STATE OF CONNECTICUT *v.* DARIUS ARMADORE
(SC 20248)

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

Syllabus

Convicted of the crime of murder in connection with the shooting death of the victim, the defendant appealed. The defendant and a friend, T, had driven to a café, where the victim was fatally shot, and subsequently drove to a nightclub about twelve miles away. Another individual, G,

saw T and a man who matched the defendant's description enter the nightclub about fifteen to twenty minutes after G received a phone call informing him that the victim had been shot. The defendant claimed that he was at the nightclub at the time of the shooting. After oral argument before the Appellate Court but before that court released its decision in the present case, the United States Supreme Court decided *Carpenter* v. *United States* (138 S. Ct. 2206), in which the court held that the fourth amendment requires the government to obtain a warrant supported by probable cause before acquiring historical cell site location information (CSLI), which reveals a cell phone user's past physical movements. The Appellate Court thereafter summarily denied the defendant's motion for permission to file a supplemental brief to raise a new claim, premised on *Carpenter*, challenging the admission of certain CSLI records, which the police had obtained prior to the defendant's arrest. The CSLI records of the defendant's cell phone and the two cell phones T had with him on the night of the shooting were admitted into evidence at trial without objection. Relying on the CSLI records of T's phones, the state's expert testified that T's and the defendant's cell phones were located near the café at about the time of the shooting and near the nightclub shortly thereafter. The Appellate Court upheld the defendant's conviction, and the defendant, on the granting of certification, appealed to this court, claiming, inter alia, that the Appellate Court improperly had denied his motion for permission to file a supplemental brief. *Held*:

1. The defendant could not prevail on his claim that the Appellate Court improperly denied his motion for permission to file a supplemental brief after oral argument before that court so that he could raise an unpreserved claim premised on the new constitutional rule announced in *Carpenter*, as his claim failed under the fourth prong of *State* v. *Golding* (213 Conn. 233) because the Appellate Court's failure to permit the defendant to file a supplemental brief was harmless beyond a reasonable doubt: generally, an appellate court should grant a request for supplemental briefing when a party asks it to entertain an unpreserved claim premised on a newly announced constitutional rule in all but the clearest of situations in which the claim would fail under one of *Golding*'s four prongs, and principles of fairness and equity required the Appellate Court to exercise its discretion to grant the defendant's motion; nevertheless, the state sustained its burden of demonstrating that any claimed error was harmless, there having been significant evidence presented at trial that placed the defendant at the crime scene at the time of the shooting, including the historical CSLI records from T's two cell phones, which placed T at the café around the time of the shooting, T's testimony that he had the two cell phones throughout the night, admissions by both T and the defendant, to the police and at trial, that they were together that night, and testimony from other witnesses that they had seen a man fitting the defendant's description flee the scene of the shooting and enter a car that matched the appearance of the car T was

driving, and there having been significant evidence linking the defendant to the victim's murder, including DNA and ballistics evidence, and the defendant's statement to his girlfriend that he had shot someone on the night of the victim's murder; moreover, there was no merit to the defendant's claim that this court could not consider the CSLI records of T's cell phones in determining the strength of the state's case, as the defendant lacked standing to challenge the admission of T's CSLI records on the ground that such admission violated T's fourth amendment rights.

2. The trial court properly admitted G's testimony about a phone call that he had received from another individual informing him that the victim had been shot: the Appellate Court incorrectly determined that the defendant had not adequately preserved his claim that G's testimony constituted inadmissible hearsay because, although defense counsel objected when the prosecutor asked G what was said to G during the phone call without clarifying that the ground for the objection was hearsay, the state and the trial court were aware of the basis of the objection, and, thus, any failure by defense counsel to clarify the ground for the objection did not deprive the state and the trial court of fair notice of the defendant's claim; moreover, G's testimony was properly admitted as nonhearsay, as the caller's statements were not offered for their truth but, rather, to show their effect on G, specifically, that the phone call caused G to take certain actions that were relevant to establish the state's time line of events; furthermore, even if G's testimony about the call constituted inadmissible hearsay, its admission was harmless because, even if G had not been permitted to testify about what the caller told him, G's other testimony, to which defense counsel did not object, would have led a jury reasonably to infer that the victim had been shot prior to the defendant's and T's arrival at the nightclub, and because there was other evidence establishing the defendant's guilt, including the CSLI records of T's phones, which, coupled with the defendant's admission that he was with T on the night of the shooting, demonstrated that the defendant was near the café at the time of the shooting.

Argued October 20, 2020—officially released March 23, 2021*

Procedural History

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of New London and tried to the jury before *A. Hadden, J.*; verdict and judgment of guilty, from which the defendant appealed to this court; thereafter, the case was transferred to the Appellate Court,

* March 23, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

which denied the defendant's motions for permission to file a late motion for rectification and to file a supplemental brief; subsequently, the Appellate Court, *Lavine*, *Sheldon* and *Harper*, *Js.*, affirmed the judgment of the trial court, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Emily Graner Sexton, assigned counsel, with whom were *Julia K. Conlin*, assigned counsel, and, on the brief, *Matthew C. Eagan*, assigned counsel, *James P. Sexton*, assigned counsel, *Megan L. Wade*, assigned counsel, and *John R. Weikart*, assigned counsel, for the appellant (defendant).

James A. Killen, senior assistant state's attorney, with whom, on the brief, were *Michael L. Regan*, state's attorney, and *Paul J. Narducci*, supervisory assistant state's attorney, for the appellee (state).

Opinion

D'AURIA, J. In this certified appeal, we are again required to examine the effect of the United States Supreme Court's recent decision in *Carpenter* v. *United States*, U.S. , 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018), on a pending case. In *Carpenter*, the court held that, under the fourth amendment to the United States constitution, the government generally must obtain a warrant supported by probable cause before acquiring historical cell site location information (CSLI), which provides a comprehensive chronicle of a cell phone user's past physical movements.

The defendant, Darius Armadore, appeals from the Appellate Court's judgment affirming his conviction of murder, as either a principal or as an accessory, in violation of General Statutes §§ 53a-8 and 53a-54a (a). Specifically, he claims that the Appellate Court abused its discretion by denying him permission to file a supplemental brief to raise a new claim pursuant to *Carpenter*,

which was released while his appeal was pending before that court. He argues that the rule in *Carpenter* applies retroactively to pending cases, and, thus, his failure to raise this claim before the trial court or in his initial brief to the Appellate Court did not bar review. Additionally, he claims that the Appellate Court incorrectly determined that his hearsay claim regarding the testimony of a key state's witness, Eduardo Guilbert, was unpreserved.

We agree with the defendant that our courts should liberally grant motions seeking to file supplemental briefs to raise claims premised on new constitutional rules announced during the pendency of a case and that the Appellate Court should have granted his motion in the present case. Nevertheless, we conclude that any error was harmless because the defendant's *Carpenter* claim fails under the fourth prong of *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). Additionally, although we agree with the defendant that the Appellate Court incorrectly determined that he did not preserve his hearsay claim regarding Guilbert's testimony, we agree with the state that the trial court properly admitted the testimony as nonhearsay because it was offered to show its effect on the hearer and that, alternatively, any error was harmless. Accordingly, we affirm the Appellate Court's judgment.

The following facts, which the jury reasonably could have found from the evidence admitted at trial, and procedural history are relevant to our review of the defendant's claims. In December, 2006, Gerjuan Rainer Tyus was involved in an ongoing dispute with the victim, Todd Thomas, regarding a necklace that the victim's brother had given to Tyus but wanted returned. Tyus refused to return the necklace unless the victim paid him $10,000.

During the course of this dispute, on December 3, 2006, the victim, who was a passenger in a white Lexus registered to his wife, fired several gunshots with a .38 caliber firearm at Tyus, who was outside his apartment on Willetts Avenue in New London, striking him in the leg and the back. Tyus countered by firing five gunshots with a nine millimeter firearm at the victim. Five nine millimeter cartridge casings were recovered from the scene of the shooting. Later that day, Tyus was treated for his wounds at a hospital. The defendant, a close friend of Tyus, whom he considered to be a brother, later went to the hospital to receive news of Tyus' condition.[1] Although the defendant and Tyus were aware that the victim was the shooter, neither relayed this information to the police.

Following the Willetts Avenue shooting, on December 15, 2006, Tyus rented a silver-colored Chevrolet Impala. It was this vehicle that Tyus and the defendant used to travel to Boston, Massachusetts, at approximately 7 p.m. on December 22, 2006. While in Boston, the defendant and Tyus visited family and then picked up three women they wanted to bring back to Connecticut in the Impala. When one of the women refused to return with them, the defendant and Tyus returned to Connecticut with the other two women.

[1] At trial, Cindalee Torres, the mother of Tyus' son, testified that she also went to the hospital to check on Tyus and that, while there, overheard the defendant state that "we're gonna get them niggas . . . ." She also testified, however, that she never met or saw the defendant prior to that night in the hospital. On appeal to the Appellate Court, the defendant claimed that Torres improperly identified him as the speaker of this overheard statement for the first time in court in violation of *State* v. *Dickson*, 322 Conn. 410, 426, 141 A.3d 810 (2016), cert. denied, U.S. , 137 S. Ct. 2263, 198 L. Ed. 2d 713 (2017). The Appellate Court agreed, holding that the identification was improper but that the error was harmless. *State* v. *Armadore*, 186 Conn. App. 140, 156–58, 198 A.3d 586 (2018). The defendant did not seek certification to appeal as to this issue. Thus, for purposes of our review, we do not consider Torres' testimony that she heard the defendant make this statement.

Later that evening, at approximately 11 p.m., the victim arrived at Ernie's Café on Bank Street in New London. Shortly after midnight, while the victim stood outside the front entrance of Ernie's Café smoking a cigarette, he was shot in the head. A light-skinned African American male wearing a hooded sweatshirt was observed fleeing the scene of the crime to a municipal parking lot, where he entered the passenger side of a silver-colored vehicle that had been waiting there with its motor running. The vehicle immediately sped away. The victim was transported to Lawrence + Memorial Hospital in New London, where he was pronounced dead upon arrival.

After the shooting, the defendant and Tyus arrived at Bella Notte, a nightclub in Norwich, approximately twelve and one-half miles from Ernie's Café. At trial, the defendant asserted an alibi defense, testifying that he and Tyus were at Bella Notte at the time the victim was shot. Tracking information contained in records produced by their cell service providers, which were admitted into evidence without objection at trial, established that their three cell phones—Tyus had two cell phones in his possession and the defendant had one—had activated cell towers near New London minutes prior to the shooting. One of Tyus' cell phones activated a cell tower in New London near Ernie's Café approximately eight times in the minutes before and after a 911 call was received reporting the shooting. Additionally, the cell phones activated cell towers north of New London, toward Norwich, from approximately 12:42 to 12:44 a.m. and activated a cell tower farther north near Bella Notte from approximately 1:12 to 1:55 a.m. A few hours later, Tyus dropped the defendant off at the apartment the defendant shared with his then girlfriend, Ritchae Ebrahimi. At trial, Ebrahimi testified that, after the defendant arrived at the apartment, they argued

over his having been with other women that night, and that he told her he had shot someone that night.

In addition to the historical CSLI, Tyus and a man matching the description of the defendant were seen entering Bella Notte by Guilbert while Guilbert was in the nightclub's bar area. Guilbert testified that the two men arrived after he received a phone call informing him that the victim had been shot. Guilbert was not sure of the precise time those events occurred, initially telling the police that it was at about 11 p.m., which would have been before the shooting occurred at Ernie's Café. See part II of this opinion.

Additionally, the police recovered one nine millimeter cartridge casing from the scene of the December 23, 2006 shooting. Ballistics evidence showed that this cartridge casing had been fired from the same firearm as the five nine millimeter cartridge casings that were recovered from the scene of the December 3, 2006 shooting on Willetts Avenue.

In November, 2012, the defendant and Tyus were arrested and charged with murder in violation of § 53a-54a.[2] The state thereafter filed long form informations charging the defendant and Tyus each with murder, both as a principal and as an accessory, in violation of §§ 53a-8 and 53a-54a (a). The state subsequently filed a motion to join the cases for trial, which the trial court granted over the objections of the defendant and Tyus. The defendant and Tyus were tried together before a single jury, which returned guilty verdicts as to both men without specifying whether the verdicts were based on principal or accessorial liability. The court

[2] Both the defendant and Tyus also were charged with conspiracy to commit murder in violation of General Statutes §§ 53a-48 and 53a-54a, but those charges were later dismissed on the ground that they were barred by the statute of limitations.

sentenced the defendant to a term of sixty years of incarceration.

The defendant appealed from his conviction to this court, which transferred the appeal to the Appellate Court. See General Statutes § 51-199 (c); Practice Book § 65-1.[3] Before the Appellate Court, the defendant claimed that "(1) . . . the trial court abused its discretion in granting the state's motion to join his case with the case of his codefendant . . . Tyus; (2) . . . he was deprived of his constitutional right to confrontation when the state's firearms examiner was permitted to testify regarding the findings of another firearms examiner, who was deceased and thus unavailable to testify at trial; (3) . . . he was deprived of a fair trial when he was identified for the first time in court by Cindalee Torres without a prior nonsuggestive identification; and (4) . . . the court abused its discretion by admitting certain hearsay statements into evidence." *State* v. *Armadore*, 186 Conn. App. 140, 142, 198 A.3d 586 (2018). After oral argument before the Appellate Court, the United States Supreme Court released its decision in *Carpenter*.

Approximately six weeks after the release of the *Carpenter* decision but prior to the Appellate Court's release of its decision in this case, the defendant moved in the Appellate Court for permission to file a supplemental brief to raise a new claim, premised on the new rule in *Carpenter*, challenging the admission of his historical CSLI, which was obtained through an ex parte order, along with the related testimony of James J. Wines, the state's expert in historical CSLI analysis. The defendant also moved for permission to file a motion for rectification with the trial court to have the ex parte order marked as a court exhibit because it was not

[3] Tyus has filed a separate appeal, which is pending in this court under Docket No. SC 20462.

introduced or admitted at trial. The Appellate Court summarily denied both motions.

