Although a construction of Practice Book § 11-21 as mandatory is consistent with the rule's purpose of ending uncertainty about enforcement and ensuring that the trial court has "fresh familiarity" with the case, a construction of the rule as directory—providing the trial court with discretion to forgive lapses in suitable cases, such as when an untimely motion does not prejudice the nonmoving party—still provides far more structure to the proceedings than the amorphous "reasonable" time standard adopted by the Appellate Court in *Oakley*.[7] Cf. *Stewart* v. *Tunxis Service Center*, supra,

interest in the finality of legal proceedings, and that, because as a practical matter costs cannot be assessed until after the judgment, there cannot be an unlimited time in which the prevailing party can file a motion to recover those costs." Id.

[7] We disagree with the plaintiff's argument that we should presume from the use of the word "shall" that the judges of the Superior Court intended Practice Book § 11-21 to be mandatory. Had the judges used a more permissive word such as "may," they would have rendered the new rule completely meaningless, thus nullifying its purpose of providing structure in the wake of *Oakley* v. *Commission on Human Rights & Opportunities*, supra, 38 Conn. App. 506. Put differently, an actual deadline was necessary to impart some structure to the proceedings, despite the fact that judges retain discretion to permit untimely filings in suitable cases.

237 Conn. 80 (noting that legislative history suggested that insertion of 120 day decision deadline into Workers' Compensation Commission statute was "the essence of the thing to be done, not simply the issuance of a decision, but the issuance of a *timely* decision" [emphasis in original]).

"We next consider whether holding a requirement to be mandatory would result in an unjust windfall for the party seeking to enforce the duty or, in the alternative, whether holding it to be directory would deprive that party of any legal recourse." *Electrical Contractors, Inc.* v. *Ins. Co. of the State of Pennsylvania*, supra, 314 Conn. 764. The balancing analysis attendant to this factor favors a construction of Practice Book § 11-21 as directory. Under the well established "American rule," attorney's fees are not available to a prevailing party unless provided by contract or statute. See, e.g., *Aaron Manor, Inc.* v. *Irving*, 307 Conn. 608, 616–17, 57 A.3d 342 (2013). In the present case, the fees sought by the defendant are provided by § 42-150bb, which, as the Appellate Court pointed out, "is a legislative vehicle for consumer protection that affords consumers, as a matter of law, awards of reasonable attorney's fees for their successful defense or prosecution of actions based on consumer contracts." *Meadowbrook Center, Inc.* v. *Buchman*, supra, 169 Conn. App. 532; see, e.g., *Aaron Manor, Inc.* v. *Irving*, supra, 617–18 (stating that § 42-150bb "was designed to provide equitable results for a consumer who successfully defended an action under a commercial contract and the commercial party who was entitled to attorney's fees," and that its "purpose . . . is to bring parity between a commercial party and a consumer who defends successfully an action on a contract prepared by the commercial party" [internal quotation marks omitted]). A construction of Practice Book § 11-21 as mandatory, which would deprive the trial court of authority to entertain untimely filings even

when there is good cause and no prejudice to the nonmoving party, raises the specter of abridging this legal right—especially when the legislature has not provided a time limitation in the authorizing statute. We tread carefully in such cases because it "has long been understood that Practice Book provisions are not intended to enlarge or abrogate substantive rights. See General Statutes § 51-14 (a) (noting that rules of practice and procedure 'shall not abridge, enlarge or modify any substantive right or the jurisdiction of any of the courts'); *In re Samantha C.*, 268 Conn. 614, 639, 847 A.2d 883 (2004) ('we are obliged to interpret [the rules of practice] so as not to create a new right, but rather to delineate whatever rights may have existed, statutorily or otherwise, at the time of the proceedings underlying the present appeal')." *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 292 Conn. 1, 44, 970 A.2d 656, cert. denied sub nom. *Bridgeport Roman Catholic Diocesan Corp.* v. *New York Times Co.*, 558 U.S. 991, 130 S. Ct. 500, 175 L. Ed. 2d 348 (2009); see *Wiseman* v. *Armstrong*, supra, 295 Conn. 110–11. Put differently, we construe rules of practice "in light of" the statutory policy that they implement. *In re Samantha C.*, supra, 640. This factor, therefore, counsels against a construction of Practice Book § 11-21 that would permit a relatively minor or nonprejudicial delay in filing to divest a party of a right granted by contract or statute.[8]

