STATE OF CONNECTICUT *v.* QUENTINE L. DAVIS (SC 20157)

Robinson, C. J., and Palmer, McDonald, D'Auria, Mullins and Ecker, Js.*

Syllabus

Convicted, on a conditional plea of nolo contendere, of the crimes of criminal possession of a pistol and carrying a pistol without a permit, the defendant appealed, claiming, inter alia, that the trial court improperly denied his motion to suppress the handgun that had given rise to those charges. On the evening of the defendant's arrest, an anonymous tipster had called 911 to report that a group of men was gathered near a vehicle parked outside of his window and that "a young man" in that group was in possession of a handgun. The caller could not say exactly how many men there were because they were moving back and forth across the street. The caller further stated that, although he had seen the handgun, he could not identify the specific person who was carrying it because all of the men were wearing dark clothing. When police officers responded to that location, a group of approximately six men who were standing around the vehicle began to walk away. The police officers then ordered the men to stop in order to conduct a search pursuant to *Terry* v. *Ohio* (392 U.S. 1), but the defendant continued to walk away. The officers repeated their order, after which they witnessed the defendant drop an object into a nearby garbage can. The police ultimately arrested the defendant, searched the garbage can, and discovered the handgun. On the basis of these facts, the defendant filed a motion to suppress the handgun, claiming, inter alia, that the *Terry* stop was

* This case originally was scheduled to be argued before a panel of this court consisting of Chief Justice Robinson and Justices Palmer, McDonald, D'Auria, Mullins and Ecker. Although Chief Justice Robinson was not present when the case was argued before the court, he has read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision.

unlawful and that the subsequent discovery of the handgun was tainted by the unlawful *Terry* stop. Specifically, the defendant claimed that the anonymous tip did not give rise to a reasonable suspicion that he had been engaged in criminal activity and that his detention therefore violated his right to be free from unreasonable seizures under the fourth amendment to the United States constitution. The trial court denied the motion to suppress, and the defendant appealed. *Held* that the trial court improperly denied the defendant's motion to suppress, this court having concluded that the detention of the defendant violated the fourth amendment because the anonymous tip that the police received did not give rise to a reasonable suspicion that the defendant had been engaged in criminal activity: although the information conveyed in the anonymous tip may have supported a reasonable suspicion that a young man possessed a handgun in the location where the group of men were spotted under the standard set forth in *Navarette* v. *California* (572 U.S. 393), that information was not sufficiently detailed or specific to enable the police to know which of the approximately six individuals subject to the *Terry* stop possessed the handgun and, therefore, did not give rise to a reasonable suspicion that the defendant himself was in possession of the handgun.

Argued November 16, 2018—officially released April 2, 2019

Procedural History

Information charging the defendant with the crimes of criminal possession of a pistol, carrying a pistol without a permit, possession of less than one-half ounce of cannabis-type substance, breach of peace in the second degree and interfering with an officer, brought to the Superior Court in the judicial district of New Haven, geographical area number twenty-three, where the court, *B. Fischer*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the defendant was presented to the court, *Cradle*, *J.*, on a conditional plea of nolo contendere to the charges of criminal possession of a pistol and carrying a pistol without a permit; judgment of guilty in accordance with the plea, from which the defendant appealed. *Reversed*; *further proceedings*.

Daniel M. Erwin, for the appellant (defendant).

Jennifer F. Miller, assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's

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

Opinion

ROBINSON, C. J. The sole issue in this appeal is whether, under *Navarette* v. *California*, 572 U.S. 393, 134 S. Ct. 1683, 188 L. Ed. 2d 680 (2014), the trial court properly denied a motion to suppress evidence discovered by the police during the forcible detention of the defendant, Quentine L. Davis, pursuant to *Terry* v. *Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), on the basis of an anonymous telephone tip regarding "a young man that has a handgun." After the police detained the defendant, they saw him drop an object in a garbage can, a subsequent search of which revealed a handgun. The defendant was arrested and charged with, inter alia, criminal possession of a pistol in violation of General Statutes § 53a-217c and carrying a pistol without a permit in violation of General Statutes § 29-35 (a).[1] The defendant moved to suppress the handgun, claiming that the evidence resulting from the search of the garbage can was tainted as the result of his unlawful seizure. Specifically, the defendant claimed that the anonymous tip did not give rise to a reasonable suspicion that he was engaged in, or was about to be engaged in, criminal activity, and, therefore, that his detention violated his right to be free from unreasonable seizures under the fourth amendment to the United States constitution[2] and article first, §§ 7 and 9, of the Connecticut constitution. The trial court denied the motion to sup-

[1] We note that, although these statutes have been amended since the events underlying the present appeal; see, e.g., Public Acts 2016, No. 16-34, § 16; those amendments have no bearing on the merits of this appeal. For the sake of simplicity, we refer to the current revision of these statutes.

[2] "The fourth amendment's protection against unreasonable searches and seizures is made applicable to the states through the due process clause of the fourteenth amendment to the United States constitution." *State* v. *Kelly*, 313 Conn. 1, 8 n.3, 95 A.3d 1081 (2014).

press. Thereafter, the defendant entered a conditional plea of nolo contendere to the gun charges pursuant to General Statutes § 54-94a. See also footnote 4 of this opinion. The trial court accepted that plea and rendered a judgment of conviction. This appeal followed.[3] We agree with the defendant's claim that his detention violated his fourth amendment rights under *Navarette*. Accordingly, we conclude that the trial court improperly denied the motion to suppress and reverse the judgment of the trial court.

The record reveals the following facts that were found by the trial court or are undisputed, and procedural history. At approximately 7:26 p.m. on the evening of September 28, 2016, the New Haven Police Department received an anonymous 911 telephone call regarding "a young man that has a handgun." The caller reported that he could see "a whole bunch" of men between 472 and 476 Winthrop Avenue in New Haven, some of whom were gathered around a black Infiniti. The caller could not "say exactly how many" men there were because they were crossing back and forth across the street. The caller stated that he could see the handgun from his window but that he could not identify the specific person who was carrying it because all of the men were wearing dark clothing. When asked, the caller denied that the men were fighting or arguing. When the dispatcher inquired, the caller declined to give his name or telephone number.

The dispatcher relayed the anonymous tip to police officers on the beat. Within minutes, three police cruisers containing at least five uniformed police officers arrived at the scene. At least one of the cruisers was sounding its siren. As the police officers exited the

[3] The defendant appealed to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

cruisers, a number of them unholstered their guns. The officers considered this location to be in a high crime area.

The officers observed approximately six men standing around a black Infiniti. As the police approached the men, they walked away. Officer Thomas Glynn ordered them to stop, and five of them did. Glynn and another officer, Matthew Collier, recognized two of the men from previous criminal interactions. The sixth individual, later identified as the defendant, continued to walk away from the police down Winthrop Avenue, despite additional orders to stop by Collier and Glynn. The defendant held his right hand at his waist in front of his body, extended his arm, and dropped an object into a garbage can. Shortly after dropping the object, the defendant turned toward Collier and Glynn and said something to the effect of "who, me?" At that point, the police arrested the defendant. A subsequent search of the garbage can produced a 9 millimeter handgun.

The defendant was charged with criminal possession of a pistol in violation of § 53a-217c and carrying a pistol without a permit in violation of § 29-35 (a).[4] Thereafter, he filed a motion to suppress the handgun, claiming that his detention violated the fourth amendment of the United States constitution and article first, §§ 7 and 9, of the Connecticut constitution, and that the search of the garbage can was tainted by his unconstitutional seizure. Specifically, the defendant contended that the anonymous telephone tip was not sufficiently reliable to give rise to a reasonable suspicion that he was engaged in criminal activity. After conducting an evidentiary hearing, the trial court determined that the

[4] The defendant was also charged with possession of less than one-half ounce of cannabis in violation of General Statutes § 21a-279a, breach of the peace in the second degree in violation of General Statutes § 53a-181, and interfering with an officer in violation of General Statutes § 53a-167a. The state subsequently nolled these charges.

police effectuated an investigative stop of the defendant when Glynn initially ordered the six men to stop.[5] The trial court further concluded that, under the United States Supreme Court's decision in *Navarette* v. *California*, supra, 572 U.S. 393, the anonymous telephone tip was sufficiently reliable to give rise to a reasonable suspicion that the defendant was engaged in criminal activity because (1) the caller was relaying his firsthand, eyewitness observations, (2) the caller's observations were contemporaneous with the call, (3) the caller was using the 911 system, and (4) the caller was reporting what would have been a "startling event" for a person in his position. In addition, the trial court found it "significant" that the police officers knew that this location was in a high crime area and that the six individuals who were gathered around the black Infiniti immediately began to disperse upon seeing the police. The trial court also noted, without further comment, that the police recognized two of the individuals from prior criminal encounters. Accordingly, the trial court denied the defendant's motion to suppress.

Thereafter, the defendant filed a "motion to reconsider and/or articulate" in which he contended that the trial court's reliance on *Navarette* was misplaced because the state had not cited that case. The defendant further argued that, because *Navarette* was based on

[5] The trial court rejected the state's argument that, if the initial stop of the six individuals was unconstitutional because the anonymous tip was not sufficiently reliable to give rise to a reasonable suspicion of criminal activity, the defendant's subsequent conduct in ignoring the police commands to stop, walking away from the police and dropping the handgun in the garbage can, nevertheless constituted criminal activity warranting a stop. Citing this court's decision in *State* v. *Hammond*, 257 Conn. 610, 627, 778 A.2d 108 (2001), the trial court concluded that the evidence would have to be suppressed if the initial stop was illegal because the "disposal of the gun would not be sufficiently distinguishable from the illegal seizure and [was] in some sense the product of the illegal government activity." (Internal quotation marks omitted.) The state does not challenge that determination in the present appeal.

specific concerns arising in the context of anonymous tips about drunk driving, it should be limited to that context. The defendant also requested that the trial court clarify whether it had rejected his claim under the state constitution. The trial court summarily denied this motion.

Thereafter, the defendant entered a conditional plea of nolo contendere to the gun charges pursuant to § 54-94a. The trial court accepted the plea and imposed an effective sentence of ten years imprisonment, execution suspended after five years, followed by five years of probation. This appeal followed. See footnote 3 of this opinion.

On appeal, the defendant contends that the trial court improperly determined that the anonymous 911 call was sufficiently reliable under the United States constitution to give rise to a reasonable suspicion that he was engaged in, or about to engage in, criminal activity, thereby warranting a *Terry* stop. Specifically, he again contends that *Navarette* v. *California*, supra, 572 U.S. 393, should be limited to cases involving anonymous tips about drunk driving. The defendant further contends that, even if *Navarette* extends beyond drunk driving, the anonymous tip in the present case was insufficient to give rise to a reasonable suspicion that the defendant was engaged in criminal activity because the anonymous caller "identified only a group of young men as opposed to an individual," and he "did not report an ongoing crime [but] specifically repudiated the threat of violence."

Assuming, without deciding, that *Navarette* is not limited to anonymous tips about drunk driving, we conclude that, although the anonymous tip in the present case was sufficiently reliable under the *Navarette* standard to give rise to a reasonable suspicion that a young man in the vicinity of 472-476 Winthrop Avenue had a

handgun, it was *not* sufficiently detailed to give rise to a reasonable suspicion that the *defendant* was in possession of that gun.[6] Accordingly, we conclude that the forcible detention of the defendant violated the fourth amendment to the United States constitution.[7]

We begin our analysis with the standard of review. "Our standard of review of a trial court's findings and conclusions in connection with a motion to suppress is well defined. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [W]here the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision . . . . We undertake a more probing factual review when a constitutional question hangs in the balance." (Citation omitted; internal quotation marks omitted.) *State* v. *Burroughs*, 288 Conn. 836, 843, 955 A.2d 43 (2008). Because the defendant in the present case does not challenge the trial court's factual findings but claims only that those findings do not support the conclusion that the police had

[6] In light of this conclusion, we need not address the defendant's contention that the anonymous tip did not give rise to a reasonable suspicion that criminal activity was afoot.

[7] The defendant also contends that, even if the anonymous tip was sufficiently reliable under *Navarette*, article first, §§ 7 and 9, of the Connecticut constitution embodies a more protective standard. We recently stated in *State* v. *Kono*, 324 Conn. 80, 123, 152 A.3d 1 (2016), that, "if the federal constitution does not clearly and definitively resolve the issue in the defendant's favor, we turn first to the state constitution to ascertain whether its provisions entitle the defendant to relief." In *Kono*, however, we had "no idea how a majority of the members of the United States Supreme Court would decide the issue." Id., 129. In the present case, we conclude that it is sufficiently clear, under the standard that we articulated in *Kono*, that the United States Supreme Court would conclude under *Navarette* that the anonymous tip did not give rise to a reasonable suspicion that the defendant was engaged in criminal activity. Accordingly, we decide the issue under the federal constitution and need not reach the defendant's state constitutional claims.

a reasonable and articulable suspicion that he was engaged in criminal activity, our review is de novo. See, e.g., *State* v. *Benton*, 304 Conn. 838, 842–43, 43 A.3d 619 (2012). The state has the "burden of proving that the police had a reasonable and articulable suspicion to justify an investigatory detention." *State* v. *Batts*, 281 Conn. 682, 694, 916 A.2d 788, cert. denied, 552 U.S. 1047, 128 S. Ct. 667, 169 L. Ed. 2d 524 (2007).

We next review the governing legal principles. "Under the fourth amendment to the United States constitution, and under article first, [§§ 7 and 9, of the] Connecticut constitution, a police officer may briefly detain an individual for investigative purposes if the officer has a reasonable and articulable suspicion that the individual has committed or is about to commit a crime." (Internal quotation marks omitted.) *State* v. *Clark*, 255 Conn. 268, 281, 764 A.2d 1251 (2001); see also *Terry* v. *Ohio*, supra, 392 U.S. 30–31 (police officer may detain suspect and engage in stop and frisk investigation if officer has reasonable and articulable suspicion that suspect is armed and dangerous). "When considering the validity of a [*Terry*] stop, our threshold inquiry is twofold. . . . First, we must determine at what point, if any . . . the encounter between [the police officers] and the defendant constitute[d] an investigatory stop or seizure. . . . Next, [i]f we conclude that there was such a seizure, we must then determine whether [the police officers] possessed a reasonable and articulable suspicion [that the individual is engaged in criminal activity] at the time the seizure occurred. . . . In assessing whether the police officers possessed the requisite reasonable and articulable suspicion, we must consider whether, relying on the whole picture, the detaining officers had a particularized and objective basis for suspecting the particular person stopped of criminal activity. When reviewing the legality of a stop, a court must examine the specific information available to the

police officer at the time of the initial intrusion and any rational inferences to be derived therefrom." (Citation omitted; internal quotation marks omitted.) *State* v. *Benton*, supra, 304 Conn. 843–44.

"Reasonable and articulable suspicion is an objective standard that focuses not on the actual state of mind of the police officer, but on whether a reasonable person, having the information available to and known by the police would have had that level of suspicion. . . . The police officer's decision . . . must be based on more than a hunch or speculation. . . . In justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." (Internal quotation marks omitted.) *State* v. *Hammond*, 257 Conn. 610, 617, 778 A.2d 108 (2001).

"An anonymous tip generally does not satisfy the requirement of reasonable suspicion . . . ." *State* v. *Mann*, 271 Conn. 300, 326 n.21, 857 A.2d 329 (2004), cert. denied, 544 U.S. 949, 125 S. Ct. 1711, 161 L. Ed. 2d 527 (2005). This is because, "[u]nlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, see *Adams* v. *Williams*, 407 U.S. 143, [146–47, 92 S. Ct. 1921, 32 L. Ed. 2d 612] (1972), an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity, *Alabama* v. *White*, [496 U.S. 325, 329, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990)]. As we have recognized, however, there are situations in which an anonymous tip, suitably corroborated, exhibits sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop." (Internal quotation marks omitted.) *State* v. *Hammond*, supra, 257 Conn. 617; see also *Navarette* v. *California*, supra, 572 U.S. 397 ("[O]rdinary citizens generally do not provide extensive recitations of the basis of their

everyday observations, and an anonymous tipster's veracity is by hypothesis largely unknown, and unknowable. . . . But under appropriate circumstances, an anonymous tip can demonstrate sufficient indicia of reliability to provide reasonable suspicion to make [an] investigatory stop." [Citation omitted; internal quotation marks omitted.]).

"Whether an anonymous tip suffices to give rise to reasonable suspicion depends on both the quantity of information it conveys as well as the quality, or degree of reliability, of that information, viewed under the totality of the circumstances." *United States* v. *Wheat*, 278 F.3d 722, 726 (8th Cir. 2001), cert. denied, 537 U.S. 850, 123 S. Ct. 194, 154 L. Ed. 2d 81 (2002). "[I]f a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable." *Alabama* v. *White*, supra, 496 U.S. 330.

