# CITY OF MERIDEN ET AL. *v.* FREEDOM OF INFORMATION COMMISSION ET AL.
## (SC 20378)

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

*Syllabus*

Pursuant to a provision of the Freedom of Information Act (§ 1-200 (2)), the term "meeting" means "any hearing or other proceeding of a public agency, any convening or assembly of a quorum of a multimember public agency, and any communication by or to a quorum of a multimember public agency . . . to discuss or act upon a matter over which the public agency has supervision, control, jurisdiction or advisory power."

The defendant Freedom of Information Commission appealed to this court from the judgment of the Appellate Court, which reversed the trial court's judgment dismissing the administrative appeal of the plaintiffs, the city of Meriden and its city council. Four leaders of the twelve member city council had gathered at city hall with the mayor and the retiring city manager to discuss the upcoming search for a new city manager. The four member leadership group agreed to submit a resolution to create a city manager search committee to the full city council for its consideration at an upcoming meeting and thereafter drafted a proposed resolution listing the names of people to be considered for appointment to the committee and detailing the committee's duties. Thereafter, a complaint was filed with the commission, alleging that the leadership group gathering was an unnoticed and private meeting, in violation of the open meetings provision of the Freedom of Information Act (§ 1-225 (a)). The commission concluded that the gathering was a "proceeding" within the meaning of § 1-200 (2), such a proceeding constituted a "meeting" within the meaning of that subdivision, and the plaintiffs violated § 1-225 (a) by failing to properly notice the gathering and to conduct it in public view. Subsequently, the plaintiffs appealed from the commission's decision to the trial court. In dismissing the plaintiffs' appeal, the trial court concluded that the commissioner's factual findings and conclusions were supported by substantial evidence and that the gathering constituted a meeting within the meaning of § 1-200 (2). In reversing the trial court's judgment, the Appellate Court

concluded that the gathering did not constitute a meeting under § 1-200 (2) and, thus, did not trigger the open meeting requirements of § 1-225 (a). Specifically, the Appellate Court disagreed with the trial court's interpretation of the phrase "hearing or other proceeding" in § 1-200 (2) as meaning a gathering among agency members that constituted a step in the process of agency-member activity. The Appellate Court explained that, consistent with the legal dictionary definitions of "proceeding" and "hearing," "hearing or other proceeding" in § 1-200 (2) refers to a process of adjudication, which falls outside the scope of activities conducted during the gathering at issue. On the granting of certification, the commission appealed to this court. *Held* that, because the gathering of the city council's four member leadership group with the mayor and the retiring city manager was not a "hearing or other proceeding" of a public agency under § 1-200 (2), it was not subject to the open meeting requirements of § 1-225 (a), and, accordingly, the judgment of the Appellate Court was affirmed: the phrase "hearing or other proceeding," as a whole, connoted a formal process by which official business was authorized to be conducted, and, when the phrase "hearing or other proceeding" in § 1-200 (2) was considered in the context of the entire statutory framework, it was apparent that a group comprising less than a quorum of a public agency, such as the four member leadership group, may conduct a hearing or other proceeding within the meaning of § 1-200 (2) only when it has express authority to take action; accordingly, because the mayor and the retiring city manager had no authority to create the city manager search committee, there was no evidence in the record that the leadership group was formed pursuant to any official resolution of the city council, and the leadership group had no independent, express authority to take any action regarding the formation of the search committee that could legally bind the city council, the gathering was not a hearing or other proceeding for purposes of § 1-200 (2); moreover, this court disagreed with the Appellate Court's restrictive reading of "hearing or other proceeding," which would have circumscribed the applicability of the open meeting requirements to adjudicative activities, insofar as public agencies conduct hearings or proceedings that do not have adjudicative functions associated with them; furthermore, this court declined to adopt the commission's proposed definition of "hearing or other proceeding" as including all communications between government officials that constitute "a step in the process of agency-member activity," regardless of whether such group has authority to act, because that interpretation would yield absurd results and render meaningless the quorum requirement in the second and third definitions of "meeting" under § 1-200 (2).

Argued September 8, 2020—officially released March 12, 2021*

* March 12, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

*Procedural History*

Appeal from the decision of the named defendant, brought to the Superior Court in the judicial district of New Britain, where the court, *Hon. Henry S. Cohn*, judge trial referee, exercising the powers of the Superior Court, rendered judgment dismissing the plaintiffs' appeal, from which the plaintiffs appealed to the Appellate Court, *Prescott*, *Moll* and *Bishop*, *Js.*, which reversed the trial court's judgment and remanded the case to that court with direction to render judgment sustaining the plaintiffs' appeal; thereafter, the named defendant, on the granting of certification, appealed to this court. *Affirmed.*

*Valicia Dee Harmon*, commission counsel, with whom, on the brief, was *Colleen M. Murphy*, general counsel, for the appellant (named defendant).

*Stephanie Dellolio*, city attorney, for the appellees (plaintiffs).

*Proloy K. Das*, *Kari L. Olson* and *Matthew A. Ciarleglio* filed a brief for the Connecticut Conference of Municipalities as amicus curiae.

*Opinion*

McDONALD, J. Although all meetings of individuals may be gatherings, the general question before us is whether all gatherings of individuals are necessarily meetings. More specifically, this certified appeal requires us to construe the meaning of the term "meeting" as it is defined in the Freedom of Information Act (act), General Statutes § 1-200 et seq. Even more precisely, the narrow issue we must decide is whether a gathering of individuals comprising less than a quorum of the members of a city council, together with the mayor and the city manager, constitutes a "hearing or other proceeding of a public agency"; General Statutes § 1-200 (2); and, therefore, a "meeting" within the mean-

ing of the act. If that gathering was a meeting, it was subject to the open meeting requirements of the act. See General Statutes § 1-225 (a).

The defendant Freedom of Information Commission appeals from the judgment of the Appellate Court, which reversed the judgment of the trial court and concluded that the plaintiffs, the city of Meriden and the Meriden City Council,[1] did not violate the open meeting requirements of the act. *Meriden* v. *Freedom of Information Commission*, 191 Conn. App. 648, 650, 663, 665, 216 A.3d 847 (2019). On appeal, the commission claims that the Appellate Court incorrectly determined that a "hearing or other proceeding" refers to a process of adjudication, which fell outside the scope of the activities conducted during the gathering at issue in this case. (Internal quotation marks omitted.) Id., 659.

The Appellate Court's decision sets forth the facts and procedural history; see id., 651–53; which we summarize in relevant part. In January, 2016, four members of the twelve member city council, namely, the majority and minority leaders and their respective deputies (leadership group), gathered at the city hall with the mayor and the retiring city manager to discuss the upcoming search for a new city manager.[2] At the gathering, the leadership group agreed to submit a resolution to create a city manager search committee to the full city council for its consideration at an upcoming meeting. The leadership group drafted a one page proposed resolution, which listed the names of people to be considered for appointment to the committee and detailed the duties of the committee, including recommending to the city council suitable candidates for the city manager position. At a city council meeting later that month,

[1] We refer to the city and the city council collectively as the plaintiff.

[2] There is no dispute that the city council as a whole is a public agency within the meaning of § 1-200 (1) (A).

the leadership group introduced the resolution, which subsequently was placed on the city council's consent calendar and was unanimously adopted.

Following the city council's meeting, an editor from the Meriden Record Journal[3] filed a complaint with the commission, alleging that the leadership group gathering was an unnoticed and private meeting, in violation of § 1-225 (a).[4] The commission held a hearing at which both parties appeared and presented evidence. The commission then issued a final decision, concluding that the leadership group gathering violated the act. It found that the leadership group "gather[s] regularly with the mayor and the city manager" to remain informed about issues that the city council may need to address. *Brechlin* v. *City Council*, Freedom of Information Commission, Docket No. FIC 2016-0066 (November 16, 2016) p. 2. During these gatherings, the group "decides whether an issue requires city council action, and when necessary . . . discusses and drafts a resolution to go on the agenda of a city council meeting." Id. The commission also found that these gatherings are not intended to constitute a quorum of the city council, which requires a meeting of at least seven council members. Id. Additionally, the commission explained that, in gathering to discuss the formation of a city manager search committee and drafting the resolution, "the leadership group [had] met to discuss or act upon a matter over which the leadership [group] and the city council as a whole ha[d] supervision and control." Id. The commission took administrative notice of the city council's minutes of the January, 2016 meet-

[3] "The Meriden Record Journal and Daniel Brechlin, an editor from that publication, were the complainants before the commission and were named as defendants in the administrative appeal, but they did not participate therein." *Meriden* v. *Freedom of Information Commission*, supra, 191 Conn. App. 651 n.3.

[4] General Statutes § 1-225 (a) provides in relevant part that "[t]he meetings of all public agencies . . . shall be open to the public. . . ."

ing and found that the resolution was adopted at the city council meeting. Id.

The commission rejected the plaintiff's claim that the leadership group gathering was not a "meeting" under § 1-200 (2) because the commission found that, contrary to the plaintiff's assertions, the communications at the leadership group gathering were not limited to notice of meetings or the setting of agendas. Id. The commission also rejected the plaintiff's claim that the gathering was not a "meeting" because a quorum was not present. Id. The commission considered the Appellate Court's decision in *Emergency Medical Services Commission* v. *Freedom of Information Commission*, 19 Conn. App. 352, 561 A.2d 981 (1989), in which the court held that the plain language of the predecessor statute to § 1-200 (2) "does not require a quorum as a necessary precondition to 'any hearing or other proceeding of a public agency . . . .' " Id., 355; see *Brechlin* v. *City Council*, supra, Docket No. FIC 2016-0066, p. 3. It also considered the Appellate Court's decision in *Windham* v. *Freedom of Information Commission*, 48 Conn. App. 529, 711 A.2d 741 (1998), appeal dismissed, 249 Conn. 291, 732 A.2d 752 (1999), in which the court held that a gathering, akin to a convening or assembly, of less than a quorum of members of a public agency, generally does not constitute a meeting. See id., 531; see also *Brechlin* v. *City Council*, supra, p. 2. The commission explained that the former decision was more applicable to the facts of the present case. The commission concluded that the gathering was a "proceeding" within the meaning of § 1-200 (2), and that such a proceeding constituted a "meeting" within the meaning of that subdivision. *Brechlin* v. *City Council*, supra, p. 6. As a result, the commission concluded that the plaintiff had violated § 1-225 (a) by failing to properly notice the leadership group gathering and conduct it in public view. Id. The commission ordered the plaintiff to

"strictly comply" with the open meeting requirements of § 1-225 (a) and, although not raised in the complaint, "advised the plaintiff that the leadership group may, in its own right, constitute a 'committee of' the city council pursuant to § 1-200 (1) . . . ." Id.; see also footnote 6 of this opinion.

The plaintiff appealed from the commission's decision to the Superior Court, arguing that a gathering of elected officials without a quorum present does not constitute a "meeting" in accordance with *Windham* v. *Freedom of Information Commission*, supra, 48 Conn. App. 529. Thereafter, the trial court dismissed the plaintiff's appeal, concluding that the Appellate Court's holding in *Windham* "is not completely determinative and, therefore, [is] not binding on the issue" of whether the leadership group gathering fell within the definition of "meeting" under § 1-200 (2). The trial court explained that "there are times, factually, [when] certain agency members are merely 'convening' and there is a requirement of a quorum under § 1-200 (2), and there are times, factually, [when] agency members, in the language of the [commission] . . . are gathering with the implicit authorization of the city council as a whole, and this gathering 'constituted a step in the process of agency-member activity.' " The court stated that the "commission's factual findings and . . . conclusions . . . [were] supported by substantial evidence" and concluded that the leadership group gathering constituted a meeting under § 1-200 (2). See *Meriden* v. *Freedom of Information Commission*, supra, 191 Conn. App. 653.

Thereafter, the plaintiff appealed from the trial court's judgment to the Appellate Court. The Appellate Court "disagree[d] with the trial court's interpretation of . . . 'hearing or other proceeding' . . . as meaning a gathering among agency members that constitutes 'a step in the process of agency-member activity . . . .' " Id., 659. The Appellate Court considered the definitions

of "proceeding" and "hearing"; id., 658–59; and explained that they "allude to adjudicative activities." Id., 659. The court also explained that it was bound by its "holding in *Windham* v. *Freedom of Information Commission*, supra, 48 Conn. App. 531, that a gathering, akin to a 'convening or assembly' as opposed to a 'hearing or other proceeding,' of less than a quorum of members of a public agency generally does not constitute a 'meeting' within the meaning of § 1-200 (2)." *Meriden* v. *Freedom of Information Commission*, supra, 191 Conn. App. 662. The court noted that this holding was not in conflict with its holding in *Emergency Medical Services Commission* v. *Freedom of Information Commission*, supra, 19 Conn. App. 355. See *Meriden* v. *Freedom of Information Commission*, supra, 663. The court explained that, consistent with the legal dictionary definitions of "proceeding" and "hearing," the "proper reading of [§ 1-200 (2)] is that 'hearing or other proceeding' refers to a process of adjudication, which falls outside the scope of activities conducted during the leadership group gathering in the present case." Id., 659. Accordingly, the Appellate Court reversed the judgment of the trial court, concluding that the gathering of the leadership group did not constitute a meeting under § 1-200 (2) and, thus, did not trigger the open meeting requirements of § 1-225 (a). Id., 660, 663.

Thereafter, the commission filed a petition for certification to appeal, which we granted, limited to the following issue: "Did the Appellate Court properly construe the term 'proceeding,' contained in . . . § 1-200 (2), not to include a gathering of four political leaders of the . . . [c]ity [c]ouncil at which they discussed a search for a new city manager?" *Meriden* v. *Freedom of Information Commission*, 333 Conn. 926, 217 A.3d 994 (2019).

On appeal to this court, the commission contends that the Appellate Court improperly restricted the

meaning of "proceeding" to adjudicative activities. Specifically, the commission contends that the Appellate Court consulted only legal dictionaries for the definitions of "proceeding" and "hearing," and failed to consider the strong, open government policy embodied in the act. The commission asks this court to define "proceeding" according to its standard dictionary definition, which will accord "with the open meetings principles espoused in the legislative history . . . ." The commission argues that there is sufficient evidence in the administrative record to conclude that the leadership group conducted a "proceeding" within the meaning of § 1-200 (2) and that, in doing so, the plaintiff failed to comply with the open meeting requirements of § 1-225 (a).

In response, the plaintiff contends that the Appellate Court correctly determined that "proceeding" refers to adjudicative activities conducted through an evidentiary process by a public agency empowered to do so. Because the gathering in this case was made up of less than a quorum of the members of the city council and did not serve an adjudicatory function, the plaintiff contends that the Appellate Court properly held that the gathering was not subject to the open meeting requirements of the act.

We begin with the relevant legal principles and standard of review. "This court reviews the trial court's judgment pursuant to the [Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq.] . . . . Under the UAPA, it is [not] the function . . . of this court to retry the case or to substitute its judgment for that of the administrative agency. . . . Even for conclusions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. . . . [Thus] [c]onclusions of law reached by the administrative agency must stand if the

court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts. . . . [Similarly], this court affords deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . Furthermore, when a state agency's determination of a question of law has not previously been subject to judicial scrutiny . . . the agency is not entitled to special deference. . . . We have determined, therefore, that the traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] a governmental agency's time-tested interpretation . . . . Even if time-tested, we will defer to an agency's interpretation of a statute only if it is reasonable; that reasonableness is determined by [application of] our established rules of statutory construction." (Citation omitted; internal quotation marks omitted.) *Commissioner of Emergency Services & Public Protection* v. *Freedom of Information Commission*, 330 Conn. 372, 379–80, 194 A.3d 759 (2018).

Although the determination of what constitutes a "meeting" under § 1-200 (2) has been subjected to judicial interpretation, the issue in this case requires us to construe § 1-200 (2) to determine whether the leadership group gathering constituted a "hearing or other proceeding" under that subdivision and, therefore, a meeting. Because the definition of "proceeding" that the commission advanced before the Appellate Court, that is, "a step in the process of agency-member activity"; (internal quotation marks omitted) *Meriden* v.

*Freedom of Information Commission*, supra, 191 Conn. App. 655; has not "been subjected to judicial scrutiny or consistently applied by the agency over a long period of time," we need not afford deference to the commission's interpretation.[5] (Internal quotation marks omitted.) *Chairperson, Connecticut Medical Examining Board* v. *Freedom of Information Commission*, 310 Conn. 276, 283, 77 A.3d 121 (2013).

Whether the gathering of the leadership group constituted a "hearing or other proceeding of a public agency," and, therefore, a meeting under § 1-200 (2), is a question of statutory interpretation over which our review is plenary. See, e.g., *Gould* v. *Freedom of Information Commission*, 314 Conn. 802, 810, 104 A.3d 727 (2014). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent

[5] The commission contends that, because it has previously construed "proceeding," and such construction has been subjected to judicial review, its construction of the statute should be entitled to some deference. Specifically, the commission points to one Appellate Court decision and four Superior Court decisions in support of its contention. See *Emergency Medical Services Commission* v. *Freedom of Information Commission*, supra, 19 Conn. App. 355; *Board of Education* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV-99-0496503-S (June 6, 2000) (27 Conn. L. Rptr. 298); *Common Council* v. *Freedom of Information Commission*, Superior Court, judicial district of Middlesex, Docket No. CV-95-0074406-S (January 31, 1996) (16 Conn. L. Rptr. 163); *Town Council* v. *Freedom of Information Commission*, Superior Court, judicial district of Hartford-New Britain, Docket No. CV-95-0549602-S (January 24, 1996) (16 Conn. L. Rptr. 121); *Ansonia Library Board of Directors* v. *Freedom of Information Commission*, 42 Conn. Supp. 84, 600 A.2d 1058 (1991). We are not persuaded. These cases did not address whether a "proceeding" is "a step in the process of agency-member activity." Moreover, the commission does not specifically argue before this court for a specific definition of "proceeding" but, rather, asks us to "select a definition of 'proceeding' that accords with the open meetings principles espoused in the legislative history . . . ." Finally, even if the cases relied on by the commission were applicable, we know of no authority to support the proposition that, once the Superior Court or the Appellate Court has construed a particular statute, we are thereby precluded from further considering the construction of the statute once an appropriate case has reached our state's highest court.

intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and [common-law] principles governing the same general subject matter . . . .'' (Internal quotation marks omitted.) Id., 810–11.

We are mindful that our inquiry into the statutory definition of ''meeting'' contained in § 1-200 (2) ''must commence with the recognition of the legislature's general commitment to open governmental proceedings. The overarching legislative policy of the [act] is one that favors the open conduct of government and free public access to government records.'' (Internal quotation marks omitted.) *Glastonbury Education Assn.* v. *Freedom of Information Commission*, 234 Conn. 704, 711–12, 663 A.2d 349 (1995).

We begin with the text of the statute. Section 1-200 (2) provides in relevant part that a '' '[m]eeting' means any hearing or other proceeding of a public agency, any convening or assembly of a quorum of a multimember public agency, and any communication by or to a quorum of a multimember public agency . . . to discuss or act upon a matter over which the public agency has supervision, control, jurisdiction or advisory power.

. . .'' The parties agree that a quorum of a multimember public agency is not required for a ''hearing or other proceeding of a public agency'' to constitute a meeting under § 1-200 (2). We also agree. There are three distinct statutory definitions of ''meeting'': (1) ''any hearing or other proceeding of a public agency,'' (2) ''any convening or assembly of a quorum of a multimember public agency,'' and (3) ''any communication by or to a quorum of a multimember public agency . . . .'' General Statutes § 1-200 (2). The term ''quorum'' is not contained in the first definition but is included in the two subsequent definitions. The language of the statute, therefore, provides that the act's open meeting requirements apply to ''any hearing or other proceeding of a public agency,'' regardless of the number of people attending. See *Emergency Medical Services Commission* v. *Freedom of Information Commission*, supra, 19 Conn. App. 356 (noting that there was no reason to read quorum requirement into first clause of predecessor statute to § 1-200 (2)). As such, this case requires us to determine whether the leadership group gathering was a ''hearing or other proceeding of a public agency,'' which does not require a quorum to constitute a meeting.

The terms ''hearing'' and ''proceeding'' are not defined in the act. ''In the absence of a definition of terms in the statute itself, [w]e may presume . . . that the legislature intended [a word] to have its ordinary meaning in the English language, as gleaned from the context of its use. . . . Under such circumstances, it is appropriate to look to the common understanding of the term as expressed in a dictionary.'' (Internal quotation marks omitted.) *Studer* v. *Studer*, 320 Conn. 483, 488, 131 A.3d 240 (2016); see also General Statutes § 1-1 (a) (''[i]n the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate

meaning in the law, shall be construed and understood accordingly").

We look first to the dictionary definition of "hearing" because § 1-200 (2) provides in relevant part that "any *hearing or other proceeding* of a public agency" constitutes a "meeting." (Emphasis added.) The phrase "other proceeding" complements and must be understood in light of the term "hearing." A "hearing" is defined variously as an "opportunity to be heard" and a "session, as of an investigatory committee, at which testimony is taken from witnesses." The American Heritage Dictionary of the English Language (New College Ed. 1976) p. 607. A "hearing" is also defined as "an instance or a session in which testimony and arguments are presented, [especially] before an official, [such] as a judge in [a legal action]." The Random House Dictionary of the English Language (Unabridged Ed. 1966) p. 654.