The Appellate Court affirmed the trial court's judgment of conviction,[4] and the defendant sought certification to appeal to this court, which we granted, limited to the following issues: (1) "Did the Appellate Court properly deny the defendant's motion to file a late motion for rectification and the defendant's motion for permission to file a supplemental brief, which would have allowed the defendant to present an issue before the Appellate Court that the defendant claims is controlled by the retroactive application of [*Carpenter*]?" And (2) "Did the Appellate Court properly decline to review the defendant's evidentiary claim on the basis that it was not properly preserved?"[5] *State* v. *Armadore*, 330 Conn. 965, 200 A.3d 188 (2019). Prior to the parties' filing their briefs, this court sua sponte ordered them to address the merits of the defendant's *Carpenter* claim in addition to whether the Appellate Court properly denied the defendant's motion for permission to file a supplemental brief on the *Carpenter* issue. After oral argument before this court, we sua sponte ordered the

[4] The Appellate Court held that (1) the trial court did not abuse its discretion by granting the state's motion to join the defendant's trial with that of Tyus, (2) the defendant's constitutional right to confrontation was not violated when a state firearms examiner testified about the findings and conclusions made by another firearms examiner who was unavailable to testify, (3) although the defendant was improperly identified for the first time in court by Torres as the speaker of a statement she overheard at the hospital where she went to check on Tyus after he had been shot, this error was harmless; see footnote 1 of this opinion; and (4) the defendant's general objection to the alleged hearsay testimony of Guilbert was insufficient to preserve his claim for review. See *State* v. *Armadore*, supra, 186 Conn. App. 145, 151, 156, 158, 160.

[5] We declined to grant the defendant certification to appeal as to whether the trial court violated his right to confrontation by admitting expert testimony from a state firearms examiner; see footnote 4 of this opinion; and whether this court should adopt the doctrine of cumulative error. The defendant did not seek certification to appeal on the issue of whether the trial court improperly granted the state's motion to join his trial with that of Tyus.

parties to file additional supplemental briefs on the issue of whether this court could consider historical CSLI relating to Tyus' two cell phones in assessing harmless error under *Golding*'s fourth prong. We will present additional facts and procedural history as required.

I

The defendant first claims that the Appellate Court improperly denied his motion for permission to file a supplemental brief after oral argument in that court so that he could raise an unpreserved claim premised on the new constitutional rule announced in *Carpenter*. Specifically, he argues that, because the rule announced in *Carpenter* is a new constitutional rule, it applies to all pending cases, regardless of whether the claim was preserved at trial or included in his initial brief on appeal, and, thus, the Appellate Court's failure to review the claim was "a per se abuse of discretion . . . ." The state responds that, although an unpreserved constitutional claim may be reviewed under *Golding*, the defendant still had to comply with the rules governing appellate procedure, regardless of the rules regarding retroactivity, and, thus, he abandoned his *Carpenter* claim when he failed to raise it in his initial brief in the Appellate Court. According to the state, the defendant could raise his abandoned *Carpenter* claim only if he could establish that the new constitutional rule in *Carpenter* overruled clearly established precedent, thereby rendering his procedural default excusable. The state contends that, because case law prior to *Carpenter* did not prohibit the defendant from seeking to suppress his historical CSLI under the fourth amendment, he cannot overcome his procedural default.

Before addressing this claim, we must review the pertinent facts and procedural history. Prior to the defendant's arrest, Detective Franklin S. Jarvis of the

New London Police Department prepared ex parte orders pursuant to General Statutes § 54-47aa (b), which requires only "a reasonable and articulable suspicion that a crime has been or is being committed," to obtain historical CSLI associated with the defendant's cell phone and Tyus' two cell phones, from the day of the murder to the day after the murder. Detective Richard Curcuro of the New London Police Department subsequently received those records. The records were then sent to Wines, an agent with the Federal Bureau of Investigation's cellular analysis survey team, who analyzed the records and prepared a slideshow presentation detailing his analysis. Neither the defendant nor Tyus sought to suppress these records before trial, at which the CSLI, the slideshow, and Wines' expert testimony were admitted without objection.[6]

This evidence showed that all three cell phones activated cell towers in or near New London from between approximately 12:04 and 12:15 a.m., within minutes of when a 911 call was received at 12:09 a.m. reporting the shooting. Most importantly, one of Tyus' cell phones activated a cell tower in New London close to Ernie's Café eight times from approximately 12:04 to 12:14 a.m. Additionally, this evidence showed that the cell phones activated cell towers north of New London from approximately 12:42 to 12:44 a.m. and activated a cell tower

[6] We note that there was an objection to the labeling on the printout of Wines' slideshow presentation that identified the defendant by name in relation to the cell phone numbers from which calls were made and received on the night of the shooting. The trial court sustained the objection, and the state had Wines redact the defendant's name insofar as it concerned to whom the cell phone numbers were registered or by whom they were used. The printout thus showed only which cell phone numbers were activated and where and when they were activated. However, there was other evidence admitted at trial that established that one of these phone numbers was connected to a cell phone registered to the defendant and that the other two phone numbers were connected to cell phones registered to or used by Tyus.

farther north near Bella Notte between approximately 1:12 and 1:55 a.m.

The jury found the defendant guilty on November 19, 2015. The trial court sentenced him on January 15, 2016, after denying his postverdict motions for acquittal and for a new trial, but granted his request for a fee waiver and appointment of appellate counsel. The defendant appealed on September 2, 2016, filed his Appellate Court reply brief on March 7, 2018, and that court heard oral argument on May 15, 2018.

The defendant did not raise a claim in his briefs to the Appellate Court challenging the admission of his historical CSLI. The United States Supreme Court released its decision in *Carpenter* on June 22, 2018, after oral argument in the Appellate Court in the present case. On August 3, 2018, the defendant moved for permission to file a supplemental brief in the Appellate Court to raise a new claim premised on the new constitutional rule in *Carpenter*. The Appellate Court summarily denied the motion on August 27, 2018, and, on November 13, 2018, released its decision, affirming the defendant's conviction.

In addressing this claim, it is necessary for us to clarify the standard governing our appellate courts' exercise of discretion under these circumstances. We determine that the policies underlying the requirement that new constitutional rules apply retroactively to pending cases weigh in favor of our courts' liberally permitting supplemental briefing to raise unpreserved claims premised on those new constitutional rules when they are announced during the pendency of a case. Thus, as a general rule, there is a presumption in favor of granting such motions. Only if it is clear that the claim would fail under one of the four prongs of *Golding*, thereby eliminating the need for briefing, should an appellate court deny a request for supplemental briefing

under those circumstances. Nevertheless, in the present case, although we conclude that the Appellate Court abused its discretion by denying the defendant's motion for permission to file a supplemental brief, we determine that this error was harmless because the defendant's *Carpenter* claim fails under the fourth prong of *Golding*.

A

Our rules of practice do not specifically discuss motions for permission to file a supplemental brief. Pursuant to Practice Book § 60-2, however, an appellate court may, "on its own motion or upon motion of any party . . . (5) order that a party for good cause shown may file a late appeal, petition for certification, *brief or any other document* unless the court lacks jurisdiction to allow the late filing . . . ." (Emphasis added.) Additionally, Practice Book § 60-3 provides that, "[i]n the interest of expediting decision, or for other good cause shown, the court in which the appellate matter is pending may suspend the requirements or provisions of any of these rules on motion of a party or on its own motion and may order proceedings in accordance with its direction."

We previously have not articulated a standard of review for an appellate court's decision to grant or deny a motion for permission to file a supplemental brief. This gap in our law is hardly surprising. Although it would be an overstatement to suggest that supplemental briefing is routinely granted or ordered in appellate cases, such briefs are filed with some regularity, both before and after oral argument and upon both the court's order or a party's motion. See, e.g., *State* v. *White*, 334 Conn. 742, 769 and n.14, 224 A.3d 855 (2020) (granting parties permission to file supplemental briefs to address effect of decision released after initial briefs filed); *State* v. *McCleese*, 333 Conn. 378, 411 n.15, 215

A.3d 1154 (2019) (granting defendant's request to file supplemental brief to address effect of decision released after defendant filed initial brief); *Petrucelli* v. *Meriden*, 198 Conn. App. 838, 846 n.7, 234 A.3d 981 (2020) (court sua sponte ordered supplemental briefing after oral argument); *Nonhuman Rights Project, Inc.* v. *R.W. Commerford & Sons, Inc.*, 197 Conn. App. 353, 359, 231 A.3d 1171 (granting petitioner's request for supplemental briefing), cert. denied, 335 Conn. 929, 235 A.3d 525 (2020). Despite this regularity, our research does not reveal any cases in which a party has challenged an appellate court's decision not to permit supplemental briefing.

We have recognized repeatedly that our rules of practice vest broad authority in the Appellate Court for the management of its docket. See, e.g., *Novak* v. *Levin*, 287 Conn. 71, 80, 951 A.2d 514 (2008). Additionally, this court has applied the abuse of discretion standard of review to the Appellate Court's rulings under Practice Book § 60-2. See id. (applying abuse of discretion standard in reviewing decision to grant late motion for reconsideration, which was included within scope of "any other document" under Practice Book (2006) § 60-2 (6) (now § 60-2 (5)); *Alliance Partners, Inc.* v. *Voltarc Technologies, Inc.*, 263 Conn. 204, 210, 820 A.2d 224 (2003) (Appellate Court has discretion to determine whether party has established good cause to file late appeal under Practice Book (2003) § 60-2 (6) (now § 60-2 (5)); *Ramos* v. *Commissioner of Correction*, 248 Conn. 52, 59, 61, 727 A.2d 213 (1999) (Appellate Court's decision to deny motion for permission to file late appeal under Practice Book (1999) § 60-2 (6) (now § 60-2 (5)) subject to abuse of discretion standard of review). A supplemental brief is similarly a document filed out of time, subject to the good cause standard, and, therefore, a ruling on its filing is appropriately reviewed for abuse of discretion.

To determine whether the Appellate Court appropriately exercised this discretion in the present case, we must first review the reason that court was asked to grant supplemental briefing—the United States Supreme Court's decision in *Carpenter*—along with our recent decision in *State* v. *Brown*, 331 Conn. 258, 261–62, 202 A.3d 1003 (2019), in which we applied *Carpenter*. "In *Carpenter*, the court considered whether the state conducts a search under the [f]ourth [a]mendment when it accesses historical cell phone records that provide a comprehensive chronicle of the user's past movements. . . . The court answered that question in the affirmative and held that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI. . . . Accordingly, the state must generally obtain a warrant supported by probable cause before acquiring such records." (Citations omitted; internal quotation marks omitted.) Id., 272.

Prior to the release of the decision in *Carpenter*, the defendant in *Brown* was arrested and charged with numerous offenses, including burglary, after the police obtained his historical and prospective CSLI pursuant to multiple ex parte orders. Id., 262, 268–69. Prior to trial, the defendant filed motions to suppress the CSLI on the ground that the ex parte orders violated both § 54-47aa and his rights under the fourth amendment. Id., 269. Reaching only the statutory grounds for the motions, the trial court granted the defendant's motions, holding that the ex parte orders violated § 54-47aa and that suppression was the proper remedy. Id. "Following the granting of the defendant's motions to suppress, the state entered nolles prosequi on all of the charges against the defendant in the pending cases. In response, the defendant made an oral motion to dismiss all charges, which the trial court granted." Id., 270–71. The state then appealed to this court. "In their original briefs

and arguments to this court, the parties focused primarily on whether the trial court properly granted the defendant's motions on the basis of its conclusion that the state obtained the prospective and historical CSLI in violation of § 54-47aa, and that suppression of the records was the appropriate remedy." Id., 263. "Following oral argument, however, this court stayed the appeal pending the decision of the United States Supreme Court in *Carpenter* and ordered the parties to submit supplemental briefs concerning the relevance of that decision to [the] appeal." Id.

After the decision in *Carpenter* was released, this court released its decision in *Brown*, in which we applied the new rule in *Carpenter* and concluded that the CSLI had been obtained illegally. Id., 271. Specifically, as to the ex parte order authorizing the disclosure of approximately three months of the defendant's historical CSLI,[7] we concluded that the order violated his fourth amendment rights because the records were obtained without a warrant. Id., 273. Next, we concluded that the trial court properly determined that suppression was the appropriate remedy. Id., 277.

Although, in *Brown*, this court applied the new rule from *Carpenter* retroactively to a pending case, we did not need to address any preservation issue because the defendant had moved to suppress the CSLI prior to trial. Additionally, we did not address the effect, if any, of a defendant's failure to raise a *Carpenter* claim in his initial brief on appeal because the defendant in *Brown* had prevailed in the trial court on the statutory claim and argued in his initial brief, as an alternative ground for affirming the trial court's judgment, that the

[7] As to the ex parte orders concerning the defendant's prospective CSLI, we held that "[t]he state's concession that the prospective orders were issued in violation of § 54-47aa resolves that question for the two prospective orders." *State* v. *Brown*, supra, 331 Conn. 271.

CSLI was obtained without a warrant in violation of the fourth amendment.

Yet, although the new constitutional rule in *Carpenter* was not discussed in detail in *Brown*, it is clear that we applied the rule retroactively to that pending case on appeal. In *Griffith* v. *Kentucky*, 479 U.S. 314, 322–23, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987), the United States Supreme Court had explained that, "at a minimum, all defendants whose cases [are] still pending on direct appeal at the time of [a law changing] decision should be entitled to invoke the new rule. . . . [F]ailure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication. First . . . after we have decided a new rule in the case selected, the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review. . . . If we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is difficult to see why we should so adjudicate any case at all. . . . Second, selective application of new rules violates the principle of treating similarly situated defendants the same. . . . [T]he problem with not applying new rules to cases pending on direct review is the actual inequity that results when the [c]ourt chooses which of many similarly situated defendants should be the chance beneficiary of a new rule." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) Id.