In *Navarette* v. *California*, supra, 572 U.S. 397, a majority of the United States Supreme Court found its decisions in *Alabama* v. *White*, supra, 496 U.S. 325, and *Florida* v. *J. L.*, 529 U.S. 266, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000), to be "useful guides" in determining whether an anonymous tip had sufficient indicia of reliability to give rise to a reasonable suspicion. See also *State* v. *Hammond*, supra, 257 Conn. 617–20 (United States Supreme Court's decisions in *White* and *J. L.* "dominate this analysis"). "In *White*, an anonymous tipster told the police that a woman would drive from a particular apartment building to a particular motel in a brown Plymouth station wagon with a broken right tail light. The tipster further asserted that the woman would be transporting cocaine. . . . After confirming the innocent details, officers stopped the station wagon as it neared the motel and found cocaine in the vehicle. . . . [The United States Supreme Court] held that the officers' corroboration of certain details made the anon-

ymous tip sufficiently reliable to create reasonable suspicion of criminal activity. By accurately predicting future behavior, the tipster demonstrated a special familiarity with [the suspect's] affairs, which in turn implied that the tipster had access to reliable information about that individual's illegal activities. . . . [The court] also recognized that an informant who is proved to tell the truth about some things is more likely to tell the truth about other things, including the claim that the object of the tip is engaged in criminal activity. . . .

"In *J. L.*, by contrast, [the court] determined that no reasonable suspicion arose from a barebones tip that a young black male in a plaid shirt standing at a bus stop was carrying a gun. . . . The tipster did not explain how he knew about the gun, nor did he suggest that he had any special familiarity with the young man's affairs. . . . As a result, police had no basis for believing that the tipster [had] knowledge of concealed criminal activity. . . . Furthermore, the tip included no predictions of future behavior that could be corroborated to assess the tipster's credibility. . . . [The court] accordingly concluded that the tip was insufficiently reliable to justify a stop and frisk." (Citations omitted; internal quotation marks omitted.) *Navarette* v. *California*, supra, 572 U.S. 397–98.

On the basis of its decisions in *Alabama* v. *White*, supra, 496 U.S. 325, and *Florida* v. *J. L.*, supra, 529 U.S. 266, the majority in *Navarette* identified the following four factors to be considered in determining whether an anonymous tip has sufficient indicia of reliability: (1) whether the tipster had firsthand knowledge of the alleged criminal behavior; (2) whether the report was contemporaneous with the alleged criminal behavior; (3) whether the report was made "under the stress of excitement caused by a startling event"; and (4) whether the tipster used the 911 emergency system, which allows calls to be recorded, thereby providing

"victims with an opportunity to identify the false tipster's voice and subject him to prosecution . . . ." *Navarette* v. *California*, supra, 572 U.S. 399–400. Once a court has determined that an anonymous tip is reliable on the basis of these factors, that court must then determine whether the tip "creates reasonable suspicion that criminal activity may be afoot." (Internal quotation marks omitted.) Id., 401; see also id. (upon determining that anonymous 911 call was reliable, court was required to "determine whether the 911 caller's report of being run off the roadway created reasonable suspicion of an ongoing crime such as drunk driving as opposed to an isolated episode of past recklessness").

In *Navarette*, the anonymous 911 call was recorded as follows: "Showing southbound Highway 1 at mile marker 88, Silver Ford 150 pickup. Plate of 8-David-94925. Ran the reporting party off the roadway and was last seen approximately five [minutes] ago." (Internal quotation marks omitted.) Id., 395. Applying the four reliability factors that it had identified, the court noted that (1) the tipster had firsthand knowledge of the defendant's conduct, (2) the tip was contemporaneous with the conduct and contained innocent details later corroborated by police observations, (3) the observed conduct was startling, and (4) the tipster used the 911 system. Id., 399–401. The court ultimately concluded that, although it was a close case, the police reasonably could rely on the veracity of the tipster's report. Id., 404. The court further concluded that the observed conduct gave rise to a reasonable suspicion of drunk driving. Id. Accordingly, it concluded that the *Terry* stop of the defendant was lawful.[8] Id.

[8] Justice Scalia authored a dissenting opinion in *Navarette*, in which Justices Ginsburg, Sotomayor, and Kagan joined, arguing that the fact that the anonymous tipster had specifically identified the subject's vehicle "in no way makes it plausible that the tipster saw the car run someone off the road" and that the tipster's claim to eyewitness knowledge "supports *not at all* [the] veracity" of the tip. (Emphasis in original.) *Navarette* v. *California*, supra, 572 U.S. 407. The dissent further posited that the rationale underlying

Like the anonymous tipster in *Navarette*, the anonymous caller in the present case used the 911 system, and provided a contemporaneous, firsthand account of the alleged criminal conduct[9] containing innocent details later corroborated by the police. Likewise, the caller reasonably might have been startled by seeing a handgun. We therefore assume for purposes of this opinion that, *as far as it went*, the police reasonably could have relied on the caller's statement.[10] In other words, we assume that, under *Navarette*, the police reasonably could have believed the anonymous caller's statement that he saw a young man with a handgun in the vicinity of 472 to 476 Winthrop Avenue shortly before they arrived at the scene. We conclude for the following reasons, however, that, even if the tip was trustworthy, it did not give rise to a reasonable suspicion that the *defendant* was in possession of that gun.

the excited utterance exception to the hearsay rule did not support the reliability of the tipster's report because she had "[p]lenty of time to dissemble or embellish," and that it was unclear whether that exception even applied in the absence of other proof of the alleged criminal conduct. Id., 408. The dissent also argued that the tipster's use of the 911 system proved "absolutely nothing . . . unless the anonymous caller was *aware* of [the] fact" that 911 callers can be identified, and that, even if the tip was reliable, a single instance of careless driving did not give rise to a reasonable suspicion of "*ongoing intoxicated driving.*" (Emphasis in original.) Id., 409–10; see also *Florida* v. *J. L.*, supra, 529 U.S. 272 ("[a]n accurate description of a subject's readily observable location and appearance" is not alone sufficient to establish reliability of allegation that subject had concealed weapon because "reasonable suspicion . . . requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person"). Because we conclude that the defendant in the present case can prevail even under the majority's analysis in *Navarette*, we need not consider whether we would find Justice Scalia's concerns to be persuasive in a state constitutional analysis.

[9] Because the issue is not before us, we express no opinion as to whether a report that an individual is in possession of a handgun gives rise to a reasonable suspicion that criminal activity is afoot for purposes of *Terry*.

[10] As we have explained previously, we assume, without deciding, that the *Navarette* standard applies outside the context of drunk driving and that the police need not independently corroborate the allegation that the suspect was engaged in illegal activity before initiating a stop if the other reliability factors are satisfied.

Unlike the tipster in *Navarette*, who provided a detailed description of the specific vehicle that had run her off the road, thereby enabling the police to identify that particular vehicle, the anonymous caller in the present case did not provide a sufficiently detailed, specific description of the "young man" who had the handgun to allow the police to identify that particular individual. Numerous courts have recognized that the lack of a detailed, specific description sufficient to enable the police to identify the particular individual or vehicle that is alleged to have been involved in criminal conduct fatally undermines the sufficiency of an anonymous tip. In *United States* v. *Wheat*, supra, 278 F.3d 731, for example, the United States Court of Appeals for the Eighth Circuit stated that "the anonymous tipster must provide a sufficient quantity of information, such as the make and model of the vehicle, its license plate numbers, its location and bearing, and similar innocent details, so that the officer, and the court, may be certain that the vehicle stopped is the same as the one identified by the caller." In *Wheat*, the court further observed that, although *Florida* v. *J. L.*, supra, 529 U.S. 266, "focused on deficiencies in the quality, rather than in the quantity, of the information contained in the tip at issue in that case . . . it [was] significant that that tip only spoke of a young black male wearing a plaid shirt, standing at a particular bus stop. See [*Florida* v. *J. L.*, supra, 268]. That is a rather generic description [creating] the possibility for confusion of the suspect's identity . . . ." *United States* v. *Wheat*, supra, 731.

Similarly, the District of Columbia Court of Appeals has observed that, "[i]n order to pass muster under *Terry* and its progeny, the articulable suspicion must be particularized as to the individual stopped. . . . Accordingly, in the absence of other circumstances that provide sufficient particularity, a description applicable to large numbers of people will not suffice to justify

the seizure of an individual." (Citations omitted; internal quotation marks omitted.) *In re S.B.*, 44 A.3d 948, 954–55 (D.C. 2012). In that case, the court concluded that an anonymous tip that a black male who was wearing white pants and "messing around" with a girl in a particular playground had a gun was insufficient to establish reasonable suspicion as to the defendant in that case because the police officers lacked "a rational basis for differentiating [the defendant] from [a different] individual in white clothing whom they had just searched (or any other juvenile in white pants who might come along) . . . ." Id., 956–57; see also *Goodson* v. *Corpus Christi*, 202 F.3d 730, 737 (5th Cir. 2000) (lookout broadcast for "tall, heavy-set, white man dressed as a cowboy" did not give police "reasonable suspicion to stop and frisk any tall, heavy-set, white man" because "[s]uch a description would simply be too vague, and fit too many people, to constitute particular, articulable facts on which to base reasonable suspicion"); *United States* v. *Jones*, 998 F.2d 883, 884–85 (10th Cir. 1993) (tip from identified callers regarding suspicious activity by two African-American men who left scene in black Mercedes was not sufficiently specific to give rise to reasonable suspicion to stop black Mercedes in which two African-American men were traveling); *United States* v. *Jones*, 619 F.2d 494, 497 (5th Cir. 1980) (radio bulletin indicating that "the police were looking for a black male, [five] feet [six] inches to [five] feet [nine] inches tall and weighing between 150 and 180 pounds, with a medium afro hair style, who was wearing jeans and a long denim jacket" did not give rise to probable cause to arrest individual merely because he matched that description); *In re A.S.*, 614 A.2d 534, 539 (D.C. 1992) (lookout broadcast was not sufficient to establish reasonable suspicion when police officer's description "could have fit not merely the five individuals [in the specified location], but a potentially

much greater number of youths in the area"); *State* v. *Golotta*, 178 N.J. 205, 222, 837 A.2d 359 (2003) (911 caller "must provide a sufficient quantity of information, such as an adequate description of the vehicle, its location and bearing, or similar innocent details, so that the officer, and the court, may be certain that the vehicle stopped is the same as the one identified by the caller" [internal quotation marks omitted]); see also *State* v. *Benton*, supra, 304 Conn. 843 (police must have "a particularized and objective basis for suspecting the particular person stopped of criminal activity" [internal quotation marks omitted]).[11] Indeed, we entirely agree

[11] In *State* v. *Hammond*, supra, 257 Conn. 623–24, this court concluded that the fact that the police corroborated the anonymous tipster's description of the alleged wrongdoers as two black males, one of whom was taller than the other, and one of whom was wearing a blue and white coat and the other of whom was wearing a blue and red coat, "added nothing to the reliability or credibility of the tip, but merely allowed the police to pinpoint the persons who were the targets of the accusation." Thus, the court appears to have followed the reasoning of the court in *Florida* v. *J. L.*, supra, 529 U.S. 272, that "[a]n accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity." We note, however, that this line of reasoning was arguably overruled, or at least weakened, as a matter of federal constitutional analysis under the fourth amendment, by *Navarette* v. *California*, supra, 572 U.S. 399, when the court concluded that a detailed description sufficient to allow the police to identify the specific vehicle observed by the tipster, together with an allegation that the vehicle had been driven dangerously, was sufficient to give rise to a reasonable suspicion of drunk driving. See Note, "The Supreme Court—Leading Cases," 128 Harv. L. Rev. 119, 240 (2014) ("in [*Navarette*'s] wake the police may lawfully stop a person when someone else anonymously claims to be the victim of a crime by that person, despite lacking evidence that a crime even occurred"). This court also stated in *Hammond* that "[t]oo many people fit [the tipster's] description for it to justify a reasonable suspicion of criminal activity"; (internal quotation marks omitted) *State* v. *Hammond*, supra, 624; a remark that would appear to be inconsistent with the immediately preceding statement that the tip was sufficiently detailed to allow the police to identify the targets of the accusation. See id. In any event, regardless of the reasoning underlying this court's decision in *Hammond*, nothing in that case or in *Navarette* undermines the principle that an anonymous tipster's description must be sufficiently detailed and specific to allow the police to identify a particular individual or vehicle.

with the District of Columbia Court of Appeals that the "dragnet seizure of [multiple] youths who resembled a generalized description cannot be squared with the long-standing requirement for particularized, individualized suspicion." *In re A.S.*, supra, 540; see also id. ("[t]o allow the seizure of three people on the basis of a generalized description that would fit many people is directly contrary to the central teaching of the [Supreme] Court's [f]ourth [a]mendment jurisprudence demanding specificity" [internal quotation marks omitted]).

In the present case, the anonymous caller indicated only that the handgun was in possession of one of several young men wearing dark clothing in the vicinity of 472 to 476 Winthrop Avenue. It is clear, therefore, that the tip was not sufficiently detailed or specific to enable the police to know which of the six individuals subjected to the *Terry* stop had the handgun. Indeed, they had no way of knowing whether *any* of those individuals had that gun. The caller could not specify exactly how many individuals he had seen, and he indicated that some of the individuals were gathered around the Infiniti, while others were "crossing the street . . . back and forth." Thus, for all the police knew, it was possible that the individual with the handgun was not part of the group gathered around the Infiniti. Accordingly, we conclude that the tip was not sufficiently specific to give rise to the particularized, individualized suspicion required by the fourth amendment. The fact that the tip involved the possession of a firearm does not affect this conclusion. See *Florida* v. *J. L.*, supra, 529 U.S. 272 ("an automatic firearm exception to our established reliability analysis would rove too far").[12]

[12] In *J. L.*, the court concluded that the danger posed by firearms did not outweigh the possibility that an anonymous tip might be *false* for purposes of determining whether police had a reasonable suspicion that criminal activity was afoot. See *Florida* v. *J. L.*, supra, 529 U.S. 272. Even if we were to assume that *Navarette* tends to undermine that conclusion; see footnote 11 of this opinion; nothing in *Navarette* suggests that there is a "dangerous

We therefore conclude that the anonymous 911 call in the present case did not give rise to a reasonable suspicion that any of the individuals gathered in the vicinity of the black Infiniti, including the defendant, was in possession of a handgun, justifying an investigative *Terry* stop. We, therefore, further conclude that the seizure of the defendant violated his fourth amendment rights. Accordingly, we also conclude that the trial court improperly denied the defendant's motion to suppress.

In reaching these conclusions, we are mindful of the gun violence that plagues our state and our nation and the importance of ensuring that the police have the tools that they need to combat this pestilence. We emphasize that the police have not only the right, but the duty to respond appropriately and effectively to gun complaints. For example, as the defendant conceded at oral argument before this court, the police in the present case could have responded to the anonymous 911 call by going to the scene and observing the men or approaching them to ask about the handgun without effecting a *Terry* stop. See *United States* v. *Watson*, 900 F.3d 892, 898 (7th Cir. 2018) (when police receive anonymous tip about gun, they can respond "with a strong and visible police presence, one that involved talking with people on the scene when they arrived" or "make their own observations about the developing situation, which could transform an innocuous tip into reasonable suspicion" [internal quotation marks omitted]); *United States* v. *Lowe*, 791 F.3d 424, 436 (3d Cir. 2015) ("[o]fficers proceeding on the basis of an anonymous tip that does not itself give rise to reason-

conduct" exception to the requirement that an anonymous tip be sufficiently detailed and specific to allow the police to identify a particular individual. In other words, if the only details reported by anonymous caller in *Navarette* had been that she had been run off the road by a Ford pickup, we find it unlikely that the court would have found that the police had reasonable suspicion to stop every Ford pickup in the vicinity merely because the caller had made an otherwise reliable allegation of dangerous conduct.

able suspicion have many tools at their disposal to gather additional evidence that could satisfy the requirements of *Terry* and therefore allow police to stop the individual . . . [including] investigation, surveillance, and even approaching the suspect without a show of authority to pose questions and to make observations about the suspect's conduct and demeanor" [citation omitted]); see also *United States* v. *Harger*, 313 F. Supp. 3d 1082, 1092 (N.D. Cal. 2018).

The judgment is reversed and the case is remanded with direction to grant the defendant's motion to suppress.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* TERRANCE BROWN (SC 19960)

Palmer, McDonald, Robinson, D'Auria, Mullins and Kahn, Js.*

Syllabus

Pursuant to statute ([Rev. to 2009] § 54-47aa), a law enforcement official may request an ex parte order from a Superior Court judge to compel a telecommunications carrier to disclose basic cell phone subscriber information and information identifying the origin and destination of each communication generated or received by the subscriber. The judge shall grant the order if the law enforcement official states a reasonable and articulable suspicion that a crime has been or is being committed.