The American Heritage Dictionary defines "proceeding" broadly as a "course of action," a "sequence of events occurring at a particular place or occasion," and a "record of business carried on by a society or other organization . . . ." The American Heritage Dictionary of the English Language, supra, p. 1043; see also The American College Dictionary (1955) p. 965 (defining "proceeding" as "the instituting or carrying on of an action at law"). Similarly, "proceeding" is also defined as an "act, measure or step in a course of business or conduct . . . ." Webster's New International Dictionary (2d Ed. 1953) p. 1972. Black's Law Dictionary defines "proceeding" as, among other things, "the form and manner of conducting juridical business before a court or judicial officer . . . including all possible steps in an action from its commencement to the execution of judgment." Black's Law Dictionary (4th Ed. 1968) p. 1368; see also Black's Law Dictionary (11th Ed. 2019) p. 1457 (defining "proceeding" as "[a]ny procedural means for seeking redress from a tribunal or agency,"

"[t]he business conducted by a court or other official body" and "a hearing"). When "other proceeding" is considered in conjunction with the precedent term "hearing," the phrase as a whole connotes a formal process by which official business is authorized to be conducted.

As the Appellate Court noted in its decision, certain definitions in legal dictionaries of "proceeding" and "hearing" also connote adjudicative activities. See *Meriden* v. *Freedom of Information Commission*, supra, 191 Conn. App. 658 ("Ballentine's Law Dictionary defines a 'proceeding' as, inter alia, 'any application *to a court of justice*, however made, for aid in the enforcement of rights, for relief, for redress of injuries, for damages, or for any remedial object' " (emphasis in original)), quoting Ballentine's Law Dictionary (3d Ed. 1969) p. 1000; see also *Meriden* v. *Freedom of Information Commission*, supra, 658 ("[A] 'hearing' is defined variously as '[t]he *presentation and consideration of proofs and arguments*, and determinative action with respect to the issue,' and '[t]he *presentation of a case or defense* before an administrative agency, with opportunity to introduce evidence in chief and on rebuttal, and to cross-examine witnesses, as may be required for a full and true disclosure of the facts.' . . . A 'hearing' is also defined as '[a] judicial session, [usually] open to the public, *held for the purpose of deciding issues of fact or of law*, sometimes with witnesses testifying,' and '[a]ny setting in which an affected person *presents arguments to a* [*decision maker*] . . . .' " (Citation omitted; emphasis in original.)). In consulting only legal dictionaries, however, the Appellate Court did not recognize that public agencies conduct other types of "hearing[s] or other proceeding[s]" that do not have adjudicative functions associated with them. For instance, many public agencies conduct public hearings that allow interested parties to address the agency on a matter that

may be the subject of future, nonadjudicative action by the agency. Alternatively, the public agency may conduct an invitational forum in which it solicits the views of people with specialized expertise on a particular subject to inform or educate the members of the public agency on that subject. By so narrowly construing "hearing" and "proceeding," the Appellate Court did not animate the policy favoring public access to government "hearing[s] or other proceeding[s] . . . ." General Statutes § 1-200 (2); see *Glastonbury Education Assn.* v. *Freedom of Information Commission*, supra, 234 Conn. 711–12; see also *NPC Offices, LLC* v. *Kowaleski*, 320 Conn. 519, 528 n.3, 131 A.3d 1144 (2016) ("[a]lthough we have previously relied on Black's Law Dictionary in order to ascertain the common, natural, and ordinary meaning and usage of a term . . . we note that it is often not the best source for determining the ordinary use of a term" (citation omitted; internal quotation marks omitted)). As such, we disagree with the Appellate Court's restrictive reading of "hearing or other proceeding," which would circumscribe the applicability of the act's open meeting requirements to adjudicative activities.

The meaning of "hearing or other proceeding" is clarified further when the phrase is considered in the context of the entire statutory framework. See, e.g., *Studer* v. *Studer*, supra, 320 Conn. 488 (meanings of statutory terms are "gleaned from the context of [their] use" (internal quotation marks omitted)). A defining characteristic of a "hearing or other proceeding" is that it be undertaken by a public agency that has the authority to conduct official business or to take action. Section 1-200 (2) provides in relevant part that "any hearing or other proceeding *of a public agency* . . . to discuss or act upon a matter *over which the public agency has supervision, control, jurisdiction or advisory power*"

constitutes a "meeting."[6] (Emphasis added.) For a gathering of individuals who are members of a public agency to constitute a "hearing or other proceeding," therefore, it must be comprised of individual members of that public agency who have express authority to take action on behalf of the public agency. This authority may be conferred by statute, regulation, ordinance, charter, or other legal authority. Indeed, the regulations that govern the commission itself define "hearing" in relevant part as "that portion of the commission's *proceedings* in the disposition of matters *delegated to its jurisdiction by law* wherein an opportunity for the presentation of evidence and argument occurs. . . ." (Emphasis added.) Regs., Conn. State Agencies § 1-21j-1 (b) (9). Because a "hearing or other proceeding" does not require a quorum of a public agency's members to constitute a meeting, a group comprising less than a quorum of a public agency may conduct a "hearing or other proceeding" when it has the express authority to take action. This construction recognizes that public agencies conduct various types of business, not simply adjudicative activities, and furthers the policy of the act favoring disclosure of and public access to government records, rather than limiting the act's applicability to those public agencies that conduct adjudicative functions.

Although we agree with the commission that the practice of consulting standard dictionaries, rather than legal dictionaries alone, more appropriately illuminates

[6] The parties have not specifically analyzed whether the leadership group of the city council itself constitutes a "public agency" as that term is defined in § 1-200 (1) (A). The commission concluded that "[t]he respondents are public agencies within the meaning of § 1-200 (1) . . . ." *Brechlin* v. *City Council*, supra, Docket No. FIC 2016-0066, p. 1. Given that the plaintiffs in this action are the full city council and the city of Meriden, the commission's determination that they constitute public agencies does not inform whether the four individual members of the city council at the gathering constitute a "public agency." We have no occasion here to address that separate question.

the meaning of "hearing or other proceeding," the commission's analysis does not go beyond dictionary definitions and fails to consider the context of the term's use in § 1-200 (2). The commission would have us adopt a definition of "proceeding" without consideration of the fact that § 1-200 (2) provides that a gathering constitutes a "hearing or other proceeding" only when it is made up of a public agency gathering "to discuss or act upon a matter over which the public agency has supervision, control, jurisdiction or advisory power." Concluding that a "hearing or other proceeding" includes all communications between government officials that constitute "a step in the process of agency-member activity," regardless of whether such group has authority to act, would render meaningless the quorum requirement in the second and third definitions of "meeting" under § 1-200 (2). We decline to construe § 1-200 (2) in such a manner. See, e.g., *Lopa* v. *Brinker International, Inc.*, 296 Conn. 426, 433, 994 A.2d 1265 (2010) ("It is a basic tenet of statutory construction that the legislature [does] not intend to enact meaningless provisions. . . . [I]n construing statutes, we presume that there is a purpose behind every sentence, clause, or phrase used in an act and that no part of a statute is superfluous. . . . Because [e]very word and phrase [of a statute] is presumed to have meaning . . . [a statute] must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant." (Internal quotation marks omitted.)).

Moreover, a requirement that all communications between government officials that constitute "a step in the process of agency-member activity" be subject to the act's open meeting requirements would disrupt the orderly and efficient functioning of government in a manner that the act does not contemplate. The practical effect of the commission's proposed construction of the phrase would be that nearly all gatherings of any

public officials—from meetings between a city councilor and a member of the public about a neighborhood concern, to staff meetings of the employees of a municipal department, to budget negotiation meetings between the governor and legislative leaders—would be subject to the act's open meeting requirements. As the amicus curiae notes, this would place a significant burden on government agencies that is beyond the scope of the language used in the act. See, e.g., General Statutes § 1-225 (setting forth various requirements for open meeting compliance); General Statutes § 1-228 (notice requirements for adjournment of public meetings); General Statutes § 1-229 (procedural requirements for continuation of hearing at public meeting).

As the commission acknowledged at oral argument before this court, its construction of "proceeding" would also discourage two members of different political parties from gathering because any such gathering would constitute a "meeting" subject to the open meeting requirements of the act, regardless of whether a quorum was present. By contrast, a group of individuals from the same political party, even if the group constituted a quorum of the public agency, would avoid the open meeting requirements of the act because that group would constitute a caucus, which is exempt from the definition of "meeting." See General Statutes § 1-200 (2) (providing in relevant part that " '[m]eeting' does not include . . . a caucus of members of a single political party notwithstanding that such members also constitute a quorum of a public agency"). Because we construe statutes to avoid such an absurd result, we decline to construe "hearing or other proceeding" as "a step in the process of agency-member activity" for this additional reason. See, e.g., *Goldstar Medical Services, Inc.* v. *Dept. of Social Services*, 288 Conn. 790, 803, 955 A.2d 15 (2008) ("[i]n construing a statute, common sense must be used and courts must assume that

a reasonable and rational result was intended" (internal quotation marks omitted)). Should the commission seek greater change to the meaning of "hearing or other proceeding," the appropriate remedy is through the legislature, not this court. See, e.g., *Castro* v. *Viera*, 207 Conn. 420, 435, 541 A.2d 1216 (1988) ("[I]t is up to the legislatures, not courts, to decide on the wisdom and utility of legislation. . . . [C]ourts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." (Internal quotation marks omitted.)).

Applying these principles to the facts of this case, we conclude that the gathering of the leadership group with the mayor and the retiring city manager was not a "hearing or other proceeding" of a public agency under § 1-200 (2). The mayor and the retiring city manager had no authority to create the city manager search committee. There is no evidence in the record that the leadership group was formed pursuant to any official resolution of the city council, and it had no independent, express authority to take any action regarding the formation of the search committee that could legally bind the city council.[7] There is no statute, ordinance, bylaw, or other legal source of power granting the leadership group any authority to act, either as a group or on behalf of the city council. Indeed, that is why the leadership group submitted the resolution to the full city council

[7] We acknowledge that the commission concluded that "the gathering of the [leadership group] with the mayor and the city manager was at least *implicitly* authorized by the city council as a whole." (Emphasis added.) *Brechlin* v. *City Council*, supra, Docket No. FIC 2016-0066, p. 6. As we have explained, however, for a gathering of individuals who are members of a public agency to constitute a "hearing or other proceeding," it must be made up of individual members of that public agency who have *express* authority to take action on behalf of the public agency. There is no evidence that the leadership group has any express, or even implied, authority to take action on its own. Rather, the evidence simply demonstrates that the city council was aware that the gathering took place.

for its consideration and a vote.[8] See Meriden City Charter § C5-1 ("[t]he [c]ity [m]anager . . . shall be appointed . . . by the [c]ity [c]ouncil"). The commission acknowledges in its brief that it was the city council "as a whole" that had responsibility for hiring a new city manager. Accordingly, because the gathering of the leadership group with the mayor and the retiring city manager did not constitute a "hearing or other proceeding of a public agency," and, therefore, a "meeting," the gathering was not subject to the act's open meeting requirements.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

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## JOSEPH MOORE *v.* COMMISSIONER OF CORRECTION (SC 20252)

Robinson, C. J., and McDonald, D'Auria, Kahn and Ecker, Js.

*Syllabus*

The petitioner, who had been convicted of robbery in the first degree and the commission of a class B felony with a firearm, sought a writ of habeas corpus, claiming that his trial counsel, O, had rendered ineffective assistance by failing to adequately advise him during pretrial negotiations

[8] The commission puts undue legal weight on the fact that the resolution was put on the city council's consent calendar and was adopted without modification or change. The commission has not identified any basis to conclude that a member of the city council could not have asked to discuss or amend the resolution had he or she wanted to do so. The record reflects that the resolution was available for public discussion and public view, and that, by being placed on the consent calendar, "*unless a city-elected official asked for it to be removed from the consent calendar*, it would just get approved without discussion . . . ." (Emphasis added.) Indeed, the majority leader of the city council testified that the resolution "is always subject to full discussion, full public comment, full information gathering, people vot[ing] in favor of it, people deciding to vote against it, amending it . . . ." There is nothing in the record to suggest that council members' authority to act independently with respect to voting on the resolution, or not voting on it at all, was compromised.

when he had purportedly expressed a misunderstanding of the law regarding his maximum sentencing exposure. The petitioner had rejected three plea offers, all of which called for him to plead guilty to robbery in the first degree in exchange for either a ten or fifteen year prison sentence, and proceeded to trial under the belief that the state could prove only that he was guilty of robbery in the third degree and that the maximum sentence he deserved for that offense was five years' imprisonment. The petitioner claimed that O's performance was deficient insofar as O had failed to advise him that, if he were convicted only of the lesser included offense of robbery in the third degree, his maximum sentence would nonetheless be as severe as or exceed the sentences contained in the plea offers due to certain sentence enhancements with which the petitioner also had been charged. The habeas court rendered judgment denying the habeas petition, concluding, inter alia, that the petitioner had failed to meet his burden of establishing that O did not advise him of the maximum sentencing exposure for robbery in the third degree with enhancements. The trial court thereafter denied the petitioner's petition for certification to appeal, and the petitioner appealed to the Appellate Court, which dismissed the appeal. On the granting of certification, the petitioner appealed to this court. *Held* that the petitioner could not prevail on his ineffective assistance claim because he failed to establish that O had not advised him about his maximum sentencing exposure for a conviction of robbery in the third degree, and, accordingly, the Appellate Court properly dismissed the petitioner's appeal; although counsel has an obligation to address an expressed, material misunderstanding of law that appears to influence a defendant's decision whether to accept a plea offer or to proceed to trial, neither the petitioner nor O could recall whether O specifically advised him about his potential exposure for robbery in the third degree, and the habeas court expressly credited O's testimony that he was reasonably certain that he would have told the petitioner that, even if he were convicted of robbery in the third degree, he would face a sentence of more than ten years' imprisonment in light of the sentence enhancements.

Argued September 11, 2020—officially released March 15, 2021*

*Procedural History*

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Cobb*, *J.*; judgment denying the petition; thereafter, the court, *Cobb*, *J.*, denied the petition for certification to appeal, and the peti-

* March 15, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

tioner appealed to the Appellate Court, *Lavine*, *Keller* and *Elgo*, *Js.*, which dismissed the appeal, and the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

*Michael W. Brown*, assigned counsel, for the appellant (petitioner).

*Mitchell S. Brody*, senior assistant state's attorney, with whom, on the brief, were *Matthew C. Gedansky*, state's attorney, and *Angela R. Macchiarulo*, senior assistant state's attorney, for the appellee (respondent).

*Opinion*

ROBINSON, C. J. The principal issue in this certified appeal is whether a criminal defense attorney who is aware that his or her client has a legal misunderstanding material to the decision of whether to accept a plea bargain has a duty to provide advice to address that misunderstanding. The petitioner, Joseph Moore, appeals, upon our grant of his petition for certification,[1] from the judgment of the Appellate Court dismissing his appeal from the judgment of the habeas court. The habeas court denied his petition for a writ of habeas corpus, in which he claimed that he had received ineffective assistance of counsel during plea negotiations prior to his criminal trial at which he was convicted of, among other crimes, robbery in the first degree. *Moore* v. *Commissioner of Correction*, 186 Conn. App. 254, 255–58, 270, 199 A.3d 594 (2018). On appeal, the petitioner claims that he did not receive effective assistance of counsel because his trial attorney did not adequately advise him of his maximum sentencing exposure if convicted at trial of the lesser included offense of robbery

[1] We granted the petitioner's petition for certification to appeal, limited to the following issue: "Did the Appellate Court properly conclude that trial counsel did not render ineffective assistance of counsel in advising the petitioner regarding the pretrial plea offers?" *Moore* v. *Commissioner of Correction*, 330 Conn. 970, 200 A.3d 700 (2019).

in the third degree. Because the petitioner failed to meet his burden of proving that trial counsel did not advise him about his maximum exposure for a conviction of the lesser included offense of robbery in the third degree, we conclude that the petitioner cannot prevail on his claim of ineffective assistance of trial counsel. Accordingly, we affirm the judgment of the Appellate Court.

The record reveals the following relevant facts and procedural history, much of which is aptly recited in the Appellate Court's opinion in this case. The petitioner was arrested in 2009 after entering a New Alliance Bank and demanding cash from the bank employees. Id., 256–57. He was charged with robbery in the first degree in violation of General Statutes § 53a-134 (a) (4) and commission of a class B felony with a firearm in violation of General Statutes § 53-202k. The state also filed a part B information charging the petitioner with (1) committing the offenses while on release in violation of General Statutes § 53a-40b, and (2) being a persistent felony offender in violation of General Statutes § 53a-40 (f). Id., 256. At his criminal trial, the petitioner did not dispute having robbed the bank; his only contention was that he did not write a note to the bank teller stating " '[g]ive cash. I have gun.' " Id. The petitioner's theory at trial was that he did not write the note and, therefore, should be convicted of only the lesser included offense of robbery in the third degree.[2] See

[2] "At the habeas trial, [the petitioner's trial counsel, Douglas A. Ovian] testified that the petitioner had taken a position that the note recovered at the bank was not the note he had written and handed to the teller. Ovian testified that it was the petitioner's position that the note he handed to the teller never indicated that he had a gun, and that the teller had given him back the note prior to his running from the bank and jumping into a river. [Matthew C.] Gedansky [the prosecutor] indicated that the petitioner had a theory that the police had invented the note on which the state relied; Gedansky described this as a 'conspiracy theory.' Ovian also testified that he recalled contacting a handwriting expert to see if his evaluation of the note could give some support to the petitioner's theory. Ovian testified that after the handwriting analyst reviewed a copy of the note, the handwriting

id., 258 and n.2. The petitioner was, however, convicted of all the crimes charged after a jury trial and sentenced to a total effective term of thirty-four years of incarceration. Id., 256. The Appellate Court subsequently affirmed the petitioner's conviction on direct appeal. *State* v. *Moore*, 141 Conn. App. 814, 825, 64 A.3d 787, cert. denied, 309 Conn. 908, 68 A.3d 663 (2013).

In 2016, the petitioner filed an amended petition for a writ of habeas corpus, alleging that his trial counsel, Douglas A. Ovian, rendered ineffective assistance when he failed to advise the petitioner adequately during pretrial plea negotiations. *Moore* v. *Commissioner of Correction*, supra, 186 Conn. App. 257–58. "At the habeas trial on September 15, 2016, the habeas court heard testimony from Matthew C. Gedansky, the state's attorney in the petitioner's criminal case, [Ovian], and the petitioner. . . . There was testimony that three plea offers were made to the petitioner: an offer for ten years to serve with five years of special parole; an offer for ten years to serve with two years of special parole; and an offer made at a judicial pretrial conference with *Sullivan, J.*, offering the petitioner fifteen years to serve if he pleaded guilty to one count of robbery in the first degree.[3] Ovian testified that his notes indicated that he advised the petitioner to accept the offers and that he would never have told the petitioner to take this case to trial. In addition, Gedansky testified that he recalled Ovian telling him that Ovian had advised the petitioner to take the offer of ten years to serve with two years [of] special parole. The petitioner testified that he rejected these offers because he had faith the state might present

analyst indicated to him that he thought it 'would not be a good idea to call him as a witness.' " *Moore* v. *Commissioner of Correction*, supra, 186 Conn. App. 258 n.2.

[3] "Gedansky testified that Ovian was able to persuade him to reduce his initial offer of ten years to serve with five years [of] special parole to ten years to serve with two years [of] special parole." *Moore* v. *Commissioner of Correction*, supra, 186 Conn. App. 258 n.3.

him with a more favorable offer, and that he believed he deserved only five years of imprisonment. There also was differing testimony between Ovian and the petitioner with respect to what Ovian advised as to the potential maximum sentence the petitioner faced if he was found guilty of all the charges, and whether he advised the petitioner of the potential maximum sentence he faced if he prevailed on a robbery in the third degree theory at trial.[4]

"In a memorandum of decision filed [on] January 10, 2017, the habeas court denied the amended petition for a writ of habeas corpus, finding that the petitioner had failed to prove deficient performance or prejudice. In particular, the habeas court found that 'Ovian had many discussions with the petitioner throughout the course of his representation,' and that Ovian 'went over the state's evidence with [the petitioner] and he advised

[4] "At the habeas trial, Ovian testified that he recalled there being a 'specific discussion of numbers' with the petitioner about his exposure if he was found guilty of robbery in the first degree. He also testified that his notes contained a chart showing that the total exposure the petitioner faced was forty-eight and one-half years, which included the enhancements the petitioner likely faced for committing a crime while he was out on bond and for being a persistent felony offender. Ovian then testified that he could not definitively say that he advised the petitioner on the maximum sentence the petitioner faced if convicted on the lesser included offense of robbery in the third degree, but he indicated that he would not have led the petitioner to believe that he would have avoided jail time, especially in light of the conversations they had about the enhancements the petitioner faced.