Our application of the factors set forth in *Electrical Contractors, Inc.*, leads us to a conclusion that is consis-

[8] We disagree with the plaintiff's contention, made at oral argument before this court, that the Appellate Court's description of this case as one that "requires us to assess the interplay between a legislative mandate based on a public policy and a procedural rule of practice"; *Meadowbrook Center, Inc.* v. *Buchman*, supra, 169 Conn. App. 529; constitutes a categorical logical "flaw" that undermines its construction of Practice Book § 11-21. Although the plaintiff accurately points out that § 11-21 applies to motions for attorney's fees that are authorized by contract as well as statute, that is a distinction without a difference with respect to whether the rule of practice may be enforced in a way that abridges a substantive legal right.

tent with this court's earlier decisions construing deadlines provided in the rules of practice. See *Disciplinary Counsel* v. *Elder*, supra, 325 Conn. 387–93 (six year limitation period for grievance complaints against attorneys under Practice Book § 2-32 [a] [2] [E] is mandatory, barring untimely complaints, because rule expressly provided equitable exceptions to limitation period for specific cases, and relatively lengthy limitations period reflected policies underlying both statutes of limitations and disciplinary proceedings); *Statewide Grievance Committee* v. *Rozbicki*, supra, 219 Conn. 480–82 (failure to conduct hearing on attorney presentment within sixty days required by rules of practice did not require dismissal because good cause existed for delay and rule was directory, as it was "designed to encourage order and dispatch" in prosecution of presentments, was "cast in affirmative words," contained "no penalty for noncompliance," and purported "only to establish a time limit for acting upon complaints"); see also *State* v. *Heredia*, supra, 310 Conn. 765–67 (release is not automatic remedy for violation of Practice Book § 37-12 [a], which requires that defendant be presented to court for determination of probable cause within forty-eight hours of warrantless arrest, with court instead required to balance "the interests of individual liberty and community protection" in determining whether release is appropriate in given case); *LaReau* v. *Reincke*, 158 Conn. 486, 493–94, 264 A.2d 576 (1969) (twenty day period for filing appeal set forth in rules of practice not jurisdictional); cf. *Electrical Contractors, Inc.* v. *Ins. Co. of the State of Pennsylvania*, supra, 314 Conn. 761–62 (citing cases concerning statutory deadlines). Accordingly, we conclude that Practice Book § 11-21 is directory and, therefore, affords the trial court discretion to entertain untimely motions for attorney's fees in appropriate cases.

II

We next address the plaintiff's claim that remand to the trial court is not necessary, notwithstanding our conclusion that Practice Book § 11-21 is directory, because we should render judgment as a matter of law with respect to the defendant's untimely motion for attorney's fees.[9] First, the plaintiff argues that Connecticut courts should follow rule 6 (b) (1) (B) of the Federal Rules of Civil Procedure, and employ the "excusable neglect" standard in considering untimely motions for attorney's fees. Second, the plaintiff contends that, under the excusable neglect standard, the defendant's reasons for missing the deadline, namely, counsel's misunderstanding of the rule and whether a final judgment had entered, are insufficient as a matter of law. In support of this contention, the plaintiff cites *Canfield* v. *Van Atta Buick/GMC Truck, Inc.*, 127 F.3d 248, 250 (2d Cir. 1997), cert. denied, 522 U.S. 1117, 118 S. Ct. 1055, 140 L. Ed. 2d 117 (1998), for the proposition that a "failure to follow the clear dictates of a court rule will generally not constitute such excusable neglect." In response, the defendant, although not challenging the excusable neglect standard propounded by the plaintiff, claims that his reasons were not unpersuasive as a matter of law, given the trial court's broad discretion to permit late filings and the relatively minor delay at issue in this case. We agree with the defendant and conclude that remand is required for the exercise of the trial court's discretion in the first instance.