The defendant, who had been charged in multiple informations with various crimes, including burglary and larceny, for his alleged role in the theft or attempted theft of automated teller machines from gas stations and convenience stores, filed motions to suppress the historical and prospective cell phone call and location data obtained by the state as a result of three ex parte orders that had been issued pursuant to § 54-47aa. A police task force had been organized to investigate a series of crimes in which an individual or individuals, using various stolen vehicles, had backed those vehicles into the stores or gas stations and removed freestanding automated teller machines. As a result of information obtained by the police, an officer conducted a motor vehicle stop of

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

the defendant, who was released after questioning. After uncovering further information about the defendant, including his cell phone number, the police determined that the defendant may have been involved in the various thefts under investigation. The police then obtained the first ex parte order, which directed the defendant's cell phone carrier to disclose the past three months of his cell phone data and other basic subscriber information. An analysis of that data led the police to determine that the defendant had used his cell phone in relevant locations during times and dates that coincided with dates on which the various thefts under investigation had occurred. On the basis of this information, the police obtained two more ex parte orders that were prospective in nature, requiring the defendant's cell phone carrier to disclose caller identification information linked to his cell phone number, including live updates every ten minutes, for two consecutive early morning periods and for a later three day period. Based on the cell phone data that had been obtained pursuant to the orders, J, who had been in communication with the defendant at certain relevant times, was arrested and taken into custody in connection with an automated teller machine theft. During their interview of J, the police revealed to J that his cell phone number was listed in the defendant's phone log and that the cell phone data indicated that the defendant and J had contacted each other at or around the time of certain of the alleged thefts or attempted thefts. J then gave a statement implicating himself and the defendant in connection with many of the thefts and attempted thefts that had been under investigation. Relying on the state's concession that the second and third orders authorizing the disclosure of prospective cell phone data violated § 54-47aa and its determination that the first order authorizing the disclosure of historical data also violated § 54-47aa, the trial court granted the defendant's motions to suppress all of the cell phone data, J's statement to the police, and any potential testimony by J. The trial court also concluded that the state had failed to prove that the inevitable discovery exception to the exclusionary rule applied to J's statement and potential testimony. Thereafter, the trial court granted the defendant's motions to dismiss the charges and rendered judgments thereon, from which the state, on the granting of permission, appealed. *Held*:

1. The trial court correctly concluded that the state obtained the defendant's cell phone data illegally; the state had conceded that the two court orders authorizing the disclosure of prospective cell phone data were obtained in violation of § 54-47aa, and the disclosure of historical cell phone data pursuant to the first ex parte order violated the defendant's fourth amendment rights in light of the United States Supreme Court's recent decision in *Carpenter* v. *United States* (138 S. Ct. 2206), in which the court held that an individual has a legitimate expectation of privacy in the historical record of his physical movements as captured through cell phone data and that the government must generally obtain a warrant

supported by probable cause before acquiring such data, because the police obtained the defendant's historical data on the basis of a reasonable and articulable suspicion, rather than on the basis of a warrant supported by probable cause.

2. The trial court correctly concluded that the suppression of the historical and prospective cell phone data that had been illegally obtained by the state was the appropriate remedy: notwithstanding the state's claim that, because the police officers acted in reasonable reliance on the court's order authorizing the disclosure of the historical cell phone data, they acted in good faith, and that the purpose of the exclusionary rule, namely, to deter police misconduct, did not apply under these circumstances,, this court's prior case law has uniformly established a bright-line rejection of the good faith exception to the exclusionary rule under the state constitution, and, accordingly, the trial court properly suppressed the defendant's historical cell phone data; moreover, the state could not prevail on its claim that, with respect to the disclosure of the prospective cell phone data, suppression was not a remedy for a violation of § 54-47aa, this court having determined, after reviewing the statute's text and legislative history, as well as related statutes, that the statute's legislative history provided strong support for the conclusion that the legislature intended that suppression would be an appropriate remedy for violations of § 54-47aa and that the tracking of the defendant's cell phone, in the absence of a showing of probable cause and in violation of § 54-47aa, implicated important privacy interests that are traditionally the type protected by the fourth amendment, which required the application of the exclusionary rule and the suppression of the prospective cell phone data.

3. The trial court correctly determined that the state failed to meet its burden of proving that the inevitable discovery exception to the exclusionary rule applied to J's statement to the police implicating the defendant and J's potential testimony, which the trial court suppressed on the ground that the state conceded that, in the absence of the illegally obtained cell phone data, the police would not have interviewed J and obtained his statement; the trial court properly determined that the state, in order to bear its burden of proving that that inevitable discovery exception applied, was required to prove by a preponderance of the evidence not only that the police would have identified and located J by legal means, but also that J would have cooperated and provided the same information in the absence of the illegally obtained cell phone data, and, although the state presented credible evidence at the defendant's suppression hearing that it inevitably would have discovered J by lawful means, it failed to present any evidence to demonstrate that J would have similarly cooperated with the police in the absence of being confronted with the illegally obtained cell phone data.

Argued December 15, 2017—officially released April 2, 2019

Procedural History

Informations, in twelve cases, charging the defendant with nine counts each of the crimes of larceny in the third degree and criminal mischief in the first degree, six counts of the crime of burglary in the third degree, four counts each of the crimes of conspiracy to commit burglary in the third degree and conspiracy to commit larceny in the third degree, three counts of the crime of conspiracy to commit criminal mischief in the first degree, two counts each of the crimes of attempt to commit burglary in the third degree and criminal trover in the first degree, and one count each of the crimes of burglary in the first degree, larceny in the fourth degree, conspiracy to commit larceny in the fourth degree, larceny in the fifth degree and possession of burglar tools, brought to the Superior Court in the judicial district of New Haven, where the court, *Blue*, *J.*, granted the defendant's motions to suppress certain evidence; thereafter, the court, *Clifford*, *J.*, granted the defendant's motions to dismiss the charges and rendered judgments thereon, from which the state, on the granting of permission, appealed. *Affirmed.*

Harry Weller, senior assistant state's attorney, with whom were *John P. Doyle*, *Jr.*, senior assistant state's attorney, and, on the brief, *Patrick J. Griffin*, state's attorney, *Timothy J. Sugrue*, assistant state's attorney, and *Dana Tal*, certified legal intern, for the appellant (state).

Jennifer B. Smith, for the appellee (defendant).

Opinion

KAHN, J. The present case is in large part governed by the recent decision of the United States Supreme Court in *Carpenter* v. *United States*, U.S. , 138 S. Ct. 2206, 2217, 2221, 201 L. Ed. 2d 507 (2018), in which the court held that an individual has "a legitimate expectation of privacy in the record of his physical movements as captured through [cell site location infor-

mation]" (CSLI), and, therefore, "the [g]overnment must generally obtain a warrant supported by probable cause before acquiring such records." The state appeals[1] from the judgments of dismissal rendered by the trial court after it granted the oral motion of the defendant, Terrance Brown, seeking dismissal of all charges in thirteen separate dockets.[2] The state claims that the trial court improperly granted the defendant's motions to suppress any and all "cellular-telephone-derived location information" obtained by the state as a result of three ex parte orders that had been granted pursuant to General Statutes (Rev. to 2009) § 54-47aa.[3]

[1] The state appealed to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[2] The defendant was charged in twelve of the informations with, inter alia, various burglary and larceny charges. As to the thirteenth information, Docket No. CR-11-0076427-S, referenced in the trial court's corrected consolidated memorandum of decision, the record contains neither the information nor the judgment file for that docket. Nor is there any other document in the record that identifies the charges filed against the defendant in that docket. We observe that, although the trial court, *Clifford*, *J.*, subsequently indicated that it was granting dismissal in all thirteen dockets, in its appeal form, the state did not list the judgment in Docket No. CR-11-0076427-S as a judgment from which the state is appealing. The state appeals only from the judgments in the remaining twelve dockets.

[3] General Statutes (Rev. to 2009) § 54-47aa provides in relevant part:

"(a) For the purposes of this section:

"(1) 'Basic subscriber information' means: (A) Name, (B) address, (C) local and long distance telephone connection records or records of session times and durations, (D) length of service, including start date, and types of services utilized, (E) telephone or instrument number or other subscriber number or identity, including any assigned Internet protocol address, and (F) means and source of payment for such service, including any credit card or bank account number;

"(2) 'Call-identifying information' means dialing or signaling information that identifies the origin, direction, destination or termination of each communication generated or received by a subscriber or customer by means of any equipment, facility or service of a telecommunications carrier;

. . .

"(b) A law enforcement official may request an ex parte order from a judge of the Superior Court to compel (1) a telecommunications carrier to disclose call-identifying information pertaining to a subscriber or customer, or (2) a provider of electronic communication service or remote computing

In their original briefs and arguments to this court, the parties focused primarily on whether the trial court properly granted the defendant's motions on the basis of its conclusion that the state obtained the prospective and historical CSLI in violation of § 54-47aa, and that suppression of the records was the appropriate remedy. Following oral argument, however, this court stayed the appeal pending the decision of the United States Supreme Court in *Carpenter* and ordered the parties to submit supplemental briefs concerning the relevance of that decision to this appeal. In light of the court's holding in *Carpenter*, we conclude that, because the state obtained the defendant's historical CSLI solely on the basis of a reasonable and articulable suspicion, rather than on a warrant supported by probable cause, the records were obtained in violation of the defendant's fourth amendment rights. We further conclude that the trial court properly determined that suppression of both the historical and prospective CSLI—which the state concedes it obtained in violation of § 54-47aa—was the appropriate remedy. Finally, we conclude that the trial court properly rejected the state's reliance on the inevitable discovery doctrine. Accordingly, we affirm the judgments of the trial court.

The record reveals the following facts and procedural background. From July 30 through November 23, 2010,

service to disclose basic subscriber information pertaining to a subscriber or customer. The judge shall grant such order if the law enforcement official states a reasonable and articulable suspicion that a crime has been or is being committed or that exigent circumstances exist and such call-identifying or basic subscriber information is relevant and material to an ongoing criminal investigation. The order shall state upon its face the case number assigned to such investigation, the date and time of issuance and the name of the judge authorizing the order. The law enforcement official shall have any ex parte order issued pursuant to this subsection signed by the authorizing judge within forty-eight hours or not later than the next business day, whichever is earlier. . . ."

Unless otherwise indicated, all subsequent references to § 54-47aa in this opinion are to the 2009 revision.

Connecticut State Police Detective Patrick Meehan was a member of a task force investigating a series of burglaries and attempted burglaries at a variety of gas stations and convenience stores in the New Haven, Waterbury and Fairfield areas. In the late night and early morning hours, the thieves targeted businesses that had freestanding ATMs inside a windowed storefront. Using a stolen vehicle, in many instances a Dodge Caravan minivan, the thieves backed the vehicle into the building when the business was closed, smashing through the glass and, in many cases, knocking over the ATM. The thieves would then load the ATM into the back of the vehicle, from which the rear seats had been removed, and drive away. Several of the ATMs had subsequently been recovered; those machines appeared to have been cut open with a reciprocating saw. Three of the ATMs were recovered in a cemetery not far from where the defendant lived. The stolen vehicles were later abandoned in different locations from where the ATMs had been discarded.

Following a task force meeting on September 15, 2010, Meehan learned that, on or about May 26, 2009, a police officer patrolling in the town of Monroe had observed a Dodge Caravan swerve over the double yellow line in the road several times. The officer pulled the Caravan over and, because there was heavy traffic, directed the driver to a nearby parking lot. As the driver of the Caravan began to pull into the parking lot, a Lincoln Navigator pulled up alongside the Caravan. The Lincoln's driver briefly spoke to the driver of the Caravan, then drove away. The Caravan continued into the parking lot but, while the van was still in gear, the driver opened the door and fled on foot. Although the officers attempted to pursue the driver, he was never apprehended or identified. The rear seats of the Caravan, which had been stolen in Bridgeport just prior to the incident, had been removed. The Lincoln Navigator was

stopped moments later. At the time of the stop, the defendant, who was driving that vehicle, informed the officers that he was a student at Southern Connecticut State University (Southern) and played for the football team. After being questioned by the officers, the defendant was allowed to leave.

Meehan subsequently began investigating the defendant. From the campus police at Southern, Meehan obtained the defendant's cell phone number and his address in New Haven, a location not far from where a couple of the stolen vehicles had been recovered. When Meehan ran a criminal history check on the defendant, he discovered that he previously had been convicted of burglary and larceny. Specifically, the defendant had been convicted of committing two burglaries over the course of several weeks at a gun shop. Of particular interest to Meehan was the fact that the defendant had used a vehicle to smash through the front door to enter the shop.

On October 4, 2010, Meehan and other police officers conducted overnight surveillance of the defendant. Sometime after 10 p.m., they observed the defendant leave his house, get into his car and drive to the cemetery where three of the stolen ATMs had been recovered approximately two weeks earlier. The officers followed him to the cemetery, where he remained for a few minutes. He then returned to his home and did not leave for the rest of the night.

On the basis of all of this information, Meehan obtained the first of the three ex parte orders that are the subject of this appeal and which was the sole order that authorized the disclosure of historical cell phone records. In this first ex parte order, issued on October 22, 2010, the court, *Holden*, *J.*, directed T-Mobile Com-

munications (T-Mobile)[4] to disclose telephone records, including basic subscriber information and call identifying information, pertaining to the defendant's cell phone number for the period of July 29 to September 29, 2010. The order specified that basic subscriber information included "name, address, local and long distant telephone connection records, records of session times and durations, length of service (including start date, and types of service utilized), telephone or instrument number, other subscriber number or identity, assigned internet protocol addresses, and means and source of payment for such service including any credit card or bank account number." "Call identifying information" included "dialing or signaling information that identifies the origin, direction, destination or termination of each communication generated or received by a subscriber or customer by means of any equipment, facility or service of telecommunications carrier." The order also directed the disclosure of "cellular site/tower information including addresses of cellular towers . . . ."

The remaining two ex parte orders were prospective in nature. In the second order, issued on November 15, 2010, the court, *Shaban*, *J.*, directed T-Mobile to disclose call identifying information for the defendant's cell phone number, including live updates from T-Mobile on cell phone pings every ten minutes between midnight and 6 a.m. on both November 16 and 17, 2010. In the third order, issued on November 22, 2010, the court, *Cremins*, *J.*, directed T-Mobile to disclose call identifying information for the defendant's cell phone number, including "E911 pings," every ten minutes from midnight on November 23, 2010 until 7 a.m. on November 25, 2010.

[4] The November 15 and 22, 2010 ex parte orders were directed to T-Mobile USA, Inc., at the same business address as the October 22, 2010 order. The record does not clarify any reason for the difference in corporate name, and we refer in this opinion to the telecommunications carrier as T-Mobile.

From the records disclosed as a result of the October 22, 2010 order, following consultation with other officers who assisted in the analysis of the records, Meehan noticed that, during the period between July 29 and September 29, 2010, the defendant's daily cell phone calls ordinarily stopped sometime between 10 and 11 p.m. There were some exceptions to that general pattern—certain days when the defendant made several phone calls between 2 and 4 a.m. Those dates and times coincided with the dates on which there had been attempted or completed ATM burglaries. In addition, Meehan observed that the location information recovered from the cell phone records often "match[ed] . . . up" with the location of the burglaries or attempts that had occurred on a given date. That is, during the time period of the burglaries, the defendant's cell phone records showed that his phone was pinging off of nearby cell towers.

Meehan particularly focused on the defendant's phone records for the early morning hours of September 28, 2010, when two attempted or completed ATM burglaries had occurred, both of which had involved stolen vans smashing through storefronts. An ATM was removed from a business in Shelton at approximately 2:15 a.m., and there was an attempt to steal an ATM in Ansonia at 5:04 a.m. At the time that these two incidents occurred, six phone calls were exchanged between the defendant's cell phone and a New Jersey telephone number. Meehan discovered that the New Jersey telephone number was registered under the name "Ollie Twig."

On November 23, 2010, Meehan reported to the Wallingford Police Department, where a suspect, Ramon Johnson, had been arrested and taken into custody in connection with an ATM burglary. The police had located Johnson as a result of the real time tracking of the defendant's CSLI on that date, pursuant to the

prospective ex parte order granted on November 22, 2010. During his interview of Johnson, Meehan learned that Johnson, like the defendant, was a student at Southern and a member of the school's football team. Johnson informed Meehan that, when not at school, he lived in New Jersey with his grandmother, Ollie Twig. At that point, Meehan showed Johnson the defendant's phone log for September 28, 2010, which he had obtained pursuant to the October 22, 2010 order, and in the margins of which Meehan had written "Ollie Twig" and drawn arrows pointing to the New Jersey phone number that the defendant had been calling when the Shelton burglary and the Ansonia attempted burglary were taking place. Johnson admitted that the phone number in the log was his and gave a statement implicating himself and the defendant in connection with the series of ATM burglaries and attempted burglaries.