"The petitioner testified that Ovian did not tell him that he may receive a sentence of thirty-four years. He also said that he did not think that Ovian had brought to his attention the potential maximum sentence if he was found guilty on all the charges. The petitioner indicated that had he known that he was going to receive a thirty-four year sentence, he would not have gone to trial. Additionally, the petitioner testified that he was asking at trial that he be found guilty of robbery in the third degree and felt that the maximum sentence was five years; he testified that Ovian never told him the maximum potential sentence for robbery in the third degree was twenty years. He also testified, though, that he did not recall whether Ovian told him that a five year sentence was a likely outcome." *Moore* v. *Commissioner of Correction*, supra, 186 Conn. App. 259 n.4.

the petitioner to take each of the deals as they were offered given the circumstances.' Additionally, the habeas court found that Ovian 'informed the petitioner that he was facing a maximum exposure of forty-eight and one-half years if convicted of robbery in the first degree due to the sentence enhancements the petitioner faced.' The habeas court concluded that Ovian relayed the offers to the petitioner, properly explained the state's evidence to him, and adequately warned him of the exposure he could face should he choose to go to trial. On January 17, 2017, the petitioner filed a petition for certification to appeal, which was later denied by the habeas court." (Footnotes in original; footnote omitted.) Id., 258–60.

The petitioner appealed from the denial of his petition for certification to appeal to the Appellate Court, claiming that the habeas court improperly rejected his claim that Ovian's "performance was deficient for failing to advise him of the maximum sentence he faced if he was successful in proving at trial that he was guilty only of committing the lesser included offense of robbery in the third degree." Id., 261. The Appellate Court declined to conclude that Ovian's performance was deficient as a result of his alleged "failure to inform the petitioner of the potential total sentence exposure he faced if he succeeded on the unlikely theory of [defense that the state could only] prov[e] robbery in the third degree . . . ." Id., 268. Instead, the Appellate Court held that the information and advice that Ovian did provide were adequate to allow the petitioner to make an informed decision regarding the state's plea offers and that any failure to further explain the consequences of proceeding to trial fell outside the objective standard of reasonableness of counsel's performance. Id., 268–69. In so concluding, the Appellate Court opined that criminal defense attorneys should not be required "to advise their clients on the total sentence exposure they

face for each and every possible defense scenario . . . .'' Id., 265. Finally, in holding that Ovian's advice was appropriate, the Appellate Court observed that any effort made by Ovian to correct the petitioner's mistaken belief that he would receive a sentence of less than ten years if he had been convicted of the lesser included offense of robbery in the third degree would have only encouraged his mistaken belief. Id., 269 n.10. Accordingly, the Appellate Court rendered judgment dismissing the appeal. Id., 270. This certified appeal followed. See footnote 1 of this opinion.

On appeal, the petitioner claims that, although Ovian rendered competent advice in clearly conveying all pretrial offers to the petitioner and advising him to accept those offers, his assistance was nevertheless ineffective because he failed to advise the petitioner on his maximum sentencing exposure for robbery in the third degree. The petitioner argues that Ovian's performance was ineffective because he failed to address the petitioner's expressed misunderstanding of the law regarding his sentencing exposure for robbery in the third degree at trial, which meant that the petitioner lacked the appropriate context for deciding whether to accept a plea or to go to trial. The petitioner argues, and the habeas court found, that the petitioner's choice to proceed to trial was a result of his mistaken belief that he would be exposed only to a sentence of less than ten years if convicted of robbery in the third degree. As a result, the petitioner argues, his choice to proceed to trial was ''irrational and essentially suicidal given the circumstances.''

In response, the respondent, the Commissioner of Correction, argues that Ovian's advice to accept the plea offers was constitutionally sufficient because he made clear to the petitioner the low probability of acquittal for robbery in the first degree. The respondent asserts that the petitioner's decision to proceed to trial

was a last chance " 'Hail Mary' " to avoid a sentence for robbery in the first degree. Furthermore, the respondent contends that the petitioner failed to meet his burden of proving that Ovian did not advise him that a sentence for a conviction of robbery in the third degree would still exceed the plea offers presented to the petitioner.

Having considered the parties' arguments, we agree with the petitioner that trial counsel has a duty to correct a defendant's expressed, material misunderstanding of the law that influences his decision whether to accept a plea. Nevertheless, we conclude that the Appellate Court properly upheld the habeas court's denial of the petition for certification to appeal in light of the habeas court's articulation, which this court sua sponte ordered after hearing oral argument,[5] clarifying that the petitioner had failed to prove that Ovian did not advise him in this regard.

We begin by setting forth the applicable standard of review. "The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . The application of [the pertinent legal standard to] the habeas court's factual findings . . . however, presents

[5] We directed the habeas court to issue an articulation on the following issue: "Whether . . . Ovian advised the petitioner about his sentencing exposure for a conviction at trial of the lesser included offense of robbery in the third degree." We ordered that articulation sua sponte pursuant to Practice Book §§ 60-5 and 61-10 (b). See *CCT Communications, Inc.* v. *Zone Telecom, Inc.*, 327 Conn. 114, 126, 172 A.3d 1228 (2017) (this court sua sponte ordered articulation pursuant to Practice Book § 60-5 with respect to factual basis for alternative ground for affirmance).

We note that, while this appeal was pending before the Appellate Court, the petitioner filed a motion for articulation, asking, inter alia, "whether [Ovian] advised the petitioner about his potential and likely exposure after a trial [at which] he prevailed on his robbery in the third degree theory . . . ." The habeas court denied the petitioner's motion for articulation on May 10, 2017. The petitioner filed a motion for review of the denial, to which the respondent objected. On July 12, 2017, the Appellate Court granted the motion for review but denied the relief requested.

a mixed question of law and fact, which is subject to plenary review." (Internal quotation marks omitted.) *Ebron* v. *Commissioner of Correction*, 307 Conn. 342, 351, 53 A.3d 983 (2012), cert. denied sub nom. *Arnone* v. *Ebron*, 569 U.S. 913, 133 S. Ct. 1726, 185 L. Ed. 2d 802 (2013).

"Faced with the habeas court's denial of certification to appeal, a petitioner's first burden is to demonstrate that the habeas court's ruling constituted an abuse of discretion. . . . A petitioner may establish an abuse of discretion by demonstrating that the issues are debatable among jurists of reason . . . [the] court could resolve the issues [in a different manner] . . . or . . . the questions are adequate to deserve encouragement to proceed further. . . . The required determination may be made on the basis of the record before the habeas court and the applicable legal principles. . . . If the petitioner succeeds in surmounting that hurdle, the petitioner must then demonstrate that the judgment of the habeas court should be reversed on its merits. . . . In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous." (Citation omitted; internal quotation marks omitted.) *Meletrich* v. *Commissioner of Correction*, 332 Conn. 615, 626, 212 A.3d 678 (2019).

Given the centrality of plea bargaining to the efficient administration of the criminal justice system, "defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the [s]ixth [a]mendment [to the United States constitution] requires in the criminal process at critical stages. Because ours 'is for the most part a system of pleas, not a system of trials'

. . . it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process." (Citation omitted.) *Missouri* v. *Frye*, 566 U.S. 134, 143–44, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012), quoting *Lafler* v. *Cooper*, 566 U.S. 156, 170, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012). "In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." *Missouri* v. *Frye*, supra, 144. In order to prevail on a claim of ineffective assistance of counsel during plea negotiations under the well established standard of *Strickland* v. *Washington*, 466 U.S. 668, 687–88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), which governs such claims, the defendant must establish that (1) counsel's performance was deficient, and (2) there was a reasonable probability that—but for the deficient performance—the petitioner would have accepted the plea offer, and that the trial court would have assented to the plea offer. See *Ebron* v. *Commissioner of Correction*, supra, 307 Conn. 357. For purposes of this appeal, we focus on the first prong of *Strickland*, specifically, whether counsel's failure to correct a client's expressed, material misunderstanding of his sentencing exposure for a lesser included charge constitutes deficient performance. As we noted previously, the petitioner's exposure with respect to the lesser included offense of robbery in the third degree is a significant consideration in this case because, as the habeas court found, he "believed that he should be convicted of robbery in the third degree because he only gave the bank teller a note and did not hurt anyone. The petitioner rejected both plea offers for ten and fifteen years to serve for robbery in the first degree because he [believed that he] . . . committed [only] a robbery in the third degree and he believed that five years was a more reasonable sentence for his offense."

The United States Supreme Court has declined to limit findings of deficient performance solely to affirmative misadvice by counsel because there is no meaningful distinction between acts of commission and acts of omission when assessing ineffective assistance of counsel claims. See *Padilla* v. *Kentucky*, 559 U.S. 356, 370, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010). There is no per se rule requiring specific conduct of defense attorneys during plea negotiations.[6] *Purdy* v. *United States*, 208 F.3d 41, 46 (2d Cir. 2000). Instead, we must determine whether, "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland* v. *Washington*, supra, 466 U.S. 690; accord *Padilla* v. *Kentucky*, supra, 370. The parameters of appropriate advice required during plea negotiations are determined by a fact specific inquiry in which we consider whether an attorney's performance fell below "an objective stan-

[6] We note that the respondent asks us to overrule two Appellate Court decisions, namely, *Sanders* v. *Commissioner of Correction*, 169 Conn. App. 813, 153 A.3d 8 (2016), cert. denied, 325 Conn. 904, 156 A.3d 536 (2017), and *Barlow* v. *Commissioner of Correction*, 150 Conn. App. 781, 93 A.3d 165 (2014), on which that court relied in the present case. See *Moore* v. *Commissioner of Correction*, supra, 186 Conn. App. 264. The respondent argues that both *Sanders* and *Barlow* always require counsel to recommend the "best course of action"; *Barlow* v. *Commissioner of Correction*, supra, 800; accord *Sanders* v. *Commissioner of Correction*, supra, 830–32; when advising a client about whether to accept a plea offer, which, the respondent contends, is inconsistent with the Second Circuit's rejection of a per se rule in *Purdy* v. *United States*, 208 F.3d 41, 46 (2d Cir. 2000). We disagree with the respondent's reading of *Sanders* and *Barlow*. Those cases do require counsel to provide advice on plea offers, but they do not mandate that counsel make specific recommendations in all circumstances. See *Sanders* v. *Commissioner of Correction*, supra, 832 (no per se obligation that counsel provide recommendation regarding plea offers); *Barlow* v. *Commissioner of Correction*, supra, 794–95 (same). Finally, we note that the present case does not implicate a failure on Ovian's part to provide a recommendation regarding whether the petitioner should have accepted a plea offer, as Ovian provided such guidance. Instead, this case concerns Ovian's alleged failure to address the petitioner's expression of a material misunderstanding as to his sentencing exposure, which ultimately influenced the petitioner's decision to reject the plea offers.

dard of reasonableness." *Strickland* v. *Washington*, supra, 688; accord *Padilla* v. *Kentucky*, supra, 366; *Davis* v. *Commissioner of Correction*, 319 Conn. 548, 555, 126 A.3d 538 (2015), cert. denied sub nom. *Semple* v. *Davis*, U.S. , 136 S. Ct. 1676, 194 L. Ed. 2d 801 (2016).

The objective standard of reasonableness for an attorney's performance is defined by prevailing professional norms and standards, such as those contained in the American Bar Association's Standards for Criminal Justice and Model Rules of Professional Conduct. See, e.g., *Padilla* v. *Kentucky*, supra, 559 U.S. 366–67; *Strickland* v. *Washington*, supra, 466 U.S. 688; G. Chin & R. Holmes, "Effective Assistance of Counsel and the Consequences of Guilty Pleas," 87 Cornell L. Rev. 697, 713 (2002). When advising a defendant during plea negotiations, counsel should "advise the defendant of the alternatives available and address considerations deemed important by defense counsel *or the defendant* in reaching a decision." (Emphasis added.) A.B.A., Standards for Criminal Justice: Pleas of Guilty (3d Ed. 1999) standard 14-3.2 (b), p. 116 (A.B.A. Standards for Criminal Justice). "[D]efense counsel is charged with the primary responsibility [of] ensur[ing] that the defendant fully understands the plea that is being offered, including all terms of the sentence that could be imposed and other ramifications of that plea." Id., standard 14-3.2, commentary, p. 120. Given the fact specific nature of plea negotiations and client communications, the necessary information depends on the individual circumstances of each defendant and his or her case. Id.; see also 1 Restatement (Third), The Law Governing Lawyers § 20 (3), p. 169 (2000) ("[a] lawyer . . . must explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation").

"Counsel rendering advice in this critical area may take into account, among other factors, the defendant's chances of prevailing at trial, the likely disparity in sentencing after a full trial as compared to a guilty plea . . . whether the defendant has maintained his innocence, and the defendant's *comprehension of the various factors that will inform his plea decision*." (Emphasis added.) *Purdy* v. *United States*, supra, 208 F.3d 45. Instead of failing to meet a prescribed, mechanical standard, counsel's performance has been held constitutionally deficient when counsel failed to provide his client with "sufficient information about the client's sentencing exposure to allow the client 'to make a reasonably informed decision [regarding] whether to accept a plea offer.' "[7] *United States* v. *Penoncello*, 358 F. Supp. 3d 815, 822 (D. Minn. 2019), quoting *United States* v. *Day*, 969 F.2d 39, 43 (3d Cir. 1992). An understanding of the difference between sentencing exposures resulting from standing trial and accepting a plea offer "will often be crucial to the decision [regarding] whether to plead guilty." *United States* v. *Day*, supra, 43; see id., 44 (holding that performance would be deficient if counsel failed to advise defendant about sentence exposure). "A defendant cannot make an intelligent choice about whether to accept a plea offer unless he fully understands the risks of proceeding to trial." *United States* v. *Herrera*, 412 F.3d 577, 580 (5th Cir.

[7] As the petitioner noted in his brief, much of the United States Supreme Court and Connecticut precedent that considers claims of inadequate representation during the plea negotiation stage focuses on instances in which a criminal defendant *accepts* a plea as a result of ineffective assistance. This case is distinct in that it concerns a criminal defendant who *rejected* plea offers on the basis of *his own misunderstanding* of the law that went uncorrected. However, the rationale behind those cases, specifically, that a defendant must make an informed decision, remains relevant in light of the United States Supreme Court's emphasis on the importance of a defendant's ability to receive competent legal assistance during the plea negotiations stage. See *Missouri* v. *Frye*, supra, 566 U.S. 144; *Ebron* v. *Commissioner of Correction*, supra, 307 Conn. 357–59.

2005); see also *Smith* v. *United States*, 348 F.3d 545, 553 (6th Cir. 2003) ("[a] criminal defendant has a right to expect at least that his attorney will . . . explain the sentencing exposure the defendant will face as a consequence of exercising each of the options available"). On this point, the United States Court of Appeals for the Third Circuit has held that a defense attorney's failure to accurately advise his client about the range of sentences he faced if found guilty constituted ineffective assistance of counsel inasmuch as "his judgment was clouded by misunderstanding up through the time of his trial because his counsel did not do his job." *United States* v. *Bennett*, 588 Fed. Appx. 159, 161 (3d Cir. 2014); see also *United States* v. *Penoncello*, supra, 822–23 (concluding that defense counsel's failure to inform defendant that rejecting initial plea offer would result in fifty year increase in sentencing exposure amounted to deficient performance).

The respondent argues, and the Appellate Court agreed, that requiring counsel to advise their criminal defense clients as to each and every possible sentencing scenario would broaden the duty of trial counsel beyond the scope of the objective standard of reasonableness. *Moore* v. *Commissioner of Correction*, supra, 186 Conn. App. 265. We do not, however, understand the petitioner to seek to impose such a broad duty on defense attorneys in contending that Ovian failed to provide him with constitutionally adequate advice. Instead, the petitioner argues that, "[w]hen a criminal defendant's strong, subjective, and unrealistic beliefs about his case . . . stem from *an articulated legal or factual misunderstanding*, the role of constitutionally competent counsel is to give accurate and complete advice about the law or relevant facts." (Citation omitted; emphasis added; internal quotation marks omitted.) We agree with this more limited understanding of the defense attorney's obligation. Indeed, this obligation is consistent with those already

imposed on counsel when advising on deportation or other collateral consequences that are likely determinative of a criminal defendant's decision whether to accept a plea offer, beyond just maximum exposure after conviction.[8] See *Lee* v. *United States*, U.S. , 137 S. Ct. 1958, 1967, 198 L. Ed. 2d 476 (2017) (recognizing that defense counsel's error in advising on deportation consequences prejudiced defendant because deportation was " 'the determinative issue' " in his decision whether to accept plea); *Padilla* v. *Kentucky*, supra, 559 U.S. 368–69 (holding performance to be deficient when counsel failed to advise client about deportation consequences of plea agreement). Given the gravity of a defendant's decision whether to accept a plea offer or proceed to trial, we conclude that trial counsel has an obligation to address a material misunderstanding of law, expressed by the client, that appears to influence the client's decision whether to accept a plea offer or to proceed to trial. This obligation is wholly consistent with counsel's obligation to ensure defendants have the specific information necessary *for them* to make an informed decision. See *Purdy* v. *United States*, supra, 208 F.3d 44–45 (clarifying that counsel's obligation to advise on probable costs and benefits of decision

[8] Like the court in *Purdy* v. *United States*, supra, 208 F.3d 44–45, the A.B.A. Standards for Criminal Justice specifically contemplate that the provision of legal advice during plea bargaining is not a one-size-fits-all process. For example, the commentary to standard 14-3.2 (f) recognizes that determining the collateral consequences of a conviction may be vast and difficult to predict in some cases; accordingly, the attorney should interview the client to determine which consequences are important to the client. A.B.A. Standards for Criminal Justice, supra, standard 14-3.2, commentary, pp. 126–27. In accordance with defense counsel's duty to explain the import and effect of all plea offers to the defendant, the A.B.A. Standards for Criminal Justice also reference the Model Rules of Professional Conduct. See id., p. 119. Model rule 1.4 (b) dictates that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." A.B.A., Model Rules of Professional Conduct (2017) rule 1.4 (b), p. 19.

requires fact specific inquiry into circumstances surrounding plea negotiation).

In response to this court's articulation order; see footnote 5 of this opinion; the habeas court clarified that the petitioner failed to "meet his burden to establish facts that would support his claim that . . . Ovian did not advise him as to his maximum exposure with enhancements on a conviction for robbery in the third degree." Specifically, during the habeas proceedings, neither the petitioner nor Ovian could recall whether Ovian specifically advised him as to his exposure under a sentence for robbery in the third degree. Ovian testified that, "although not completely certain, [he] was reasonably certain that he would have explained to the petitioner that *the enhanced penalties would apply to any conviction, including robbery in the third degree.* He therefore believed that he would have told the petitioner that, even if he was convicted of robbery in the third degree, he would face more than ten years." (Emphasis added.) In its articulation, the habeas court expressly credited Ovian's testimony and found that he likely did advise the petitioner as to his exposure for a sentence of robbery in the third degree. Therefore, because the habeas court found, as a factual matter, that the petitioner did not meet his burden of proving that Ovian breached his duty to advise him regarding his sentencing exposure for robbery in the third degree, we conclude that the petitioner has failed to establish that Ovian rendered ineffective assistance of counsel. Accordingly, the Appellate Court properly dismissed the petitioner's appeal from the denial of the petition for a writ of habeas corpus.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

# ERNEST FRANCIS *v.* BOARD OF PARDONS AND PAROLES ET AL.
## (SC 20377)

Robinson, C. J., and McDonald, D'Auria, Mullins, Kahn, Ecker and Vertefeuille, Js.

*Syllabus*

Pursuant to statute (§ 54-125g), "any person who has six months or less to the expiration of the maximum term or terms for which such person was sentenced" is eligible "to go at large on parole . . . after having served ninety-five per cent of the definite sentence imposed."