This court repeatedly has recognized and applied the *Griffith* rule regarding the retroactive application of new constitutional rules to pending cases. See, e.g., *State* v. *Dickson*, 322 Conn. 410, 449–51, 141 A.3d 810 (2016) (applying new rule regarding first time, in-court identifications to pending cases under *Griffith*), cert. denied, U.S. , 137 S. Ct. 2263, 198 L. Ed. 2d 713 (2017); *State* v. *Sanseverino*, 287 Conn. 608, 620 n.11,

949 A.2d 1156 (2008) (applying new rule in *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008), to pending cases), overruled in part on other grounds by *State* v. *DeJesus*, 288 Conn. 418, 953 A.2d 45 (2008), and superseded in part after reconsideration, 291 Conn. 574, 969 A.2d 710 (2009); *State* v. *Coleman*, 38 Conn. App. 531, 536, 662 A.2d 150 ("[The] Supreme Court announced a new rule under our state constitution when it declared that the [balancing test enunciated in *State* v. *Asherman*, 193 Conn. 695, 478 A.2d 227 (1984), cert. denied, 470 U.S. 1050, 105 S. Ct. 1749, 84 L. Ed. 2d 814 (1985), which requires the weighing of the reasons for the unavailability of evidence against the degree of prejudice to the defendant caused by that unavailability] must be used in cases involving a claim of violation of due process because of the loss or destruction of physical evidence. Because direct review is pending as to the defendant [under *Griffith*], it is mandated that the new rule be applied in this case."), cert. denied, 235 Conn. 906, 665 A.2d 903 (1995). In these cases, however, there was no discussion of how the retroactivity rule in *Griffith* interacted with preservation and procedural requirements, which were not at issue in these cases. Rather, in these cases, the court merely had to apply the new constitutional rule to a preexisting, properly raised claim.

Additionally, when a new constitutional rule has been announced after the parties have filed their briefs on appeal, consistent with the principles underlying the *Griffith* retroactivity rule, this court has granted parties' motions for permission to file a supplemental brief to analyze the new rule at issue. See *State* v. *Ryerson*, 201 Conn. 333, 337, 339, 514 A.2d 337 (1986). In fact, our Appellate Court has recognized that supplemental briefing is most common and appropriate in this circumstance: "Perhaps most frequently, supplemental briefing is ordered when a decision in another case or a

change in law intervenes between the time of initial briefing and [an] appellate court's decision." *Gosselin* v. *Gosselin*, 110 Conn. App. 142, 153 n.4, 955 A.2d 60 (2008). In these cases, however, the litigant preserved the issue at trial and/or raised it in his initial brief on appeal; thus, the supplemental briefing on the new constitutional rule related back to a preexisting claim. See *State* v. *Ryerson*, supra, 337.

The application of the *Griffith* retroactivity rule is more complicated when the claim premised on the new rule is unpreserved. This court and the Appellate Court, both before and after *Griffith*, have allowed defendants to raise claims on appeal that were *unpreserved* at trial but were premised on a new constitutional rule that applied retroactively to the pending case.[8] Prior to 1989,

[8] We note that there is some debate among courts in some jurisdictions regarding whether the retroactivity rule in *Griffith* is meant to trump state appellate procedural rules. Some courts have held that this rule does not trump procedural rules, and, thus, a defendant may not raise a claim premised on a new constitutional rule—even if his case was pending at the time the rule was announced—if he failed to raise the claim before the trial court or in his initial appeal. See *United States* v. *McCrimmon*, 443 F.3d 454, 461–63 (5th Cir.) (defendant failed to raise claim on direct appeal), cert. denied, 547 U.S. 1120, 126 S. Ct. 1931, 164 L. Ed. 2d 679 (2006); see also *United States* v. *Levy*, 391 F.3d 1327, 1332 (11th Cir. 2004) (Hull, J., concurring in the denial of rehearing en banc) (request for rehearing en banc was denied because defendant failed to comply with rule requiring that all issues must be raised in initial appellate brief).

Other courts have permitted review under the federal plain error doctrine embodied in Fed. R. Crim. P. 52 (b) or rejected arguments that a defendant " 'waived' a claim based on a then-recent Supreme Court decision by failing to object at trial or advance the claim in his initial brief." *United States* v. *Levy*, supra, 1342 (Tjoflat, J., dissenting from the denial of rehearing en banc); id., 1342–43 (Tjoflat, J., dissenting from the denial of rehearing en banc) (discussing cases in which claims were considered under plain error standard); see also *United States* v. *Pree*, 408 F.3d 855, 874 (7th Cir. 2005) (claim premised on new rule announced after defendant filed original briefs on appeal reviewed for plain error despite defendant's having failed to raise claim at trial or in original appellate briefs); *United States* v. *Delgado*, 256 F.3d 264, 280 (5th Cir. 2001) (plain error review afforded claim raised pursuant to new rule announced in *Apprendi* v. *New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), when claim was first made in supplemental brief after defendant failed to object at sentencing or to raise issue in initial

we recognized as an exception to our preservation requirement "two situations that may constitute 'exceptional circumstances' such that newly raised claims can and will be considered by this court. The first is . . . where a new constitutional right not readily foreseeable has arisen between the time of trial and appeal. . . . The second 'exceptional circumstance' may arise where the record adequately supports a claim that a litigant has clearly been deprived of a fundamental constitutional right and a fair trial." (Citation omitted.) *State* v. *Evans*, 165 Conn. 61, 70, 327 A.2d 576 (1973); see *State* v. *Vars*, 154 Conn. 255, 269–72, 224 A.2d 744 (1966) (holding that new constitutional claims need not be preserved at trial to be raised on appeal but not addressing whether such claims must be raised in initial brief on appeal).

In 1989, in *State* v. *Golding*, supra, 213 Conn. 239–40, "we reformulated the guidelines for appellate review of unpreserved constitutional claims articulated in [*Evans*]," adopting the now familiar four part *Golding* standard. *State* v. *Ortiz*, 217 Conn. 648, 659, 588 A.2d

appellate brief); *United States* v. *Cernobyl*, 255 F.3d 1215, 1216, 1218 (10th Cir. 2001) (same); cf. *United States* v. *Rogers*, 118 F.3d 466, 471 (6th Cir. 1997) (claim failed to meet requirements for review of plain error).

Thus, courts in some jurisdictions have held that a defendant's failure to preserve a *Carpenter* claim at trial prevents review of that claim, despite the fact that the new rule was not announced until after the defendant's trial but while the case remained pending. See *State* v. *Lewis*, Docket Nos. A-2411-15T3, A-2550-15T1 and A-2551-15T3, 2019 WL 149907, *6 (N.J. App. Div. January 7, 2019) (declining to review unpreserved *Carpenter* claim even though appeal was pending when *Carpenter* was released), cert. denied, 238 N.J. 432, 211 A.3d 723 (2019), and cert. denied, 238 N.J. 433, 211 A.3d 724 (2019), and cert. denied, 238 N.J. 437, 211 A.3d 726 (2019); *People* v. *Crum*, 184 App. Div. 3d 454, 455, 126 N.Y.S.3d 7 (holding that failure to preserve *Carpenter* claim at trial precluded appellate review even though *Carpenter* was decided after defendant's conviction), appeal denied, 35 N.Y.3d 1065, 152 N.E.3d 1206, 129 N.Y.S.3d 404 (2020).

In light of this court's *Golding* jurisprudence, which permits review of unpreserved constitutional claims, we need not join the fray to determine whether *Griffith* was intended to trump state procedural rules.

127 (1991). Under *Golding*, a party's failure to preserve a constitutional claim before the trial court does not prevent review as long as the record is adequate for review and the claim is not waived.[9] See *State* v. *Fabricatore*, 281 Conn. 469, 482, 915 A.2d 872 (2007) (waived constitutional claims are not reviewable under third prong of *Golding*). Nevertheless, the state argues that the defendant is not entitled to review of his unpreserved *Carpenter* claim unless it was unforeseeable at the time of trial.[10] The state's argument presumes that the first exceptional circumstance articulated in *Evans* remains the standard that is applicable when a defendant seeks to raise an unpreserved constitutional claim premised on a new constitutional rule. This is incorrect.

It is true that, in a footnote in *Golding*, this court explained that, only the second, not the first, excep-

[9] The state does not argue that the defendant waived his unpreserved *Carpenter* claim under *Golding*'s third prong. See, e.g., *State* v. *Foster*, 293 Conn. 327, 337–38, 977 A.2d 199 (2009) ("For certain fundamental rights, the defendant must personally make an informed waiver. . . . For other rights, however, waiver may be effected by action of counsel [such as consenting to or expressing satisfaction with the ruling at issue]." (Internal quotation marks omitted.)).

[10] As part of this argument, the state contends that, because the defendant failed to raise a *Carpenter* claim in his initial appeal, the claim is abandoned and that, under our procedural default rule, he has no right to review unless he establishes that prior law made the claim unavailable to him. See *Hinds* v. *Commissioner of Correction*, 321 Conn. 56, 71, 136 A.3d 596 (2016) (discussing procedural default standard applied in habeas corpus cases); see also *United States* v. *David*, 83 F.3d 638, 644–45 (4th Cir. 1996) (as exception to procedural default rule, defendant may raise unpreserved claim based on new constitutional rule if claim would have been implausible before new rule).

The state appears to conflate our procedural default rule and the first exceptional circumstance articulated under *Evans*. To the extent that the state conflates these doctrines, as we explain in this opinion, the *Golding* standard fully replaced the *Evans* standard, and, thus, to be entitled to *Golding* review, the defendant is not required to establish that his unpreserved constitutional claim was not readily foreseeable. To the extent that the state attempts to apply the procedural default rule to the circumstances of this case, we note that this court normally applies the procedural default rule on collateral review. We have been unable to find any cases in which we have applied this rule on direct review, and, thus, we decline to do so now.

tional circumstance stated in *Evans* was at issue in that case. See *State* v. *Golding*, supra, 213 Conn. 239 n.8. We did not indicate, however, that the new standard applied *only* to the second exceptional circumstance but, instead, stated that we were articulating "guidelines designed to facilitate a less burdensome, more uniform application of the present *Evans* standard in future cases involving alleged constitutional violations that are raised for the first time on appeal." Id., 239. We made the *Golding* standard applicable to *all* future cases involving alleged constitutional violations, not just to future cases raising constitutional violations pursuant to the second exceptional circumstance of *Evans*. Thus, the standard articulated in *Golding* fully replaced the exceptional circumstances standard articulated in *Evans*.

We recognize, however, that there has been apparent confusion over whether the *Golding* standard applies only to the second exceptional circumstance articulated in *Evans* and, thus, whether the *Evans* standard remains for unpreserved constitutional claims premised on new constitutional rules announced during the pendency of a case. See *State* v. *Shinn*, 47 Conn. App. 401, 408–409, 704 A.2d 816 (1997) (although defendant asserted that unpreserved claim, which was based on new rule announced while case was pending, was reviewable under both *Golding* and *Evans* standards, court reviewed claim under *Golding* without addressing *Evans*), cert. denied, 244 Conn. 913, 713 A.2d 832 (1998), and cert. denied, 244 Conn. 914, 713 A.2d 833 (1998); id., 419 (*Foti*, *J.*, dissenting) (stating that defendant argued that his claim satisfied first exceptional circumstance in *Evans*); see also *State* v. *Correa*, 185 Conn. App. 308, 322 and 322–23 n.10, 197 A.3d 393 (2018) (holding that unpreserved claim based on new rule announced in *State* v. *Kono*, 324 Conn. 80, 152 A.3d 1 (2016), was reviewable under first two prongs of *Golding* but failed

to satisfy third prong, and that claim would fail for same reasons under *Evans* exception for new constitutional rules that were not readily foreseeable), cert. granted, 330 Conn. 959, 199 A.3d 19 (2019); cf. *State* v. *Adams*, 139 Conn. App. 540, 545–46, 56 A.3d 747 (2012) ("there is no basis in our case law for the proposition that, following *Golding*, *Evans* provides an independent or distinct avenue for review for unpreserved claims of error"), cert. denied, 308 Conn. 928, 64 A.3d 121 (2013); *State* v. *Clark*, 48 Conn. App. 812, 827 n.13, 713 A.2d 834 ("[b]ecause *Golding* encompasses the exceptional circumstances of *Evans*, it is not necessary for us to review the defendant's claims under *Evans*"), cert. denied, 245 Conn. 921, 717 A.2d 238 (1998). To the extent that *Golding* leaves any doubt, we clarify that the *Golding* standard fully replaced the *Evans* standard. This is the only rational reading of *Golding* for three reasons.

First, as explained previously, the plain language of our opinion in *Golding* makes clear that this court intended to replace completely the *Evans* standard with a more uniform standard that would apply to *all* unpreserved claims of constitutional violations. Second, replacing the *Evans* standard with the *Golding* standard is in conformance with the policies underlying the retroactivity rule in *Griffith*. The *Griffith* rule would be rendered practically meaningless if it applied only when a claim premised on the new rule had been preserved at trial, a challenging—albeit not impossible—task when the new constitutional rule did not exist. Third, under the *Golding* standard, unpreserved constitutional claims premised on settled law—which are clearly foreseeable—are granted review as long as the record is adequate. It would be illogical to afford review to those claims, but not to unpreserved constitutional claims premised on new constitutional rules, regardless of whether the new rule was foreseeable.