The defendant was subsequently arrested and charged in thirteen separate informations under thirteen different docket numbers, with committing numerous offenses, including burglary, attempt to commit burglary, conspiracy to commit burglary, larceny, conspiracy to commit larceny, criminal mischief and possession of burglar tools. See footnote 2 of this opinion. The defendant filed motions to suppress any and all "cellular-telephone-derived location information," both historical and prospective in nature, as well as any evidence found to be the fruit of such information, including any potential testimony by Johnson.[5] Included in the evidence considered by the trial court during the suppression hearing were stipulated facts submitted by the parties, including: "As a result of the real time

[5] The trial court noted that the defendant had filed identical motions to suppress in four of the criminal dockets and further noted that, "[a]lthough no written suppression motions have been filed in the remaining files, the parties agreed at the hearing that the already filed motions address issues common to all files." Accordingly, the court considered the defendant to have filed motions to suppress in the remaining files.

tracking of the defendant through the monitoring of [his] cell site location data, the police were able to track the defendant's activities on November 23, 2010, and to thereby locate [Johnson]. . . . But for the ability of the police to track [the defendant's] movements by monitoring [his] cell phone on a real time basis, Johnson would never have been stopped, detained, arrested or interrogated by the police on November 23, 2010."

Following the suppression hearing, the trial court granted the defendant's motions to suppress in all of the cases pending against him. In its memorandum of decision, the court acknowledged that the defendant's motions implicated both statutory and constitutional principles, but, because the constitutional question of whether the ex parte orders violated the defendant's fourth amendment rights had not yet been clearly settled, the court first considered whether the ex parte orders violated § 54-47aa, and, if so, whether suppression was the proper remedy.

As to the prospective ex parte orders, issued on November 15 and 22, 2010, the state conceded that those orders violated § 54-47aa. The first part of the court's inquiry focused, therefore, on whether the October 22, 2010 order, which authorized the disclosure of the defendant's historical cell phone records, violated § 54-47aa, a question that the court answered in the affirmative. The court then addressed the second issue—whether suppression was the appropriate remedy for evidence that the state had obtained in violation of § 54-47aa. The court acknowledged that suppression was not always required for evidence obtained in violation of state law. The court observed, however, that, because § 54-47aa implicates important fourth amendment privacy interests and because the failure to apply the exclusionary rule would encourage further violations, suppression was the appropriate remedy.

Finally, the court considered the defendant's claim that, because the state had conceded that, in the absence of the illegally obtained CSLI, it would not have interviewed Johnson and obtained his statement implicating himself and the defendant on November 23, 2010, the court should suppress Johnson's statement and potential trial testimony. The court observed that there was ample evidence in the record to sustain the defendant's burden to prove that Johnson's arrest was tainted. The remaining question for the court was whether the state had proven that one of the exceptions to the exclusionary rule applied. The court began with the observation that, because Johnson did not testify at the suppression hearing, "the record is utterly barren concerning the circumstances of [his] interrogation and [his] willingness or unwillingness to give his statements or to testify." Although the court credited the testimony and evidence presented by the state that supported a finding that the state eventually would have identified and located Johnson even without the CSLI, it noted that it was unclear whether Johnson would have confessed if he had not been confronted with the damning CSLI evidence. In light of that lacuna in the record, the court concluded that the state had failed to prove that it inevitably would have obtained the statement from Johnson incriminating himself and the defendant.[6]

Following the granting of the defendant's motions to suppress, the state entered nolles prosequi on all of the charges against the defendant in the pending cases. In response, the defendant made an oral motion to dismiss

[6] The trial court also concluded that the state had failed to prove that Johnson's statement and potential testimony were sufficiently attenuated from the tainted arrest. The state claims that the attenuation doctrine is not implicated under the facts of the present case and challenges only the trial court's finding that it failed to prove that the inevitable discovery exception to the exclusionary rule applied. Accordingly, we consider only whether the trial court properly analyzed the inevitable discovery doctrine.

all charges, which the trial court granted. This appeal followed.

We consider the question of whether the trial court properly granted the defendant's motions to suppress the CSLI records in two parts. First, we conclude that those records were obtained illegally. The state's concession that the prospective orders were issued in violation of § 54-47aa resolves that question for the two prospective orders. As for the October 22, 2010 ex parte order authorizing the disclosure of approximately three months of the defendant's historical CSLI, we conclude that the order violated his fourth amendment rights. See *Carpenter* v. *United States*, supra, 138 S. Ct. 2206. Second, we conclude that the trial court properly determined that suppression was the appropriate remedy as to all three sets of illegally obtained records. Finally, we conclude that the trial court properly determined that the suppression of those records also required that Johnson's statement and potential testimony be suppressed.

I

We first consider whether the trial court properly concluded that the state obtained the defendant's CSLI illegally. Before proceeding to the substance, we set forth the applicable standard of review of a trial court's decision on a motion to suppress. "A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [W]hen a question of fact is essential to the outcome of a particular legal determination that implicates a defendant's constitutional rights, [however] and the credibility of witnesses is not the primary issue, 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. . . . [W]here the

legal conclusions of the court are challenged, [our review is plenary, and] we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision . . . ." (Internal quotation marks omitted.) *State* v. *Kendrick*, 314 Conn. 212, 222, 100 A.3d 821 (2014). Because the state's claim that the trial court improperly concluded that law enforcement obtained the CSLI illegally challenges the trial court's legal conclusions, we exercise plenary review. See id.

We begin, as did the trial court, with the state's concession of the illegality of the two prospective ex parte orders. Given that concession, we need only resolve the legality of the October 22, 2010 ex parte order, which authorized the disclosure of the defendant's historical CSLI. That question is resolved by the recent decision of the United States Supreme Court in *Carpenter* v. *United States*, supra, 138 S. Ct. 2206. In *Carpenter*, the court considered whether the state "conducts a search under the [f]ourth [a]mendment when it accesses historical cell phone records that provide a comprehensive chronicle of the user's past movements." Id., 2211. The court answered that question in the affirmative and held that "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI." Id., 2217. Accordingly, the state "must generally obtain a warrant supported by probable cause before acquiring such records." Id., 2221.

It is undisputed that the state did not obtain a warrant supported by probable cause in order to procure the defendant's historical CSLI. Instead, the state relied on § 54-47aa (b) to obtain the ex parte order authorizing the disclosure of those records. At the time of the offenses, § 54-47aa (b) authorized a judge of the Superior Court to issue an ex parte order compelling a telecommunications carrier to disclose call identifying information and/or basic subscriber information per-

taining to a customer if the law enforcement official seeking the order swore under oath that there was a "reasonable and articulable suspicion that a crime has been or is being committed or that exigent circumstances exist and such call-identifying or basic subscriber information is relevant and material to an ongoing criminal investigation."[7] General Statutes (Rev. to 2009) § 54-47aa (b). Accordingly, because the record is clear that the state obtained the defendant's historical CSLI in the absence of a warrant supported by probable cause, the disclosure of those records violated the defendant's fourth amendment rights.[8]

[7] The statute has subsequently been amended to clarify that a judge of the Superior Court must make a finding of probable cause prior to issuing an order compelling a telecommunications carrier to disclose "the geolocation data associated with such subscriber's or customer's call-identifying information . . . ." General Statutes § 54-47aa (b); see Public Acts 2016, No. 16-148, § 1.

[8] The state contends that we should not apply *Carpenter* to this appeal unless we first conclude that the October 22, 2010 ex parte order was issued in violation of § 54-47aa (b). The state relies on the principle that this court "eschew[s] unnecessarily deciding constitutional questions . . . ." (Citations omitted.) *Hogan* v. *Dept. of Children & Families*, 290 Conn. 545, 560, 964 A.2d 1213 (2009). The jurisprudential principles underlying that policy are not implicated in the present case, however, where *Carpenter* is clearly dispositive of the issue of whether the state obtained the defendant's historical CSLI in violation of the fourth amendment.

In the alternative, the state contends that *Carpenter* would not prohibit the October 22, 2010 ex parte order. The state points to the majority's response in *Carpenter* to Justice Kennedy's claim in his dissent that the majority had established "an arbitrary [six day] cutoff . . . [that] suggests that less than seven days of location information may not require a warrant." *Carpenter* v. *United States*, supra, 138 S. Ct. 2234 (Kennedy, J., dissenting). The majority rejected that characterization, responding that "we need not decide whether there is a limited period for which the [g]overnment may obtain an individual's historical CSLI free from [f]ourth [a]mendment scrutiny, and if so, how long that period might be. It is sufficient for our purposes . . . to hold that accessing seven days of CSLI constitutes a [f]ourth amendment search." Id., 2217 n.3. We believe that a fair reading of the decision is that accessing CSLI for seven days or more is clearly a search for purposes of the fourth amendment. What the court left unsettled is whether accessing CSLI for fewer than seven days constitutes a search. At best, therefore, *Carpenter* leaves unanswered the question of whether an order targeting a very short time frame would be permitted under the fourth amendment.

II

We next address the question of whether the trial court properly concluded that suppression of the historical and real time CSLI was the appropriate remedy. The issue presents a question of law over which we have plenary review. See, e.g., *State* v. *Kendrick*, supra, 314 Conn. 222. Because the illegality of the historical CSLI is grounded on our conclusion that the seizure of those records violated the defendant's fourth amendment rights, we first consider whether those records properly were suppressed. The state contends that, because the officers acted in reasonable reliance on the court's ex parte order, they acted in good faith and the purpose of the exclusionary rule—to deter police misconduct—does not apply. In response, the defendant relies on the greater protection provided under the state constitution for fourth amendment violations. That is, relying on this court's decision in *State* v. *Marsala*, 216 Conn. 150, 171, 579 A.2d 58 (1990), the defendant responds that Connecticut has rejected the good faith exception to the application of the exclusionary rule. We agree with the defendant.

More importantly for purposes of the present case, however, is that, even if the state were correct that *Carpenter* is limited to cases in which the state accesses more than six days of CSLI, the October 22, 2010 ex parte order falls well within that rule. As the state acknowledges, that order authorized the disclosure of sixty-two days of historical CSLI, from July 29 to September 29, 2010.

Finally, we observe that the state appears to suggest that, if it is correct that the holding in *Carpenter* is limited to instances in which the state has accessed seven days or more of historical CSLI, this court should remand to the trial court for a hearing to determine which six days of historical CSLI the state *would have sought* if they had been aware of the supposed six day limit. Even if we agreed with the state's reading of *Carpenter*, we would categorically reject that claim. We find the procedure requested by the state to be inappropriate in the present case, in which the state seeks the opportunity to return to the trial court so that it may belatedly attempt to "correct" the infringement with the benefit of having reviewed all the data for the critical pieces of evidence.

We have recognized that, "[a]s a general principle, the exclusionary rule bars the government from introducing at trial evidence obtained in violation of the fourth amendment to the United States constitution. See *Wong Sun* v. *United States*, 371 U.S. 471, 485, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). [T]he rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the [f]ourth [a]mendment against unreasonable searches and seizures. *United States* v. *Calandra*, 414 U.S. 338, 347, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974)." (Internal quotation marks omitted.) *State* v. *Brunetti*, 279 Conn. 39, 72–73, 901 A.2d 1 (2006), cert. denied, 549 U.S. 1212, 127 S. Ct. 1328, 167 L. Ed. 2d 85 (2007).

Under the "[good faith] exception" to the exclusionary rule under the federal constitution, suppression of "reliable physical evidence seized by officers reasonably relying on a warrant issued by a detached and neutral magistrate" is not required. *United States* v. *Leon*, 468 U.S. 897, 913, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). In *Marsala*, however, this court categorically rejected the good faith exception, holding that it is "incompatible with article first, § 7, of our state constitution, which provides: 'The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures; and no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.' " *State* v. *Marsala*, supra, 216 Conn. 159. Nothing in our decision in *Marsala* suggested that we intended courts to accord the higher level of protection to defendants on a case-by-case basis. Instead, the decision established a bright-line rejection of the good faith exception under our state constitution. Id., 171.

Our subsequent decisions citing to *Marsala* uniformly have characterized *Marsala* as categorically rejecting

the good faith exception—not, as suggested by the state, on a case-by-case basis. See, e.g., *State* v. *Kelly*, 313 Conn. 1, 15 n.13, 95 A.3d 1081 (2014) (in *Marsala*, court declined "to recognize, for purposes of state constitution, good faith exception applicable to fourth amendment exclusionary rule"); *State* v. *Buie*, 312 Conn. 574, 584, 94 A.3d 608 (2014) (summarizing holding of *Marsala* as "good faith exception to warrant requirement does not exist under article first, § 7, of state constitution"); *State* v. *Jenkins*, 298 Conn. 209, 291, 3 A.3d 806 (2010) (*Katz*, *J.*, dissenting) (noting that *Marsala* "reject[ed] good faith exception to exclusionary rule adopted by United States Supreme Court"); *State* v. *Lawrence*, 282 Conn. 141, 205–206, 920 A.2d 236 (2007) (citing general principle relied on in *Marsala* for rejection of good faith exception: "[a]lthough we recognize that the exclusionary rule exacts a certain cost from society in the form of the suppression of relevant evidence in criminal trials, we conclude, nevertheless, that this cost is not sufficiently substantial to overcome the benefits to be gained by our disavowal of the *Leon* court's good faith exception to the exclusionary rule" [internal quotation marks omitted]). Accordingly, because the only exception on which the state relies is one that this court expressly and consistently has held is not recognized in Connecticut, the trial court properly suppressed the CSLI obtained pursuant to the October 22, 2010 ex parte order.

As to the two prospective ex parte orders issued on November 10 and 22, 2010, once again we begin with the state's concession that those two orders were obtained in violation of § 54-47aa.[9] Notwithstanding that

[9] As we noted previously in this opinion, the state's concession that the two prospective orders violated § 54-47aa has rendered it unnecessary to resolve whether those orders also violate the fourth amendment. Moreover, it is at best unclear whether the holding in *Carpenter* would extend to the two prospective orders. Neither of the two orders authorized the release of more than three days of CSLI and both applied prospectively. Although we see no difficulty in extending the rationale of *Carpenter* as applied to

concession, the state contends that, because § 54-47aa does not identify suppression as an available remedy for a violation of the statute, the trial court improperly granted the motion to suppress the CSLI obtained as a result of those two orders. The defendant responds that the trial court properly concluded that, because § 54-47aa implicates important fourth amendment interests, suppression of the CSLI obtained as a result of the two prospective orders is required. We conclude that, although the plain language of § 54-47aa is unclear as to whether suppression is available as a remedy for a violation of the statute, the legislative history provides strong, albeit not conclusive, support for the conclusion that the legislature intended the remedy to be available for violations. We find further support for interpreting § 54-47aa to provide for suppression as the appropriate remedy in the policy principles underlying the exclusionary rule itself. That is, we conclude that the real time tracking of the defendant's cell phone, in the absence of a showing of probable cause and in violation of § 54-47aa, implicated important fourth amendment interests, requiring the application of the exclusionary rule. We therefore conclude that the trial court properly determined that the violation of § 54-47aa required the suppression of the CSLI obtained from the two prospective ex parte orders.

The question of whether § 54-47aa provides suppression as a remedy for a violation presents a question of

historical CSLI to prospective orders, the court expressly declined to resolve whether its holding would extend to orders authorizing the disclosure of fewer than seven days of CSLI. *Carpenter* v. *United States*, supra, 138 S. Ct. 2217 n.3. See footnote 8 of this opinion. This court "eschew[s] unnecessarily deciding constitutional questions . . . ." (Citations omitted.) *Hogan* v. *Dept. of Children & Families*, 290 Conn. 545, 560, 964 A.2d 1213 (2009). Accordingly, in light of the state's concession and the court's failure in *Carpenter* to provide a clear resolution of the constitutional question—at least as to the two prospective orders—we confine our analysis to considering whether application of the exclusionary rule is the proper remedy for a violation of § 54-47aa.

statutory interpretation, over which we exercise plenary review, guided by well established principles regarding legislative intent. See, e.g., *Kasica* v. *Columbia*, 309 Conn. 85, 93, 70 A.3d 1 (2013) (explaining plain meaning rule under General Statutes § 1-2z and setting forth process for ascertaining legislative intent). We turn first to the statutory text, which does not clarify whether the legislature intended to require or allow suppression for a violation of § 54-47aa. The statute neither expressly identifies nor precludes *any* remedies for violations of the statute. See footnote 3 of this opinion. By contrast, as the state points out, General Statutes § 54-41m expressly provides that a person aggrieved by a communication that was allegedly "unlawfully intercepted" pursuant to chapter 959a, which governs wiretapping and electronic surveillance, may file a motion to suppress.[10] The state contends that the provision of suppression as a remedy for a violation of the wiretapping statutes,[11] contrasted with the absence of a similar provision for a violation of § 54-47aa, supports its posi-

[10] General Statutes § 54-41m provides: "Any aggrieved person in any trial, hearing or proceeding in or before any court, department, officer, agency, regulatory body or other authority of the state of Connecticut, or of a political subdivision thereof, may move to suppress the contents of any intercepted wire communication, or evidence derived therefrom, on the grounds that the communication was unlawfully intercepted under the provisions of this chapter; the order of authorization or approval under which it was intercepted is insufficient on its face; or the interception was not made in conformity with the order of authorization or approval. Such motion shall be made before the trial, hearing or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion, in which case such motion may be made at any time during the course of such trial, hearing or proceeding. If the motion is granted, the contents of the intercepted wire communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter and shall not be received in evidence in any such trial, hearing or proceeding. The panel, upon the filing of such motion by the aggrieved person, shall make available to the aggrieved person or his counsel for inspection the intercepted communication and evidence derived therefrom."