[9] Although this additional claim is beyond the scope of the certified question; see footnote 2 of this opinion; and was not addressed by the Appellate Court, we address it in the interest of judicial economy because doing so will provide guidance for the trial court on remand. We note that the defendant does not object to our consideration of this issue in the present appeal and has fully briefed his response. See, e.g., *Feliciano* v. *Autozone, Inc.*, 316 Conn. 65, 84, 111 A.3d 453 (2015); *State* v. *James*, 261 Conn. 395, 411, 802 A.2d 820 (2002); but see Practice Book § 84-11 (b) (setting forth procedure for "present[ing] for review any claim that the relief afforded by the [A]ppellate [C]ourt in its judgment should be modified").

In the federal courts, the "excusable neglect" standard is an "elastic concept," which implies "a determination that is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission . . . . Factors to be considered in evaluating excusable neglect include [1] the danger of prejudice to the [nonmovant], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith." (Citation omitted; internal quotation marks omitted.) *Silivanch* v. *Celebrity Cruises, Inc.*, 333 F.3d 355, 366 (2d Cir. 2003), cert. denied sub nom. *Essef Corp.* v. *Silivanch*, 540 U.S. 1105, 124 S. Ct. 1047, 157 L. Ed. 2d 890 (2004); see also *Pioneer Investment Services Co.* v. *Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 392–93, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993). We adopt the four factor analysis used by the federal courts because it is consistent with existing Connecticut case law governing a trial court's exercise of its discretion in determining whether to allow an untimely filing. See, e.g., *Kervick* v. *Silver Hill Hospital*, 128 Conn. App. 341, 353–55, 18 A.3d 622 (2011) (considering prejudice to opposing party, length of delay, and reason for delay with respect to untimely motion for summary judgment), rev'd on other grounds, 309 Conn. 688, 72 A.3d 1044 (2013); see also *Ruddock* v. *Burrowes*, 243 Conn. 569, 576–77, 706 A.2d 967 (1998) (General Statutes § 52-592 [a], accidental failure of suit statute, applies if "prior dismissal was a 'matter of form' in the sense that the plaintiff's noncompliance with a court order occurred in circumstances such as mistake, inadvertence or excusable neglect"). As in Connecticut courts, a federal district court's finding of excusable neglect, permitting a late filing, is reviewed for abuse of discretion. See, e.g., *Silivanch* v. *Celebrity Cruises, Inc.*, supra, 362; *Canfield* v. *Van Atta Buick/GMC Truck*,

*Inc.*, supra, 127 F.3d 250; *LoSacco* v. *Middletown*, 71 F.3d 88, 93 (2d Cir. 1995).

The United States Court of Appeals for the Second Circuit "sets a high bar for excusable neglect concluding that failure to follow the clear dictates of a court rule will generally not constitute such excusable neglect." *Sewell* v. *Lincoln Life & Annuity Co. of New York*, United States District Court, Docket No. 11 Civ. 4236 (ALC) (S.D.N.Y. March 22, 2013); see *Silivanch* v. *Celebrity Cruises, Inc.*, supra, 333 F.3d 366–68; *Canfield* v. *Van Atta Buick/GMC Truck, Inc.*, supra, 127 F.3d 250. Nevertheless, federal district courts within the Second Circuit continue to forgive attorneys' lapses as excusable neglect. See *LoSacco* v. *Middletown*, supra, 71 F.3d 93 (District Court did not abuse its discretion by allowing untimely bill of costs); *Sewell* v. *Lincoln Life & Annuity Co. of New York*, supra (underestimation of time needed to brief opposition to summary judgment motion was excusable neglect when there was no bad faith, scheduling was not affected, and moving party "was not severely prejudiced by the delay"); *Laina* v. *United Cerebral Palsy of New York City, Inc.*, United States District Court, Docket No. CV2011-3983 (MDG) (E.D.N.Y. January 5, 2012) ("[t]his [c]ourt finds that the [one day] gap between the deadline of defendant's answer and its extension motion, the uncertainty . . . as to the exact date of that deadline, defendant corporation's erroneous report to its counsel of the date of service and defendant's need to consult with its insurance carrier constitute excusable neglect on defendant's part and valid reasons to extend the time to respond to the complaint"); *United States ex rel. Moye* v. *Strode*, 276 F.R.D. 414, 416–17 (D. Conn. 2010) (setting aside default judgment after crediting attorney's representation that "he simply forgot about the answer deadline because he did not write it down").