The plaintiff, who had been convicted of murder and sentenced to fifty years' imprisonment in 1992, sought a judgment declaring, inter alia, that § 54-125g applies to prisoners, like himself, who have been convicted of murder and that the defendants, the Board of Pardons and Paroles and the Commissioner of Correction, must consider his eligibility for early parole in calculating his estimated date of release from prison. The commissioner projected that, after applying certain statutory (§§ 18-7a and 18-98a) credits that the plaintiff had earned toward the reduction of his sentence, the plaintiff's maximum release date would be in 2027. The defendants argued that the plaintiff's action was not ripe because the term "definite sentence," as used in § 54-125g, refers to the full sentence imposed by the trial court, not the sentence an inmate will actually serve, and because, after applying the statutory credits that he has earned and will continue to earn, the plaintiff had not yet served, and almost certainly never would serve, 95 percent of his fifty year sentence. The defendants further argued that, even if the term "definite sentence" refers to an inmate's sentence as reduced by the credits he has earned, the plaintiff's action still was not ripe because he would not serve 95 percent of his sentence, as reduced by the credits he has earned, until 2024. The trial court assumed that § 54-125g applied to the plaintiff and that the term "definite sentence" means the sentence an inmate will actually serve. Nevertheless, the trial court concluded, in light of its assumptions, that the plaintiff's action was not ripe because he would not be eligible for parole until 2024, at the very earliest, and, thus, rendered judgment dismissing the action. The plaintiff appealed to the Appellate Court, which dismissed the appeal. On the granting of certification, the plaintiff appealed to this court. *Held* that the judgment of the Appellate Court was affirmed on the ground that, even if this court were to assume that § 54-125g applies to inmates, like the plaintiff, who have been convicted of murder, the plaintiff's claims were nonjusticiable for lack of standing: upon reviewing the statutory history of the determinate sentencing scheme, this court concluded that the legislature intended the term "definite sentence," as used in § 54-125g, to mean the

full sentence imposed by the sentencing court, and, because the plaintiff would not serve 95 percent of his fifty year definite sentence until 2039, which was well after his maximum release date in 2027, the plaintiff's claims were contingent on an event that would never occur; accordingly, because the plaintiff would, with virtual certainty, never serve 95 percent of his definite sentence, his interest in whether § 54-125g applies to inmates who have been convicted of murder was purely theoretical, and, accordingly, he lacked standing to bring the present action.

Argued November 16, 2020—officially released March 16, 2021*

*Procedural History*

Action for a judgment declaring, inter alia, that a statute regarding the parole of prisoners nearing the end of a maximum sentence is applicable to the plaintiff, brought to the Superior Court in the judicial district of New Haven, where the court, *Abrams*, *J.*, rendered judgment dismissing the action; thereafter, the plaintiff appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Keller* and *Olear*, *Js.*, which affirmed the trial court's judgment, and the plaintiff, on the granting of certification, appealed to this court. *Affirmed.*

*Ernest Francis*, self-represented, the appellant (plaintiff).

*James M. Belforti*, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Clare E. Kindall*, solicitor general, for the appellees (defendants).

*Opinion*

VERTEFEUILLE, J. The plaintiff, Ernest Francis, an inmate in a Connecticut correctional facility, brought this declaratory judgment action, proceeding pro se, against the defendants, the Board of Pardons and Paroles (board) and the Commissioner of Correction (commissioner). The plaintiff sought a judgment declar-

* March 16, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

ing that General Statutes § 54-125g[1] applies to him, that the commissioner must factor his eligibility for early release under § 54-125g into his "time sheet,"[2] and that the commissioner must "schedule dates to determine [his] suitability for release." Thereafter, the trial court, sua sponte, ordered the parties to file briefs addressing the issue of whether the plaintiff's claims were ripe for review given that, even if § 54-125g applied to the plaintiff, he would not be eligible for parole under the statute for several years. After a hearing on that issue, the trial court concluded that the plaintiff's claims were not ripe and dismissed the action for lack of subject matter jurisdiction. The plaintiff appealed to the Appellate Court, which affirmed the judgment in a memorandum decision. *Francis* v. *Board of Pardons & Paroles*, 189 Conn. App. 906, 204 A.3d 1263 (2019). This court granted the plaintiff's petition for certification on the following issue: "Did the Appellate Court properly uphold the trial court's dismissal of the plaintiff's declaratory judgment action as not ripe?" *Francis* v. *Board of Pardons & Paroles*, 333 Conn. 907, 215 A.3d 731 (2019). We affirm the judgment of the Appellate Court.

[1] General Statutes § 54-125g provides: "Notwithstanding the provisions of sections 18-100d, 54-124c and 54-125a, any person who has six months or less to the expiration of the maximum term or terms for which such person was sentenced, may be allowed to go at large on parole pursuant to section 54-125i or following a hearing pursuant to section 54-125a, provided such person agrees (1) to be subject to supervision by personnel of the Department of Correction for a period of one year, and (2) to be retained in the institution from which such person was paroled for a period equal to the unexpired portion of the term of his or her sentence if such person is found to have violated the terms or conditions of his or her parole. Any person subject to the provisions of subdivision (1) or (2) of subsection (b) of section 54-125a shall only be eligible to go at large on parole under this section after having served ninety-five per cent of the definite sentence imposed."

[2] Presumably, the defendant's "time sheet" is the form on which the Department of Correction calculates the time in prison that the defendant must serve after application of all earned statutory credits and considering any statutory parole eligibility.

The record reveals the following facts, which the trial court reasonably could have found or are undisputed, and procedural history. In 1992, the plaintiff was convicted of murder and sentenced to fifty years imprisonment. The plaintiff has been incarcerated since August 30, 1990, and contends that, after applying the sentence reductions that he has earned and will continue to earn pursuant to General Statutes §§ 18-7a[3] and 18-98a,[4] his estimated release date is approximately August 18, 2025. According to the commissioner, the plaintiff's maximum release date after applying the sentence reductions that the plaintiff had already earned as of March 16, 2020,[5] was October 4, 2027.

In 2013, the plaintiff, proceeding pro se, brought this declaratory judgment action against the defendants, alleging that he will be eligible for early release after serving 95 percent of his sentence pursuant to § 54-125g and that the defendants had failed to include his eligibility for early release in calculating his estimated

[3] General Statutes § 18-7a (c) provides in relevant part: "Any person sentenced to a term of imprisonment for an offense committed on or after July 1, 1983, may, while held in default of bond or while serving such sentence, by good conduct and obedience to the rules which have been established for the service of his sentence, earn a reduction of his sentence as such sentence is served in the amount of ten days for each month served and pro rata for a part of a month served of a sentence up to five years, and twelve days for each month served and pro rata for a part of a month served for the sixth and each subsequent year of a sentence which is more than five years. . . ."

Section 18-7a was amended by No. 15-14, § 4, of the 2015 Public Acts, which made technical changes to the statute that are not relevant to this appeal. For purposes of clarity, we refer to the current revision of the statute.

[4] General Statutes § 18-98a provides: "Each person committed to the custody of the Commissioner of Correction who is employed within the institution to which he was sentenced, or outside as provided by section 18-100, for a period of seven consecutive days, except for temporary interruption of such period as excused by the commissioner for valid reasons, may have one day deducted from his sentence for such period, in addition to any other earned time, at the discretion of the Commissioner of Correction."

[5] March 16, 2020, was the date that the defendants filed their brief with this court.

release date. The plaintiff sought a judgment declaring that § 54-125g is applicable to him, that the commissioner must factor his eligibility for early release under § 54-125g into his time sheet, and that the commissioner "should schedule dates to determine [his] suitability for release." Thereafter, the trial court, sua sponte, ordered the parties to file briefs on the issue of whether the plaintiff's claims were ripe. In his brief, the plaintiff contended that the trial court should construe the term "definite sentence," as used in § 54-125g, to mean the sentence that an inmate will actually serve and not the full amount of the sentence imposed by the sentencing court because, otherwise, he would never serve 95 percent of his sentence. The plaintiff also contended that his eligibility for various rehabilitative programs that are offered in prison is dependent on his eligibility for parole under § 54-125g. He further contended that the board's website indicated that persons convicted of murder are not eligible for parole, and he attached a copy of the website page to his brief.

The defendants argued in their brief on the ripeness issue that the plaintiff's claims were not ripe because the term "definite sentence" means the full amount of the sentence imposed by the trial court, not the sentence that an inmate will actually serve after the application of the various statutory credits. The defendants contended that, because the plaintiff had not served and, indeed, would almost certainly never serve, 95 percent of his fifty year sentence, the plaintiff's claim that he was eligible for parole under § 54-125g was not ripe. The defendants further contended that, even if the plaintiff were correct that "definite sentence" means the length of the sentence after the application of the various statutory credits, his claim still would not be ripe because he would not have served 95 percent of that sentence until approximately January, 2024.

At the hearing on the ripeness issue, the plaintiff again referred the trial court to the board's website,

indicating that prisoners convicted of murder are not eligible for parole. The plaintiff contended that, because, according to him, parole eligibility is a prerequisite for eligibility for rehabilitative programs, he would be effectively ineligible for such programs if § 54-125g did not apply to him.

In its memorandum of decision, which was dated December 28, 2017, the trial court concluded that, "even under the rosiest possible scenario, the plaintiff would not be eligible for parole until 2024." Accordingly, the court concluded that, although, "with the passage of time, the issue raised by the plaintiff may indeed become ripe for adjudication, it is not ripe at present, at least six years prior to the earliest possible triggering event." Thus, the court appears to have assumed, without deciding, that the plaintiff was correct that the term "definite sentence," as used in § 54-125g, means the sentence that a convicted defendant will actually serve. The court dismissed the plaintiff's complaint without prejudice to his reassertion of the claims in a future action filed on or after January 1, 2022.

The plaintiff then appealed to the Appellate Court. The sole claim that the plaintiff made in his brief to that court was that the trial court had applied an improper standard when it determined that his claims were not ripe. Specifically, the plaintiff pointed out that, in its memorandum of decision, the trial court had stated that, "[i]n reviewing this matter prior to trial, the court recognized the possibility that the matter was not currently ripe for adjudication . . . ." The plaintiff contended that the mere possibility that the matter was not ripe was not sufficient to deprive the trial court of jurisdiction. The defendants again claimed as an alternative ground for affirmance—without expressly denominating the claim as such—that the term "definite sentence" means the full sentence that is imposed by the sentencing court, not the sentence that a defendant

actually serves. Because the plaintiff would never serve 95 percent of his fifty year sentence, the defendants argued, his claim was not ripe. The Appellate Court summarily affirmed the judgment of the trial court in a memorandum decision. *Francis* v. *Board of Pardons & Paroles*, supra, 189 Conn. App. 906.

This certified appeal followed. The plaintiff contends on appeal that his claims are justiciable because, if this court determines that § 54-125g applies to him, the board can provide him with a "parole date," and he will then be eligible for rehabilitation programs.[6] Although his brief to this court does not expressly raise the issue, it is implicit in this claim that, as the defendant claimed below, the term "definite sentence," as used in the statute,means the sentence that the trial court imposed less any accrued statutory credits. The defendants again contend, essentially as an alternative ground for affirmance, that the plaintiff's claim is not ripe because "definite sentence," as used in § 54-125g, means the sentence that the trial court imposed, not the sentence as reduced by the various statutory credits. They argue that, even if § 54-125g applies to inmates, like the plaintiff, who have been convicted of murder, because it is virtually certain that the plaintiff will never serve 95 percent of his fifty year sentence, he will never become eligible for parole under the statute.[7] Accordingly, they argue

[6] The plaintiff also claims on appeal that the trial court applied an improper standard when it determined that his claim was not ripe. We reject this claim. When the trial court referred to the "possibility" that the matter was not ripe for adjudication, it was simply noting that, *before* the issue was briefed and argued, there was a question about the ripeness of the plaintiff's claims.

[7] The defendants also contend that the plaintiff's claim pertaining to his eligibility for rehabilitation programs is unreviewable because he made no such claim in his complaint. See *Barde* v. *Board of Trustees*, 207 Conn. 59, 62, 539 A.2d 1000 (1988) ("[t]he motion to dismiss . . . admits all facts [that] are well pleaded, invokes the existing record and must be decided upon that alone" (internal quotation marks omitted)). We conclude that the record is inadequate for review of the plaintiff's claim because he made no representation to the court and presented no evidence on the question of

that the plaintiff's claim is not ripe because it is contingent on an event that will not occur.

We agree with the defendants that the plaintiff's claim is nonjusticiable because the term "definite sentence" means the full amount of the sentence that the trial court imposed. Although we ordinarily would not address an alternative ground for affirmance without first determining that the ruling that the appellant has challenged on appeal was incorrect, we do so in the present case because it is clear to us, for the reasons discussed subsequently in this opinion, that the term "definite sentence," as used in § 54-125g, means the full amount of the sentence imposed by the trial court. Accordingly, it is clear that the plaintiff's claims are nonjusticiable because they are contingent on an event that will *never* occur, namely, his serving 95 percent of his definite sentence of fifty years imprisonment.[8] It is a closer and more difficult question whether the trial court properly determined that the plaintiff's claim is not ripe because it is contingent on an event that will transpire with virtual certainty—namely, the defen-

whether he would be eligible for rehabilitation programs if § 54-125g applies to all persons who have been convicted of murder—in which case his claim would likely be justiciable—or, instead, he would be eligible for such programs if he will be eligible for parole in the near future because "definite sentence" means the sentence that he will actually serve after application of the various credits. If the plaintiff is making the latter claim, his eligibility for rehabilitation programs would not somehow convert a claim of parole eligibility that is nonjusticiable because his interpretation of § 54-125g is incorrect into a justiciable claim of eligibility for rehabilitation programs. We note, however, that the board has never denied that persons convicted of murder can become eligible for parole. See footnote 14 of this opinion. If the plaintiff believes that he is eligible for rehabilitation programs as a person who has been convicted of murder, even if he will never actually be eligible for parole because he will never serve 95 percent of his definite sentence, nothing prevents him from requesting that the Department of Correction allow him to participate in such programs on that ground. If the Department of Correction denies that request, the plaintiff can seek whatever legal or administrative relief is available.

[8] See footnote 12 of this opinion.

dant's serving 95 percent of his sentence as reduced by the various statutory credits—but not in the near future.[9] Cf. *Chapman Lumber, Inc.* v. *Tager*, 288 Conn. 69, 86–87, 952 A.2d 1 (2008) ("in determining whether a case is ripe, a trial court must be satisfied that the case before [it] does not present a hypothetical injury or a claim contingent upon some event that has not *and indeed may never transpire*" (emphasis added; internal quotation marks omitted)). Indeed, at oral argument before this court, counsel for the defendants conceded that he was not sure whether the plaintiff's claim would be unripe if his sentence had not been reduced by the accrual statutory credits and he were required to serve the entire fifty year sentence. A fortiori, it is less than clear that the trial court correctly determined the plaintiff's claim is not ripe even on the assumption that the plaintiff's interpretation of the term "definite sentence" is correct and he will be eligible for parole under § 54-125g in 2024.

Accordingly, we turn to the defendants' claim that the term "definite sentence," as used in § 54-125g, means the full amount of the sentence imposed by the trial court. We begin our analysis with the standard of review. The proper interpretation of § 54-125g is a question of statutory interpretation to which we apply well established rules of construction and over which we exercise plenary review. See General Statutes § 1-2z (plain meaning rule); *Canty* v. *Otto*, 304 Conn. 546, 557–58, 41 A.3d 280 (2012) (general rules of construction aimed at ascertaining legislative intent).

[9] We acknowledge that it is not metaphysically certain that, if the plaintiff's interpretation of § 54-125g were correct, he would be eligible for parole under the statute in 2024 because it is theoretically possible that he could lose his good time credits. See footnote 13 of this opinion. Indeed, the future is unpredictable, and it is theoretically possible that he would never be eligible for parole for any number of unforeseeable reasons. We need not address the effect of these theoretical possibilities on the plaintiff's claim that his claims are ripe, however, because we conclude that the defendants' interpretation of § 54-125g is correct.

The Appellate Court considered an issue very similar to the one before us in *State* v. *Adam H.*, 54 Conn. App. 387, 735 A.2d 839, cert. denied, 251 Conn. 905, 738 A.2d 1091 (1999). The defendant in *Adam H.* was sentenced to "nine years imprisonment, execution suspended after three years, with five years of probation. On June 17, 1997, the defendant filed a motion for modification of his sentence pursuant to [General Statutes] § 53a-39.[10] The state's attorney did not agree to seek review of the defendant's sentence. Because the trial court determined that under § 53a-39 the defendant's sentence was a definite sentence of more than three years, it concluded that without the agreement of the state's attorney it lacked jurisdiction to modify the sentence and denied the motion." (Footnote added; internal quotation marks omitted.) Id., 389. On appeal, the defendant claimed that the trial court had the authority to modify his sentence because "the definite sentence referred to in § 53a-39 [was] comprised solely of the executed portion of his sentence," which was three years. Id.

The Appellate Court rejected this claim. The court observed that, "[p]rior to 1981, defendants were subjected to an indeterminate sentencing scheme. See General Statutes § 53a-35.[11] The indeterminate sentencing

[10] General Statutes § 53a-39 provides in relevant part: "(a) At any time during the period of a definite sentence of three years or less, the sentencing court or judge may, after hearing and for good cause shown, reduce the sentence, order the defendant discharged, or order the defendant discharged on probation or conditional discharge for a period not to exceed that to which the defendant could have been originally sentenced.

"(b) At any time during the period of a definite sentence of more than three years, upon agreement of the defendant and the state's attorney to seek review of the sentence, the sentencing court or judge may, after hearing and for good cause shown, reduce the sentence, order the defendant discharged, or order the defendant discharged on probation or conditional discharge for a period not to exceed that to which the defendant could have been originally sentenced. . . ."

[11] General Statutes § 53a-35 (a) provides: "For any felony committed prior to July 1, 1981, the sentence of imprisonment shall be an indeterminate sentence, except as provided in subsection (d). When such a sentence is imposed the court shall impose a maximum term in accordance with the

scheme used . . . allowed the court to set both the minimum and maximum portion of the sentence . . . parole eligibility [was] established at the minimum less any good time used to reduce that minimum term. . . . The minimum and maximum portions of the sentence [were] a fixed number of years except for a class A felony where the maximum [was] life imprisonment, unless for a capital felony where a sentence of death [could] be imposed. . . . This scheme was subsequently abolished and replaced by the current scheme of definite sentencing applicable to crimes committed on or after July 1, 1981. See General Statutes § 53a-35a.[12] Under this system, sentencing courts impose a flat or exact term of years of imprisonment without a minimum or maximum; that term could be reduced by various statutory credits. . . . The legislature's purpose, therefore, in using the label definite sentence is to differentiate the type of sentence it denotes from the historical, indeterminate sentence, and not to indicate any definite amount of time that a defendant will be incarcerated. Furthermore, because of the availability of statutory credits as well as the operation of probation, the precise time that a defendant will serve in prison cannot be predicted with exact certainty. Accordingly, the most logical interpretation of definite sentence is the flat maximum to which a defendant is sentenced, in [*Adam H.*], nine years." (Citations omitted; footnotes added; internal quotation marks omitted.) *State* v. *Adam H.*, supra, 54 Conn App. 393.

We find this analysis persuasive. "[I]n the absence of persuasive evidence to the contrary, we may presume that [words] used in different parts of the same statutory

provisions of subsection (b) and the minimum term shall be as provided in subsection (c) or (d)."

[12] General Statutes § 53a-35a provides in relevant part: "For any felony committed on or after July 1, 1981, the sentence of imprisonment shall be a definite sentence . . . ."

scheme [have] the same meaning." *State* v. *Rivera*, 250 Conn. 188, 201, 736 A.2d 790 (1999). Although §§ 54-125g and 53a-39 are not contained in the same title of the General Statutes, their subject matter is clearly related. We conclude, therefore, that the term "definite sentence," as used in § 54-125g, means the full sentence imposed by the sentencing court, and not the sentence as reduced by various statutory credits. Thus, in the present case, the plaintiff's "definite sentence" is the sentence of fifty years imprisonment imposed by the trial court. The plaintiff would serve 95 percent of that sentence in approximately October, 2039. Because the plaintiff's maximum release date is 2027, it is clear that he will never serve 95 percent of his definite sentence and will never become eligible for parole under § 54-125g, even if we were to assume that the statute applies to persons convicted of murder.[13]

Having reached this conclusion, we address the question of whether the Appellate Court properly upheld the trial court's ruling that the plaintiff's claims are not ripe. We begin with the standard of review. "[J]usticiability comprises several related doctrines, namely, standing, *ripeness*, mootness and the political question doctrine, that implicate a court's subject matter jurisdiction and its competency to adjudicate a particular matter. . . . A case that is nonjusticiable must be dismissed for lack of subject matter jurisdiction. . . .

[13] In reaching this conclusion, we acknowledge that it is not metaphysically certain that the plaintiff will be released from prison before he serves 95 percent of his fifty year sentence because it is theoretically possible that, as the result of unforeseeable events, he could lose all of the credits against his sentence that he has accrued to date. The risk of this occurrence is so remote, however, that we treat it as nonexistent. Indeed, counsel for the defendants represented at oral argument before this court that the likelihood that the plaintiff would serve 95 percent of his fifty year sentence was negligible. Accordingly, for purposes of this opinion, we assume that the plaintiff will be released on or before his maximum release date of October 24, 2027, and that it is therefore certain that he will not serve 95 percent of his fifty year sentence.

[B]ecause an issue regarding justiciability raises a question of law, our appellate review [of a ripeness claim] is plenary. . . .

"[T]he rationale behind the ripeness requirement is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . . . Accordingly, in determining whether a case is ripe, a trial court must be satisfied that the case before [it] does not present a hypothetical injury or a claim contingent upon some event that has not and indeed may never transpire." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Chapman Lumber, Inc.* v. *Tager*, supra, 288 Conn. 86–87.