[11] Other statutes to which the state refers that expressly provide for suppression as a remedy include General Statutes §§ 54-41*l*, 54-1c, 46b-137 (a) and 14-227a (b).

tion that suppression is not available as a remedy pursuant to § 54-47aa.

We observe, however, that a comparison of § 54-47aa with the federal Stored Wire and Electronic Communications and Transactional Records Access Act (SCA), one of the statutory schemes on which § 54-47aa generally was modeled, yields a different contrast. Unlike § 54-47aa, the SCA lists the remedies available for a violation of that act. See 18 U.S.C. § 2707 (b) (2012) (authorizing persons aggrieved by violations of SCA to bring civil action and listing "appropriate relief," including equitable or declaratory relief, damages and attorney's fees). Suppression of illegally obtained evidence is not one of the listed remedies. Furthermore, the SCA includes an exclusivity of remedies provision: "The remedies and sanctions described in this chapter are the only judicial remedies and sanctions for nonconstitutional violations of this chapter." 18 U.S.C. § 2708 (2012). By contrast, as we have noted, § 54-47aa neither specifies available remedies nor limits them. The legislature easily could have incorporated the SCA's limited list of remedies into § 54-47aa, along with the SCA's exclusivity of remedies provision. The failure to do so supports the conclusion that the legislature did not intend to limit the remedies available for a violation of § 54-47aa.[12] At best, therefore, the plain language of the

[12] The state claims that the reporting requirement in § 54-47aa (g) suggests a remedy other than suppression. Subsection (g) requires the chief state's attorney to submit an annual report itemizing certain statistics regarding orders issued pursuant to § 54-47aa, including the number of motions to vacate that were filed, and the number of such motions granted and denied. See General Statutes (Rev. to 2009) § 54-47aa (g) (6).

The state's suggestion, however, that a motion to vacate could serve as a remedy for an order granted in violation of § 54-47aa, cannot be reconciled with the nature of the order—it is ex parte. Notice of the order is only required to be provided to the subscriber forty-eight hours after the order is issued, and there are numerous bases upon which a law enforcement officer may request that notice not be given. See General Statutes (Rev. to 2009) § 54-47aa (d). Given the delayed notice available to a subscriber, a motion to vacate can hardly be considered an efficacious remedy.

statute is ambiguous as to whether suppression is an available remedy.

Because the plain language of the statute is ambiguous, we turn to the legislative history, which provides at least some support for the conclusion that the legislature intended that suppression would be available as a remedy for abuses of § 54-47aa. Section 54-47aa was first enacted through No. 05-182 of the 2005 Public Acts in order to address the difficulties encountered by law enforcement in gaining access to the basic subscriber information associated with a telephone number. Previously, that information had been readily obtained from local telephone companies. With the expansion of the telecommunications industry and the increasing prevalence of cell phones, however, law enforcement personnel increasingly found themselves dealing with out of state providers that were less cooperative in providing that basic information. See 48 S. Proc., Pt. 11, 2005 Sess. pp. 3435–36, remarks of Senator Andrew J. McDonald.

One of the primary concerns in crafting the legislation was to strike the proper balance between the need for law enforcement to have access to such information and the need to safeguard the legitimate privacy interests of citizens. See 48 H.R. Proc., Pt. 26, 2005 Sess., pp. 7869, 7871, remarks of Representative Michael P. Lawlor. During the public hearing on the bill, Fanol Bojka, an attorney speaking on behalf of the Connecticut Criminal Defense Lawyers Association, spoke in opposition to the bill, expressing concern that the standard required in the proposed legislation was merely a reasonable suspicion rather than probable cause. Conn. Joint Standing Committee Hearings, Judiciary, Pt. 14, 2005 Sess., pp. 4122, 4124–25. In light of the lower standard and the absence of any express language specifying any recourse available to aggrieved parties, Bojka questioned: "What is the remedy under this bill . . . if

there are abuses?" Id., 4125. Representative Robert Farr responded immediately that suppression would be the appropriate remedy. Id. Nothing in the legislative history counters that representation.

Representative Farr's assertion that suppression is available as a remedy for a violation of § 54-47aa is consistent with the legal principles governing suppression. As the trial court correctly noted, the "Connecticut Code of Evidence does not prescribe a specific rule governing the admissibility of evidence obtained under these circumstances. 'Where the code does not prescribe a rule governing the admissibility of evidence, the court shall be governed by the principles of common law as they may be interpreted in the light of reason and experience.' Conn. Code Evid. § 1-2 (b)." Reason and experience counsel that the exclusionary rule requires the suppression of prospective CSLI obtained in violation of § 54-47aa. Although the United States Supreme Court has applied "the exclusionary rule primarily to deter constitutional violations"; *Sanchez-Llamas* v. *Oregon*, 548 U.S. 331, 348, 126 S. Ct. 2669, 165 L. Ed. 2d 557 (2006); it has identified narrow circumstances under which the rule properly applies to exclude evidence obtained in violation of statutory law. The circumstances under which the exclusionary rule may be applied to statutory violations, however, has been limited to those violations that implicate "important [f]ourth [or] [f]ifth [a]mendment interests." Id.[13]

[13] We find unpersuasive the state's reliance on *Virginia* v. *Moore*, 553 U.S. 164, 128 S. Ct. 1598, 170 L. Ed. 2d 559 (2008), for the proposition that this court cannot conclude that suppression is an appropriate remedy for a violation of a statute that implicates the same important interests that are protected by the fourth amendment. The state's argument relies on a misreading of *Moore*. That case involved the question of whether "a police officer violates the [f]ourth [a]mendment by making an arrest based on probable cause but prohibited by state law." Id., 166. In *Moore*, the defendant was arrested for the misdemeanor of driving with a suspended license. Id., 167. Under applicable state law, however, the officers should have issued the defendant a summons instead of arresting him. Id. In a search incident to

In the present case, the evidence obtained in violation of § 54-47aa—the prospective CSLI yielded from the real time tracking of the defendant's cell phone—implicates important privacy interests that are traditionally the type protected by the fourth amendment. In fact, as one court has observed, much of the rationale that the court relied on in *Carpenter* to hold that accessing historical CSLI implicates legitimate privacy interests applies with equal force to CSLI obtained by real time tracking, because the two types of records are not "meaningfully different . . . ." *Sims* v. *State*, Docket No. PD-0941-17, 2019 WL 208631, *7 n.15 (Tex. Crim. App. January 16, 2019). In *Carpenter*, the court began its analysis by describing the nature of the interests

the arrest, the officers discovered that the defendant had crack cocaine on his person. Id. The defendant sought suppression of the crack cocaine on the basis that, because the arrest violated state statutory law, it automatically violated the defendant's fourth amendment rights, and, therefore, he was entitled to the protection of the exclusionary rule. Id., 167–68. The court rejected that argument, explaining, "[w]e are aware of no historical indication that those who ratified the [f]ourth [a]mendment understood it as a redundant guarantee of whatever limits on search and seizure legislatures might have enacted." Id., 168. The court explained further that the problem is that "the [f]ourth [a]mendment's meaning [does] not change with local law enforcement practices—even practices set by rule. While those practices vary from place to place and from time to time, [f]ourth [a]mendment protections are not so variable and cannot be made to turn upon such trivialities." (Internal quotation marks omitted.) Id., 172.

In contrast to *Moore*, we are not presented in this appeal with the question of whether a violation of § 54-47aa automatically constitutes a violation of the fourth amendment, thus entitling the defendant to the protection of the exclusionary rule. The defendant's argument is that the violation of § 54-47aa triggers the rule's protections because of the *important nature of the interests* implicated by the statute, interests that are also protected by the fourth amendment. Accordingly, the concerns expressed by the court in *Moore* do not apply in the present case, in which we hold only that suppression is required for a violation of § 54-47aa because the statute implicates important interests protected by the fourth amendment. It is the importance of the protected interests—not the force of the fourth amendment itself—that requires suppression in the present case. Our decision does not reduce the fourth amendment to a redundancy; it simply recognizes that the fourth amendment is not the only means by which those important interests are protected.

implicated, explaining: "A person does not surrender all [f]ourth [a]mendment protection by venturing into the public sphere. To the contrary, what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. . . . A majority of this [c]ourt has already recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements. [*United States* v. *Jones*, 565 U.S. 400, 430, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012) (Alito, J., concurring); id., 415 (Sotomayor, J., concurring)]. Prior to the digital age, law enforcement might have pursued a suspect for a brief stretch, but doing so for any extended period of time was difficult and costly and therefore rarely undertaken. Id., [429 (Alito, J., concurring)]. For that reason, society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period." (Citation omitted; internal quotation marks omitted.) *Carpenter* v. *United States*, supra, 138 S. Ct. 2217. The court further observed that, "like GPS monitoring, cell phone tracking is remarkably easy, cheap, and efficient compared to traditional investigative tools." Id., 2217–18.

Cell phone tracking, the court observed, presented "even greater privacy concerns than the GPS monitoring of a vehicle [it] considered in *Jones*. Unlike [a] bugged container . . . or the car in *Jones*, a cell phone—almost a feature of human anatomy . . . tracks nearly exactly the movements of its owner. While individuals regularly leave their vehicles, they compulsively carry cell phones with them all the time. A cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales. . . . Accordingly, when the [g]overnment tracks the location of a cell phone it achieves near

perfect surveillance, as if it had attached an ankle monitor to the phone's user." (Citations omitted; internal quotation marks omitted.) Id., 2218.

The concerns expressed by the court in *Carpenter* regarding historical CSLI apply with equal force to prospective CSLI. As that court observed, "the time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his familial, political, professional, religious, and sexual associations." (Internal quotation marks omitted.) Id., 2217. An individual's cell phone has the ability to disclose increasingly exhaustive information regarding that person's movements, revealing the most intimate details of that individual's life. See generally J. Valentino-DeVries et al., "Your Apps Know Where You Were Last Night, and They're Not Keeping It Secret," N.Y. Times, December 10, 2018, p. A1 (describing abilities of smartphone apps to track individuals' movements and discussing privacy implications of smartphone technology). We therefore conclude that the trial court properly granted the defendant's motions to suppress the CSLI obtained from the two prospective ex parte orders.[14]

III

Finally, we address the state's claim that, although, as the state concedes, Johnson's arrest was tainted by the illegally obtained CSLI, the trial court improperly concluded that the state had failed to prove that, in the absence of the illegally obtained CSLI, it inevitably would have obtained Johnson's postarrest statement through lawful means. Therefore, the state contends,

[14] To the extent that the state's brief may be read to suggest that the good faith exception to the exclusionary rule applies in Connecticut when the basis for the rule's application is a statutory, rather than a constitutional violation, we reject that argument. As we have explained in this opinion, in *State* v. *Marsala*, supra, 216 Conn. 171, we *categorically rejected* the good faith exception to the exclusionary rule.

the trial court improperly suppressed Johnson's potential trial testimony.[15] The state argues that, in arriving at that conclusion, the trial court improperly concluded that in order to prove inevitable discovery, the state was required to prove that Johnson would have testified in a manner similar to and consistent with the statement that he gave to the police when he was confronted with the illegally obtained CSLI.[16] The state claims that all it was required to prove under the inevitable discovery doctrine was that it would inevitably have identified and located Johnson. The defendant responds that the trial court correctly concluded that the state failed to meet its burden to prove that the inevitable discovery doctrine applied under the facts of the present case.

The trial court credited the testimonial evidence presented by the state at the suppression hearing in support of its claim that, even if it had not relied on the illegally obtained CSLI, it inevitably would have discovered Johnson by lawful means. The court further found, however, that the state failed to sustain its burden to prove that, in the absence of the illegally obtained CSLI, it would have obtained the same information from Johnson. We conclude that the trial court properly determined that, in order to bear its burden to prove that

[15] The state does not challenge the portion of the trial court's ruling suppressing Johnson's postarrest statement and concedes that Johnson's statement was obtained illegally. We observe that, although the state challenges only the portion of the trial court's ruling suppressing Johnson's potential testimony, if called to testify, he would have had to testify consistent with his prior statement to the police or risk negative consequences, including further charges. Accordingly, we question the efficacy of the state's concession of the inadmissibility of Johnson's statement in light of its challenge to his potential testimony.

[16] The state claims that, in concluding that the inevitable discovery doctrine required the state to prove that Johnson would have testified in a similar manner, the trial court improperly conflated the attenuation and inevitable discovery doctrines. Because we conclude that the trial court properly applied the inevitable discovery doctrine, we need not resolve the state's claim that the court conflated the two doctrines.

the inevitable discovery exception to the exclusionary rule applied, the state was required to prove by a preponderance of the evidence not only that it inevitably would have identified and located Johnson by legal means, but also that, under the different circumstances, Johnson would have cooperated and provided the same information.

We have explained that " '[a]pplication of the exclusionary rule . . . is not automatic.' " *State* v. *Spencer*, 268 Conn. 575, 599, 848 A.2d 1183, cert. denied, 543 U.S. 957, 125 S. Ct. 409, 160 L. Ed. 2d 320 (2004). "Under the inevitable discovery rule, evidence illegally secured in violation of the defendant's constitutional rights need not be suppressed if the state demonstrates by a preponderance of the evidence that the evidence would have been ultimately discovered by lawful means." *State* v. *Badgett*, 200 Conn. 412, 433, 512 A.2d 160, cert. denied, 479 U.S. 940, 107 S. Ct. 423, 93 L. Ed. 2d 373 (1986). The inevitable discovery doctrine is "based on the premise that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Vivo*, 241 Conn. 665, 672, 697 A.2d 1130 (1997).

This court has not addressed the question of whether the state must prove not only that it would inevitably have discovered the witness but also that it would have obtained the testimony or statements of that witness that were procured through illegal means. The decisions of the United States Court of Appeals for the Second Circuit discussing the state's burden to prove that the inevitable discovery exception to the exclusionary rule applies in a given case, however, are instructive. See *Martinez* v. *Empire Fire & Marine Ins. Co.*, 322 Conn.

47, 62, 139 A.3d 611 (2016) ("[w]hen addressing questions of federal law, we give special consideration to the decisions of the Second Circuit"). Specifically, the Second Circuit has explained that "proof of inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment, *United States* v. *Eng*, 971 F.2d 854, 859 (2d Cir. 1992), quoting [*Nix* v. *Williams*, 467 U.S. 431, 445 n.5, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984)]. The focus on demonstrated historical facts keeps speculation to a minimum, by requiring the [D]istrict [C]ourt to determine, viewing affairs as they existed at the instant before the unlawful search occurred, what would have happened had the unlawful search never occurred. . . . Evidence should not be admitted, therefore, unless a court can find, with a *high level of confidence*, that *each* of the contingencies necessary to the legal discovery of the contested evidence would be resolved in the government's favor." (Citations omitted; emphasis altered; internal quotation marks omitted.) *United States* v. *Stokes*, 733 F.3d 438, 444 (2d Cir. 2013), citing *United States* v. *Cabassa*, 62 F.3d 470, 472–73 (2d Cir. 1995).

The United States District Court for the Southern District of New York has applied the standard set forth by the Second Circuit to conclude that one of the contingencies that the state must establish is that a witness whose statement had been obtained by illegal means would have been cooperative if the state had identified, located and questioned the witness through legal means. *United States* v. *Ghailani*, 743 F. Supp. 2d 242, 254 (S.D.N.Y. 2010). The court reasoned that, pursuant to the standard that was first announced in *United States* v. *Cabassa*, supra, 62 F.3d 472–73, "[i]nevitable discovery analysis . . . requires a court to examine *each of the contingencies* that would have had to have been resolved favorably to the government in order for

the evidence to have been discovered legally and to assess the probability of that having occurred." (Emphasis in original; internal quotation marks omitted.) *United States* v. *Ghailani*, supra, 253–54.

The requirement that the state prove that each contingency would have been resolved in its favor demands that, at the least, the state had to prove at the suppression hearing that it would have identified, located and secured the same level of cooperation from Johnson in the absence of the illegally obtained CSLI. The trial court found that the state had established that it would have identified and located Johnson. The court grounded its rejection of the state's reliance on the inevitable discovery doctrine, however, on the state's failure to prove that, if found by legal means and if questioned without the reliance on the illegally obtained CSLI, Johnson would have cooperated to the same extent. Johnson's cooperation was a contingency upon which the procurement of a statement incriminating himself and the defendant depended. The state bore the burden, therefore, to prove that this contingency would have resolved in its favor.