Guided by these cases, we disagree with the plaintiff's argument that the defendant's untimely motion for attorney's fees under Practice Book § 11-21 is barred as a matter of law or, more specifically, that remand is unnecessary because the information contained the record indicates that the trial court would abuse its discretion by allowing that untimely filing. With respect to the first two excusable neglect factors, the plaintiff has made no claim of prejudice, and the five day delay in filing was relatively minor. Similarly, there is no claim of bad faith. With respect to the reason for the delay, as was discussed extensively at oral argument before this court, the record reveals that the parties—at least counsel for the defendant—experienced some confusion following the Appellate Court's April 8, 2014 order in *Meadowbrook Center, Inc.* v. *Buchman*, supra, 149 Conn. App. 212, remanding the case to the trial court with direction to render judgment in favor of the defendant. As counsel for the defendant represented at oral argument, some of this confusion may have been occasioned by the infirmity and ultimate passing of Judge Hale, the original trial judge, in the spring and summer of 2014, after the directed judgment in the present case. Indeed, on April 17, 2014, the trial court's civil caseflow office issued an order, at the direction of Judge Robaina, directing the parties to appear for a status conference on May 22, 2014. At the request of the plaintiff, and with the consent of the defendant, that conference was continued to June 10, 2014. Despite the pending status conference, Judge Robaina issued an order rendering the judgment directed by the Appellate Court on April 30, 2014. Nevertheless, on June 3, 2014, the defendant filed a proposed judgment file to that effect for Judge Hale to sign, followed by his motion for attorney's fees on June 4, 2014. Given these facts, we conclude that a trial court reasonably might exercise its discretion to grant permission to file an untimely motion—at least

in part with respect to trial attorney's fees—where there was some confusion as to the operative judgment date and no apparent prejudice to the nonmoving party.[10] Accordingly, remand to the trial court remains appropriate for the exercise of its discretion in the first instance.

We, therefore, agree with the Appellate Court that remanding the present case for a hearing on the defendant's motion is appropriate because the trial court improperly failed "to exercise its discretion to determine whether strict adherence to the [thirty day deadline set forth in Practice Book § 11-21] would 'work surprise or injustice.' Practice Book § 1-8." *Meadowbrook Center, Inc.* v. *Buchman*, supra, 169 Conn. App. 540; see also, e.g., *Costello* v. *Goldstein & Peck, P.C.*, 321 Conn. 244, 256, 137 A.3d 748 (2016) ("the court's failure to recognize its authority to act constituted an abuse of discretion"); *State* v. *Martin*, 201 Conn. 74, 88, 513 A.2d 116 (1986) ("[w]here . . . the trial court is properly called upon to exercise its discretion, its failure to do so is error").

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

[10] In any event, the lapse in this case was not as egregious as in *Canfield*, upon which the plaintiff relies, in which the attorney was specifically reminded as to the unambiguous deadline at issue, which governed the filing of an objection to a motion for summary judgment. *Canfield* v. *Van Atta Buick/GMC Truck, Inc.*, supra, 127 F.3d 249; see also *Silivanch* v. *Celebrity Cruises, Inc.*, supra, 333 F.3d 370 (concluding that District Court "abused its discretion when it decided that . . . counsel's determination of the wrong date by which [a party] had to file a notice of appeal in sole reliance on a remark by counsel for another party during a scheduling conference for another appeal constituted excusable neglect"); *Rodriguez* v. *Brass Mill Center, LLC*, Superior Court, judicial district of Hartford, Docket No. CV-16-6064935-S (October 2, 2017) ("The court finds that the delay of 265 days was . . . not the result of a minor failure to adhere to the timing requirements of Practice Book § 11-21 . . . . Rather, such delay demonstrated an egregious lack of fidelity . . . to basic rules of practice. The court therefore finds that the enforcement of the thirty day mandate of Practice Book § 11-21 works neither an injustice nor surprise . . . ." [Citation omitted.]).