This reading of *Golding* is consistent with this court's and the Appellate Court's application of *Golding* under these circumstances. Since *Golding*, when a new constitutional rule has been announced after a defendant's trial, but while his case remains pending, the Appellate Court has allowed the defendant to raise an unpreserved claim that was premised on the new rule. See *State* v. *Correa*, supra, 185 Conn. App. 322–23 and n.10 (holding that unpreserved claim based on new rule in *State* v. *Kono*, supra, 324 Conn. 80, was reviewable under first two prongs of *Golding* but failed under third prong); *State* v. *William L.*, 126 Conn. App. 472, 480, 11 A.3d 1132 ("new constitutional claims are reviewable under [*Golding*]"), cert. denied, 300 Conn. 926, 15 A.3d 628 (2011); *State* v. *Shinn*, supra, 47 Conn. App. 408–409 (unpreserved claim based on new rule announced while case was pending was reviewable under *Golding*).[11]

We note, however, that, in cases in which an appellate court has reviewed under *Golding* an unpreserved claim

[11] Although none of these cases explicitly addresses whether the new rule at issue had to be "not readily foreseeable" to entitle a litigant to review under *Golding*, two of these cases involved unpreserved claims that were at least arguably foreseeable. See *State* v. *Correa*, supra, 185 Conn. App. 322–23 n.10 (unpreserved claim based on recent rule announced in *State* v. *Kono*, supra, 324 Conn. 93, which did not reverse any established precedent but, rather, followed existing case law from United States Court of Appeals for Second Circuit); *State* v. *Shinn*, supra, 47 Conn. App. 408–409 (affording *Golding* review to unpreserved claim, which was based on new rule that arguably was not unforeseeable or that applied established rule to new set of facts); *State* v. *Shinn*, supra, 419–20 (*Foti*, *J.*, dissenting) (concluding that, contrary to defendant's claim, new constitutional right was not created while his case was pending and that right that defendant claimed was violated was readily foreseeable to him).

We note that, although this court granted certification to appeal in *Correa* on the issue of whether, under *Kono*, article first, § 7, of the Connecticut constitution prohibits the police from conducting a warrantless canine sniff of the exterior door to a motel room for the purpose of detecting the presence of illegal drugs inside the room; see *State* v. *Correa*, 330 Conn. 959, 959–60, 199 A.3d 19 (2019); no party challenges the applicability of *Golding* to the unpreserved claim in *Correa*.

premised on a new constitutional rule, the defendant raised the issue in the initial brief on appeal, which the defendant did not do here. See *State* v. *William L.*, supra, 126 Conn. App. 480; cf. *State* v. *Vars*, supra, 154 Conn. 269–72. The state concedes that, if the defendant had done so, he would have been entitled to review under *Golding*, as long as the record was adequate.

Less clear is how the rule in *Griffith* interacts with our rules of appellate procedure that deem a claim abandoned if it is not raised in a party's initial brief on appeal. See *State* v. *Elson*, 311 Conn. 726, 766, 91 A.3d 862 (2014) ("to receive review, a claim must be raised and briefed adequately in a party's principal brief, and . . . the failure to do so constitutes the abandonment of the claim"); *State* v. *Thompson*, 98 Conn. App. 245, 248, 907 A.2d 1257 ("[o]ur practice requires an appellant to raise claims of error in his original brief" (internal quotation marks omitted)), cert. denied, 280 Conn. 946, 912 A.2d 482 (2006). A claim otherwise reviewable under *Golding* may be abandoned if it is improperly briefed. Although, in *Evans*, this court stated that our procedural rules "must yield to the authority" of new constitutional rules if, "at the time of trial, [the claim] appeared to lack semblance of merit because it was clearly contrary to settled state law," thereby excusing any noncompliance with procedural rules; *State* v. *Evans*, supra, 165 Conn. 67–68; it is not clear whether an unpreserved claim premised on a new constitutional rule that arguably was foreseeable must satisfy our appellate procedural rules.

Although, generally, we are not bound to review claims that were not raised in a party's initial brief on appeal, "[w]e have never held . . . that we are precluded from doing so." *State* v. *Joyce*, 229 Conn. 10, 17, 639 A.2d 1007 (1994). Rather, appellate courts have discretion to consider a claim that was not raised in a party's initial brief, as long as "concerns regarding unfair surprise and inadequate argumentation can be

alleviated by an order requiring the parties to file supplemental briefs." *State* v. *Elson*, supra, 311 Conn. 766. This is consistent with the discretion our appellate courts have to suspend appellate procedural rules for good cause and to permit supplemental briefing of a claim that was not raised in the initial brief on appeal. See Practice Book §§ 60-2 and 60-3. Thus, both this court and the Appellate Court have exercised this discretion to permit supplemental briefing of a claim that was not raised initially on appeal when that claim was premised on a new constitutional rule announced during the pendency of the appeal. See *State* v. *Hampton*, 293 Conn. 435, 457–58, 988 A.2d 167 (2009) (permitting defendant to file supplemental brief raising new claim in light of new constitutional rule announced in *Salamon*, which was released after defendant filed initial brief on appeal); *State* v. *Sanders*, 54 Conn. App. 732, 743, 738 A.2d 674 (permitting defendant to file supplemental brief raising unpreserved claim in light of new constitutional rule announced in *State* v. *Schiappa*, 248 Conn. 132, 728 A.2d 466, cert. denied, 528 U.S. 862, 120 S. Ct. 152, 145 L. Ed. 2d 129 (1999), which was released after initial briefing in *Sanders*), cert. denied, 251 Conn. 913, 739 A.2d 1250 (1999)). Such an exercise of discretion is reasonable in light of the policies underlying *Griffith*'s retroactivity rule. Specifically, as explained previously, under *Griffith*, applying new constitutional rules to pending cases promotes both judicial integrity and equity. See *Griffith* v. *Kentucky*, supra, 479 U.S. 322–23. Not to do so may violate "basic norms of constitutional adjudication."[12] Id., 322. Because these policies require

[12] Additionally, as noted previously, the retroactivity rule in *Griffith* ensures that similarly situated defendants are treated equally. *Griffith* v. *Kentucky*, supra, 479 U.S. 323. This principle is particularly important in the present case, as Tyus, likewise, has an appeal pending before this court under Docket No. SC 20462, in which this court granted certification to appeal regarding the merits of his *Carpenter* claim; see *State* v. *Tyus*, 335 Conn. 907, 227 A.3d 77 (2020); although he, too, raised this claim after oral argument in the Appellate Court in a motion for permission to file a supplemental brief, which was denied.

retroactive application of new constitutional rules, a newly announced constitutional rule provides good cause for a party to seek permission to file a supplemental brief raising a claim premised on that new constitutional rule.

Thus, in the present case, not only did the Appellate Court have discretion to grant the defendant's motion for permission to file a supplemental brief,[13] but principles of fairness weighed heavily in favor of granting the motion, as it was premised on a new constitutional rule announced during the pendency of the appeal. In such cases, it is difficult to imagine a situation in which supplemental briefing should not be granted.

Nevertheless, even in cases in which a court has allowed supplemental briefing to raise a claim that was based on a new constitutional rule, the defendant must establish that the unpreserved claim is entitled to review under *Golding*'s first two prongs and merits relief under *Golding*'s second two prongs. See *State* v. *Sanders*, supra, 54 Conn. App. 743 n.9, 743–44 (supplemental briefing was permitted for purpose of raising unpreserved claim premised on new constitutional rule, and claim was reviewable under *Golding*'s first two prongs but failed under *Golding*'s third prong); see also *State* v. *Davis*, 269 So. 3d 1123, 1134–35 (La. App.) (holding that, even if unpreserved claim premised on new constitutional rule in *Carpenter* was not waived and was reviewable, claim failed, as any error was harmless), cert. denied, 282 So. 3d 229 (La. 2019); *People* v. *Crum*, 184 App. Div. 3d 454, 455, 126 N.Y.S.3d 7 (holding that *Carpenter* claim was not preserved and was, thus,

[13] The defendant also argues that the Appellate Court abused its discretion by denying his motion to supplement the record. Because the defendant's claim would fail under the fourth prong of *Golding* even if we were to assume that the record was adequate for review, we hold that, to the extent that the Appellate Court abused its discretion by denying the defendant's request to supplement the record, the error was harmless.

unreviewable but, alternatively, holding that, "regardless of the admissibility of the [CSLI], there was overwhelming evidence, including [the] defendant's confession, as well as videotapes that independently established his guilt"), appeal denied, 35 N.Y.3d 1065, 152 N.E.3d 1206, 129 N.Y.S.3d 404 (2020). As a result, even if supplemental briefing is granted, the defendant's claim ultimately may be unreviewable or fail on the merits.

Because a defendant raising an unpreserved constitutional claim premised on a new constitutional rule must satisfy all four prongs of *Golding*, in limited circumstances, an appellate court may consider a defendant's clear inability to satisfy one of these prongs in determining whether it should exercise its discretion to permit supplemental briefing to raise this claim. See *State* v. *Watson*, 47 Conn. App. 771, 772, 706 A.2d 1368 (1998) (defendant denied permission to file supplemental brief to raise unpreserved claim premised on new federal interpretation of jury instruction language because, even if claim were allowed, it clearly would fail on merits, as it was settled law that state law controlled defendant's claim). We presume, however, that such cases are rare, as a determination of whether a claim satisfies the four prongs of *Golding* usually requires considerable reference to the record and relevant case law, thereby necessitating briefing.

Therefore, as a general rule, an appellate court ought to grant a request for supplemental briefing when a party asks it to entertain an unpreserved claim premised on a newly announced constitutional rule. The briefing should address both the merits of the new constitutional rule and whether it applies to the defendant, as well as whether the claim fails under one of the four prongs of *Golding*. We imagine that briefing would be appropriate in all but the clearest of situations in which the

claim would fail under one of *Golding*'s four prongs. See id.

In the present case, because the Appellate Court summarily denied the defendant's motion for permission to file a supplemental brief, we do not know whether it exercised its discretion on the basis of its belief that the defendant's *Carpenter* claim clearly would fail under *Golding*. This case does not clearly fall within the limited category of cases in which the new rule clearly does not apply because it would fail under one of *Golding*'s four prongs. It is not the kind of case that does not require briefing to flesh out the record and unresolved legal issues in light of this new constitutional rule. This is made clear by the fact that this court had to request supplemental briefing regarding the fourth prong of *Golding* after oral argument. Additionally, there is the unresolved legal issue of whether *Carpenter* applies when the CSLI covers a period of less than seven days, which could apply to both the merits of the claim and the third prong of *Golding*. See *Carpenter* v. *United States*, supra, 138 S. Ct. 2217 n.3; id., 2224, 2233 (Kennedy, J., dissenting).

Thus, we conclude that principles of fairness and equity required the Appellate Court to exercise its discretion to grant the defendant's motion for permission to file a supplemental brief. Nevertheless, we conclude that the Appellate Court's erroneous denial of the defendant's motion was harmless, because, even if we assume, without deciding, that the defendant's *Carpenter* claim is reviewable under the first two prongs of *Golding*, it fails under the fourth prong.

B

A defendant may prevail on an unpreserved claim under *Golding* when "(1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fun-

damental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40; see *In re Yasiel R.*, supra, 317 Conn. 781. "The first two [prongs of *Golding*] involve a determination of whether the claim is reviewable; the second two . . . involve a determination of whether the defendant may prevail." (Internal quotation marks omitted.) *State* v. *Peeler*, 271 Conn. 338, 360, 857 A.2d 808 (2004), cert. denied, 546 U.S. 845, 126 S. Ct. 94, 163 L. Ed. 2d 110 (2005).

Even if we assume that the defendant's *Carpenter* claim is reviewable under the first two prongs of *Golding* and that a constitutional violation exists that deprived him of a fair trial under the third prong, we nevertheless conclude that the state has sustained its burden of demonstrating that any claimed error was harmless beyond a reasonable doubt. "It is well settled that constitutional search and seizure violations are not structural improprieties requiring reversal, but rather, are subject to harmless error analysis." *State* v. *Esarey*, 308 Conn. 819, 832, 67 A.3d 1001 (2013). Whether any error "is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the evidence on the trier of fact and the result of the trial. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless."

(Internal quotation marks omitted.) *State* v. *Smith*, 289 Conn. 598, 628, 960 A.2d 993 (2008).

Both to determine whether the defendant's historical CSLI was cumulative and to evaluate the strength of the state's case, we must examine the other evidence admitted at trial. The defendant, however, argues that we cannot consider certain admitted evidence in undertaking this analysis, specifically, Tyus' historical CSLI, the admission of which, he claims, violated Tyus' fourth amendment rights. When codefendants are tried jointly,[14] the defendant contends, and there is harm to one codefendant, the court also may consider the effect of that harm on the other codefendant.[15]

1

The defendant's argument is premised on an alleged violation of Tyus' fourth amendment rights. A defendant

[14] We note that, in his petition for certification to appeal, the defendant did not seek to challenge the trial court's granting of the state's motion to join his trial with that of Tyus.

[15] In his supplemental brief concerning whether this court may consider Tyus' historical CSLI in determining harm under *Golding*'s fourth prong, the defendant, for the first time, raises a claim that this court, in determining harm, also cannot consider Ebrahimi's testimony that, on the night of the shooting, the defendant told her that he had shot someone because Ebrahimi's testimony constituted a fruit of the poisonous tree.

Specifically, the defendant contends that Ebrahimi made this statement only years later, after Detective Curcuro showed her his case file, which would have included the defendant's historical CSLI, thereby reminding her that the defendant had been with other women that night and giving her motive to fabricate her testimony. The state has moved to strike this portion of the supplemental brief, arguing that it went beyond the scope of the question on which this court requested supplemental briefs from the parties. We agree with the state that this claim is beyond the scope of any of the questions we certified for review or our request for supplemental briefs, and we decline to address it.