The state failed, however, to present *any* evidence to demonstrate that Johnson would have similarly cooperated in the absence of being confronted with the illegally obtained CSLI. For example, as the trial court observed, the state did not present Johnson's testimony at the hearing. Due to that failure, the court observed, "the record is utterly barren concerning the circumstances of [his] interrogation and [his] willingness or unwillingness to give his statements or to testify." We further observe that the state failed to present any evidence at the suppression hearing as to how it would have obtained the same cooperation from Johnson in the absence of the illegally obtained CSLI and did not make a proffer or otherwise articulate what other sources or means it had available that would have led

the state to discover the same information it obtained from Johnson. Because the state failed to present any evidence regarding the likelihood of Johnson's cooperation under different circumstances, the trial court properly reasoned that any conclusion regarding Johnson's cooperation would have rested on pure speculation. The court properly concluded that the state failed to sustain its burden to prove that the inevitable discovery exception applied.

The judgments are affirmed.

In this opinion the other justices concurred.

PETER GOULD *v.* CITY OF STAMFORD ET AL. (SC 20004)

Palmer, Mullins, Kahn, Vertefeuille and Ecker, Js.*

Syllabus

The plaintiff appealed from the decision of the Compensation Review Board, claiming that the board improperly upheld the decision of the Workers' Compensation Commissioner denying and dismissing his claim for benefits under a provision (§ 31-310) of the Workers' Compensation Act (§ 31-275 et seq.) that allows for additional benefits in certain circumstances when an injured employee worked for more than one employer as of the date of the compensable injury. The plaintiff sustained an injury in the course of his part-time employment with the defendant city. At the time of his injury, the plaintiff was also the sole member of a limited liability company, I Co., which provided video production services for corporations. I Co. occasionally hired independent contractors, but the plaintiff otherwise was solely responsible for completing I Co.'s projects. I Co. had purchased a workers' compensation insurance policy that covered the period in which he had been injured while working for the

* This case originally was argued before a panel of this court consisting of Justices Palmer, Mullins, Kahn, Espinosa and Vertefeuille. Thereafter, Justice Espinosa retired from this court and did not participate in the consideration of the case. Justice Ecker was added to the panel and has read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision.

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

city. After his injury, the plaintiff filed a claim for workers' compensation based on both his earnings from the city and from I Co. Although the city accepted the compensability of the injury, the defendant Second Injury Fund denied the plaintiff's claim for concurrent employment benefits on the grounds that there was no employer-employee relationship between the plaintiff and I Co., and that members of single-member limited liability companies are presumptively excluded from the act pursuant to a 2003 memorandum issued by the chairman of the Workers' Compensation Commission that provided, inter alia, that members of single-member limited liability companies are presumed to be excluded from the act unless they elect to be covered by filing Form 75, which serves to notify the commission that the limited liability company is electing to accept the provisions of the act. In reviewing the Second Injury Fund's denial of the plaintiff's claim, the Workers' Compensation Commissioner concluded that the plaintiff was not entitled to concurrent benefits, reasoning that the plaintiff was not an employee of I Co. because, among other things, he controlled the means and methods of the services that he performed on behalf of I Co., lacked a fixed salary, reported to no one, and treated I Co. as a sole proprietorship for tax purposes. The commissioner also observed that I Co. had not elected to accept the provisions of the act by filing Form 75 in accordance with the dictates of the 2003 memorandum. The plaintiff thereafter appealed to the board, which affirmed the commissioner's decision. The board concluded that, regardless of whether I Co. elected to accept the provisions of the act by filing Form 75, and regardless of whether the commission chairman correctly determined in the 2003 memorandum that such an election is required for single-member limited liability companies, the plaintiff could not prevail because the commissioner properly found that the plaintiff was not an employee of I Co. The board reasoned that, because the plaintiff was not paid on the basis of the number of hours he worked but, rather, compensated himself for his activities solely as a business owner obtaining profits from his business, he commingled his personal activities with I Co.'s activities, and, thus, I Co. did not maintain the appropriate corporate formalities to establish an employer-employee relationship with its principal. The board also observed that the plaintiff did not receive a tax form for reporting wages from I Co. but reported his income from I Co. as a self-employed individual, which, according to the board, supported the determination that he was self-employed. On appeal from the board's decision, the plaintiff claimed, inter alia, that he was an employee of I Co. for purposes of the act and, therefore, was eligible for concurrent employment benefits. *Held*:

1. This court rejected the rationale that the board relied on in affirming the commissioner's decision, namely, that, because I Co. distributed its profits to the plaintiff instead of paying him an hourly rate, it did not maintain the appropriate corporate formalities, and, thus, I Co.'s status as a limited liability company had to be disregarded: the Second Injury

Fund never claimed that I Co.'s corporate status as a limited liability company must be disregarded, and the board cited no persuasive authority for the proposition that it is improper for a single-member limited liability company to distribute profits to the member rather than paying him or her an hourly wage or that it was improper for the member to report earnings from the company as self-employment earnings rather than wages, and the governing law appeared to be to the contrary; accordingly, I Co. was treated as a properly constituted limited liability company for purposes of the present case.

2. There was no requirement under the act that a single-member limited liability company must elect to accept the act's provisions before its member can be covered thereunder, and, therefore, the commission chairman did not have the authority to adopt, in the 2003 memorandum, a conclusive presumption that members of single-member limited liability companies are not their employees; nothing in § 31-275 (10), which defines "employer" for purposes of the act to include a limited liability company, and which also provides that a person who is a sole proprietor of a business may accept the provisions of the act by notifying the commissioner of his intent to do so and thereby become an employer for purposes of the act, requires single-member limited liability companies to elect to accept the provisions of the act before their members are covered thereunder, and the legislature's choice not to include single-member limited liability companies in the election provision of § 31-275 (10) indicated that it intended that single-member limited liability companies may be employers of their members.

3. The board incorrectly concluded that the plaintiff was not an employee of I Co. and, therefore, was not entitled to concurrent employment benefits pursuant to § 31-310; this court clarified that the proper test for determining whether the member of a single-member limited liability company is an employee of the company is whether the member performed services for the company and was subject to the hazards of the company's business, and, because there was no dispute in the present case that the plaintiff provided services to I Co. and was subject to the hazards of I Co.'s business, he was I Co.'s employee for purposes of the act.

Argued April 5, 2018—officially released April 2, 2019

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Seventh District denying and dismissing the plaintiff's claim for certain additional workers' compensation benefits, brought to the Compensation Review Board, which affirmed the commis-

sioner's decision, and the plaintiff appealed. *Reversed*; *judgment directed.*

John J. Morgan, for the appellant (plaintiff).

Kenneth H. Kennedy, Jr., assistant attorney general, with whom, on the brief, were *George Jepsen*, former attorney general, and *Philip M. Schulz*, assistant attorney general, for the appellee (defendant Second Injury Fund).

Opinion

PALMER, J. The issue that we must resolve in this appeal is whether the plaintiff, Peter Gould, the sole member of a single-member limited liability company, Intervale Group, LLC (Intervale), qualifies as Intervale's employee for purposes of the Workers' Compensation Act (act), General Statutes § 31-275 et seq., and is therefore eligible for concurrent compensation benefits from the defendant Second Injury Fund (fund) pursuant to General Statutes § 31-310.[1] The plaintiff was a part-time

[1] General Statutes § 31-310 (a) provides in relevant part: "Where the injured employee has worked for more than one employer as of the date of the injury and the average weekly wage received from the employer in whose employ the injured employee was injured, as determined under the provisions of this section, [is] insufficient to obtain the maximum weekly compensation rate from the employer under section 31-309, prevailing as of the date of the injury, the injured employee's average weekly wages shall be calculated upon the basis of wages earned from all such employers in the period of concurrent employment not in excess of fifty-two weeks prior to the date of the injury, but the employer in whose employ the injury occurred shall be liable for all medical and hospital costs and a portion of the compensation rate equal to seventy-five per cent of the average weekly wage paid by the employer to the injured employee, after such earnings have been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contribution Act made from such employees' total wages received from such employer during the period of calculation of such average weekly wage, but not less than an amount equal to the minimum compensation rate prevailing as of the date of the injury. The remaining portion of the applicable compensation rate shall be paid from the Second Injury Fund upon submission to the Treasurer by the employer or the employer's insurer of such vouchers and information as the Treasurer may require. . . ."

employee of the named defendant, the city of Stamford (city),[2] and, according to him, was concurrently employed by Intervale. After the plaintiff was injured while working for the city, he filed a claim, pursuant to the act, seeking compensation based on the earnings that he received from both the city and Intervale. The city accepted the compensability of the injury and paid its indemnity obligations to the plaintiff but, pursuant to § 31-310, transferred the concurrent compensation obligation to the fund. The fund denied the claim for benefits on the ground that the plaintiff was not Intervale's employee. The plaintiff sought review of this ruling by the Workers' Compensation Commission (commission). After a hearing, the Workers' Compensation Commissioner for the Seventh District (commissioner) determined that the plaintiff was not an employee of Intervale for purposes of the act and, therefore, did not qualify for compensation benefits based on his allegedly concurrent employment. The plaintiff appealed from the decision of the commissioner to the Compensation Review Board (board), which affirmed that decision. This appeal followed.[3] We conclude that the plaintiff qualifies as Intervale's employee for purposes of the act and, therefore, is eligible for concurrent employment benefits pursuant to § 31-310. Accordingly, we reverse the decision of the board.

The record reveals the following procedural history and facts that were found by the commissioner or that are undisputed. In 2000, the plaintiff formed Intervale, a limited liability company of which he is the sole member. Intervale provided various video production services to corporations. Intervale occasionally hired

[2] The city and the fund are both defendants in the present case. The city, however, has not participated in the litigation regarding this issue at any stage of the proceedings in the case, including on appeal to this court.

[3] The plaintiff appealed to the Appellate Court from the decision of the board, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

independent contractors, but the plaintiff was otherwise solely responsible for completing the company's projects, which included field production work. He reported to no one other than Intervale's clients.

Intervale did not pay the plaintiff a fixed salary. Rather, when Intervale received a payment from a customer, the plaintiff would deposit the payment in Intervale's bank account and then withdraw funds as needed. In 2012 and 2013, the plaintiff reported his income from Intervale for federal tax purposes on schedule C of Internal Revenue Service Form 1040, which is the form used to report "Profit or Loss From Business (Sole Proprietorship)."

In 2012, a shopping mall in Massachusetts hired Intervale to shoot a video at the mall. As a condition of the engagement, the mall required Intervale to obtain workers' compensation insurance. The premium for the policy that Intervale purchased was based on an estimated annual employee remuneration of $12,750, which was the figure that the insurance company recommended for small businesses with an undetermined payroll. The plaintiff's gross earnings from Intervale were $43,600 in 2012 and $97,496 in 2013. Thereafter, Intervale purchased a workers' compensation insurance policy for the period from April 4, 2013, to April 4, 2014.

In 2013, in addition to his work in connection with Intervale, the plaintiff worked part-time for the city as a park police officer. On July 28, 2013, the plaintiff injured his back and legs during the course of his employment with the city. Thereafter, he filed a claim for compensation under the act based on both his earnings from the city and his earnings from Intervale. The city paid its indemnity obligation to the plaintiff and transferred the claim for compensation to the fund pursuant to § 31-310 based on the plaintiff's allegedly concurrent employment with Intervale. The fund denied

the plaintiff's claim for concurrent employment benefits on the grounds that (1) there was no employer-employee relationship between the plaintiff and Intervale, and (2) members of single-member limited liability companies are presumptively excluded from the act pursuant to a memorandum issued by the chairman of the commission in 2003. See John A. Mastropietro, Chairman, Workers' Compensation Commission, State of Connecticut, Memorandum No. 2003-02, "WCC Limited Liability Companies & Revised Forms Memorandum—April 17, 2003" (2003 memorandum), available at https://wcc.state.ct.us/memos/2003/2003-02.htm (last visited March 26, 2019). The 2003 memorandum provides in relevant part: "After carefully considering this matter, we have determined that members of [limited liability companies (LLCs)] that contain only one member (single-member LLCs) should be presumed to be *excluded* from the [a]ct unless they have elected to be covered, [whereas] members of multiple-member LLCs should be presumed to be *covered* under the [a]ct unless they have elected to be excluded. In order to clarify this policy, we have amended our Form 6B and . . . Form 75[4] accordingly, and direct all members of LLCs to use such forms in the future." (Emphasis in original.) The 2003 memorandum thus analogized single-member limited liability companies to sole proprietors, who are excluded from the provisions of the act pursuant to General Statutes § 31-275 (10)[5] unless they elect to

[4] "Form 75" is a preprinted form created by the commission that may be used by a sole proprietorship or, after the issuance of the 2003 memorandum, a single-member limited liability company, to notify the commission that the entity is electing to accept the provisions of the act pursuant to General Statutes § 31-275 (10). See footnote 5 of this opinion. The form is entitled "Coverage Election by Sole Proprietor or Single-Member LLC."

[5] General Statutes § 31-275 (10) provides in relevant part: " 'Employer' means any person, corporation, limited liability company, firm, partnership, voluntary association, joint stock associate, the state and any public corporation within the state using the services of one or more employees for pay, or the legal representative of any such employer . . . . A person who is the sole proprietor of a business may accept the provisions of [the act] by

accept its provisions, and analogized members of multiple-member limited liability companies to the partners of a partnership, who, under the same statute, are deemed to have accepted the provisions of the act with respect to themselves unless they elect to be excluded.

The plaintiff thereafter sought the commission's review of the fund's denial of his claim for concurrent employment benefits. In his proposed finding and award, the plaintiff contended that there was "no serious dispute that [he was] an employee of [Intervale]" and that the rule promulgated by the 2003 memorandum, namely, that the member of a single-member limited liability company is presumed not to be an employee of the company, is inconsistent with the definition of "employer" set forth in § 31-275 (10), which includes limited liability companies. In its proposed finding and dismissal, the fund contended that, because the plaintiff was the sole member of Intervale, he was a sole proprietor. Accordingly, the fund argued, under both the provision of § 31-275 (10) requiring sole proprietorships to elect to accept the provisions of the act and the 2003 memorandum, the plaintiff was required to elect coverage by filing a Form 75 before he would be entitled to compensation based on his work for Intervale. The fund also summarily stated that "[t]here is no employer-employee relationship between the [plaintiff] and [Intervale]."

After conducting an evidentiary hearing, the commissioner concluded that the plaintiff was not an employee

notifying the commissioner, in writing, of his intent to do so. If such person accepts the provisions of [the act] he shall be considered to be an employer and shall insure his full liability in accordance with subdivision (2) of subsection (b) of section 31-284. Such person may withdraw his acceptance by giving notice of his withdrawal, in writing, to the commissioner. Any person who is a partner in a business shall be deemed to have accepted the provisions of [the act] and shall insure his full liability in accordance with subdivision (2) of subsection (b) of section 31-284, unless the partnership elects to be excluded from the provisions of [the act] by notice, in writing and by signed agreement of each partner, to the commissioner."

of Intervale because he controlled "the means and method[s] of the services [that] he performed on behalf of [Intervale]," he lacked a fixed salary, he reported to no one, he treated Intervale as a sole proprietorship for tax purposes, and it was "questionable . . . whether the [plaintiff] intended to cover himself as an employee when [Intervale] procured [workers' compensation coverage] . . . ." The commissioner also observed that Intervale had not elected to accept the provisions of the act pursuant to § 31-275 (10) by filing a Form 75 with the commission, as required by the 2003 memorandum. The commissioner concluded, however, that, irrespective of whether Intervale had filed Form 75, he was not Intervale's employee and, therefore, was not entitled to concurrent employment benefits pursuant to § 31-310.

The plaintiff then appealed from the commissioner's decision to the board. In his brief to the board, the plaintiff asserted that, because the definition of "employer" set forth in § 31-275 (10) expressly includes limited liability companies, the commission chairman had no authority to require single-member limited liability companies to elect to accept the provisions of the act pursuant to § 31-275 (10) before the single member would be covered, as the chairman had done in the 2003 memorandum. The fund maintained in its brief to the board that the commissioner had correctly determined that, because the plaintiff controlled the means and methods of the services that he performed for Intervale, had no fixed salary but, rather, withdrew money from Intervale's bank account as needed, and reported his earnings from Intervale as earnings from self-employment, the plaintiff was not Intervale's employee. The fund also claimed that the commissioner correctly had determined that, because the plaintiff's gross earnings from Intervale were far in excess of the $12,750 reflected in the workers' compensation insurance policy that the plaintiff had purchased, it was doubtful that

he intended to be covered by the policy. Finally, the fund argued that, contrary to the plaintiff's contention, the 2003 memorandum did not require single-member limited liability companies to elect to accept the provisions of the act before their members would be covered but, instead, merely created a rebuttable presumption that such members are not covered.