Although the parties in the present case have framed the issue before us as implicating the ripeness doctrine, it appears to us that that doctrine applies when a claim is contingent on an event that *may* or *may not* occur. See id., 87 (event "*may* never transpire" (emphasis added; internal quotation marks omitted)). In other words, the ripeness doctrine presumes that there is at least a possibility that the plaintiff's claim will become ripe at some future time. When a claim is contingent on an event that, with virtual *certainty*, will *never* occur, it appears to us that the plaintiff's standing to bring the claim is implicated because the plaintiff cannot "demonstrate a specific, personal and legal interest in the subject matter of the [controversy] . . . ." (Internal quotation marks omitted.) *Lazar* v. *Ganim*, 334 Conn. 73, 85, 220 A.3d 18 (2019). In any event, regardless of whether there is some overlap between the doctrines of ripeness and standing or, instead, only the plaintiff's standing is implicated here, we conclude that the plaintiff's claims are nonjusticiable because the event on which the claims are contingent, namely, his serving 95 percent of his definite sentence, will never occur.

Accordingly, we conclude that the trial court lacked subject matter jurisdiction on this alternative ground.

The plaintiff contends that, even if he will never become eligible for parole under § 54-125g because he will never serve 95 percent of his definite sentence, his claims are justiciable because he has a specific, personal and legal interest in knowing whether § 54-125g applies to inmates, like him, who have been convicted of murder. We disagree. Although he may have an interest in this question, any such interest is purely theoretical because resolution of the issue will have no practical consequences for him. Accordingly, his interest is not sufficient to create standing to bring this action for a declaratory judgment.[14] Cf. *In re Ava W.*, 336 Conn. 545, 558, 248 A.3d 675 (2020) ("[a] case is considered moot if [the trial] court cannot grant . . . any practical relief through its disposition of the merits" (internal quotation marks omitted)); see also *Milford Power Co., LLC* v. *Alstom Power, Inc.*, 263 Conn. 616, 625, 822 A.2d 196 (2003) ("[a] declaratory judgment action is not . . . a procedural panacea for use on all occasions, but, rather, is limited to solving justiciable controversies" (internal quotation marks omitted)); id., 625–26 (declaratory judgment statute cannot be used "to secure the construction of a statute if the effect of that construction will not affect a plaintiff's personal

[14] We emphasize that the defendants have never denied that § 54-125g applies to inmates who have been convicted of murder but claim only that the plaintiff's claims are nonjusticiable. At oral argument before this court, counsel for the defendants represented that the board's website indicating that inmates convicted of murder are not eligible for parole refers only to eligibility for parole under General Statutes § 54-125a, although the website does not expressly identify that statute. See Connecticut Board of Pardons and Paroles, Parole Eligibility Information, available at https://portal.ct.gov/BOPP/Parole-Division/Parole-Links/Parole-Eligibility-Info (last visited March 15, 2021). Moreover, the defendants noted in their brief to this court that § 54-125g applies to " '[a]ny person subject to the provisions of subdivision (1) or (2) of subsection (b) of section 54-125a' " and that § 54-125a (b) (1) (E) applies to persons convicted of murder.

rights"). Accordingly, we conclude that the Appellate Court properly affirmed the judgment of the trial court dismissing the plaintiff's action.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

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## VIKING CONSTRUCTION, INC. *v.* TMP CONSTRUCTION GROUP, LLC
## (SC 20484)

Robinson, C. J., and D'Auria, Mullins, Kahn and Ecker, Js.

*Syllabus*

The plaintiff general contractor sought to recover damages for breach of contract from the defendant subcontractor in connection with the defendant's abandonment of work it was purportedly obligated to perform in constructing an apartment complex. The jury returned a verdict in favor of the plaintiff and awarded damages. The defendant filed a motion to set aside the verdict, arguing that the parties' contract, as a matter of law, precluded an award of any relief to the plaintiff. The trial court denied the defendant's motion, concluding that the jury reasonably could have based its award of damages on provisions of the contract permitting an award of damages against the defendant for costs associated with repairing defective work. Thereafter, the trial court rendered judgment in accordance with the verdict, and the defendant appealed. *Held* that the trial court properly declined to set aside the jury's verdict: to the extent that the defendant presented arguments relying on evidence or arguments that were presented to the jury, and to the extent that the defendant contended that the plaintiff never claimed at trial that the provisions of the contract obligating the defendant to cover the cost to the plaintiff of repairing defective work entitled the plaintiff to damages, this court was unable to assess such arguments or contention, as the defendant failed to provide this court with transcripts of the trial court proceedings; moreover, there was no merit to the defendant's claim that, even if the jury had based its award of damages on other provisions of the contract, those provisions did not entitle the plaintiff to recover repair damages as a matter of law, as the trial court properly relied on the provisions of the contract obligating the defendant to cover the cost of repairing defective work in declining to set aside the jury's verdict.

Argued November 20, 2020—officially released March 16, 2021*

* March 16, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

*Procedural History*

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the defendant filed a counterclaim; thereafter, the case was tried to the jury before *Stewart*, *J.*; verdict for the plaintiff on count one of the complaint alleging breach of contract and on the defendant's counterclaim; subsequently, the court, *Stewart*, *J.*, denied the defendant's motions to set aside the verdict and rendered judgment in accordance with the verdict, from which the defendant appealed. *Affirmed*.

*James Colin Mulholland*, for the appellant (defendant).

*Luke R. Conrad*, with whom were *Timothy T. Corey* and, on the brief, *Sara J. Stankus*, for the appellee (plaintiff).

*Opinion*

KAHN, J. The defendant, TMP Construction Group, LLC, appeals from the judgment of the trial court in favor of the plaintiff, Viking Construction, Inc., on a claim alleging breach of contract. On appeal, the defendant claims that the trial court improperly denied its motion to set aside the jury's verdict, which contains an award of money damages, because the terms of the underlying contract precluded such relief. We disagree with the defendant and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant to our consideration of the present appeal. In 2016, the plaintiff, a general contractor overseeing the construction of an apartment complex in the city of Bridgeport, entered into a contract with the defendant, a subcontractor, to provide services related to the installation of drywall and trim in exchange for $1.5 million.

The defendant subsequently undertook performance of its work in accordance with that agreement.

Disputes eventually developed, and, on May 19, 2017, the plaintiff mailed a letter to the defendant complaining that the defendant had fallen behind schedule and had failed to meet certain financial obligations. That letter stated in relevant part: "This is your notice pursuant to [a]rticle 11.1 [of the contract] that if these defaults are not remedied within [twenty-four] hours, [the plaintiff] will supplement your crew until the remaining portion of your contract is completed. [The plaintiff] will seek damages for all losses and costs above the balance to bill of the [contract]. The remaining balance to bill is $350,685.56."[1] As a result of these disputes, the defendant abandoned its work on the project.

A few weeks later, the plaintiff commenced the present action against the defendant. The operative complaint, dated September 29, 2017, alleged that the defendant had breached the contract by abandoning per-formance. The complaint also alleged that the defendant had failed to provide a sufficient number of workers to complete the project on schedule, that the defendant had failed to supervise and direct its own agents, and that certain work that the defendant had performed prior to abandonment failed to comply with project specifications. The plaintiff claimed that these breaches resulted in monetary damages including, inter alia, (1) the cost of correcting the work that had been improperly performed, and (2) the cost of completing the work that remained undone.[2]

[1] Although the phrase "balance to bill" is not defined in the contract, the parties in the present case agree that it refers to "any money then due or thereafter to become due" to the defendant under the terms of the contract. See footnote 5 of this opinion. The precise method of calculating this sum is not in dispute.

[2] The operative complaint contained two additional counts that, respectively, sought indemnification for certain expenses incurred by the plaintiff and alleged unjust enrichment. In response to the complaint, the defendant pleaded various special defenses and counterclaims. These issues are not, however, relevant to the present appeal.

The case was tried to a jury before the court, *Stewart*, *J.*, over the course of several days.[3] At trial, the plaintiff sought to prove that its total damages exceeded the balance to bill ($350,685.56) on the contract by $515,080.22[4] and argued that it was entitled to an award of money damages in that amount. In support of its claims, the plaintiff entered the contract itself into evidence as a full exhibit. The jury ultimately found the defendant liable for breach of contract but chose to award the plaintiff only $45,373.88 above the balance to bill, an amount precisely equal to the sum that the plaintiff had paid others to correct the defendant's defective work. In reaching its verdict, it is clear that the jury chose not to award the plaintiff damages for the cost of completing the remaining drywall work.

The defendant subsequently filed a motion to set aside the jury's verdict, arguing, among other things, that "the parties' contract, as a matter of law, unambiguously precluded the court or the jury from awarding any relief to [the plaintiff]." The defendant's argument was premised on the interplay of two particular provisions of the contract. The first, article 11.1, permits the plaintiff to recover costs incurred by it for labor, materials, and equipment required to cure defects or defaults caused by the defendant from the balance to bill after providing notice to the defendant.[5] The second,

[3] The defendant has affirmatively declined to provide this court with transcripts of these proceedings. Specifically, the defendant sent a letter to the Office of the Appellate Clerk on April 1, 2019, stating: "No transcript[s] [are] deemed necessary to prosecute this appeal." By that representation, the defendant failed to make the trial transcripts a part of the record on appeal.

[4] The total amount of damages sought by the plaintiff was $865,765.78.

[5] Article 11.1 of the contract provides: "If, in the opinion of the [c]ontractor, the [s]ubcontractor fails at any time to supply a sufficient number of properly skilled workmen or sufficient material and equipment of the proper quality and/or quantity, or fails in any respect to prosecute the [w]ork with promptness and diligence, or fails to promptly correct defective work, or causes by any action or omission the stoppage or interference with the work of the [c]ontractor or other subcontractors or fails in the performance of any of the covenants herein contained, the [c]ontractor may, at its option, after

article 11.2, allows the plaintiff to expressly terminate the contract as the result of the defendant's delay, defective work, or nonpayment of debts after providing written notice to the defendant. This latter provision not only permitted the plaintiff to retain the balance to bill, but also provided that "all charges, expenses, losses, costs, damages, and attorney's fees" in excess thereof would be paid "directly by" the defendant.[6] The defendant's motion argued that, because the formal notice it had received from the plaintiff expressly invoked only

having given [s]ubcontractor notice of said defects and/or defaults and [twenty-four] hours for [s]ubcontractor to commence to cure said defects and/or defaults, provide such labor, material and equipment and deduct the cost thereof, together with all losses or damages occasioned thereby, from any money then due or thereafter to become due to the [s]ubcontractor under this [a]greement."

[6] Article 11.2 of the contract provides: "In addition to any rights of [c]ontractor under the prior paragraph, if, in the opinion of the [c]ontractor, the [s]ubcontractor at any time fails or refuses or neglects to supply sufficient number of properly skilled workmen or sufficient materials or equipment of the proper quality and/or quantity, or fails in any respect to prosecute the [w]ork with promptness and diligence, or fails to promptly correct defective [w]ork, or causes by any action or omission the stoppage or interference with the work of the [c]ontractor or other subcontractors, or fails in the performance of any of the covenants herein contained, or fails to make payment to any of its subcontractors or vendors or employees or any union benefit funds or taxes, or is otherwise not able to meet its debts as they mature, the [c]ontractor may, at its option at any time, and after serving written notice of such default with direction to cure same within [three] days as well as the [s]ubcontractor's failure to cure the default within [three] days, terminate this [a]greement for [s]ubcontractor's default by delivering written notice of termination to the [s]ubcontractor. Thereafter, the [c]ontractor may take possession of the plant and work, materials, tools, appliances and equipment of the [s]ubcontractor at the [p]roject [s]ite and any material stored off site, and through itself or others provide labor, equipment and materials to prosecute [s]ubcontractor's [w]ork on such terms and conditions as shall be deemed necessary, and shall deduct the cost thereof, including without restriction thereto all charges, expenses, losses, costs, damages, and attorney's fees, incurred as a result of the [s]ubcontractor's failure to perform, which sums shall be set off from any money then due or thereafter to become due to the [s]ubcontractor under this [a]greement or paid directly by [s]ubcontractor or in the event that any sums remain unpaid after set off."

article 11.1, and because the parties agreed that the contract had never been terminated, the plaintiff's relief was limited to the relief under article 11.1, which was retention of the balance to bill.

The trial court rejected this argument because it concluded that other provisions of the contract permitted an award of money damages against the defendant for costs associated with repairing defective work. Specifically, the trial court noted that article 11.7 of the contract, an election of remedies clause, provides that the plaintiff "may sue [the defendant] . . . and recover damages" in order to recover "[a]ny sum or sums chargeable to [the defendant] under any provision of [the contract] . . . ." The trial court then observed that the warranty provision set forth in article 9.1 of the contract, which relates directly to the repair of defective work, provides that the plaintiff "shall have the right itself, or [through] others, to remove said part of the [w]ork and to purchase from others in the market or otherwise and install new materials or equipment in replacement thereof, and the cost and expense thereof, together with the expense to [the plaintiff] of making good all other work and property destroyed or damaged by the condition requiring such replacement, shall be paid by [the defendant] to [the plaintiff] on demand."[7]

[7] Article 9.1 of the contract provides: "The [s]ubcontractor agrees to promptly repair and make good without cost to the [o]wner or [c]ontractor any and all defects due to faulty workmanship and/or materials which may appear within the guarantee or warranty period so established in the [c]ontract [d]ocuments. The [w]arranty will [e]nsure that:

"(1) all the work and materials furnished and installed by [s]ubcontractor as part of the [w]ork are in compliance with [c]ontract [d]ocuments and the approval of [o]wner and . . . [a]rchitect or [e]ngineer; and

"(2) that, promptly after notice from the [o]wner and/or the [c]ontractor regarding defective work or materials, the [s]ubcontractor shall immediately remove and replace said part of the [w]ork with [w]ork in strict conformity to the provisions of the [c]ontract [d]ocuments and shall bear the expense of making good all other [w]ork and property destroyed or damaged by the condition requiring such removal and replacement, or, should [c]ontractor or [o]wner, in their sole discretion, decide that such removal or replacement is not expedient, [c]ontractor shall have the right to accept said part of the

The trial court found that the jury could have reasonably based its award of damages on these provisions and, accordingly, declined to set aside the verdict. This appeal followed.[8]

We begin our analysis of the present case by briefly stating what is *not* at issue. The defendant does not presently contest the jury's finding that it was liable for breach of contract. The defendant also does not contest the claim that its work was, in fact, defective or in any way challenge the adequacy of the plaintiff's proof relating to the cost of repairing it. The issue presented in this appeal is a narrow one: whether the defendant has demonstrated, on the basis of the record presented, that the trial court committed reversible error by declining to set aside the jury's award of $45,373.88 in damages. We answer this question in the negative.[9]

[w]ork, in which event [s]ubcontractor shall be liable for paying the difference in value between the [w]ork required by this [a]greement and the [w]ork so furnished by [s]ubcontractor. The exercise by [c]ontractor of such option, however, shall not affect any right or remedy which [c]ontractor may otherwise have. In case of the failure of [s]ubcontractor to promptly remove and replace any part of the [w]ork as aforesaid, [c]ontractor shall have the right itself, or [through] others, to remove said part of the [w]ork and to purchase from others in the market or otherwise and install new materials or equipment in replacement thereof, and the cost and expense thereof, together with the expense to [c]ontractor of making good all other work and property destroyed or damaged by the condition requiring such replacement, shall be paid by [s]ubcontractor to [c]ontractor on demand. Anything in this [s]ection or any other [s]ection of this [a]greement to the contrary notwithstanding, [s]ubcontractor shall also make good, replace or repair all electrical, mechanical and other equipment, including bearings which have been damaged by physical injury or have deteriorated from rust, dust or other causes during the progress of the [w]ork."

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

[9] The defendant's brief posits, in a conclusory fashion, that the trial court lacked subject matter jurisdiction over the plaintiff's breach of contract claim because no "practical relief" could ultimately be afforded on it under the terms of the contract. (Internal quotation marks omitted.) The plaintiff's request for money damages in the present case was, however, sufficient to render the matter justiciable. See, e.g., *Burbank* v. *Board of Education*, 299

The standard for reviewing a trial court's denial of a motion to set aside a jury's verdict is well established. "The proper appellate standard of review when considering the action of a trial court in granting or denying a motion to set aside a verdict is the abuse of discretion standard. . . . In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . Reversal is required only [when] an abuse of discretion is manifest or [when] injustice appears to have been done. . . . [T]he role of the trial court on a motion to set aside the jury's verdict is not to sit as [an added] juror . . . but, rather, to decide whether, viewing the evidence in the light most favorable to the prevailing party, the jury could reasonably have reached the verdict that it did." (Internal quotation marks omitted.) *Ulbrich* v. *Groth*, 310 Conn. 375, 414, 78 A.3d 76 (2013).

This general standard does not, however, warrant deference to the trial court's legal conclusions. See, e.g., *Snell* v. *Norwalk Yellow Cab, Inc.*, 332 Conn. 720, 763, 212 A.3d 646 (2019) ("[a]lthough we ordinarily review the denial of a motion to set aside a verdict under an abuse of discretion standard . . . our review is plenary when . . . the trial court's decision turned on a question of law" (citation omitted)); see also *Patino* v. *Birken Mfg. Co.*, 304 Conn. 679, 687–88, 41 A.3d 1013 (2012). The defendant asserts, and we agree, that a plenary standard of review applies to the extent the contract at issue employs plain and unambiguous language. *Cruz* v. *Visual Perceptions, LLC*, 311 Conn. 93, 101, 84 A.3d 828 (2014) ("When the language of a con-

Conn. 833, 841 n.11, 11 A.3d 658 (2011); see also *All Cycle, Inc.* v. *Chittenden Solid Waste District*, 164 Vt. 428, 435, 670 A.2d 800 (1995). The defendant's contention that the contractual provisions at issue legally preclude such relief relates to an analysis of the merits of the case, not to the threshold issue of jurisdiction. See *Milford Power Co., LLC* v. *Alstom Power, Inc.*, 263 Conn. 616, 626, 822 A.2d 196 (2003).

tract is ambiguous, the determination of the parties' intent is a question of fact . . . . [W]here there is definitive contract language, [however] the determination of what the parties intended by their contractual commitments is a question of law." (Citation omitted; internal quotation marks omitted.)).

In the present appeal, the defendant raises both legal and factual issues in support of its claim that the trial court erred in denying its motion to set aside the jury's verdict. Specifically, the defendant argues that the contract provision the plaintiff sought to enforce, article 11.1, does not allow for the damages the jury awarded, and, even if the plaintiff had sought relief under other provisions of the contract, including article 9.1, it failed to introduce evidence from which the jury could have awarded damages under those provisions. Before addressing the particular arguments raised by the defendant, we note that, to the extent that those arguments rely on the evidence or arguments presented to the jury, this court is unable to assess them because, as previously stated; see footnote 3 of this opinion; the defendant has failed to provide this court with transcripts of the proceedings before the trial court.

We turn first to the threshold issue of whether the plaintiff sought relief under other provisions of the contract, including article 9.1. The defendant claims that it was unfairly surprised by the breach of warranty issue because the plaintiff "[n]ever raise[d] article [9.1] in support of any claim for repair damages" during the course of trial. The plaintiff argues, in response, that it relied on the entirety of the contract in presenting its claims to the jury. In declining to set aside the jury's verdict, the trial court concluded that the jury could have reasonably relied on article 9.1 in reaching the result that it did. In order to independently determine whether a breach of warranty claim under article 9.1 was made at trial, however, we would need to review

the transcripts of that proceeding to assess the precise manner in which the plaintiff presented its claim for repair damages to the jury, including both its presentation of the evidence and the closing arguments of counsel. Without transcripts of the trial, however, we are unable to engage in such an assessment and resolve this claim. See Practice Book § 61-10 (a) ("It is the responsibility of the appellant to provide an adequate record for review. The appellant shall determine whether the entire record is complete, correct and otherwise perfected for presentation on appeal."); see also, e.g., *State* v. *Spillane*, 257 Conn. 750, 758–59 and n.12, 778 A.2d 101 (2001) (appellant responsible for filing transcripts necessary for appellate review); *O'Halpin* v. *O'Halpin*, 144 Conn. App. 671, 675, 74 A.3d 465 (same), cert. denied, 310 Conn. 952, 81 A.3d 1180 (2013).