Nevertheless, we note that the connection between the defendant's historical CSLI and Ebrahimi's statement inculpating the defendant is so attenuated as to dissipate any taint. Ebrahimi already knew that the defendant had been with other women that night; it was not news to her. And, at the time of her statement, Detective Curcuro's file had significant other evidence showing that the defendant was with other women that night. See *State* v.

must have a reasonable expectation of privacy in the property that was unlawfully searched to have standing to challenge the admission of evidence obtained during that search. See, e.g., *State* v. *Davis*, 283 Conn. 280, 323–24, 929 A.2d 278 (2007). Both this court and the United States Supreme Court repeatedly have explained that, "[t]he rights guaranteed by the fourth amendment are personal rights, and, therefore, only one whose own protection was infringed by a search and seizure may enforce those rights." (Internal quotation marks omitted.) *State* v. *Houghtaling*, 326 Conn. 330, 341, 163 A.3d 563 (2017), cert. denied, U.S. , 138 S. Ct. 1593, 200 L. Ed. 2d 776 (2018); accord *Rawlings* v. *Kentucky*, 448 U.S. 98, 106, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980). Because a party must have a reasonable expectation of privacy in the property searched, a party generally lacks standing to challenge an illegal search of a third party's property. See, e.g., *State* v. *Houghtaling*, supra, 352 (defendant lacked reasonable expectation of privacy in property he owned but leased to third party); *State* v. *Iban C.*, 275 Conn. 624, 665, 881 A.2d 1005 (2005) ("a party is precluded from asserting the constitutional rights of another" (internal quotation marks omitted));[16] *State* v. *Castle*, 161 Conn. 570, 572, 287 A.2d 744 (1971) ("the defendant had no standing to object to the use of the evidence taken from his brother's room since the defendant had no possessory interest in either the room searched or the evidence seized and was not present when his brother's room was searched and the seizure [was] made"); see also *State* v. *Davis*, supra, 321 (rejecting automatic standing doctrine under state constitution, in part because defendant may not raise

Spencer, 268 Conn. 575, 599–600, 848 A.2d 1183, cert. denied, 543 U.S. 957, 125 S. Ct. 409, 160 L. Ed. 2d 320 (2004).

[16] We note that there are certain limited exceptions to this rule, such as third-party standing, but that none has been asserted in the present case. See *State* v. *Bradley*, 195 Conn. App. 36, 51, 223 A.3d 62 (2019), cert. granted, 334 Conn. 925, 223 A.3d 379 (2020).

constitutional right of third party). "[S]uppression of the product of a [f]ourth [a]mendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence." (Internal quotation marks omitted.) *United States* v. *Padilla*, 508 U.S. 77, 81–82, 113 S. Ct. 1936, 123 L. Ed. 2d 635 (1993).

Although neither this court nor our Appellate Court has had the opportunity to apply these principles in relation to the new rule in *Carpenter*, federal courts consistently have held that a defendant may not raise a *Carpenter* claim concerning the historical CSLI of a third party unless he can establish his own reasonable expectation of privacy in the cell phone. See *United States* v. *Beverly*, 943 F.3d 225, 238 (5th Cir. 2019) ("[The defendant] lacks standing to assert that the search of [the alleged coconspirator's] phone records was unconstitutional. [The defendant] had no expectation of privacy in [the alleged coconspirator's] phone data, even if the search was unconstitutional as to [the alleged coconspirator]."), cert. denied, U.S. , 140 S. Ct. 2550, 206 L. Ed. 2d 485 (2020); *United States* v. *Brewer*, 708 Fed. Appx. 96, 99 (3d Cir. 2017) (holding that defendant lacked standing to suppress cell phone records obtained from phone that was in codefendant's possession and control), cert. denied, U.S. , 139 S. Ct. 1395, 203 L. Ed. 2d 625 (2019); see also *United States* v. *Dore*, 586 Fed. Appx. 42, 46 (2d Cir.) (in decision released prior to *Carpenter*, court held that defendant failed to establish legitimate expectation of privacy in cell phone and, thus, lacked standing to move to suppress CSLI records), cert. denied, 574 U.S. 1002, 135 S. Ct. 505, 190 L. Ed. 2d 380 (2014); cf. *United States* v. *Lauria*, Docket Nos. 19-CR-449-01 (NSR), 19-CR-449-02 (NSR) and 19-CR-449-03 (NSR), 2020 WL 5743523, *5 (S.D.N.Y. September 25, 2020) ("the defendant must

establish ownership or another possessory interest in the phone at the time for which the data [are] searched"); *United States* v. *Serrano*, Docket No. 13 CR. 58 (KBF), 2014 WL 2696569, *7 (S.D.N.Y. June 10, 2014) ("The defendant has not proffered an affidavit that he has a privacy interest in that phone or the data on that phone. . . . Accordingly, the defendant's motion to preclude or suppress the cell site data is denied on the basis that the defendant has not established the requisite standing to bring the motion."). But see *United States* v. *Herron*, 2 F. Supp. 3d 391, 400–401 (E.D.N.Y. 2014) (defendant had legitimate expectation of privacy in cell phone registered to another individual but used exclusively by defendant and, thus, had standing to move to suppress historical CSLI obtained from that phone), aff'd, 762 Fed. Appx. 25 (2d Cir. 2019), petition for cert. filed (U.S. November 17, 2020) (No. 20-6428).

These courts have extended this rule to cases in which the defendant challenged the search of property belonging to a codefendant, even when the codefendants were tried jointly, explaining that "[coconspirators] and codefendants have been accorded no special standing." (Internal quotation marks omitted.) *United States* v. *Padilla*, supra, 508 U.S. 82; see *United States* v. *Turner*, 781 F.3d 374, 382 (8th Cir. 2015) ("[The defendant] has failed to establish that he has standing to challenge the issuance of the warrants for [precise location information] for phones belonging to [two coconspirators]. [He] does not assert that he owned, possessed, or used either of these cell phones; nor does he describe any other legitimate expectation of privacy in these phones or in the [precise location information] obtained from them."), cert. denied, 577 U.S. 889, 136 S. Ct. 208, 193 L. Ed. 2d 160 (2015), and cert. denied, 577 U.S. 912, 136 S. Ct. 280, 193 L. Ed. 2d 204 (2015), and cert. denied, 577 U.S. 980, 136 S. Ct. 493, 193 L. Ed.

2d 359 (2015); *United States* v. *Forest*, 355 F.3d 942, 948 (6th Cir.) (defendant lacked standing to challenge admission of codefendant's CSLI, even though defendant was in vehicle with codefendant during time period reflected in CSLI), vacated and remanded sub nom. *Garner* v. *United States*, 543 U.S. 1100, 125 S. Ct. 1050, 160 L. Ed. 2d 1001 (2005); *United States* v. *Anthony*, 354 F. Supp. 3d 607, 619–20 (E.D. Pa. 2018) ("[d]efendant . . . has not demonstrated that he had the reasonable expectation of privacy in the CSLI data of [codefendants]"), appeal filed (3d Cir. December 28, 2018) (No. 18-3812); *DeMartino* v. *United States*, Docket No. 07 CV 1412 (NG), 2010 WL 3023896, *9 (E.D.N.Y. August 2, 2010) (defendant had no expectation of privacy and thus no standing to challenge admission of information from codefendant's cell phone, despite having been tried jointly with codefendant); *United States* v. *Grissom*, 760 Fed. Appx. 448, 454 (7th Cir. 2019) (defendant did not have legitimate expectation of privacy in codefendant's CSLI); *United States* v. *Wilford*, 689 Fed. Appx. 727, 730 (4th Cir. 2017) (defendant lacked standing to challenge use of cell site stimulator to show location of coconspirator's cell phone), cert. denied, U.S. , 138 S. Ct. 2707, 201 L. Ed. 2d 1100 (2018);[17] see also *United States* v. *Capra*, 501 F.2d 267, 281 (2d Cir. 1974) (applying rule that "[c]oconspirators and codefendants have been accorded no special standing to enforce the exclusionary rule" when codefendants sought to suppress records of wiretapped calls on which only other codefendants were participants), cert. denied, 420 U.S. 990, 95 S. Ct. 1424, 43 L. Ed. 2d 670 (1975).

Although our Appellate Court has not yet addressed whether a defendant may challenge a *Carpenter* violation relating to a codefendant, it has ruled consistent

[17] See General Statutes § 54-47aa (a) (3) (defining cell site stimulator device).

with this federal precedent on similar issues. See *State* v. *Bethea*, 187 Conn. App. 263, 277, 202 A.3d 429 (even if defendant's unpreserved challenge to warrant for search of girlfriend's cell phone were reviewed, claim would fail because defendant lacked standing to move to suppress girlfriend's cell phone records), cert. denied, 332 Conn. 904, 208 A.3d 1239 (2019); *State* v. *Stanley*, 161 Conn. App. 10, 29, 125 A.3d 1078 (2015) (defendant lacked standing to suppress victim's cell phone records), cert. denied, 320 Conn. 918, 131 A.3d 1154 (2016). In the present case, consistent with these lines of cases, we conclude that the defendant lacked standing to challenge the admission of Tyus' historical CSLI and, thus, cannot successfully argue that we cannot consider the evidence these records yielded when considering the strength of the state's case for purposes of our harmless error analysis under *Golding*'s fourth prong.

Nevertheless, the defendant contends that prior case law supports his contention that, in determining harm, this court must not consider the evidence from the illegally obtained records of Tyus' historical CSLI. Specifically, he argues that he does not need to establish standing to challenge the admission of Tyus' historical CSLI "because, [when] there is harm to one codefendant, federal jurisdictions, including the United States Supreme Court, have considered the harm of that error on the other codefendant." In support of his argument, the defendant cites cases stemming from the United States Supreme Court's holding in *McDonald* v. *United States*, 335 U.S. 451, 456, 69 S. Ct. 191, 93 L. Ed. 153 (1948). We find these cases to be not only distinguishable, but of questionable validity.

In *McDonald*, the petitioners, Earl McDonald and Joseph Washington, were tried jointly on charges of carrying on a lottery known as "the numbers game . . . ." Id., 452. Before trial, McDonald moved to sup-

press unlawfully seized evidence that included adding machines found during a warrantless search of his room inside a rooming house.[18] Id., 452–53. McDonald also sought the return of the adding machines. Id., 456. The trial court denied McDonald's motion, and, after both petitioners were convicted, they appealed, challenging the denial of the motion to suppress. Id. In a five to three decision, the United States Supreme Court held that "McDonald's motion for suppression of the evidence and the return of the property to him should have been granted." Id. As to Washington, the opinion announcing the judgment noted that "the unlawfully seized evidence was used not only against McDonald but against Washington as well, the two being tried jointly. Apart from this evidence, there seems to have been little or none against Washington. Even though we assume, without deciding, that Washington, who was a guest of McDonald, had no right of privacy that was [invaded] when the officers searched McDonald's room without a warrant, we think that the denial of McDonald's motion was error that was prejudicial to Washington as well . . . [because] the unlawfully seized materials were the basis of evidence used against [Washington, and] [i]f] the property had been returned to McDonald, it would not have been available for use at the trial." (Citations omitted.) Id. Two justices, however, did not agree that the court had to address whether the denial of McDonald's motion to suppress was harmful to Washington. Rather, they reasoned that Washington also had a privacy interest in the property searched because he was a guest in McDonald's room in the rooming house at the time of the search. See id., 461 (Jackson, J., concurring).

Although some courts since *McDonald* have held that its holding meant that a defendant may challenge the

[18] At the time of the warrantless search, McDonald was inside his room, along with Washington, who was his guest. *McDonald* v. *United States*, supra, 335 U.S. 456.

admission of evidence illegally obtained from a codefendant when tried jointly; see, e.g., *Rosencranz* v. *United States*, 334 F.2d 738, 740 (1st Cir. 1964); the United States Court of Appeals for the Second Circuit has limited *McDonald*'s holding to its unique facts. Specifically, in *United States* v. *Lee Wan Nam*, 274 F.2d 863 (2d Cir.), cert. denied, 363 U.S. 803, 80 S. Ct. 1236, 4 L. Ed. 2d 1147 (1960), the defendant sought to suppress heroin seized in violation of his codefendant's fourth amendment rights, arguing that *McDonald*'s holding trumped any standing requirement. Id., 865–66. The court in that case disagreed, holding that the defendant lacked standing to object to the admission of the heroin because he had no possessory interest in it. Id. The court distinguished the case before it from *McDonald* because the codefendant never moved to suppress the heroin, as McDonald had, and because the holding in *McDonald* "hinged upon the fact that the trial court committed error in failing to return the evidence to McDonald." Id., 866. Thus, the Second Circuit ruled that *McDonald* applied only if there was a timely motion to suppress by a party with standing and if the evidence at issue would not have been available for the government to use against all codefendants had the court granted the motion to suppress and returned the evidence. See id.; see also *United States* v. *Serrano*, 317 F.2d 356, 356–57 (2d Cir. 1963) (because neither defendant made timely motion to suppress or had standing to do so, narcotics evidence seized from codefendant, who later was severed from case, was properly admitted). As in *Lee Wan Nam*, in the present case, Tyus, the only person with standing, made no timely motion to suppress, and, thus, the present case is distinguishable from *McDonald*.

Moreover, in *Alderman* v. *United States*, 394 U.S. 165, 89 S. Ct. 961, 22 L. Ed. 2d 176 (1969), a case the defendant did not cite to us, the United States Supreme Court explicitly questioned the validity of the holding in

McDonald. See id., 173 n.7. In *Alderman*, the petitioners, William Israel Alderman and Felix Antonio Alderisio, were tried jointly and convicted of conspiring to transmit murderous threats in interstate commerce. Id., 167. The record included evidence collected by illegal electronic surveillance of Alderisio's place of business. Id., 167–68. On appeal, "each petitioner demand[ed] retrial if any of the evidence used to convict him was the product of unauthorized surveillance, regardless of whose [f]ourth [a]mendment rights the surveillance violated. At the very least, it is urged that if evidence is inadmissible against one defendant or conspirator, because tainted by electronic surveillance illegal as to him, it is also inadmissible against his codefendant or coconspirator." Id., 171. The court, however, explained that evidence may be inadmissible against one defendant but not against another, even if they were tried jointly. Id., 172–74. The court explained that, to challenge the legality of a search, the defendant must establish that "he himself was the victim of an invasion of privacy." (Internal quotation marks omitted.) Id., 173. "Fourth [a]mendment rights are personal rights which . . . may not be vicariously asserted. . . . There is no necessity to exclude evidence against one defendant in order to protect the rights of another. No rights of the victim of an illegal search are at stake when the evidence is offered against some other party." (Citations omitted.) Id., 174.