The board concluded that, regardless of whether Intervale elected to accept the provisions of the act by filing Form 75, as provided by the 2003 memorandum, and regardless of whether the commission chairman correctly determined that such an election is required, the plaintiff could not prevail because the commissioner had found as a factual matter that he was not Intervale's employee, and this factual finding was supported by the evidence. Specifically, the board concluded that, because the plaintiff was not paid on the basis of the number of hours he worked for Intervale but "compensated himself for his activities . . . solely as a business owner obtaining profits from the firm," the plaintiff had commingled his personal activities with the company's activities. Thus, the board concluded, "Intervale was the alter ego of the [plaintiff] and did not maintain the appropriate corporate formalities to establish an employer-employee relationship with its principal." In addition, the board explained that the fact that the plaintiff did not receive a W-2 federal income tax form from Intervale, which is the Internal Revenue Service form for reporting wages but, instead, reported his income from Intervale as a self-employed individual, supported the determination that he was self-employed. On the basis of these considerations, the board affirmed the commissioner's decision.

The plaintiff then filed this appeal. The plaintiff claims that, because the underlying facts are undisputed, the board should have applied plenary review to the commissioner's decision that he was not Intervale's

employee instead of deferring to the commissioner's factual finding on that issue. The plaintiff also contends that, under the plain language of § 31-275 (9) (A) (i),[6] which defines "employee" for purposes of the act, he was Intervale's employee and, therefore, was eligible for concurrent employment benefits pursuant to § 31-310. Accordingly, the plaintiff contends, the commission chairman had no authority to alter the statutory provisions of the act by promulgating the rule set forth in the 2003 memorandum, which was premised on the assumption that the members of single-member limited liability companies are not employees of those companies.

The fund responds that, under the act, there is no meaningful distinction between a sole proprietor and a member of a single-member limited liability company, and, therefore, the presumption created by the 2003 memorandum that such members are not employees—which presumption the fund contends is rebuttable—is consistent with the provision of § 31-275 (10) requiring sole proprietors to elect to accept the provisions of the act before they are covered. The fund further maintains that the commissioner's finding that the plaintiff was not Intervale's employee pursuant to the traditional "right to control" test is supported by the record. See, e.g., *Doe* v. *Yale University*, 252 Conn. 641, 680–81, 748 A.2d 834 (2000) ("[t]he right to control test determines the [relationship between a worker and a putative employer] by asking whether the putative employer has the right to control the means and methods used by the worker in the performance of his or her job" [internal quotation marks omitted]).

[6] General Statutes § 31-275 (9) (A) provides in relevant part: " 'Employee' means any person who:

"(i) Has entered into or works under any contract of service or apprenticeship with an employer, whether the contract contemplated the performance of duties within or without the state . . . ."

Before addressing the merits of these claims, we pause to clarify what is and what is not at issue in this appeal. As we indicated, in its brief to the board, the fund argued that, for a variety of reasons, the *plaintiff* was not an *employee* of Intervale. The fund did *not* make the very different claim that *Intervale* has effectively been converted into a *sole proprietorship* because the plaintiff failed to observe the rules governing limited liability companies.[7] Nevertheless, the board's affirmance of the commissioner's decision was based on its determination that, because Intervale distributed its profits to the plaintiff instead of paying him

[7] The fund also appears to make no such claim on appeal. The fund does assert that the fact that the plaintiff reported his earnings from Intervale in the same manner as a sole proprietorship for federal tax purposes, which, as the fund acknowledges, he was entitled to do under federal law; see *McNamee* v. *Dept. of the Treasury*, 488 F.3d 100, 109 (2d Cir. 2007) ("[t]he . . . regulations allow the single-owner limited liability company to choose whether to be treated as an association—i.e., a corporation—or to be disregarded as a separate entity" [internal quotation marks omitted]); supports the board's determination that the plaintiff was not Intervale's employee. The fund, however, does not appear to claim—at least not expressly—that electing this method of reporting earnings for federal tax purposes somehow prevents Intervale from claiming the status of a limited liability company for any state law purpose. To the extent that the fund implicitly makes this claim, we reject it. As the court in *McNamee* recognized, "state laws of incorporation control various aspects of business relations; they may affect, but do not necessarily control, federal tax provisions. . . . As a result . . . *single-member* [*limited liability companies*] *are entitled to whatever advantages state law may extend*, but state law cannot abrogate [their owners'] federal tax liability." (Citation omitted; emphasis added; internal quotation marks omitted.) Id., 111; cf. *In re Bourbeau Custom Homes, Inc.*, 205 Vt. 42, 52, 171 A.3d 40 (2017) (rejecting suggestion that interpretation of Vermont's unemployment compensation laws should be driven by choice by member of single-member limited liability company to pay federal taxes as sole proprietorship because "[n]othing in the [Vermont] unemployment compensation statute, or the [Vermont] statute creating the [limited liability company] structure, suggests that the [Vermont] [l]egislature intended federal tax law to control how the [unemployment compensation] statute [is to be] applied"). In other words, the fact that a single-member limited liability company elects to have the company disregarded as a separate entity for federal tax purposes does not mean that that limited liability company can no longer claim that status for any state law purpose.

an hourly rate, it "did not maintain the appropriate corporate formalities." Accordingly, the board concluded, Intervale was the plaintiff's "alter ego," and, therefore, its status as a limited liability company must be disregarded. The board cited no persuasive authority, however, for the proposition that it is somehow improper for a single-member limited liability company to distribute profits to the member rather than paying the member wages or, relatedly, that it is improper for the member to report earnings from the company as self-employment earnings rather than wages.[8] Indeed, the governing law appears to be to the contrary. See, e.g., General Statutes (Rev. to 2013) § 34-152 ("[t]he

[8] The board cited four of its decisions, namely, *Diaz* v. *Capital Improvements & Management, LLC*, No. 5616, CRB 1-11-1 (January 12, 2012), *Caus* v. *Hug*, No. 5392, CRB 4-08-11 (January 22, 2010), *Bonner* v. *Liberty Home Care Agency*, No. 4945, CRB 6-05-5 (May 12, 2006), and *Dupree* v. *Masters*, No. 1791, CRB 7-93-7 (April 25, 1995). In *Diaz*, the principal of a limited liability company apparently paid an employee with personal checks, and the employee, in turn, paid himself and three other employees, including the claimant, in cash. In addition, the principal's "personal expenses and bills were paid from the [limited liability company's] checking account . . . ." *Diaz* v. *Capital Improvements & Management, LLC*, supra. The board concluded that, because the principal had "commingled firm assets for personal use and failed to maintain corporate formalities," he was personally liable for the benefits owed to the claimant. Id. In *Caus*, the employer, Paul Hug, operated a number of businesses, one of which was apparently a sole proprietorship and others of which were limited liability companies, and failed to establish which of the businesses had employed the claimant. See *Caus* v. *Hug*, supra. The board concluded that the commissioner reasonably could have concluded that Hug had "commingled the activities of his various businesses and that each firm acted as an alter ego of . . . Hug personally." Id. In *Dupree*, the respondent did not withhold social security or federal income tax from the claimant's wages; rather, the claimant paid his own income taxes and social security taxes at self-employment rates. See *Dupree* v. *Masters*, supra. The board concluded that these facts supported the commissioner's finding that the claimant was not the respondent's employee. Id. *Bonner* v. *Liberty Home Care Agency*, supra, involved the same factual situation as *Dupree*. Thus, none of these cases directly supports the proposition that, if a single-member limited liability company distributes profits to the member or if the member reports earnings from the company in the same manner as a sole proprietorship, the company must be treated as the member's alter ego.

profits and losses of a limited liability company shall be allocated among the members, and among classes of members, in the manner agreed to in the operating agreement"); General Statutes (Rev. to 2013) § 34-158 ("distributions of cash or other assets of a limited liability company shall be allocated among the members . . . in the manner provided in the operating agreement"); see also *Riether* v. *United States*, 919 F. Supp. 2d 1140, 1159 (D.N.M. 2012) (when business entity with single owner does not elect corporate style taxation pursuant to 26 C.F.R. § 301.7701-3 [a], earnings of owner are subject to taxation as self-employment earnings); 26 C.F.R. § 301.7701-3 (a) (2013) (business entity that is not classified as corporation and that has single owner can elect either to be classified as association or to be disregarded as entity separate from its owner for federal tax purposes); General Statutes (Rev. to 2013) § 34-113 (for purposes of state tax law, limited liability company is treated in accordance with classification for federal tax purposes). Because the fund has never made any claim that Intervale's corporate status as a limited liability company must be disregarded due to the method by which the plaintiff was paid, and because the board's conclusion to that effect is not supported by any authority, we cannot accept the board's rationale for affirming the decision of the commissioner. For present purposes, therefore, we treat Intervale as a properly constituted limited liability company that operated as such.

Thus, the first issue that we must address is whether a single-member limited liability company must elect to accept the provisions of the act before the member is covered, as the commission chairman determined in the 2003 memorandum, or, instead, the member may be covered automatically as an employee of the company.[9]

[9] We recognize that neither the commissioner nor the board addressed this issue because each of them determined that, even if Intervale was not required to elect to accept the provisions of the act in order for the plaintiff

Second, if we agree with the plaintiff that the member of a single-member limited liability company may be the company's employee, we also must determine whether the plaintiff was an employee of Intervale for purposes of the act. We conclude that a single-member limited liability company is not required to elect to accept the provisions of the act in order for its member to be covered; rather, the member may be covered automatically as an employee. We further conclude that an employer-employee relationship existed between Intervale and the plaintiff because the plaintiff provided services to Intervale and was subject to the hazards of Intervale's business.

"As a threshold matter, we set forth the standard of review applicable to workers' compensation appeals. The principles that govern our standard of review in workers' compensation appeals are well established. The conclusions drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . [Moreover, it] is well established that [a]lthough not dispositive, we accord great weight to the construction given to the workers' compensation statutes by the commissioner and [the] board. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . We have determined, therefore, that the traditional deference accorded to an

to be covered, the plaintiff did not meet the definition of "employee" for purposes of the act. Because the question of whether Intervale was required to elect to accept the provisions of the act before the plaintiff could be covered is inextricably intertwined with the question of whether the plaintiff was Intervale's employee, however, and, because the question presents a pure question of law and has been fully briefed by both parties, we are free to address it.

agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation . . . ." (Citation omitted; internal quotation marks omitted.) *Sullins* v. *United Parcel Service, Inc.*, 315 Conn. 543, 550, 108 A.3d 1110 (2015). "In addition to being time-tested, an agency's interpretation must also be reasonable." *Stec* v. *Raymark Industries, Inc.*, 299 Conn. 346, 356, 10 A.3d 1 (2010).

"Furthermore, [i]t is well established that, in resolving issues of statutory construction under the act, we are mindful that the act indisputably is a remedial statute that should be construed generously to accomplish its purpose. . . . The humanitarian and remedial purposes of the act counsel against an overly narrow construction that unduly limits eligibility for workers' compensation. . . . Accordingly, [i]n construing workers' compensation law, we must resolve statutory ambiguities or lacunae in a manner that will further the remedial purpose of the act. . . . [T]he purposes of the act itself are best served by allowing the remedial legislation a reasonable sphere of operation considering those purposes." (Internal quotation marks omitted.) *Sullins* v. *United Parcel Service, Inc.*, supra, 315 Conn. 550–51.

I

We first consider the plaintiff's contention that there is no requirement under the act that a single-member limited liability company elect to accept the provisions of the act before its member can be covered. We begin our analysis of this claim with the language of the applicable statutory provisions. Section 31-275 (9) (A) defines "employee" in relevant part as any person who "(i) [h]as entered into or works under any contract of service or apprenticeship with an employer, whether

the contract contemplated the performance of duties within or without the state," or "(ii) [i]s a sole proprietor or business partner who accepts the provisions of [the act] in accordance with subdivision (10) of this section . . . ." Section 31-275 (10) defines an "employer" as "any person, corporation, limited liability company, firm, partnership, voluntary association, joint stock association, the state and any public corporation within the state using the services of one or more employees for pay, or the legal representative of any such employer . . . ." Section 31-275 (10) also provides in relevant part that "[a] person who is the sole proprietor of a business may accept the provisions of [the act] by notifying the commissioner, in writing, of his intent to do so. If such person accepts the provisions of [the act] he shall be considered to be an employer and shall insure his full liability in accordance with subdivision (2) of subsection (b) of section 31-284. Such person may withdraw his acceptance by giving notice of his withdrawal, in writing, to the commissioner. Any person who is a partner in a business shall be deemed to have accepted the provisions of [the act] and shall insure his full liability in accordance with subdivision (2) of subsection (b) of section 31-284, unless the partnership elects to be excluded from the provisions of [the act] by notice, in writing and by signed agreement of each partner, to the commissioner."

The plaintiff contends that, because the first sentence of § 31-275 (10) includes limited liability companies in the definition of "employer," and because the election provision of subdivision (10) applies exclusively to sole proprietors, the legislature clearly did not intend that the election provision would apply to single-member limited liability companies. Consequently, he contends, the commission chairman lacked the authority to promulgate the rule set forth in the 2003 memorandum requiring single-member limited liability companies to

elect coverage for their members. The plaintiff further maintains that, because there is no presumption that single-member limited liability companies are not the employers of their members, to qualify as Intervale's employee for purposes of the act, he was required to satisfy only the statutory definition of "employee" set forth in § 31-275 (9) (A) (i).

The fund does not seriously dispute the plaintiff's claim that the election provision of § 31-275 (10) does not, by its terms, apply to single-member limited liability companies. Nor does the fund claim that, if we agree with it that single-member limited liability companies are not employers of their members, the commission chairman had the authority to promulgate the rule set forth in the 2003 memorandum requiring single-member limited liability companies to elect to accept the provisions of the act in order to obtain coverage for their members in the absence of any statutory basis for that rule. The fund does contend, however, that the presumption that underlies the rule contained in the 2003 memorandum—that single-member limited liability companies are not the employers of their members—is correct, because single-member limited liability companies are not meaningfully distinguishable from sole proprietorships in this regard.[10]

[10] The fund also contends that the presumption underlying the 2003 memorandum is rebuttable. Nothing in the 2003 memorandum suggests, however, that, when a single-member limited liability company does not elect to accept the provisions of the act, the member nevertheless may be covered if the member presents evidence that he or she was an employee of the company. To the contrary, the 2003 memorandum provides that "members of [limited liability companies (LLCs)] that contain only one member (single-member LLCs) should be presumed to be *excluded* from the [a]ct unless they have elected to be covered"; (emphasis in original); and Form 75, which implements the 2003 memorandum, expressly provides that "[t]he [s]ole [p]roprietor or [s]ingle-[m]ember [limited liability company] is NOT covered by the [act], *unless coverage is elected through the use of this form*." (Emphasis added.) Moreover, if the 2003 memorandum merely created a presumption that may be rebutted by evidence that the member satisfied the definition of "employee" set forth in § 31-275 (9) (A) (i), the 2003 memorandum effectively would be superfluous, inasmuch as the burden of proof is always on

We agree with the plaintiff that nothing in § 31-275 (10) requires single-member limited liability companies to elect to accept the provisions of the act before their members are covered, and, therefore, the commission chairman had no authority to adopt that rule. Indeed, as we indicated, the fund does not seriously contend otherwise. For the reasons that follow, we further conclude that the legislature's choice not to include single-member limited liability companies in the election provision of § 31-275 (10) indicates that the legislature intended that single-member limited liability companies may be employers of their members.

First, it is reasonable to conclude that the legislature adopted the provision of § 31-275 (10) allowing sole proprietors to elect to adopt the provisions of the act because it otherwise might appear that, in the absence of such a provision, a sole proprietorship would not be considered the employer of the sole proprietor under § 31-275 (10), even though that provision defines "employer" to include "any person . . . ." In turn, it is

a claimant to prove that he or she was an employee. See, e.g., *Gamez-Reyes* v. *Biagi*, 136 Conn. App. 258, 270, 44 A.3d 197 ("[i]t is well established that the claimant has the burden of proving that he is an employee of the employer from whom he seeks compensation"), cert. denied, 306 Conn. 905, 52 A.3d 731 (2012). Finally, it is unclear what evidence, in the fund's view, would be sufficient to rebut the presumption created by the 2003 memorandum. The fund contends that, because the plaintiff necessarily controlled Intervale, Intervale had no right to control him and, therefore, that he cannot be Intervale's employee. That invariably will be the case, however, with single-member limited liability companies. It is therefore apparent that the 2003 memorandum sets forth a conclusive presumption that single-member limited liability companies are not employers of their members, and that that presumption cannot be rebutted by additional evidence. See *Donahue* v. *Veridiem, Inc.*, 291 Conn. 537, 548, 970 A.2d 630 (2009) ("[g]enerally, a conclusive or irrebuttable presumption is [a] presumption that cannot be overcome by any additional evidence *or argument*" [emphasis in original; internal quotation marks omitted]). In other words, the 2003 memorandum sets forth a substantive rule of law. See id. ("[a] conclusive or irrebuttable presumption is . . . a substantive rule of law" [internal quotation marks omitted]).

reasonable to believe that the legislature maintained this view because a sole proprietor and a sole proprietorship are, for all intents and purposes, one and the same entity, and it would be anomalous to conclude that an individual can work under a contract of service with himself. See *National Fire Ins. Co. of Hartford* v. *Beaulieu Co., LLC*, 140 Conn. App. 571, 584, 59 A.3d 393 (2013) (although "sole proprietor" is not defined for purposes of act, "Black's Law Dictionary [9th Ed. 2009] defines 'sole proprietorship' as '[a] business in which *one person . . . operates in his or her personal capacity*' or '[o]wnership of such a business.' " [emphasis added]); 6 L. Larson & T. Robinson, Larson's Workers' Compensation Law (2018) § 76.05 [2], p. 76-13 ("[t]he compensation act cannot be supposed to have contemplated [the] combination of employer and employee status in one person").[11] Thus, the election provision set forth in § 31-275 (10) allowing sole proprietors to elect to accept the provisions of the act effectively creates an *exception* to the rule that only employees are covered by the act, consistent with the policy in favor of broad eligibility for coverage to accomplish the act's humanitarian purpose.[12] See, e.g., *Lopa* v. *Brinker International, Inc.*, 296 Conn. 426, 432,

[11] This statement in Larson's treatise is made in the context of a discussion of the employee status of partners. See 6 L. Larson & T. Robinson, supra, § 76.05 [2], p. 76-13. The authors assert that, for purposes of workers' compensation law, a partnership generally "is not . . . an entity separate from its members," and, therefore, the members are not employees of the partnership. (Footnote omitted.) Id. As we noted, however, under the act, partners are deemed to be covered unless the partnership elects to opt out. See General Statutes § 31-275 (10).