We turn next to the defendant's claim that, even if the jury had been presented with, and based its award of damages on, other provisions of the contract, those provisions would not entitle the plaintiff to recover repair damages as a matter of law. The defendant raises four distinct arguments in an attempt to show that the trial court improperly relied on article 9.1 of the contract in declining to set aside the jury's verdict. First, the defendant argues that the plaintiff "never alleged or claimed . . . breach of warranty . . . in any iteration of its complaint," and that the trial court unfairly interjected "an entirely new cause of action" into the case. The defendant's brief, however, has cited no support for the proposition that the plaintiff was legally required to plead breach of warranty as a separate cause of action. Several Superior Court decisions have, in fact, reached the opposite conclusion, reasoning that a breach of either an implied or express warranty can also constitute a breach of contract. See *ACE American Ins. Co.* v. *Hunter Mechanical, Inc.*, Docket No. CV-19-6040496-S, 2020 WL 3791480, *4 (Conn. Super. June

15, 2020) (granting defendant's motion to strike separate claim for breach of warranty and permitting plaintiff to replead as part of simple breach of contract claim); *Ferrigno* v. *Pep Boys—Manny, Joe & Jack of Delaware, Inc.*, 47 Conn. Supp. 580, 582–83, 818 A.2d 903 (2003) (violation of implied warranty requiring automobile services to be performed in workmanlike manner alleged as simple breach of contract); see also *Total Look of Southport, Inc.* v. *Rock Bottom Furniture & Carpet, Inc.*, Superior Court, judicial district of Fairfield, Docket No. CV-17-6066733-S (January 30, 2019) (67 Conn. L. Rptr. 784, 786) ("[t]he breach of warranty claim adds nothing more to this lawsuit than the breach of contract claims"). We, therefore, decline the defendant's invitation to conclude that the plaintiff was precluded from recovering under article 9.1 of the contract, as a matter of law, simply because the allegations relating to defective work were not alleged as a stand-alone claim for breach of warranty.

Second, the defendant claims that article 9.1 cannot permit recovery because the contract does not define the "guarantee or warranty period" during which it would apply. See footnote 7 of this opinion. The defendant's claim is not supported by the record in this case. Although the contract itself expressly indicates that the warranty period is established by the "[c]ontract [d]ocuments," a category that includes a number of other documents by definition,[10] the defendant has failed to submit the contents of these documents—or even to discuss them—in briefing the present appeal.

[10] Article 9.1 of the contract provides in relevant part that the defendant "agrees to promptly repair and make good without cost . . . any and all defects due to faulty workmanship and/or materials which may appear within *the guarantee or warranty period so established in the* [*c*]*ontract* [*d*]*ocuments*. . . ." (Emphasis added.) Article 3.1 of the contract, in turn, defines the phrase "[c]ontract [d]ocuments" to include a variety of documents such as the agreement between the plaintiff and the owner of the property.

Even if the warranty period had been completely omitted by mistake, we fail to see why the only reasonable conclusion that the jury could have reached is that article 9.1 of the contract was rendered unenforceable as a result of that omission. The jury also could have reasonably concluded that, whatever warranty period had actually been intended by the parties, the claims related to the defective work in the present case would likely have fallen within that period because the complaint was filed only weeks after the defendant abandoned its work on the project.[11]

Third, the defendant argues that, even if it was presented to the jury, article 9.1 of the contract cannot support the jury's award because the plaintiff never provided formal notice of the defective work. We observe that, unlike other provisions, article 9.1 of the contract uses the phrase "promptly after notice from the owner" and does not require "formal notice" or written notice. Compare footnote 6 of this opinion (text of article 11.2) with footnote 7 of this opinion (text of article 9.1). Whether such a notice was provided by the plaintiff is a question of fact. Cf. *T. J. Stevenson & Co., Inc.* v. *81,193 Bags of Flour*, 629 F.2d 338, 359 (5th Cir. 1980) ("[N]otification of breach of warranty [under the Uniform Commercial Code] need not be in any particular words and is ordinarily a question of fact, looking to all the circumstances of the case. Notice need not be written. It may be given in a single communication or derived from several." (Footnotes omitted.)). The defendant has failed to provide this court with any trial transcripts. See footnote 3 of this opinion. Without an adequate record of the proceedings at trial, we have no

[11] In a single sentence in its principal brief, the defendant raises a related argument that construction warrantees like those required under article 9.1 "typically" do not commence until work under a contract has been completed in full and accepted by the owner. Because this argument is unsupported by any citations to authority or independent analysis, we decline to consider it.

way of determining whether evidence of the "formal notice" the defendant claims is a condition precedent to invoking article 9.1 was ever presented or argued to the jury during the trial.[12] See, e.g., *Brown & Brown, Inc.* v. *Blumenthal*, 288 Conn. 646, 656 n.6, 954 A.2d 816 (2008) ("[i]t is the responsibility of the appellant to provide an adequate record for review" (internal quotation marks omitted)). As a result, we are unable to assess the defendant's claim that the evidence was insufficient to support the jury's damages award.

Finally, the defendant argues that the trial court's reliance on article 9.1 of the contract renders article 11.1 of the agreement superfluous. This argument also lacks merit. Although both articles 9.1 and 11.1 of the contract address the plaintiff's remedies for defective work, they differ in significant ways. Most notably, article 9.1 addresses the narrow topic of defective work and permits the plaintiff to recover repair costs by demanding direct payment from the defendant. See footnote 7 of this opinion ("shall be paid by [s]ubcontractor to [c]ontractor on demand"). Article 11.1, by contrast, addresses a wider range of conduct and permits a different form of relief, namely, retention of the balance to bill. See footnote 5 of this opinion ("[c]ontractor may . . . deduct the cost[s] [of labor, material, and equipment] together with all losses or damages occasioned thereby . . . from any money then due or thereafter to become due to the [s]ubcontractor under this [a]greement"). The fact that these two provisions provide alternative means for the plaintiff to recoup the cost of repairing defective work does not require the conclusion that one renders the other superfluous.

Apart from its arguments relating to the text of article 9.1, the defendant makes the broader contention that,

[12] The exhibits admitted into evidence during the course of trial reveal some correspondence between the parties about the defendant's substandard work. It is unclear from this record, however, if these precise issues were addressed by the defendant prior to its abandonment.

because the plaintiff only invoked article 11.1 of the contract in the letter sent on May 19, 2017, its recovery was limited to the balance to bill. An award of additional money damages, the defendant argues, could have only followed a formal termination of the contract pursuant to article 11.2. Article 12.7 of the contract, however, provides: "All of the rights and remedies of [c]ontractor under this [s]ubcontract shall be cumulative, and shall be in addition to any other rights and remedies of [c]ontractor. The exercise by [c]ontractor of any particular right or remedy on any one occasion shall not be construed as a waiver of any other right or remedy which [c]ontractor might elect to pursue on the same or any other occasion. Similarly, [c]ontractor's failure to exercise any particular right or remedy on any one occasion, or thereafter shall not be construed as a waiver thereof." Concluding that the singular reference to article 11.1 contained within the letter precluded the plaintiff from seeking relief under other provisions of the contract would contravene this plain and unambiguous language. As a result, we reject the defendant's claim that the mere reference to article 11.1 in the letter limited the plaintiff's relief, as a matter of law, to a retention of the balance to bill.[13]

On the basis of the record before us, we conclude that the defendant has failed to meet its burden of

[13] This conclusion is also sufficient to foreclose the defendant's derivative claim that the trial court improperly declined to issue an instruction to the jury directing a verdict in its favor on the breach of contract claim on the ground that recovery was, as a matter of law, limited under article 11.1 to the outstanding balance to bill. Even if we were to reach the propriety of the jury instructions, however, a proper review of a claim of instructional error would require this court to have access to the relevant transcripts, including the presentation of evidence, the closing arguments of counsel, and a full copy of the instructions actually given by the trial court. See, e.g., *Kos* v. *Lawrence + Memorial Hospital*, 334 Conn. 823, 837, 225 A.3d 261 (2020) ("[I]ndividual jury instructions should not be judged in artificial isolation . . . . The pertinent test is whether the charge, read in its entirety, fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law." (Internal quotation marks omitted.)).

demonstrating that the jury could not have reasonably reached the verdict that it did. As a result, the defendant's claim that the trial court erred in denying the motion to set aside that verdict must fail.

The judgment is affirmed.

In this opinion the other justices concurred.

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## STATE OF CONNECTICUT *v.* JOSE R.*
## (SC 20184)

McDonald, D'Auria, Mullins, Kahn, Ecker and Keller, Js.

*Syllabus*

Convicted of four counts of sexual assault in the first degree and three counts of risk of injury to a child in connection with the sexual abuse of his daughter, V, the defendant appealed to this court, claiming that the trial court improperly sentenced him to a period of probation on each sexual assault count and that certain improper remarks made by the prosecutor during closing and rebuttal arguments violated his due process right to a fair trial and his right against self-incrimination. The charges stemmed from incidents that began when V was nine years old, in which the defendant engaged in sexual activity with V and showed her pornographic videos, but V did not disclose the abuse until she was eleven years old. The defendant was then interviewed by an investigator from the Department of Children and Families and, on two other occasions, by a detective, M, during which he denied sexually abusing V or showing her pornography. At trial, V testified, inter alia, that the defendant had sexually abused her when she was nine years old, and M testified about her two interviews with the defendant, but there was no physical evidence or eyewitness testimony, and the defendant did not testify. After the jury returned its verdict, the trial court sentenced the defendant to concurrent terms of ten years' incarceration on each count of risk of injury to a child and, on each count of sexual assault in the first degree, to concurrent terms of twenty-five years' incarceration, execution suspended after twenty years, followed by ten years of probation. On the defendant's appeal, *held*:

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

1. The trial court improperly imposed a sentence that included a period of probation in connection with the defendant's convictions of sexual assault in the first degree, and, accordingly, this court vacated the defendant's sentence and remanded the case to the trial court for resentencing: case law and the plain language of the relevant statutes (§ 53a-29 (a) and (Rev to. 2013) § 53a-70 (b) (3)) established, and the state conceded, that special parole was the only form of supervised release a trial court could impose upon convicting the defendant of the class A felony of sexual assault in the first degree.

2. The defendant could not prevail on his claim that certain remarks made by the prosecutor during closing and rebuttal arguments were improper:

a. This court declined the defendant's invitation to overrule *State* v. *Payne* (303 Conn. 538), in which this court clarified that a defendant bears the burden of proving that a prosecutorial impropriety deprived him or her of the general due process right to a fair trial, whereas the state bears the burden of proving harmlessness beyond a reasonable doubt when the defendant alleges the violation of a specifically enumerated constitutional right, such as the right against self-incrimination.

b. The prosecutor did not improperly comment on the defendant's failure to testify in violation of his right against self-incrimination: the prosecutor's various comments contrasting V's in court testimony with the defendant's out-of-court statements to M and the investigator were not improper because they did nothing to draw the jury's attention, either directly or indirectly, to the fact that the defendant did not testify at trial and, instead, merely asked the jury to compare the victim's and the defendant's versions of events and to decide which version was more credible; moreover, the prosecutor did not improperly comment on the defendant's failure to testify by asking the jurors whether there was any reasonable explanation why they should not find V credible, as that remark was a rhetorical device that the prosecutor used to ask the jurors to refer to their knowledge of human nature, and a reasonable jury would have understood that remark to be a commentary on V's veracity rather than the defendant's silence; furthermore, the context of the prosecutor's entire closing argument, and particularly his emphasis on the believability of V's testimony, her performance during cross-examination, and the consistency of her testimony with the evidence adduced at trial, made it clear that the jury would not have naturally and necessarily considered the prosecutor's isolated comment that the credibility of a party is best determined by how the party performs on cross-examination to be a comment on the defendant's failure to testify.

c. The prosecutor's remarks did not constitute an improper expression of personal opinion regarding the evidence, V's credibility and the defendant's guilt but, rather, were legitimate commentary on the evidence adduced at trial; when viewed in the context of the prosecutor's entire closing argument, his remarks that "the only conclusion" to be drawn is that V testified credibly and that "the only result" is to find the defen-

dant guilty underscored an inference, namely, that V was credible and that the defendant was guilty of the crimes charged, that the jury could have drawn entirely on its own on the basis of the evidence presented at trial, including V's testimony regarding the sexual assaults, the lack of any reliable evidence indicating that she had a motive to lie, and the defendant's contradictory out-of-court statements.

d. There was no merit to the defendant's claim that the prosecutor improperly relied on facts not in evidence when he remarked that the defendant had failed to disclose to the police until his second interview with M that he spent time alone with V at home after school: the record reflected that the defendant made contradictory statements to the police regarding whether he spent time at home alone with V, M's testimony regarding her two interviews with the defendant was ambiguous with respect to whether it was at the first or second interview that the defendant disclosed spending time alone with V, and the prosecutor's remarks regarding the timing of the defendant's disclosure were a permissible commentary that was predicated on M's testimony and the reasonable inferences that could be drawn from it; moreover, defense counsel did not object to the prosecutor's characterization of M's testimony.

Argued October 20, 2020—officially released March 19, 2021**

*Procedural History*

Substitute information charging the defendant with four counts of sexual assault in the first degree and three counts of risk of injury to a child, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *D'Addabbo*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Reversed in part*; *further proceedings*.

*Megan L. Wade*, assigned counsel, with whom were *James P. Sexton*, assigned counsel, and, on the brief, *Emily Graner Sexton*, assigned counsel, for the appellant (defendant).

*Jonathan M. Sousa*, deputy assistant state's attorney, for the appellee (state).

** March 19, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

*Opinion*

ECKER, J. Following a jury trial, the defendant, Jose R., was convicted of four counts of sexual assault in the first degree in violation of General Statutes (Rev. to 2013) § 53a-70 (a) (2)[1] and three counts of risk of injury to a child in violation of General Statutes § 53-21 (a)[2] for the sexual abuse of his daughter, V. On appeal, the defendant claims that (1) the trial court improperly sentenced him to a period of probation on each count of sexual assault in violation of General Statutes § 53a-

[1] General Statutes (Rev. to 2013) § 53a-70 provides in relevant part: "(a) A person is guilty of sexual assault in the first degree when such person . . . (2) engages in sexual intercourse with another person and such other person is under thirteen years of age and the actor is more than two years older than such person . . . .

"(b) . . . (2) Sexual assault in the first degree is a class A felony if . . . the offense is a violation of subdivision (2) of subsection (a) of this section. Any person found guilty under said subdivision . . . (2) shall be sentenced to a term of imprisonment of which ten years of the sentence imposed may not be suspended or reduced by the court if the victim is under ten years of age or of which five years of the sentence imposed may not be suspended or reduced by the court if the victim is under sixteen years of age.

"(3) Any person found guilty under this section shall be sentenced to a term of imprisonment and a period of special parole pursuant to subsection (b) of section 53a-28 which together constitute a sentence of at least ten years."

Hereinafter, unless otherwise noted, all references to § 53a-70 in this opinion are to the 2013 revision of the statute.

[2] General Statutes § 53-21 (a) provides in relevant part: "Any person who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child, or (2) has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of (A) a class C felony for a violation of subdivision (1) . . . of this subsection, and (B) a class B felony for a violation of subdivision (2) of this subsection, except that, if the violation is of subdivision (2) of this subsection and the victim of the offense is under thirteen years of age, such person shall be sentenced to a term of imprisonment of which five years of the sentence imposed may not be suspended or reduced by the court."

29 (a),[3] and (2) the prosecutor made improper remarks during closing argument and rebuttal, which deprived him of his due process right to a fair trial under the fourteenth amendment and his fifth amendment right against self-incrimination. We agree with the defendant's first claim but disagree with his second claim. We therefore reverse the defendant's judgment of conviction only as to the sentence imposed and remand the case to the trial court for resentencing.

The jury reasonably could have found the following facts. The defendant and V's mother, R, were involved in an on-again, off-again romantic relationship for approximately ten years, during which they had two children: V, who was born in March, 2004, and V's younger sister, who was born in 2010. When V was nine years old, she lived in Windsor Locks with her mother, her younger sister, her maternal aunt, her aunt's boyfriend, and her cousin. While school was in session during this time, either V's aunt or the defendant watched V after school for approximately one to two hours in the afternoon until V's mother arrived home from work with her younger sister, who attended daycare during the day.

The sexual abuse of V began when she and the defendant were home alone together after school. The abuse

We note that § 53a-21 was amended by No. 13-297, § 1, of the 2013 Public Acts and No. 15-205, § 11, of the 2015 Public Acts. Those amendments made certain changes to the statute that are not relevant to this appeal. For purposes of clarity, we refer to the current revision of the statute.

[3] General Statutes § 53a-29 (a) provides: "The court may sentence a person to a period of probation upon conviction of any crime, other than a class A felony, if it is of the opinion that: (1) Present or extended institutional confinement of the defendant is not necessary for the protection of the public; (2) the defendant is in need of guidance, training or assistance which, in the defendant's case, can be effectively administered through probation supervision; and (3) such disposition is not inconsistent with the ends of justice."

Although § 53a-29 has been amended several times since the defendant's commission of the crimes that formed the basis of his conviction, those amendments have no bearing on the merits of this appeal. In the interest

started slowly, with the defendant removing V's shirt and touching her breasts. Eventually, the abuse progressed to digital penetration, penile-vaginal penetration, fellatio and cunnilingus. When V expressed discomfort with the sexual activity, the defendant told her that it was "okay" and "fun." On two occasions, the defendant showed V pornographic videos on her mother's laptop and told her "this is what we should do."

In January, 2014, V developed a cyst on the outside of her vagina, which caused her significant pain and irritation. R examined the cyst and showed it to the defendant. Concerned about the cyst, R brought V to the pediatrician, who referred V to a surgeon. The surgeon removed the cyst in February, 2014. After the surgery, the defendant stopped sexually assaulting V.

Between V's tenth and twelfth birthdays, the defendant married a woman who had her own children, thus forming a new family. The new arrangement caused a period of estrangement during which the defendant did not see V or her sister. In an effort to reunify her children with their father, R began bringing V and V's sister to therapy.

In December, 2015, when V was eleven years old, R caught V watching pornography on her Kindle tablet (Kindle). This was not the first time that V had engaged in this type of behavior; R twice previously had discovered V watching sexually explicit movies on her Kindle. R was upset, and she grabbed the Kindle away from V and slapped her on the wrist. R asked V why she kept watching sexually inappropriate movies. In response, V disclosed to her mother that the defendant had "touched her and that they would watch inappropriate things." R was devastated, and, after calling her sisters, she notified the police.

of simplicity, we refer to the current revision of § 53a-29 throughout this opinion.

The Windsor Locks Police Department and the Department of Children and Families (DCF) conducted a joint investigation into V's allegations. DCF investigator Carmen Karecki interviewed the defendant during the first week of December, 2015. The defendant was very nervous during the interview, and his hands were shaking. The defendant explained that he suffered from depression, kidney dysfunction, and memory problems. The defendant informed Karecki that, when V was nine years old, he would watch her after school, during which time he made sure that she did her homework and bathed. The defendant denied watching pornography with V or accessing pornography on R's computer but admitted that he previously had watched pornographic movies with R on the television.

Dawn Morini, a detective with the Windsor Locks Police Department, also interviewed the defendant, once on December 10, 2015, and a second time on December 22, 2015. During the first interview, the defendant's hands were shaking, and he informed Morini that "he was born like that and that he had depression." The defendant denied sexually abusing V or showing her pornographic movies. The defendant explained that he thought R and V had fabricated the sexual assault allegations out of a desire "to get more child support out of him." Morini asked the defendant "whether he would ever have time alone with [V]," and the defendant "at one point [responded that] he did have time alone with her, and another time he said that he had both children there."

In the second interview, Morini again asked the defendant about his shaking hands, and the defendant explained that "he believed it was Parkinson's disease." At the conclusion of the second interview, the defendant gave Morini the following written statement: "I watched [V] for about an hour to an hour and [one] half. During this time I never watched a pornographic

movie with [V]. One time when [V] was about [nine] or [ten] she had a sore/blister on her vagina. Her mother was concerned and showed me the sore/blister . . . and I look[ed] at [V's] private area. This was before [V] went to surgery for the problem. I never touched [V] on her private area ever. I never exposed myself or did anything [to V]."

The defendant subsequently was arrested and charged in a seven count amended information with four counts of sexual assault in the first degree in violation of § 53a-70 (a) (2) and three counts of risk of injury to a child in violation of § 53-21 (a). Following a jury trial, at which the defendant did not testify, the jury found the defendant guilty of all seven charges. The trial court rendered judgment in accordance with the jury's verdict and sentenced the defendant to twenty-five years of imprisonment, execution suspended after twenty years, and ten years of probation on each count of sexual assault in the first degree and ten years of imprisonment on each count of risk of injury to a child. The sentences were imposed concurrently, for a total effective sentence of twenty-five years of imprisonment, execution suspended after twenty years, and ten years of probation. This appeal followed.

I

The defendant first claims that the trial court improperly sentenced him to ten years of probation on each of his four sexual assault convictions because § 53a-29 (a) permits only a period of probation to be imposed "upon conviction of any crime, *other than a class A felony* . . . ." (Emphasis added.) The state concedes that "the defendant's sentences on [the sexual assault] counts . . . are illegal because they contain probationary terms." We agree.