The court in *Alderman* went on to explain that *McDonald* "is not authority to the contrary. It is not at all clear that the *McDonald* opinion would automatically extend standing to a codefendant. Two of the five [j]ustices joining the majority opinion did not read the opinion to do so and found the basis for the codefendant's standing to be the fact that he was a guest on the premises searched." Id., 173 n.7.

Although *Alderman* did not explicitly overrule *McDonald*, multiple courts since *Alderman* have treated *Alderman* as controlling, and the few courts that continue to apply *McDonald* have limited its scope to its unique facts. See, e.g., *United States* v. *Palazzo*, 488 F.2d 942, 947 (5th Cir. 1974); *Bretti* v. *Wainwright*, 439 F.2d 1042, 1047 (5th Cir.), cert. denied, 404 U.S. 943, 92 S. Ct. 293, 30 L. Ed. 2d 257 (1971); *United States* v. *Parrott*, 434 F.2d 294, 296 (10th Cir. 1970), cert. denied, 401 U.S. 979, 91 S. Ct. 1211, 28 L. Ed. 2d 330 (1971); *United States* v. *Nasse*, 432 F.2d 1293, 1302–1303 (7th Cir. 1970), cert. denied, 401 U.S. 938, 91 S. Ct. 928, 28 L. Ed. 2d 217 (1971), and cert. denied sub nom. *Tocco* v. *United States*, 401 U.S. 938, 91 S. Ct. 927, 28 L. Ed. 2d 217 (1971), and cert. denied sub nom. *David* v. *United States*, 402 U.S. 983, 91 S. Ct. 1657, 29 L. Ed. 2d 148 (1971); *United States* v. *James*, 432 F.2d 303, 306 (5th Cir. 1970), cert. denied, 403 U.S. 906, 91 S. Ct. 2214, 29 L. Ed. 2d 682 (1971); *State* v. *Wallen*, Docket No. 9-09-22, 2010 WL 529864, *4 (Ohio App. February 16, 2010), appeal denied, 125 Ohio St. 3d 1463, 928 N.E.2d 738 (2010); see also *United States* v. *Tortorello*, 533 F.2d 809, 814 n.5 (2d Cir.) ("the Supreme Court has rejected a reading of *McDonald* which would automatically extend standing to a [codefendant]"), cert. denied, 429 U.S. 894, 97 S. Ct. 254, 50 L. Ed. 2d 177 (1976); *United States* v. *Graham*, 391 F.2d 439, 445 (6th Cir. 1968) (*McDonald* applies only if defendant with standing made timely motion to suppress that was improperly denied), cert. denied, 393 U.S. 941, 89 S. Ct. 307, 21 L. Ed. 2d 278 (1968), and cert. denied sub nom. *Tucker* v. *United States*, 390 U.S. 1035, 88 S. Ct. 1433, 20 L. Ed. 2d 294 (1968). Thus, under *Alderman*, the defendant cannot challenge the admission of Tyus' historical CSLI, and, to the extent that *McDonald* remains good law, it is distinguishable and, thus, inapplicable to the present case. Accordingly, we may consider Tyus' historical CSLI in determining harm.

2

We now turn to the evidence presented at trial and conclude that the Appellate Court's failure to permit the defendant to file a supplemental brief was harmless beyond a reasonable doubt. There was significant evidence admitted at trial that placed the defendant at the crime scene at the time of the shooting. The historical CSLI from Tyus' two cell phones was admitted into evidence and relied on by Wines, who testified that these cell phones were located near Ernie's Café in New London at approximately the time of the shooting and then were located near Bella Notte in Norwich at approximately 12:45 a.m. Tyus admitted at trial that he had these cell phones with him throughout the night of the shooting. Additionally, both the defendant and Tyus admitted, to the police and at trial, that they were together on the night the victim was shot and killed.

There was other evidence as well from which the jury reasonably could have inferred that Tyus and the defendant arrived at Bella Notte after the shooting, thereby contradicting the defendant's alibi. Specifically, Guilbert testified that he saw Tyus and a man matching the defendant's description—a thinner, taller, lighter-skinned, African American male—enter Bella Notte together approximately fifteen to twenty minutes after Guilbert received a phone call informing him that the victim had been shot. See part II of this opinion. Thus, the records of the defendant's historical CSLI were cumulative of this other evidence showing that the defendant was near Ernie's Café at approximately midnight.

Moreover, there was significant other evidence of the defendant's guilt, either as a principal or as an accessory. There was evidence that the defendant and Tyus went to Boston on the night of the shooting in a silver-colored Impala that Tyus previously had rented. Multi-

ple witnesses testified that, immediately after the shooting, a man fitting the defendant's general description—a light-skinned, African American man wearing a hooded sweatshirt—ran from the scene of the shooting and entered the passenger side of a silver-colored vehicle matching the appearance of Tyus' rented Impala. The defendant's DNA was retrieved from the Impala's passenger side. As to motive, there was evidence that the victim shot Tyus three weeks prior to the victim's death, that both the defendant and Tyus were aware that the victim had been the shooter, and that the defendant was upset over this attack on his friend, whom he considered a brother. Further, the firearms evidence the state presented showed that the gun that Tyus used to fire back at the victim on December 3, 2006, was the same weapon used to shoot and kill the victim three weeks later. And perhaps most damaging to the defendant was Ebrahimi's testimony that, hours after the shooting, he confessed to her that he had shot someone that night.[19] See *Lapointe* v. *Commissioner of Correction*, 316 Conn. 225, 323 n.70, 112 A.3d 1 (2015) ("[t]his court has long recognized that confessions represent the most damaging evidence of guilt" (internal quotation marks omitted)).

[19] Although defense counsel on cross-examination tried to show that Ebrahimi had fabricated this confession years after the shooting in response to Detective Curcuro's threats, Ebrahimi responded affirmatively to the prosecutor's question as to whether, "notwithstanding anything that Detective Curcuro may have said" to her, she heard the defendant tell her that he had shot someone.

Additionally, the state rehabilitated her testimony in two ways. First, on redirect examination, the state established that Ebrahimi feared the defendant when he had been drinking or had been mad at her, and that the defendant previously had hit her, which provided an alternative reason for why she did not inform the police sooner about his confession. Second, Ebrahimi testified that, two months after the victim's death, she told her mother that the defendant had shot someone. The state also elicited testimony from Ebrahimi's mother that, near the end of 2006, Ebrahimi told her that the defendant had shot someone and that Ebrahimi "was a mess" about it.

Because the admission of the defendant's historical CSLI was cumulative of other evidence establishing that the defendant was near Ernie's Café at the time of the shooting, and because the state presented other significant evidence of guilt, we conclude that the admission of these records was harmless beyond a reasonable doubt. Therefore, the defendant's unpreserved *Carpenter* claim fails under the fourth prong of *Golding*, thereby rendering harmless the Appellate Court's improper denial of the defendant's motion for permission to file a supplemental brief.

II

We next address whether the Appellate Court correctly determined that the defendant did not adequately preserve his hearsay objection to Guilbert's testimony about having received a phone call from Charlene Thomas informing him that the victim had been shot. He argues that both the state and the trial court understood his general objection to be based on hearsay and treated it as such. Additionally, he argues that, if the Appellate Court had reviewed his claim, it would have determined that the trial court improperly admitted the contested statement as nonhearsay and that this error was harmful. The state agrees that the defendant adequately preserved his hearsay objection but contends that the trial court properly admitted the statement to show the effect on Guilbert's subsequent actions, which were relevant because they established the time line as to when the defendant and Tyus arrived at Bella Notte. The state also argues that, to the extent there was error, it was harmless. We agree with the state that the trial court properly admitted the statement to show its effect on the hearer and that, regardless, any error was harmless.

A

The following additional facts and procedural history are relevant to our review of whether the defendant's

hearsay objection to the statement at issue sufficed to preserve this issue. At trial, Guilbert testified that he was at Bella Notte on the night when the victim was shot and that, while there, he received a phone call from Charlene Thomas, who has no relation to the victim. The prosecutor then asked: "And what was relayed to you on that phone call?" Both the defendant's counsel and Tyus' counsel objected, stating only, "[o]bjection." The prosecutor immediately responded: "Your Honor, I'm going to claim it on the effect of the hear[er]—and will explain what . . . Guilbert then did." Without hearing further argument, the trial court ruled: "All right. Given that claim, I'm going to overrule the objections and allow the testimony."

Once the court overruled the objections, Guilbert testified as follows: Charlene Thomas told him that the victim had been shot and that he should call the victim's wife to let her know. After talking with Charlene Thomas, he called the victim's wife and told her that she should go to the hospital. No objection was made to Guilbert's testifying as to what he told the victim's wife. Guilbert then testified that, after talking with the victim's wife, he remained sitting at the bar at Bella Notte for approximately fifteen to twenty minutes when he saw Tyus and a taller, lighter-skinned, African American man come in from the front entrance. Guilbert had not seen them in Bella Notte prior to that moment. Tyus approached Guilbert, greeted him, and offered to buy him a drink. Guilbert responded that he was getting ready to leave and did not want a drink. Guilbert then left Bella Notte and went to the hospital to see the victim.

"[T]o preserve an evidentiary ruling for review, trial counsel must object properly by articulat[ing] the basis of the objection so as to apprise the trial court of the precise nature of the objection and its real purpose . . . . [T]he determination of whether a claim has been

properly preserved will depend on a careful review of the record to ascertain whether the claim on appeal was articulated below with sufficient clarity to place the trial court on reasonable notice of that very same claim." (Internal quotation marks omitted.) *State* v. *Best*, 337 Conn. 312, 317 n.1, 253 A.3d 458 (2020). Appellate review of the record may show that opposing counsel's response to the objection clarified whether counsel and the trial court understood the basis of the objection. See id. A party may " 'functionally preserve' " a claim even if the objection at trial did not incorporate the precise wording of the claim on appeal. Id.; see also *State* v. *Santana*, 313 Conn. 461, 467, 97 A.3d 963 (2014) ("this court has expressed a willingness to review claims that a party did not explicitly raise to the trial court if it is clear from the record that the substance of the claim was raised"). A hearsay objection is adequately preserved as long as the parties and the court had " 'fair notice' " that a hearsay objection was being raised. *State* v. *Benedict*, 313 Conn. 494, 505–506, 98 A.3d 42 (2014).

In the present case, although defense counsel merely stated, "[o]bjection," without clarifying that the ground for it was that Guilbert's testimony was hearsay, the prosecutor's response that he "claim[ed] it on the effect of the hear[er]," a recognized exclusion from the rule against hearsay; see part II B of this opinion; shows that the state was aware that the objection was premised on hearsay. Similarly, the fact that the trial court then ruled that, "[g]iven that claim [by the state], I'm going to overrule the objections," shows that the court, too, was aware of the basis for the objection. Considering that both the state and the trial court were aware of the basis of the defendant's objection, any failure to clarify the basis of the objection did not deprive the state or the trial court of fair notice of his claim. Thus,

we conclude that the defendant functionally preserved his hearsay claim.

B

Next, we turn to the merits of the defendant's claim that Guilbert's testimony regarding what Charlene Thomas told him over the phone was impermissible hearsay. The defendant argues that the statement was hearsay because it was relevant only if it was true—specifically, whether the defendant and Tyus entered Bella Notte after the phone call was relevant only if the victim already had been shot; otherwise, the phone call did not relate to the timing of the shooting or to the defendant's alibi, which was that he was already at Bella Notte at the time of the shooting. The state responds that it did not offer Guilbert's testimony to establish its truth—that the victim had been shot, which already had been established by other evidence admitted at trial—but to show its effect on Guilbert—namely, that this phone call caused him to take certain actions, which were relevant to establish the state's time line of events. We agree with the state.

"To the extent [that] a trial court's admission of evidence is based on an interpretation of the [Connecticut] Code of Evidence, our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. . . . We review the trial court's decision to admit evidence, if premised on a correct view of the law, however, for an abuse of discretion. . . . In other words, only after a trial court has made the legal determination that a particular statement is or is not hearsay, or is subject to a hearsay exception, is it vested with the discretion to admit or to bar the evidence based upon relevancy, prejudice, or other legally appropriate grounds related to the rule of evi-

dence under which admission is being sought." (Citation omitted; internal quotation marks omitted.) *State* v. *Miguel C.*, 305 Conn. 562, 571–72, 46 A.3d 126 (2012).

"Hearsay means a statement, other than one made by the declarant while testifying at the proceeding, offered in evidence to establish the truth of the matter asserted. Conn. Code Evid. § 8-1 (3). The hearsay rule forbids evidence of out-of-court assertions to prove the facts asserted in them. If the statement is not an assertion or is not offered to prove the facts asserted, it is not hearsay. . . . This exclusion from hearsay includes utterances admitted to show their effect on the hearer." (Citation omitted; internal quotation marks omitted.) *State* v. *Miguel C.*, supra, 305 Conn. 572.