[12] In other words, the election provision of § 31-275 (10) does not *create a presumption* that sole proprietors are not covered by the act. If sole proprietors would have been eligible for coverage in the absence of the election provision, the legislature presumably would have provided that they could opt *out* of coverage if it wished to provide them with that choice. Rather, the election provision appears to reflect the fact that, as a matter of substantive law, sole proprietors are not employees of their sole proprietorships and, therefore, would be ineligible for coverage in the absence of a provision allowing them to opt in.

994 A.2d 1265 (2010) (act was intended "to be as wide as possible in its scope," with "no employment left out that can practicably be included" [internal quotation marks omitted]); see also *Sullins* v. *United Parcel Service, Inc.*, supra, 315 Conn. 550 (" '[t]he humanitarian and remedial purposes of the act counsel against an overly narrow construction that unduly limits eligibility for workers' compensation' ").

In contrast to sole proprietorships, however, business entities organized as limited liability companies are entirely distinct from their members. See, e.g., *Wasko* v. *Farley*, 108 Conn. App. 156, 170, 947 A.2d 978 ("[a] limited liability company is a distinct legal entity whose existence is separate from its members"), cert. denied, 289 Conn. 922, 958 A.2d 155 (2008). Thus, it is reasonable to conclude that the legislature chose not to include single-member limited liability companies in the election provision of § 31-275 (10) because it contemplated that the member of a single-member limited liability company *can* work under a contract of service with the company—because the company is a distinct entity—and, therefore, the member *can* be the company's employee, as defined in § 31-275 (9) (A) (i). See

The plaintiff contends, to the contrary, that the board held in *Verrinder* v. *Matthew's Tru Colors Painting & Restoration*, No. 4936, CRB 4-05-4 (December 6, 2006), that an individual can be his own employer and employee. In that case, however, the board merely recognized that, when a sole proprietor has elected to accept the provisions of the act pursuant to § 31-275 (10), the sole proprietorship is *treated as* the sole proprietor's employer and, pursuant to § 31-275 (9) (A) (ii), the sole proprietor is *treated* as an employee under the act. See id. ("[T]he situation [in which] a self-employed individual in the compensation system is acting as both employee and employer is unlikely to result in an adversarial investigation of the claim. However, [in § 31-275 (9) (A) (ii) and (10)] the General Assembly specifically permitted sole proprietors to be defined as 'employers' and to have the concurrent status of both 'employers' and 'employees' . . . ." [Citations omitted.]). The case did not hold that, even in the absence of these statutory provisions, one individual could be treated as both an employer and an employee with respect to himself.

82 Am. Jur. 2d 167, Workers' Compensation § 143 (2013) ("[a]n ownership interest or officer position in a corporate enterprise generally does not prevent an injured worker from being an 'employee' within the meaning of workers' compensation acts"); Restatement, Employment Law, § 1.03, comment (a), p. 33 (2015) ("[s]ome laws treat controlling owners as employees in order to further specific statutory goals, such as facilitating the collection and calculation of taxes or encouraging owners to make employee benefits broadly available to their workforce").[13] Indeed, if the legislature had believed that the members of single-member limited liability companies cannot be employees of the companies, we can perceive no reason why it would have excluded such members from the opt-in provision of the act, thereby making such members categorically ineligible for coverage. The act as written reveals no such intention to exclude any type of worker. Indeed, the act was intended to "be as wide as possible in its scope," with "no employment left out that can practicably be

[13] As the fund observes, there is authority for the proposition that a person who works for a business entity that he or she owns or controls is not the entity's employee. See Restatement, supra, § 1.03, comment (a) p. 32 ("[a]n individual who renders services to an enterprise that the individual controls through ownership is not as a general matter treated as an employee of that enterprise for purposes of the laws providing protections or benefits to or imposing obligations on employees"); id., comment (b), p. 33 ("[O]wners of a [limited liability] company that have entrepreneurial control over their own remuneration and activities on the company's behalf are not employees of the company," and, "[i]n partnerships, too, each partner [who] exercises control approximating that of a sole proprietor over his or her remuneration and activities within the partnership is a controlling owner excluded from employee status"). These provisions, however, are not specific to workers' compensation law. The fact that owners of a business entity are not its employees for some purposes, such as determining the owner's tax liability, does not necessarily mean that they are not employees for purposes of the act. We note, for example, that, whereas the Restatement of Employment Law provides that partners do not have employment status, § 31-275 (10) reflects a conclusive presumption that partners *are* employees of the partnership unless the partnership elects to be excluded from the provisions of the act.

included." (Internal quotation marks omitted.) *Lopa* v. *Brinker International, Inc.*, supra, 296 Conn. 432. We note in this regard that, if a member of a single-member limited liability company cannot be an employee of the company, such members would appear to be the *only* workers who are categorically ineligible for coverage.[14] See General Statutes § 31-275 (9) (A) (i) ("employee" includes any person who "[h]as entered into or works under any contract of service or apprenticeship with an employer"); General Statutes § 31-275 (10) ("employer" includes "any person, corporation, limited liability company, firm, partnership, voluntary association, joint stock association, the state and any public corporation within the state using the services of one or more employees for pay, or the legal representative of any such employer," and "all contracts of employment . . . shall be conclusively presumed to [provide] . . . [A] [t]hat the employer may accept and become bound by the provisions of [the act]"); see also General Statutes § 31-275 (9) (B) (v) (employees of corporation who are corporate officers are covered by act unless they elect to be excluded);[15] General Statutes § 31-275 (10) (sole proprietors may opt to be covered by act);[16] General

[14] We recognize that, when the commission chairman drafted the 2003 memorandum, he attempted to mitigate this policy concern by providing that single-member limited liability companies could elect to accept the provisions of the act if the member wanted to be covered. As the fund essentially concedes on appeal, however, if such members were not employees under the act, and the legislature chose not to allow them to elect to accept the provisions of the act, neither the commission chairman nor this court would have the authority to mitigate that arguably harsh result by effectively changing the plain terms of the act.

[15] As we discuss more fully hereinafter, a corporate officer who provides no services to the corporation, and is not subject to the hazards of the corporation's business, is not the corporation's employee.

[16] Presumably, this provision would allow any independent contractor to elect to accept the provisions of the act. Cf. *Pulsifer* v. *Pueblo Professional Contractors, Inc.*, 161 P.3d 656, 660 n.5 (Colo. 2007) ("[t]he term 'independent contractor' describes the relationship with those for whom work is done, whereas 'sole proprietor' describes the organization of the business with whom the contract is made").

Statutes § 31-275 (10) (partners are covered by act unless they elect to be excluded). Because we are aware of nothing in the language, history or purpose of the act to indicate that the legislature had any such intent, we conclude that the legislature contemplated that the member of a single-member limited company may be an employee of the company.[17]

In reaching this conclusion, we are mindful that a limited liability company is a hybrid entity "that adopts and combines features of both partnership and corporate forms." (Internal quotation marks omitted.) *418 Meadow Street Associates, LLC* v. *Clean Air Partners, LLC*, 304 Conn. 820, 834 n.13, 43 A.3d 607 (2012). "From the partnership form, the [limited liability company] borrows characteristics of informality of organization and operation, internal governance by contract, direct participation by members in the company, and no taxation at the entity level. . . . From the corporate form, the [limited liability company] borrows the characteristic of protection of members from . . . liability" similar to the protection enjoyed by corporate shareholders. (Internal quotation marks omitted.) Id. Thus, for purposes of the act, the legislature *could have* concluded that single-member limited liability companies should be treated in the same manner as sole proprietorships and multiple-member limited liability companies in the same manner as partnerships, as the commission chairman indicated in the 2003 memorandum. Indeed, the legislature's choice not to treat limited liability companies in this manner may have potentially negative ramifications for single-member limited liability companies and their members. Specifically, the decision to treat single-member limited liability companies as distinct entities from their members for purposes of the act

[17] We address the test for determining whether the member of a single-member limited liability company is the company's employee in part II of this opinion.

means that a single-member limited liability company will be statutorily required to obtain coverage for its member even if the member would prefer not to be covered. It is not the function of this court or the commission, however, to "substitute its judgment of what would constitute a wiser provision for the clearly expressed intent of the legislature." (Internal quotation marks omitted.) *Echavarria* v. *National Grange Mutual Ins. Co.*, 275 Conn. 408, 416–17, 880 A.2d 882 (2005). We therefore conclude that the commission chairman did not have the authority to adopt a conclusive presumption that the members of single-member limited liability companies are not their employees, as he did in the 2003 memorandum.

II

We next consider the plaintiff's claim that the board incorrectly determined that the plaintiff was not Intervale's employee. We agree.

As we explained, the sole basis for the board's conclusion that the plaintiff was not Intervale's employee was its determination that Intervale must be treated as a sole proprietorship as the result of its purported failure to observe the corporate formalities governing limited liability companies when it distributed profits to the plaintiff instead of paying him an hourly salary. We have already rejected this conclusion because the fund made no such claim and the board cited no authority to support it. The board did not address the commissioner's finding that the plaintiff was not Intervale's employee in view of the fact that the plaintiff controlled the means and methods of his own work, which is the fund's position on appeal. Nevertheless, because we are in as good a position as the board to review the commissioner's factual finding concerning this issue, and because neither party objects to our review of the issue, which has been fully briefed, we may address it. Furthermore,

because the underlying facts are not in dispute, we agree with the plaintiff that our review of the commissioner's determination that the plaintiff was not Intervale's employee is de novo. See, e.g., *State* v. *Donald*, 325 Conn. 346, 354, 157 A.3d 1134 (2017) ("[w]hen the facts underlying a claim on appeal are not in dispute . . . that claim is subject to de novo review" [internal quotation marks omitted]).

As we previously indicated, the fund claims that the commissioner correctly determined that the plaintiff is not Intervale's employee because the plaintiff, not Intervale, had "the right to control the means and methods used by the [plaintiff] in the performance of his" services. (Internal quotation marks omitted.) *Doe* v. *Yale University*, supra, 252 Conn. 680. We recognize that the right to control test is the traditional test for determining the existence of an employer-employee relationship. The test generally has been used, however, to distinguish between an independent contractor and an employee, which is not the issue presented in this case. See id., 681 ("The test of the relationship is the right to control. It is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor and a servant or agent." [Internal quotation marks omitted.]). Rather, the issue for us to decide is whether the sole member of a limited liability company who has the right to control the company and who also performs services for the company can be the company's employee. If the right to control test applied in this situation, then, contrary to the apparent legislative intent, the member of a single-member limited liability company could *never* be found to be the company's employee, because a single-member limited liability company can *only* exercise control over the member through the member.

The Missouri Court of Appeals addressed a similar problem in *Lynn* v. *Lloyd A. Lynn, Inc.*, 493 S.W.2d 363 (Mo. App. 1973). In that case, the widow of the sole

owner and manager of a corporation who had been killed while performing services for the corporation claimed that the decedent was an employee of the corporation and, as a consequence, that she was eligible for death benefits under the workers' compensation laws of Missouri. See id., 363–64. The Missouri Industrial Commission and the state circuit court concluded that the decedent was not the corporation's employee because he did not satisfy the traditional controllable services test for employment under Missouri law. See id. On appeal, the Missouri Court of Appeals observed that "[t]he policy behind the controllable services test, developed to distinguish between an employee and an independent contractor, was that an independent contractor is only temporarily and peripherally connected with the master's or employer's business." Id., 365. The court concluded that "the controllable services test was inappropriate as applied to executive officers. Such officers, by virtue of their managerial abilities, often accompanied by substantial stock ownership, are naturally apt to be under less control in the performance of their duties than the typical employee. But, unlike the independent contractor, the executive officer is intimately and permanently involved in the operation of the business. Accordingly, the criteria by which independent contractor status is determined [are] not adequate to meet the needs of the unique problems created by executive officers of corporations." Id.

The court in *Lynn* concluded that, under Missouri's workers' compensation law, which defined "employee" to include "every person in the service of any employer . . . under any contract of hire, express or implied, oral or written, or under any appointment or election, including executive officers of corporations"; Mo. Rev. Stat. § 287.020 (1) (1969); the word "employee" included "executive officers . . . irrespective of whether . . . these officers rendered controllable services or exer-

cised control over the services of others. If by reason of their employment they were subjected to the hazards of the occupation or industry, then under the liberal extension of [Missouri's workers' compensation law] and the directive of the [l]egislature contained in [the statutory definition of "employee"], they should be considered employees within the terms of [that law]." *Lynn* v. *Lloyd A. Lynn, Inc.*, supra, 493 S.W.2d 366; see also *Gottlieb* v. *Arrow Door Co.*, 364 Mich. 450, 454, 110 N.W.2d 767 (1961) (individual who was sole incorporator and stockholder of corporation and who had exclusive control over corporation was employee of corporation for purposes of state workers' compensation laws when individual provided services to corporation and was subject to hazards of corporation's business); *McFarland* v. *Bollinger*, 792 S.W.2d 903, 906–907 (Mo. App. 1990) (clarifying that, to qualify as employee for workers' compensation purposes under *Lynn*, it is essential that corporate officer provide services to corporation); cf. *McFarland* v. *Bollinger*, supra, 907 ("[the] court does not believe that the legislature intended that executive officers of corporations were to be counted as employees if they do nothing but lend their name to the position and perform no service for the corporation").

The court in *Lynn* further concluded that, "[t]o hold that the decedent was not an employee at the time of his death because of the office he held and his stock ownership in the corporation is to disregard the separate and distinct legal identities of [the] decedent and [the corporation]. Since [the] defendants have failed to show that the separate identities were used as a subterfuge to defeat public convenience, for the perpetration of a fraud, or as a means to justify a wrong, [the court has] no reason to pierce the corporate veil in these proceedings." *Lynn* v. *Lloyd A. Lynn, Inc.*, supra, 493 S.W.2d 366–67. Accordingly, the court concluded that the decedent was an employee of the corporation. Id., 367.

We find the reasoning of the court in *Lynn* persuasive and equally applicable to the members of single-member limited liability companies. In particular, we agree that the right to control test is not an appropriate test for determining whether the member of a single-member limited liability company is an employee of the company. Rather, the test is whether the member performed services for the company and was subject to the hazards of the company's business. Cf. General Statutes § 31-275 (9) (A) (i) (defining "employee" as any person who "[h]as entered into or works under any contract of service . . . with an employer").

Because there is no dispute in the present case that the plaintiff provided services to Intervale and was subject to the hazards of Intervale's business, it is clear that the plaintiff was Intervale's employee for purposes of the act.[18] Thus, the board improperly upheld the decision of the commissioner that the plaintiff was not Intervale's employee and that he therefore was not entitled to concurrent employment benefits pursuant to § 31-310 in connection with his employment by Intervale.

The decision of the board is reversed and the case is remanded to the board with direction to reverse the decision of the commissioner dismissing the plaintiff's claim for concurrent employment benefits and to remand the case to the commissioner with direction to grant the plaintiff's claim.

In this opinion the other justices concurred.

[18] To the extent that the fund claims that the plaintiff was not Intervale's employee for purposes of the act because the commissioner found that it was "questionable as to whether the [plaintiff] intended to cover himself as an employee when [Intervale] procured [the workers' compensation insurance policy]," we disagree. Even if we were to assume that the plaintiff did not intend to obtain coverage for himself, the plaintiff's subjective beliefs regarding his employee status at the time he obtained the policy have no direct bearing on the question of whether he was covered by the act as a matter of law.