The defendant did not preserve his claim of sentencing error in the trial court, but we may review the

defendant's claim on direct appeal in light of the state's concession that the defendant's sentence is illegal. See *State* v. *Victor O.*, 301 Conn. 163, 193, 20 A.3d 669 (reviewing unpreserved claim of illegal sentence on direct appeal because state conceded that sentence was illegal), cert. denied, 565 U.S. 1039, 132 S. Ct. 583, 181 L. Ed. 2d 429 (2011).[4] As in the present case, the defendant in *Victor O.* was convicted of the class A felony of sexual assault in the first degree under a prior revision of § 53a-70 and sentenced to a term of imprisonment followed by a period of probation. Id., 165, 193; see General Statutes (Rev. to 2003) § 53a-70 (b) (2). The state conceded that the sentence imposed by the trial

[4] In its appellate brief, the state conceded that the defendant's claim was reviewable for the first time on appeal pursuant to *State* v. *Victor O.*, supra, 301 Conn. 163. Following the completion of briefing, the state submitted a notice of supplemental authority; see Practice Book § 67-10; contending that *Victor O.* is inconsistent with *Cobham* v. *Commissioner of Correction*, 258 Conn. 30, 38 n.13, 779 A.2d 80 (2001). Compare *State* v. *Victor O.*, supra, 301 Conn. 193 n.12 ("this court is authorized to correct an illegal sentence at any time pursuant to Practice Book § 43-22"), with *Cobham* v. *Commissioner of Correction*, supra, 38 n.13 (stating that only trial court can correct illegal sentence at any time under Practice Book § 43-22). Nonetheless, the state argued in its notice of supplemental authority that, "[p]ursuant to *State* v. *Guckian*, 27 Conn. App. 225, 246, 605 A.2d 874 (1992) [(overruled in part on other grounds by *Cobham* v. *Commissioner of Correction*, 258 Conn. 30, 779 A.2d 80 (2001)), aff'd, 226 Conn. 191, 627 A.2d 407 (1993)], illegal sentence claims raised on direct appeal are reviewed for plain error." But see *State* v. *Jin*, 179 Conn. App. 185, 195–96, 179 A.3d 266 (2018) (relying on *Cobham* and declining to review under plain error doctrine illegal sentence claim raised for first time on appeal); *State* v. *Crump*, 145 Conn. App. 749, 766, 75 A.3d 758 (same), cert. denied, 310 Conn. 947, 80 A.3d 906 (2013). The state takes the position that *Cobham* and its progeny do "not change the state's concession in this case that the sentences that the defendant received for each of the four sexual assault convictions are illegal." In light of the state's concession, we need not resolve the alleged inconsistency between *Victor O.* and *Cobham* or determine whether the defendant's claim is reviewable for the first time on appeal under Practice Book § 43-22 or the plain error doctrine. At the very least, it is clear to us that *Victor O.* stands for the proposition that a reviewing court may address unpreserved claims of sentencing error when the state concedes on appeal that the sentence imposed by the trial court is illegal and that the defendant is entitled to sentencing relief.

court was illegal on the ground that "probation was not an authorized sentence because the defendant had been convicted of a class A felony." *State* v. *Victor O.*, 320 Conn. 239, 248 n.9, 128 A.3d 940 (2016); see General Statutes § 53a-29 (a) ("[t]he court may sentence a person to a period of probation upon conviction of any crime, other than a class A felony"); see also General Statutes (Rev. to 2013) § 53a-70 (b) (3) ("[a]ny person found guilty under this section shall be sentenced to a term of imprisonment and a period of special parole pursuant to subsection (b) of section 53a-28 which together constitute a sentence of at least ten years"). We agreed and, therefore, remanded the case to the trial court for resentencing. See *State* v. *Victor O.*, supra, 301 Conn. 193–94; see also *State* v. *Victor O.*, supra, 320 Conn. 248 n.9 (clarifying that, in *State* v. *Victor O.*, supra, 301 Conn. 163, this court held that "special parole was the only form of supervised release that could be imposed" for conviction of class A felony under §§ 53a-29 (a) and 53a-70 (b) (3)).

Pursuant to the authority established in *State* v. *Victor O.*, supra, 301 Conn. 163, the plain language of §§ 53a-29 (a) and 53a-70 (b) (3),[5] and the state's conces-

[5] In 2015, § 53a-70 (b) (3) was amended to provide for the imposition of a period of probation for convictions of sexual assault in the first degree in violation of § 53a-70 (b) (2), notwithstanding the fact that it is a class A felony. See Public Acts 2015, No. 15-211, § 16, codified at General Statutes (Supp. 2016) § 53a-70 (b) (3) ("Any person found guilty under this section shall be sentenced to a term of imprisonment of at least ten years, a portion of which may be suspended, except as provided in subdivisions (1) and (2) of this subsection, or a term of imprisonment and a period of special parole pursuant to subsection (b) of section 53a-28 which together constitute a sentence of at least ten years. *Notwithstanding the provisions of subsection (a) of section 53a-29 and except as otherwise provided in this subsection, a court may suspend a portion of a sentence imposed under this subsection and impose a period of supervised probation pursuant to subsection (f) of section 53a-29.*" (Emphasis added.)). It is undisputed that this statutory amendment is inapplicable to the present case because the defendant's criminal conduct predated its enactment. See *In re Daniel H.*, 237 Conn. 364, 377, 678 A.2d 462 (1996) ("[i]n criminal cases, to determine whether a change in the law applies to a defendant, we generally have applied the law

sion, we conclude that the trial court improperly imposed a period of probation on each of the defendant's four sexual assault convictions. Accordingly, we vacate the defendant's sentence and remand this case to the trial court for resentencing. See, e.g., *State* v. *LaFleur*, 307 Conn. 115, 164, 51 A.3d 1048 (2012) ("Pursuant to [the aggregate package] theory, we must vacate a sentence in its entirety when we invalidate any part of the total sentence. On remand, the resentencing court may reconstruct the sentencing package or, alternatively, leave the sentence for the remaining valid conviction or convictions intact." (Internal quotation marks omitted.)).

## II

The defendant next claims that the prosecutor violated his fifth amendment right against self-incrimination and his fourteenth amendment right to a fair trial by making improper remarks during closing argument and rebuttal.[6] Specifically, the defendant contends that the prosecutor improperly (1) commented indirectly on the defendant's failure to testify at trial, (2) expressed his personal opinion on the strength of the evidence, the credibility of V, and the defendant's guilt, and (3) relied on facts not in evidence. The state responds that the prosecutor's remarks were not improper and that, even if they were, any impropriety was harmless. We

in existence on the date of the offense, regardless of its procedural or substantive nature"); see also *State* v. *Kalil*, 314 Conn. 529, 558, 107 A.3d 343 (2014) (holding that statutory amendments reducing penalty for criminal offenses do not apply retroactively in "the absence of any express language in the provision referring to its retroactive application").

[6] The defendant did not preserve his prosecutorial impropriety claims in the trial court, but, "under settled law, a defendant who fails to preserve claims of prosecutorial [impropriety] need not seek to prevail under the specific requirements of *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989) [as modified by *In re Yasiel*, 317 Conn. 773, 781, 120 A.3d 1188 (2015)], and, similarly, it is unnecessary for a reviewing court to apply the four-pronged *Golding* test." (Internal quotation marks omitted.). *State* v. *Payne*, 303 Conn. 538, 560, 34 A.3d 370 (2012).

conclude that the defendant has failed to establish that the prosecutor's challenged remarks were improper.

"In analyzing claims of prosecutorial impropriety, we engage in a two step analytical process. . . . The two steps are separate and distinct. . . . We first examine whether prosecutorial impropriety occurred. . . . Second, if an impropriety exists, we then examine whether it deprived the defendant" of a constitutionally protected right. (Internal quotation marks omitted.) *State* v. *Payne*, 303 Conn. 538, 560, 34 A.3d 370 (2012). In *Payne*, we clarified that the standard governing a prosecutorial impropriety claim depends on the nature of the constitutional right allegedly violated. "[W]hen a defendant raises on appeal a claim that improper remarks by the prosecutor deprived the defendant of his constitutional right to a fair trial, the burden is on the defendant to show, not only that the remarks were improper, but also that, considered in light of the whole trial, the improprieties were so egregious that they amounted to a denial of due process." Id., 562–63. "On the other hand . . . if the defendant raises a claim that the prosecutorial improprieties infringed a specifically enumerated constitutional right, such as the fifth amendment right to remain silent or the sixth amendment right to confront one's accusers, and the defendant meets his burden of establishing the constitutional violation, the burden is then on the state to prove that the impropriety was harmless beyond a reasonable doubt." Id., 563.

As an initial matter, the defendant asks us to revisit and overrule *Payne*. He first argues that that there is no legitimate distinction between prosecutorial impropriety claims implicating general due process rights and those implicating specifically enumerated rights. Second, and alternatively, he contends that, even if such a distinction exists, *Payne*'s burden shifting framework improperly collapses the two step analytical process governing our review. We disagree with both argu-

ments. As we explained in *Payne*, the different "allocation of the burden is appropriate because, when a defendant raises a general due process claim, there can be no constitutional violation in the absence of harm to the defendant caused by denial of his right to a fair trial. The constitutional analysis and the harm analysis in such cases are one and the same." Id., 563–64; see also *State* v. *LaBrec*, 270 Conn. 548, 562 n.1, 854 A.2d 1 (2004) (*Borden*, *J.*, concurring) (recognizing that, "if the [constitutional] error was harmless, then the defendant was not deprived of a fair trial," and, "if the defendant was deprived of a fair trial, then the error cannot be considered harmless"). In contrast, when a prosecutor makes improper remarks that violate a defendant's specifically enumerated constitutional rights, the constitutional analysis and the harm analysis are separate and distinct inquiries. See *State* v. *A. M.*, 324 Conn. 190, 204, 152 A.3d 49 (2016) (analyzing separately whether "the prosecutor violated [the defendant's] fifth amendment rights by directly referencing his failure to testify" and "whether the state has proven beyond a reasonable doubt that the violation was harmless"). Regardless of the type of constitutional right at stake, the burden is always on the defendant to show that the prosecutor's impropriety resulted in the violation of a constitutional right. See id., 199; *State* v. *Payne*, supra, 303 Conn. 562–63.

With these principles in mind, we turn to the merits of the defendant's prosecutorial impropriety claims. In the present case, all of the prosecutor's challenged remarks occurred during closing argument and rebuttal. "As we previously have recognized, prosecutorial [impropriety] of a constitutional magnitude can occur in the course of closing arguments. . . . When making closing arguments to the jury, [however, counsel] must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be

determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument. . . . Thus, as the state's advocate, a prosecutor may argue the state's case forcefully, [provided the argument is] fair and based upon the facts in evidence and the reasonable inferences to be drawn therefrom. . . . Moreover, [i]t does not follow . . . that every use of rhetorical language or device [by the prosecutor] is improper. . . . The occasional use of rhetorical devices is simply fair argument. . . .

"Nevertheless, the prosecutor has a heightened duty to avoid argument that strays from the evidence or diverts the jury's attention from the facts of the case. [The prosecutor] is not only an officer of the court, like every attorney, but is also a high public officer, representing the people of the [s]tate, who seek impartial justice for the guilty as much as for the innocent. . . . By reason of his office, he usually exercises great influence upon jurors. . . . While the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered, it must never be used as a license to state, or to comment upon, or to suggest an inference from, facts not in evidence, or to present matters [that] the jury ha[s] no right to consider." (Internal quotation marks omitted.) *State* v. *Ciullo*, 314 Conn. 28, 37–38, 100 A.3d 779 (2014).

A

We begin our analysis with the defendant's claim that the prosecutor made various remarks that the jury naturally and necessarily would have construed as an indirect comment on his failure to testify in violation of his right against self-incrimination under the fifth amendment to the United States constitution.[7] "The fifth

[7] The fifth amendment to the United States constitution, which is made applicable to the states through the fourteenth amendment, provides in relevant part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. Const., amend. V; see also *Griffin* v. *California*, 380 U.S. 609, 615, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) ("the

amendment prohibits the state from forcing the defendant to be a witness against himself, and . . . this protection also prohibits prosecutors from commenting at trial on the defendant's decision not to testify." *State* v. *A. M.*, supra, 324 Conn. 200. The reason for this restriction is that "allowing a prosecutor to comment on the defendant's refusal to testify would be equivalent to imposing a penalty for exercising his constitutional right to remain silent."[8] Id.

"Even an indirect remark by the prosecuting attorney may violate a defendant's privilege against self-incrimination if it draws the jury's attention to the failure of the accused to testify." *State* v. *Arline*, 223 Conn. 52, 66, 612 A.2d 755 (1992). "[W]hen it is unclear whether the prosecutor's comments at issue referred to the defendant's failure to testify," a reviewing court "appl[ies] what is known as the naturally and necessarily test" to determine whether a fifth amendment violation occurred. (Internal quotation marks omitted.) *State* v. *A. M.*, supra, 324 Conn. 201–202. "That test asks whether the language used [by the prosecutor was] manifestly intended to be, or was . . . of such a character that the jury would *naturally and necessarily* take it to be a comment on the failure of the accused to testify." (Emphasis in original; internal quotation marks omitted.) Id., 201. "[I]n applying this test, we must look to the context in which the statement was made in order to determine the manifest intention [that] prompted it and its natural and necessary impact upon the jury." (Internal quotation marks omitted.) *State* v. *Parrott*, 262 Conn. 276, 293, 811 A.2d 705 (2003).

[f]ifth [a]mendment, in its direct application to the [f]ederal [g]overnment, and in its bearing on the [s]tates by reason of the [f]ourteenth [a]mendment, forbids . . . comment by the prosecution on the accused's silence").

[8] "[General Statutes §] 54-84 (a) also prohibits a prosecutor from commenting on the 'neglect or refusal of an accused party to testify . . . .' " *State* v. *A. M.*, supra, 324 Conn. 200 n.5. We historically have "treated the protections of the statute as being synonymous with those of the fifth amendment." Id., 201 n.5.

The defendant first claims that the prosecutor improperly commented on the defendant's failure to testify at trial by contrasting V's in-court testimony with the defendant's out-of-court statements to DCF and the police. Specifically, the defendant contends that the following four remarks, which focused on the defendant's out-of-court statements, impermissibly drew the jury's attention to the fact that he did not testify at trial: (1) "Now, [V] was quizzed on the dates on when things happened and didn't happen. However, the defendant himself didn't even know when [V] had the procedure [to remove the vaginal cyst]. In his written statement—which you'll have—he says she had it sometime between nine and ten. So what's more accurate, his memory of the dates or [V], where she gives you an incident that can be dated by a medical procedure, and she says things stopped at that point?" (2) "And I explained the state's argument is that [V's] testimony was consistent with all the other testimony and that the defendant's statements were consistent with the defendant's own statements." (3) "And, as I said, what evidence, if any, is there that [V's] testimony was contradicted by anybody other than the defendant saying it didn't happen? However, look at the defendant's statements. I'd argue, as I said, not only [were they] contradicted by [V], by [V's] mother and her aunt, [they were] contradicted by [the defendant] himself: I'm not alone with her; I am alone with her . . . ." And (4) "[I]f you go about things appropriately and you focus on the testimony and you focus on [V] and you focus on the corroboration, the problem is, the state would argue, you're going to find her credible and you're going to find [the defendant's] inconsistent statements to DCF and the police not credible, and you're going to convict, so they can't have that so let's have another story altogether."

The jury in this case was presented with evidence of two different and mutually exclusive versions of events

—V's in-court testimony that the defendant sexually assaulted her after school when she was nine years old, and the defendant's out-of-court statements that no sexual assaults occurred. There was no physical evidence or eyewitness to corroborate either V's or the defendant's testimony, and, therefore, the jury was presented with one essential question—whom to believe? See, e.g., *State* v. *Fernando V.*, 331 Conn. 201, 216, 202 A.3d 350 (2019) (in absence of physical evidence and eyewitnesses to corroborate sexual assault, victim's "testimony was the only evidence of the defendant's guilt, and, therefore, [the] case turned largely on whether the jury believed [the victim]" (internal quotation marks omitted)). It was the sole province of the jury to resolve the inconsistencies between V's testimony and the defendant's statements, and to believe all of V's testimony, all of the defendant's statements, or only a part of each. See, e.g., *State* v. *Meehan*, 260 Conn. 372, 381, 796 A.2d 1191 (2002) ("[i]t is axiomatic that evidentiary inconsistencies are for the jury to resolve, and it is within the province of the jury to believe all or only part of a witness' testimony"). In this context, a prosecutor does not commit an impropriety by summarizing the relevant evidence and arguing "that the jury should find the victim credible because of the consistencies in the state's evidence." *State* v. *Ruffin*, 316 Conn. 20, 31, 110 A.3d 1225 (2015). Furthermore, a prosecutor properly may "direct the jury's attention to the alleged weakness of the defendant's version of the incident as set forth in his out-of-court statements"; *State* v. *Haase*, 243 Conn. 324, 337, 702 A.2d 1187 (1997), cert. denied, 523 U.S. 1111, 118 S. Ct. 1685, 140 L. Ed. 2d 822 (1998); and discuss "the weight to be afforded the defendant's [out-of-court] statements . . . ." *State* v. *Correa*, 241 Conn. 322, 360, 696 A.2d 944 (1997); see also *State* v. *Rivera*, 169 Conn. App. 343, 352–54, 150 A.3d 244 (2016) (prosecutor's remarks urging jury to assess defendant's credibility on basis of two out-of-

court statements to police were not improper), cert. denied, 324 Conn. 905, 152 A.3d 544 (2017); *State* v. *Rupar*, 86 Conn. App. 641, 652–53, 862 A.2d 352 (2004) (prosecutor's statement that, in sexual assault cases, " 'it's often a victim's word against a defendant's word as to what occurred' " was not improper because it was not "intended as a comment on the defendant's failure to testify"), cert. denied, 273 Conn. 919, 871 A.2d 1030 (2005); *State* v. *Smalls*, 78 Conn. App. 535, 544, 827 A.2d 784 ("[o]ral statements of a defendant introduced through the testimony of witnesses can be a facet of whether the defendant's version of events is to be believed when the defendant has chosen not to testify"), cert. denied, 266 Conn. 931, 837 A.2d 806 (2003).

Absolutely nothing in any of the prosecutor's challenged statements drew the jury's attention, either directly or indirectly, to the fact that the defendant did not testify at trial. The prosecutor merely asked the jury to compare the victim's version of events with the defendant's version of events and to decide for itself which version was more credible. The prosecutor did not suggest by implication or otherwise that the defendant's version was less credible or of a different quality because it derived from out-of-court statements rather than live, in-court testimony. We therefore conclude that the prosecutor's remarks comparing V's in-court testimony with the defendant's out-of-court statements were not improper.[9]

[9] Nothing in *State* v. *A. M.*, supra, 324 Conn. 190, is inconsistent with our conclusion. In *A. M.*, the prosecutor "directly and unambiguously called the jury's attention to the defendant's decision not to testify" in violation of the fifth amendment by explicitly commenting on the defendant's failure to take the stand. Id., 201. The state claimed that the constitutional violation was harmless beyond a reasonable doubt, arguing in relevant part that the context of the prosecutor's statements "diluted any impropriety and demonstrated a purpose unrelated to the impropriety, namely, to focus on the statements given by the defendant to the police." Id., 206. We rejected this claim, reasoning that, "[i]n spite of the prosecutor's comments asking the jurors to judge the defendant's credibility by the statements he gave to the police, the jury was instructed by the judge that credibility related to witnesses

The defendant next claims that the prosecutor indirectly commented on the defendant's failure to testify by asking questions in closing argument, the answers to which only the defendant could provide. The following additional facts are relevant to this claim. During closing argument, the prosecutor stated that, due to the lack of physical evidence and eyewitnesses, the outcome of this case should be "decided on two things: credibility [and] corroboration . . . ." With respect to credibility, the prosecutor asked the jury to consider "who's more credible, [V] or the party who can't even keep straight his medical issues and who he's alone with and who he's not alone with? I'd argue that it's undisputed that what [V] testif[ied] [to], if you find her credible, would meet all the elements of all the charges. So, really, your argument is, is she credible or not? If you don't have a reasonable explanation, then why would you not find her credible?" The prosecutor then addressed the explanation that the defendant had proffered to the police as to why V's allegations were unworthy of belief, namely, because she and R wanted more child support. The prosecutor asked: "How would fabricating a—how would getting a person arrested for sexual assault amount to you getting more child support? It would seem more logical to get you less child support. I don't know. That was never explained by him, how he thought

who testified. Thus, the prosecutor, through her statements on credibility, was reminding the jurors again that the defendant did not testify." Id., 206–207.

Contrary to the defendant's assertion, *A. M.* does not stand for the proposition that a prosecutor's remarks challenging the credibility or believability of a defendant's out-of-court statements, which have been admitted into evidence for the jury's full consideration, are improper. Instead, in *A. M.*, we held simply that the prosecutor's allegedly valid purpose in focusing on the defendant's out-of-court statements combined with the trial court's instruction on credibility were insufficient to render harmless beyond a reasonable doubt the prosecutor's clear violation of the defendant's fifth amendment rights. Accordingly, the defendant's reliance on *A. M.* is misplaced.

that this was being used—there was never any mention about them shaking him down or we'll recant if you give us more money. That was just he put that out there; they want[ed] more child support from me . . . ."