Although "[s]tatements admitted to show the effect on the hearer are not hearsay . . . they should not be admitted for that purpose unless it is clear that the hearer's state of mind or subsequent conduct is relevant." (Internal quotation marks omitted.) *O'Shea* v. *Mignone*, 35 Conn. App. 828, 833–34, 647 A.2d 37 (although statement was offered to show effect on hearer—police officer—it was not relevant, as officer's subsequent actions were not at issue and did not tend to show whether defendant was operating vehicle that struck plaintiff), cert. denied, 231 Conn. 938, 651 A.2d 263 (1994). "Because . . . the effect on the hearer rationale may be misapplied to admit facts that are not relevant to the issues at trial; C. Tait & E. Prescott, Connecticut Evidence (4th Ed. 2008) § 8.8.2, pp. 472–73; courts have an obligation to ensure that a party's purported nonhearsay purpose is indeed a legitimate one."[20] *State* v. *Miguel C.*, supra, 305 Conn. 574. To be

[20] Although defense counsel functionally objected to the contested statement on hearsay grounds, not on relevancy grounds, because we have held that trial courts have an obligation to ensure that statements offered for the effect on the hearer are relevant, and because the prosecutor specified on the record before the trial court why he believed the statement was relevant—to show the effect on Guilbert's subsequent actions—we review both whether the statement was hearsay and whether it was relevant.

relevant, evidence must "[tend] to establish a fact in issue or . . . corroborate other direct evidence in the case. . . . Accordingly, an out-of-court statement is admissible to prove the effect on the hearer only when it is relevant for the specific, permissible purpose for which it is offered." (Citation omitted; emphasis omitted; internal quotation marks omitted.) Id. "The proffering party bears the burden of establishing the relevance of the offered testimony." (Internal quotation marks omitted.) *Farrell* v. *Johnson & Johnson*, 335 Conn. 398, 408, 238 A.3d 698 (2020). Nevertheless, "[t]he trial court has broad discretion on questions of relevance." *State* v. *Watson*, 26 Conn. App. 151, 156, 599 A.2d 385 (1991), cert. denied, 221 Conn. 907, 600 A.2d 1362 (1992).

The crux of the defendant's hearsay claim is that Guilbert's testimony was relevant only if Charlene Thomas' statement was true. We disagree. Charlene Thomas' statement to Guilbert that the victim had been shot was not offered to establish that the victim had been shot—a fact that was not disputed and that the state had established through other evidence. Rather, the purpose of Guilbert's testimony was to show how Charlene Thomas' statement to him affected his subsequent actions, i.e., that he called the victim's wife and then decided to leave Bella Notte to go to the hospital to check on the victim. From Guilbert's testimony that the defendant and Tyus arrived at Bella Notte after the two phone calls and that Guilbert thereafter decided to go to the hospital to visit the victim, the jury reasonably could have inferred that the defendant and Tyus arrived at Bella Notte after the victim had been shot. This, in turn, tended to corroborate other direct evidence admitted at trial, such as the defendant's testimony that he was with Tyus that night and Tyus' historical CSLI showing that he did not arrive at Bella Notte until after the shooting. Thus, Guilbert's testimony was relevant

both to establish when the defendant and Tyus arrived at Bella Notte, which was central both to the state's case and to the defendant's alibi, and to show the effect on the hearer's subsequent actions, which also were relevant. Accordingly, this evidence was properly admitted as nonhearsay.

C

Finally, even if we assume that Guilbert's statement that Charlene Thomas told him that the victim had been shot was hearsay, we agree with the state that its admission was harmless. "When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error. . . . Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) *State* v. *Bouknight*, 323 Conn. 620, 626–27, 149 A.3d 975 (2016). In determining the harm of an erroneous evidentiary ruling, we examine the same factors as we do in determining the harm of an erroneous constitutional ruling. Id.

The defendant argues that, without Guilbert's testimony about what he was told by Charlene Thomas, the state had no means to establish its proposed time line of events and to contradict his alibi because the jury would have heard only Guilbert's testimony that he saw Tyus and a man matching the defendant's description arrive at Bella Notte at about 11 p.m. Thus, Guilbert's testimony would have supported the defendant's alibi, rather than contradicting it, and would thereby establish that it is more probable than not that the contested statement affected the verdict. We disagree.

We first note that, even if Guilbert had not been allowed to testify as to what Charlene Thomas told him, there was no objection to the other portions of Guilbert's testimony—namely, that he received a call, that because of that call he called the victim's wife and decided to leave Bella Notte to go to the hospital to check on the victim, and that, approximately fifteen to twenty minutes after those calls, he saw Tyus and another man matching the defendant's description enter Bella Notte. From this evidence, the jury reasonably could have inferred that the victim had been shot prior to the defendant's and Tyus' entering Bella Notte. See, e.g., *State* v. *Weinberg*, 215 Conn. 231, 255, 575 A.2d 1003 (jury is permitted to draw inferences from evidence admitted at trial as long as those inferences are reasonable), cert. denied, 498 U.S. 967, 111 S. Ct. 430, 112 L. Ed. 2d 413 (1990). Even without the contested statement, the jury nevertheless would have been able to reasonably infer that Tyus and the defendant arrived at Bella Notte after the victim was shot because Guilbert consistently stated that, although he thought the two men arrived at about 11 p.m., he was not looking at his watch, but they arrived after the two phone calls.

We recognize that, although reasonable, these inferences would not be as strong if the jury had heard Charlene Thomas' statement that the victim had been shot. Contrary to the defendant's contention, however, Charlene Thomas' statement to Guilbert was not the only evidence that established the state's time line of events. The defendant's argument presumes that the records of Tyus' historical CSLI should have been suppressed. But, as discussed in part I B 1 of this opinion, those records may be considered in determining whether any error, constitutional or evidentiary, harmed the defendant. Those records, coupled with the defendant's own admission that he was with Tyus on the night of the shooting, establish that the defendant was near

Ernie's Café at the time of the shooting and that only then did he and Tyus travel north to Norwich, arriving near Bella Notte at approximately 12:45 a.m. Additionally, as discussed in part I B 2 of this opinion, there was substantial other evidence admitted at trial that established the defendant's guilt. Thus, even if the contested statement was inadmissible hearsay, it did not substantially affect the jury's verdict.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* BROCK DAVIS
(SC 20335)

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

Syllabus

Convicted of the crime of murder in connection with the stabbing death of the victim, the defendant appealed to this court, claiming, inter alia, that the trial court had violated his sixth amendment right to the effective assistance of counsel by denying his written motion to dismiss defense counsel without adequately inquiring into certain grounds for his motion and without conducting any inquiry into defense counsel's alleged conflict of interest. During a pretrial hearing, the defendant informed the trial court that he no longer wanted to be represented by defense counsel. The court ruled that there was no basis to dismiss defense counsel but that the defendant could file a written motion to dismiss counsel and provide reasons why counsel should be dismissed. Thereafter, the defendant filed his written motion to dismiss counsel, in which he asserted four grounds for the dismissal, including that a conflict of interest had arisen. Following a hearing, the court denied the defendant's motion without inquiring into defense counsel's alleged conflict of interest. Two years later, at the defendant's sentencing hearing, the sentencing court asked the defendant if he wanted to address the court. In response, the defendant again raised the issue of defense counsel's alleged conflict of interest, stating that counsel was also representing the victim's son. The court proceeded to sentence the defendant without inquiring into the alleged conflict of interest. On appeal from the judgment of conviction, *held*:

1. Contrary to the defendant's claim, the trial court adequately inquired into the grounds asserted by the defendant in support of his written motion to dismiss defense counsel, other than the alleged conflict of interest; the defendant's claims that defense counsel did not diligently provide him with copies of the state's discovery materials or investigate information he had provided to her, that she allowed her investigator to advise him to plead guilty, and that she violated unspecified professional and ethical standards were not substantial complaints, and, therefore, they did not warrant further inquiry by the court, much less the dismissal of defense counsel.
2. The defendant having clearly brought to the attention of both the court presiding over the pretrial hearing and the sentecning court the possiblilty of defense counsel's conflict of interest, both courts had an affirmative duty to conduct further inquiry into the alleged conflict of interest by investigating the surrounding facts and questioning the defendant and defense counsel to determine whether counsel had an actual conflict of interest and whether that conflict had adversly affected her representation of the defendant; moreover, because both courts failed to conduct such an inquiry, this court could not determine, on the basis of the record before it, whether the defendant's allegation of a conflict of interest had any merit, and, accordingly, this court remanded the case for further proceedings to determine whether defense counsel had an actual conflict of interest that adversly affected her performance.

Argued November 24, 2020—officially released March 26, 2021*

Procedural History

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Hartford, where the court, *Dewey*, *J.*, denied the defendant's motion to dismiss counsel; thereafter, the case was tried to the jury before *Gold*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Further proceedings*.

Pamela S. Nagy, assistant public defender, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, former state's attorney, and *John F. Fahey*, supervisory assistant state's attorney, for the appellee (state).

* March 26, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

KELLER, J. Following a jury trial, the defendant, Brock Davis, was convicted of one count of murder in violation of General Statutes § 53a-54a. The trial court, *Gold*, *J.*, rendered judgment in accordance with the jury's verdict and sentenced the defendant to fifty years of imprisonment. On appeal,[1] the defendant claims that the trial court violated his right to the effective assistance of counsel as guaranteed by the sixth amendment to the United States constitution by (1) denying his motions to dismiss defense counsel, Kirstin B. Coffin, without first adequately inquiring into certain bases for his motions, namely, that defense counsel did not diligently provide him with copies of the state's discovery materials or investigate information he had provided to her; that, during a meeting with her investigator and the defendant, she allowed her investigator to recommend that he plead guilty; and that she violated unspecified professional and ethical legal standards; and (2) failing to conduct any inquiry into defense counsel's alleged conflict of interest.[2] We disagree that the trial court inadequately inquired into the bases for the defendant's motions to dismiss defense counsel. We agree, however, that the trial court improperly failed to inquire into defense counsel's alleged conflict of interest, and, accordingly, we remand the case to the trial court for further proceedings in accordance with this opinion.

[1] The defendant appealed directly to this court pursuant to General Statutes § 51-199 (b) (3).

[2] The defendant does not assert an inadequate inquiry claim under article first, § 8, of the Connecticut constitution. The defendant also claims that the trial court improperly admitted into evidence testimony from three lay witnesses identifying him in a surveillance video recording in violation of *State* v. *Finan*, 275 Conn. 60, 881 A.2d 187 (2005), and § 7-3 (a) of the Connecticut Code of Evidence. Because we agree with the defendant that the trial court was required but failed to inquire into a possible conflict of interest and remand the case to the trial court to conduct such an inquiry, we conclude that it is premature to address the defendant's remaining claim at this time.

The following facts, which the jury reasonably could have found, and procedural history are relevant to our analysis of the defendant's claims. On the morning of December 9, 2015, the defendant stabbed the victim, Joseph Lindsey, multiple times at the corner of Albany Avenue and Baltimore Street in Hartford, where the two men had been "hanging out," talking, and drinking with a third man, Jamar Cheatem, the victim's friend. Following the stabbing, Cheatem transported the victim to a hospital, where he was pronounced dead. The defendant was subsequently charged with the victim's murder. Following the defendant's arrest, Coffin was assigned to represent him.

On March 29, 2017, the trial court, *Dewey*, *J.*, conducted a pretrial hearing at which the defendant rejected the state's offer of a plea deal. During the hearing, the defendant informed Judge Dewey that he no longer wished to be represented by defense counsel due to her failure to investigate certain information he had provided her and to give him a copy of the state's discovery materials in a timely manner. The defendant also complained that defense counsel's investigator had encouraged him to plead guilty and that, "[f]rom the beginning," defense counsel had "made mistakes and alluded to the fact that [he] was guilty." Judge Dewey responded: "Well, it's your decision, obviously. . . . You have an experienced attorney and the fact that you don't like the investigation she's doing is not a ground . . . for [dismissing] her . . . . [S]he has been your strongest advocate in all of the pretrials, and I see no basis for her to be withdrawn. File a written motion and give more of [a] reason that complies with the Practice Book and the constitution. But, at the present time, she is your attorney. You do have a right to secure an attorney of your own if you wish. You have a right to represent yourself if you are competent. You also have a right to have [defense counsel] represent you."

On May 24, 2017, as Judge Dewey had suggested, the defendant filed a written motion to dismiss defense counsel in which he asserted four reasons why counsel should be dismissed: (1) she failed to meet professional and ethical standards established by the Connecticut Bar Association and the American Bar Association, (2) she "refused to allow [him] to view any items that would enable [him] to come to an intelligent and informed decision as to where [his] best interest[s] [lie] and . . . to aid in his own defense," (3) she failed to investigate certain information he had provided to her, and (4) "[a] conflict of interest has arisen." On June 13, 2017, Judge Dewey conducted a hearing on the defendant's motion at which the defendant reiterated his prior complaint that defense counsel allowed her private investigator to advise him to accept the state's plea deal, which made him "feel uncomfortable and [distrustful] that [the investigator] would actually put forth his best effort." The defendant also renewed his complaint concerning the amount of time it took for him to receive a copy of the state's discovery materials.[3] When the

[3] The following exchange occurred between Judge Dewey, defense counsel, and the defendant concerning the discovery materials:

"The Defendant: Also . . . when [defense counsel] was given the motion of discovery . . . I told her I would like a copy. She said she wouldn't be able to give me a copy of the motion of discovery at that time. And then, after I made my complaint, I received it two weeks later.

"[Judge Dewey]: You gave him copies of discovery?

"The Defendant: It took me a year to receive it, Your Honor.

"[Judge Dewey]: Counsel?

"[Defense Counsel]: He requested a copy of his file, Your Honor.

"[Judge Dewey]: Oh, his file?

"[Defense Counsel]: Yes.

"The Defendant: The motion of discovery, I asked for a copy.

"[Judge Dewey]: But not the actual discovery in this case, I hope.

"[Defense Counsel]: Yes, his file, the police reports. . . .

"[Judge Dewey]: You weren't entitled to discovery. Police reports aren't given to prisoners, sir. It might have taken a year [for you to receive a copy of discovery]. You shouldn't have gotten it at all.

"The Defendant: Shouldn't have got what?