Our case law makes clear that "a prosecutor is prohibited from asking for explanations [that] only a defendant can provide because such questions are an indirect comment on the defendant's failure to testify." (Internal quotation marks omitted.) *State* v. *Arline*, supra, 223 Conn. 67. To determine whether a prosecutor's request for an explanation is an indirect comment on the defendant's failure to testify, we must closely examine the wording of the rhetorical question and context in which it is used. For example, "[a] comment that the defendant was without a reasonable explanation or had no reasonable explanation to show why he was innocent is not necessarily a comment that the jury would naturally and necessarily interpret as related to the defendant's constitutional and statutory right to decline to testify. A prosecutor also may comment on the failure of a defendant to support his factual theories. . . . [Q]uestions posed in closing arguments, even when answers perhaps could be provided by nontestifying defendants, may, depending on the circumstances, be permissible. If a comment or question logically refers to the relative merits or weaknesses of the case, rather than naturally and necessarily to the defendant's failure to testify, it passes muster." (Citation omitted; internal quotation marks omitted.) *State* v. *Joseph R. B.*, 173 Conn. App. 518, 536, 164 A.3d 718, cert. denied, 326 Conn. 923, 169 A.3d 234 (2017); see *State* v. *Grant*, 286 Conn. 499, 539, 944 A.2d 947 ("the jury would not necessarily have understood the prosecutor's statement that there was no evidence of an innocent explanation for the presence of the defendant's fingerprint on the tissue box or his DNA on the handkerchief as a comment on the defendant's failure to testify" because "the prosecutor was

asking the jury to draw an inference from the defendant's statements, not from his refusal to testify"), cert. denied, 555 U.S. 916, 129 S. Ct. 271, 172 L. Ed. 2d 200 (2008); *State* v. *Walker*, 206 Conn. 300, 309, 311, 537 A.2d 1021 (1988) (prosecutor's comment " '[d]id you hear anybody get up and say it was him' " in reference to witness who "defense counsel had stressed . . . had committed the murder" was "not of such a character that the jury would naturally and necessarily take it to be a comment on the defendant's failure to testify" (emphasis omitted)); *State* v. *Joseph R. B.*, supra, 537 ("The jury would not naturally and necessarily understand the prosecutor's remarks to suggest that testimony from the defendant was the only means by which his rhetorical questions could be answered. Rather, the prosecutor's comments were based on the evidence presented and refer to a lack of explanation in the evidence, other than guilt, for a range of behavior . . . ." (Footnote omitted.)); *State* v. *Jarrett*, 82 Conn. App. 489, 502–503, 845 A.2d 476 (prosecutor's observation that " '[t]here was no explanation why the defendant had [the insurance policy that was seized during the search of the apartment] with his other personal documents' " was not "naturally and necessarily an improper comment on the defendant's failure to testify"), cert. denied, 269 Conn. 911, 852 A.2d 741 (2004).

The prosecutor's questions in the present case did not ask for answers from the defendant or anyone else; instead, they were employed as a rhetorical device asking "the jurors to refer to their knowledge of human nature to ascertain an answer to the question." *State* v. *Harris*, 48 Conn. App. 717, 722, 711 A.2d 769, cert. denied, 245 Conn. 922, 717 A.2d 238 (1998); see id. (prosecutor's rhetorical question " '[w]hy would you do that' " was not improper because it did "not point to the defendant's decision not to testify"); see also *State* v. *O'Brien-Veader*, 318 Conn. 514, 547, 122 A.3d 555

(2015) ("[I]n deciding cases . . . [j]urors are not expected to lay aside matters of common knowledge or their own observations and experiences, but rather, to apply them to the facts as presented to arrive at an intelligent and correct conclusion. . . . Therefore, it is entirely proper for counsel to appeal to [the jurors'] common sense in closing remarks. . . . Our jurisprudence permits these statements from the prosecution, if properly presented . . . ." (Internal quotation marks omitted.)); *State* v. *Magnotti*, 198 Conn. 209, 220, 502 A.2d 404 (1985) (prosecutor's rhetorical question asking jurors " '[w]hat about the [d]efense's case?' " was "a comment by the prosecutor on the overall quality of the defendant's evidence" and did not "[call] specific attention to the failure of the accused to testify"). The prosecutor asked the jurors to consider, on the basis of their common knowledge and experience, why V would fabricate a story regarding the sexual assaults and how such a story would result in the payment of additional child support. Because the prosecutor's questions "pertain[ed] to whether the jury should have believed the victim's testimony . . . a reasonable jury would have understood the prosecutor's remarks as a commentary on the victim's veracity, not the defendant's silence." *State* v. *Ruffin*, supra, 316 Conn. 31. We therefore reject the defendant's claim that the prosecutor's rhetorical questions were improper.[10]

[10] In arriving at this conclusion, we construe the prosecutor's statement "[t]hat was never explained by him, how he thought that [V's allegation] was being used . . . [because] they wanted more child support" to refer to the defendant's failure to offer an explanation to the police at the time his out-of-court statement was made. We consider this to be the most reasonable interpretation of the comments in the overall context of the facts as marshaled by the prosecutor in his closing argument. See *State* v. *Elmer G.*, 333 Conn. 176, 194–95, 214 A.3d 852 (2019) ("[i]f a prosecutor's remark is ambiguous, this court should not lightly infer that it is improper" (internal quotation marks omitted)); *State* v. *Rivera*, supra, 169 Conn. App. 353–54 (prosecutor's remark " '[d]oes somebody have a stake when they sit in that chair and testify for you' " was ambiguous and, therefore, could be construed to refer to "the stake that the defendant specifically has when he sits in a chair at the police station and gives his version of events," rather than to defendant's failure to testify).

The next prosecutorial comment challenged by the defendant causes us somewhat greater concern. The defendant contends that the prosecutor violated his fifth amendment right against self-incrimination by informing the jury that "the true test . . . of a party's credibility is how they do on cross-examination, when they're questioned by the opposing party." The defendant argues that, by focusing on the credibility of *parties* rather than *witnesses*, the prosecutor impermissibly drew the jury's attention to the fact that he did not testify. We are troubled by the prosecutor's remark, given that the term "party" has "a technical legal meaning, referring to those by or against whom a legal suit is brought . . . the party plaintiff or defendant, whether composed of one or more individuals and whether natural or legal persons." (Internal quotation marks omitted.) *State* v. *Salmon*, 250 Conn. 147, 154, 735 A.2d 333 (1999). The parties in the present case are the state and the defendant—neither of whom testified or was subject to cross-examination. This isolated comment, if viewed formalistically and devoid of context, could be construed to mean that the defendant's out-of-court statements were less worthy of belief than V's in-court testimony because they could not be subjected to the "true test" of credibility commended by the prosecutor.

Our concerns are assuaged, however, upon consideration of the context in which the prosecutor's comment was made. Although the prosecutor used the word "party" when emphasizing the efficacy of cross-examination as a tool to assess credibility, the context in which his statement was made leaves no doubt that he was asking the jury to consider the credibility of a witness, and one witness in particular: V. Immediately following the challenged statement, the prosecutor said: "Look at how [V] did [on cross-examination]. Defense [counsel] asked her—or told her you were nine when you told mom what happened, right, and she said no.

How old were you? She said I think I was twelve. You look at her birthday, you look at the day of the report, eleven years and seven months. Either she didn't guess, I think, she didn't say for sure. Once again, question: You had a great relationship with mom. Yes. She's your best friend. No. She didn't go that far. No. You like spending time with your mom. Yes. Back then, even now. She had no problem correcting when she thought things were not accurate, corrected either the defense or the state."

The prosecutor's introductory comment asking the jury to focus on how a "party" handles cross-examination was poorly worded—the prosecutor should have used the word "witness" rather than "party"—but we will not allow that misstatement to obscure the obvious and intended meaning of his argument because he did not attempt to contrast V's performance on cross-examination (and by extension, her credibility) with the defendant's failure to testify. "When reviewing the propriety of a prosecutor's statements, we do not scrutinize each individual comment in a vacuum but, rather, review the comments complained of in the context of the entire trial." (Internal quotation marks omitted.) *State* v. *Felix R.*, 319 Conn. 1, 9, 124 A.3d 871 (2015). In light of the prosecutor's emphasis on the believability of V's testimony, her performance on the stand during cross-examination, and the consistency of her testimony with the evidence adduced at trial, we construe the prosecutor's statement to refer, albeit imprecisely, to V's credibility. See id., 13–14 ("[B]ecause the prosecutor's comment that the victim 'had' to testify 'because of what that man said and did to her' is ambiguous, we read the remark to refer, albeit imprecisely, to the state's overarching theme: the victim had no motive to lie and the defendant did. The remarks, therefore, were not improper."). Because we cannot say that the prosecutor's statement was "manifestly intended to be, or

was . . . of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify"; (emphasis omitted; internal quotation marks omitted) *State* v. *A. M.*, supra, 324 Conn. 201; we conclude that the defendant's fifth amendment right against self-incrimination was not violated.

B

The defendant also claims that the prosecutor made various remarks during closing argument and rebuttal that deprived him of his right to a fair trial in violation of the due process clause of the fourteenth amendment to the United States constitution.[11] Specifically, the defendant argues that the prosecutor impermissibly expressed his personal opinion regarding the evidence, the credibility of V, and the defendant's guilt. The defendant further contends that the prosecutor improperly relied on facts not in evidence when he argued on multiple occasions that the defendant "failed to disclose until his second police interview that he was ever alone with [V], despite the only evidence on that point indicating that he disclosed this information during the first police interview."

It is well established that a "prosecutor has a heightened duty to avoid argument that strays from the evidence or diverts the jury's attention from the facts of the case. [As we noted previously, the prosecutor] is not only an officer of the court, like every attorney, but is also a high public officer, representing the people of the [s]tate, who seek impartial justice for the guilty as much as for the innocent. . . . By reason of his office, he usually exercises great influence upon jurors. His conduct and language in the trial of cases in which

[11] The fourteenth amendment to the United States constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty or property, without due process of law . . . ." U.S. Const., amend. XIV.

human life or liberty [is] at stake should be forceful, but fair, because he represents the public interest, which demands no victim and asks no conviction through the aid of passion, prejudice, or resentment. If the accused [is] guilty, he should [nonetheless] be convicted only after a fair trial, conducted strictly according to the sound and [well established] rules which the laws prescribe. While the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered, it must never be used as a license to state, or to comment upon, or to suggest an inference from, facts not in evidence, or to present matters [that] the jury ha[s] no right to consider. . . . [W]hile [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. . . .

"Furthermore, the prosecutor may not express his own opinion, directly or indirectly, as to the credibility of the witnesses. . . . Nor should a prosecutor express his opinion, directly or indirectly, as to the guilt of the defendant. . . . Such expressions of personal opinion are a form of unsworn and unchecked testimony, and are particularly difficult for the jury to ignore because of the prosecutor's special position. . . . Moreover, because the jury is aware that the prosecutor has prepared and presented the case and consequently, may have access to matters not in evidence . . . it is likely to infer that such matters precipitated the personal opinions." (Internal quotation marks omitted.) *State* v. *Andrews*, 313 Conn. 266, 293–94, 96 A.3d 1199 (2014).

The defendant contends that the prosecutor impermissibly expressed his personal opinion on the merits of the case when, at the end of closing argument, he stated: "I'd argue, if you look at the evidence logically, if you look at the evidence impartially, the only conclu-

sion is that [V] was testifying credibly and that she did prove the case beyond a reasonable doubt." Likewise, the defendant challenges the prosecutor's summary statement at the end of rebuttal: "And I'd ask you—and I tell you the reason why is because, if you listen to the facts of the case we heard, that was presented, that was testified on, the only result, when you look at the credibility, is [to] find the defendant guilty."

The prosecutor's remarks were not improper expressions of personal opinion. Rather, we take them to be legitimate commentary on the evidence adduced at trial and the reasonable inferences supported by the evidence. "It is not improper for the prosecutor to comment [on] the evidence presented at trial and to argue the inferences that the [jury] might draw therefrom . . . . We must give the jury the credit of being able to differentiate between argument on the evidence and attempts to persuade [it] to draw inferences in the state's favor, on one hand, and improper unsworn testimony, with the suggestion of secret knowledge, on the other hand. The [prosecutor] should not be put in the rhetorical straitjacket of always using the passive voice, or continually emphasizing that he is simply saying I submit to you that this is what the evidence shows, or the like." (Internal quotation marks omitted.) *State* v. *Long*, 293 Conn. 31, 38–39, 975 A.2d 660 (2009).

When viewed in the context of the prosecutor's entire closing argument and rebuttal, it is apparent that the prosecutor was urging the jury to infer, on the basis of the evidence presented at trial—including, but not limited to, V's testimony regarding the sexual assaults, the lack of any reliable evidence indicating that she had a motive to lie, and the defendant's contradictory out-of-court statements—that V was "testifying credibly" and "the defendant was guilty" of the crimes charged. Because the prosecutor's "remarks underscored an inference that the jury could have drawn entirely on

its own, based on the evidence presented"; *State* v. *Stevenson*, 269 Conn. 563, 585, 849 A.2d 626 (2004); we perceive no impropriety. See id., 584 (prosecutor's "remark during closing argument describing the defendant's explanation as to how he obtained money to buy drugs as 'totally unbelievable' " was not expression of personal opinion but, rather, "a comment on the evidence presented at trial, and it posited a reasonable inference that the jury itself could have drawn without access to the [prosecutor's] personal knowledge of the case"); see also *State* v. *Ciullo*, supra, 314 Conn. 42 (prosecutor's statements did "not purport to convey [his] *personal opinion* of the credibility of the witnesses; instead, the prosecutor's statements, when placed in the context in which they were made, [were] reasonable inferences the jury could have drawn from the evidence adduced at trial" (emphasis in original)); *State* v. *Long*, supra, 293 Conn. 41 (prosecutor's remarks regarding victim's credibility were not improper expressions of personal opinion but, rather, "were intended to appeal to the jurors' common sense and to elicit a particular conclusion about the veracity of [the victim's] testimony by inviting the jurors to draw reasonable inferences from the evidence presented to them"); *State* v. *Warholic*, 278 Conn. 354, 370 n.8, 897 A.2d 569 (2006) (prosecutor's comment that " '[t]here's only one explanation in this case that makes sense and as difficult as it is to understand that it happens, it's that the defendant did exactly what he's accused of' " was not personal expression of opinion but, rather, "[a] rhetorical comment" on evidence adduced at trial).

Lastly, we address the defendant's claim that the prosecutor improperly relied on facts not in evidence when he stated on multiple occasions that the defendant failed to disclose to the police until his second interview that he was home alone with V after school. The following facts are relevant to our resolution of this claim. At

trial, Detective Morini testified that she and a colleague "interviewed the defendant regarding [V's] allegations" of sexual assault "[t]wo different times." The first interview occurred on December 10, 2015, at which time the defendant denied V's allegations. At a certain point during trial, the following colloquy occurred between the prosecutor and Morini:

"[The Prosecutor]: Now, did you ask him whether he would ever have time alone with [V]?

"[Morini]: Yes, we did.

"[The Prosecutor]: And what did he tell you?

"[Morini]: He said that at one point he did have time alone with her, and another time he said that he had both children there.

"[The Prosecutor]: So he—did he tell you at one point he would . . . watch [V] and her sister?

"[Morini]: Yes.

"[The Prosecutor]: So he told you at first he would watch them together?

"[Morini]: Yes.

"[The Prosecutor]: And then he told you that's until [V's] mother got home from work?

"[Morini]: That's correct."

Morini also testified that the defendant's hands were shaking during the interview and that, "[a]t that point," the defendant informed Morini that "he was born like that and that he had depression." The prosecutor asked Morini, "[n]ow, [that was] your first interview with him," to which Morini responded "[t]hat was our first interview. Yes." Morini then described the second interview, which occurred on December 22, 2015, explaining that she inquired again about the defendant's shaking

hands, and, this time, the defendant "said he believed it was Parkinson's disease."

The prosecutor highlighted Morini's testimony during closing argument, pointing out that, when the defendant "[met] with DCF . . . he says he watched [V] after school, and he would make sure she took her shower and did her homework. Then he meets with the police, and he says he watched [V] and her sister after school when he first meets with them. Why when he meets with the police does [he] say I was not alone with [V]? Then they interview him a second time. At that point, he acknowledges the fact he was alone with [V] when watching her." The prosecutor later commented that the defendant "knew what he was saying when he said I watched both kids, oh, wait, I was alone with her. So he goes back for the second interview twelve days later with the police. . . . And now he admits he in fact was alone with [V]." In contrast, in his interview with DCF, the defendant "always admit[ted] he was alone with [V]." The prosecutor encouraged the jury to "look at the defendant's statements" and argued that, "not only [were they] contradicted by [V], by [V's] mother, and her aunt, [they were] contradicted by [the defendant] himself: I'm not alone with her; I am alone with her . . . ."

In response, defense counsel argued that there were no discrepancies in the defendant's prior out-of-court statements to DCF and the police. Defense counsel pointed out that "[the defendant] says he watches both kids, that's true. But he also says he watches [V]. He already said that to DCF: I watch [V] alone. He's not hiding anything here."

During rebuttal, the prosecutor disagreed with defense counsel's characterization of the evidence, arguing that the defendant "admit[ted] he took [V] and watched her off the bus in the second interview with

[the] police. The first interview he said he watched her with her sister. Once again, ask why you would not want to acknowledge to the police that you're alone with your daughter if there was no reason that you would be concerned about being alone with your daughter." The prosecutor later remarked: "And when you hear dad didn't hide he was alone with [V] in that first interview, I disagree. And you listened to it, but my recollection of the testimony is when he first met with the police, he said he watched both of them. Then when they reinterview[ed] him, oh, yeah, I actually was alone with her." The prosecutor continued: "He tells the police in the first meeting he's watching two kids. Why would you be concerned about admitting you're alone with [V]?"

The record reflects that the defendant made contradictory statements to the police regarding whether he was home alone with V. Morini testified that, at first, the defendant told her that he watched V and her sister together, but, at "one point," the defendant disclosed that he was alone with V. The parties dispute the "point" at which the defendant's subsequent disclosure occurred—did the defendant admit to Morini during his first interview that he was home alone with V or did he wait until his second interview? Morini's testimony was ambiguous on this subject and was susceptible of more than one reasonable interpretation. It would have been reasonable and logical for the jury to infer that the defendant's disclosure that he spent time alone with V occurred during the first interview, given Morini's later testimony that "[t]hat was our first interview." It also would have been reasonable, albeit perhaps less logical, for the jury to infer that the defendant's disclosure occurred during the second interview and that Morini's reference to "our first interview" pertained solely to the defendant's contradictory explanations for his shaking hands.

"[A] prosecutor may properly comment on the credibility of a witness where . . . the comment reflects reasonable inferences from the evidence adduced at trial." (Internal quotation marks omitted.) *State* v. *Luster*, 279 Conn. 414, 438, 902 A.2d 636 (2006). The prosecutor's remarks regarding the timing of the defendant's disclosure that he was home alone with V were predicated on Morini's testimony and the reasonable inferences that could be drawn therefrom. Indeed, the prosecutor expressly informed the jury that he "disagreed" with defense counsel's characterization of the timing of the defendant's disclosure based on his "recollection of the testimony," to which the jury also had "listened . . . ." Furthermore, defense counsel did not object to the prosecutor's characterization of Morini's testimony, a fact that suggests that he did not perceive the prosecutor's remarks to be improper. See, e.g., *State* v. *Medrano*, 308 Conn. 604, 612, 65 A.3d 503 (2013) ("we continue to adhere to the well established maxim that defense counsel's failure to object to the prosecutor's argument when it was made suggests that defense counsel did not believe that it was [improper] in light of the record of the case at the time" (internal quotation marks omitted)).

In light of the ambiguity of the testimony, it would have been preferable for the prosecutor to phrase his argument differently and to say to the jury, for example, "I submit to you that you reasonably may infer, on the basis of Morini's testimony, that the defendant did not inform the police until his second interview that he was home alone with V." We are mindful, however, that, "[w]hen making closing arguments to the jury . . . [counsel] must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line . . . ." (Internal quotation marks omitted.) *State* v. *Ciullo*, supra, 314 Conn. 37. Having reviewed the entire

record, it is apparent to us that the prosecutor's remarks, although not phrased in the most artful manner, "invite[d] the jury to draw reasonable inferences from the evidence" and did not "invite sheer speculation unconnected to [the] evidence." *State* v. *Singh*, 259 Conn. 693, 718, 793 A.2d 226 (2002). We therefore conclude that the prosecutor's comments were not improper. See, e.g., *State* v. *Stevenson*, supra, 269 Conn. 586–88 (prosecutor's statement that defendant cooperated with police because " '[h]e figured he was the number one suspect anyway . . . and maybe he would get a better deal in court' " was not improper because it "was based on evidence in the record, and did not amount to mere speculation and baseless conjecture"); *State* v. *Ceballos*, 266 Conn. 364, 400–401, 832 A.2d 14 (2003) ("[w]e conclude that the state's attorney's comment about [the victim's] having suffered from delayed disclosure syndrome was not improper because it was an argument in support of an inference that could be drawn from evidence in the record").

The judgment is reversed only as to the sentence imposed on the four counts of sexual assault in the first degree, the sentence is vacated, and the case is remanded for resentencing; the judgment is affirmed in all other respects.

In this opinion the other justices concurred.