"[Judge Dewey]: You should not get copies. Police reports are not given to people who are incarcerated. Police reports aren't given, witness statements

defendant finished speaking, Judge Dewey informed him that he had given her no reason to dismiss defense counsel, stating: "You don't like what's happening, but you haven't given me a reason to dismiss her." The defendant responded by stating that "it took some time for . . . information to be investigated as well," that he did not think defense counsel was "being honest" with him and that "it took . . . a year to get [the discovery materials]." Judge Dewey responded that investigations "take time . . . to do . . . properly," that defense counsel "has a reputation for honesty," and that "[t]he fact it took a year [to receive the requested discovery materials] is not a basis for dismissing counsel." She then denied the motion to dismiss defense counsel. During the hearing, the defendant did not discuss the conflict of interest claim, which he cited in his May 24, 2017 written motion, as an additional ground to dismiss defense counsel. At no time did Judge Dewey inquire into the defendant's claim concerning defense counsel's alleged conflict of interest. Nor did Judge Dewey ascertain whether or not the defendant had finished arguing each of the bases in his motion to dismiss defense counsel before Judge Dewey denied the motion and ended the hearing.[4]

aren't given. They are not given to incarcerated individuals. So, the fact that you even got it, you should be thankful your attorney gave it to you. You're not entitled to it, sir.

"The Defendant: Well, she told me it would have to be redacted, Your Honor. . . .

"[Judge Dewey]: Oh, if she did redact it, that was fine."

[4] The June 13, 2017 hearing ended in the following manner:

"[Judge Dewey]: Sir, excuse me?

"The Defendant: If I felt she's not being honest with me, I can't really—

"[Judge Dewey]: Sir, if this attorney is anything, she has a reputation for honesty. There has never been a doubt as to that and her credibility. Perhaps you feel uncomfortable with her, but, based on your motion, what you're indicating—you say that she's not meeting the Connecticut Bar [Association] standards. You've given me no indication of that. You say she refused to allow you to review items. Well, because she's under court orders not to disclose certain items, except redacted items. You say she's failed to investigate information. There's no indication of that.

Two years later, at the defendant's sentencing hearing, when asked by the trial court, *Gold*, *J.*, whether he wished to address the court, the defendant once again raised the issue of defense counsel's alleged conflict of interest. Specifically, he stated that, on two prior occasions, he had attempted to dismiss defense counsel because he did not have faith in her abilities and because she was "representing the son of [the victim]." When the defendant finished speaking, Judge Gold asked defense counsel if there was "anything else" she wished to say, and she indicated that there was not. Judge Gold then addressed the defendant, stating in relevant part: "[T]he first words that you say when you're given an opportunity to speak is to say . . . I tried to dismiss my lawyer. Those are the first words that you . . . wanted to say at your sentencing after hearing these appeals from [the victim's] family. . . . I just don't think that that . . . puts you in the best light. You're free to say whatever you wish to say at your sentencing, and you did. But frankly, I would have thought that you would have chosen something other than a complaint about your lawyer when you had the chance, after three and [one-half] years, to first express your feelings to this family." Judge Gold then sentenced the defendant to fifty years of imprisonment. At no time did Judge Gold inquire into the defendant's claim that defense counsel had a conflict of interest because she also was representing the victim's son.

On appeal, the defendant claims that the trial court violated his constitutional right to the effective assistance of counsel by (1) inadequately inquiring into some of the bases for his pretrial motions to dismiss defense

"The Defendant: Redacted items, it took me a year to get redacted items?

"[Judge Dewey]: The fact [that] it took a year is not a basis for dismissing counsel. Your motion is denied. Thank you. Thank you, counsel.

"[Defense Counsel]: Thank you, Your Honor.

"([The defendant] returns to lockup)."

counsel, and (2) failing to inquire at all into defense counsel's possible conflict of interest.[5] The defendant's claims implicate separate, yet similar, duties of the trial court to inquire into the relationship between the defendant and defense counsel when circumstances warrant such an inquiry. For the reasons set forth hereinafter, we conclude that the trial court conducted an adequate inquiry into the defendant's complaints that defense counsel did not diligently provide him with copies of the state's discovery materials or investigate information he had provided to her, that she allowed her investigator to advise him to plead guilty, and that she violated unspecified professional and ethical legal standards. We further conclude, however, that both trial judges improperly failed to inquire into the existence of a possible conflict of interest when the matter was brought to their attention.[6]

I

We begin with the defendant's claim that Judge Dewey inadequately inquired into the bases for his oral and written motions to dismiss defense counsel. Specifically, the defendant argues that, in both motions, he asserted a "seemingly substantial complaint," which required Judge Dewey to "inquire into the reasons for [his] dissatisfaction." (Internal quotation marks omitted.) The defendant argues that a sufficient inquiry required Judge Dewey to engage him in more than a cursory exchange regarding his complaints and to ask

[5] The defendant's first claim pertains to Judge Dewey, whereas his second claim pertains to both Judge Dewey and Judge Gold.

[6] In his written motion to dismiss defense counsel, the defendant cited an alleged conflict of interest as the fourth basis for dismissing defense counsel. Because a different legal standard governs the trial court's duty to inquire into possible conflicts of interest than its duty to inquire into other aspects of the relationship between a defendant and defense counsel, we examine the trial court's inquiry into the alleged conflict of interest separately from that court's inquiry into the other complaints raised in the defendant's motion to dismiss defense counsel.

defense counsel about those complaints, which she failed to do.

The state responds that Judge Dewey properly exercised her discretion in declining to conduct an extensive inquiry into the defendant's motions to dismiss defense counsel. The state contends that, distilled to their essence, the defendant's complaints about defense counsel concerned "the amount of time it had taken her to conduct her investigation and to provide him with requested materials, along with vague and unsubstantiated feelings or beliefs that counsel was not doing enough or being honest." The state argues that, because those complaints "were made known to [Judge Dewey], adequately explored, and demonstrably insufficient to [justify defense counsel's dismissal] . . . no further inquiry by [Judge Dewey] was required." We agree with the state.

The following legal principles guide our analysis of this claim. It is well established that "[a] defendant is not entitled to the appointment of a different public defender to represent him without a valid and sufficient reason. . . . Nor can a defendant compel the state to engage counsel of his own choice by arbitrarily refusing the services of a qualified public defender." (Citations omitted.) *State* v. *Gethers*, 193 Conn. 526, 543, 480 A.3d 435 (1984); see also *State* v. *Arroyo*, 284 Conn. 597, 645, 935 A.2d 975 (2007) ("[a]lthough the constitution guarantees a defendant counsel that is effective, it does not guarantee counsel whom a defendant will like"). "When reviewing the adequacy of a trial court's inquiries into a defendant's request for new counsel, an appellate court may reverse the trial court only for an abuse of discretion. . . . [Of course, a] trial court has a responsibility to inquire into and to evaluate carefully all substantial complaints concerning court-appointed counsel . . . . The extent of that inquiry, however, lies within the discretion of the trial court. . . . When a defen-

dant's assertions fall short of a seemingly substantial complaint, we have held that the trial court need not inquire into the reasons underlying the defendant's dissatisfaction with his attorney." (Citations omitted; internal quotation marks omitted.) *State* v. *Simpson*, 329 Conn. 820, 842–43, 189 A.3d 1215 (2018). We have held that any irreconcilable conflict that might handicap the defense is a sufficient reason to warrant the removal of counsel and the appointment of new counsel. See *State* v. *Gethers*, supra, 543. "[I]n some circumstances a complete breakdown in communication between [the defendant] and counsel [also] may require the appointment of new counsel . . . ." (Citation omitted.) *State* v. *Robinson*, 227 Conn. 711, 727, 631 A.2d 288 (1993).

In the present case, it is readily apparent that Judge Dewey properly exercised her discretion in denying the defendant's motions to dismiss defense counsel because the defendant's complaints against defense counsel were not substantial. As previously indicated, apart from defense counsel's alleged conflict of interest, the defendant raised three principal complaints that he claimed justified counsel's dismissal: during a meeting with the defendant, she allowed her investigator, who was also present, to recommend that he plead guilty, she did not diligently provide him with copies of the state's discovery materials or investigate information he had provided to her, and she violated unspecified professional and ethical legal standards.[7] We previously have

[7] We conclude that Judge Dewey properly exercised her discretion in response to the defendant's March 29, 2017 oral motion to dismiss defense counsel by instructing the defendant to file a written motion providing further support for the dismissal and, after the defendant filed that motion, by conducting the June 13, 2017 hearing on it. We note that, except for the alleged conflict of interest, which was stated in the defendant's written motion but not discussed during the June 13, 2017 hearing, all of the complaints raised by the defendant in his oral motion were either incorporated into his written motion or shared with Judge Dewey during that hearing. Accordingly, we consider only the adequacy of Judge Dewey's inquiry into the defendant's written motion during that hearing.

held that a defendant's disagreement with defense counsel regarding the strength of the state's case is not a valid reason to dismiss counsel. See *State* v. *Simpson*, supra, 329 Conn. 843 (concluding that defendant's complaint that he "felt pressured to take the [state's] plea [deal] because [he] was told [by defense counsel that he] had no chance of winning [at] trial" was insubstantial because that advice "amount[ed] to an experienced lawyer's analysis of the evidence available to [the defendant] as against the state's evidence" (internal quotation marks omitted)); see also, e.g., *United States* v. *Juncal*, 245 F.3d 166, 172 (2d Cir. 2001) ("defense counsel's blunt rendering of an honest but negative assessment of [a defendant's] chances at trial, combined with advice to enter the plea, [does not] constitute . . . coercion"); *United States* v. *Moree*, 220 F.3d 65, 72 (2d Cir. 2000) ("[t]hat the attorney advised [the defendant] to take the [plea] offer and warned him that his failure to do so would lead to a thirty year sentence merely asserts that the lawyer gave professional advice as to what the consequences of his choice might be").

Likewise, the defendant's complaint that defense counsel took too long to provide him with a copy of the state's discovery materials and to investigate information he had provided her was also insufficient to justify counsel's dismissal. Indeed, the record reveals that, by the time of the June 13, 2017 hearing on the defendant's written motion to dismiss counsel, which took place nearly two years before trial, the defendant not only had received a copy of the requested discovery materials, but had informed Judge Dewey that the requested investigation also was completed. As for the defendant's complaint that defense counsel violated professional and ethical standards, Judge Dewey had no duty of inquiry with respect to this allegation given that the defendant failed to specify what, or how, any such standards were violated. Vague assertions of this

kind are simply not the type of complaints that trigger a trial court's duty to inquire into the relationship between a defendant and defense counsel, much less do they warrant the dismissal of counsel. Accordingly, we conclude that Judge Dewey adequately inquired into the complaints underlying the defendant's motions to dismiss defense counsel.

II

The defendant next claims that the trial court, on two different occasions, inadequately inquired into defense counsel's possible conflict of interest when the defendant raised the issue. As previously indicated, in his pretrial, written motion to dismiss defense counsel, argued before Judge Dewey, the defendant alleged that "[a] conflict of interest has arisen." Two years later, during his sentencing hearing, the defendant informed Judge Gold that he previously had attempted to dismiss defense counsel because, inter alia, she was "representing the son of [the victim]." On both occasions, neither Judge Dewey nor Judge Gold asked the defendant or defense counsel any questions about the alleged conflicts of interest raised before them. The state does not dispute that Judge Dewey and Judge Gold each had a duty to inquire into defense counsel's possible conflict of interest but, rather, argues that both judges discharged their respective duties of inquiry. We disagree.

It is axiomatic that a criminal defendant's sixth amendment right to the effective assistance of counsel[8] includes the right to counsel that is free from conflicts of interest. *State* v. *Vega*, 259 Conn. 374, 386, 788 A.2d 1221, cert. denied, 537 U.S. 836, 123 S. Ct. 152, 154 L. Ed. 2d 56 (2002). It is a "fundamental principle . . .

[8] The sixth amendment right to effective assistance of counsel is made applicable to the states through the due process clause to the United States constitution. See, e.g., *Evitts* v. *Lucey*, 469 U.S. 387, 392, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985).

that an attorney owes an overarching duty of undivided loyalty to his [or her] client. At the core of the sixth amendment guarantee of effective assistance of counsel is loyalty, perhaps the most basic of counsel's duties. . . . Loyalty of a lawyer to his [or her] client's cause is the sine qua non of the [s]ixth [a]mendment's guarantee that an accused is entitled to effective assistance of counsel. . . . That guarantee affords a defendant the right to counsel's undivided loyalty." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Phillips* v. *Warden*, 220 Conn. 112, 136–37, 595 A.2d 1356 (1991).

In cases involving potential conflicts of interest, this court has held that "[t]here are two circumstances under which a trial court has a duty to inquire . . . (1) when there has been a timely conflict objection at trial . . . or (2) when the trial court knows or reasonably should know that a particular conflict exists . . . ." (Internal quotation marks omitted.) *State* v. *Vega*, supra, 259 Conn. 388. "To safeguard a criminal defendant's right to the effective assistance of counsel, a trial court has an affirmative obligation to explore the possibility of conflict when such conflict is brought to the attention of the trial judge in a timely manner." (Internal quotation marks omitted.) Id., 389; see *State* v. *Crespo*, 246 Conn. 665, 698 n.29, 718 A.2d 925 (1998) (defendant's objection to possible conflict of interest "gives rise to an absolute duty to inquire"), cert. denied, 525 U.S. 1125, 119 S. Ct. 911, 142 L. Ed. 2d 909 (1999); *State* v. *Martin*, 201 Conn. 74, 80, 513 A.2d 116 (1986) (concluding that duty to inquire arises whenever trial court knows or has reason to know of possible conflict); see also *United States* v. *Levy*, 25 F.3d 146, 153 (2d Cir. 1994) ("[w]hen a [trial] court is sufficiently apprised of even the possibility of a conflict of interest, the court . . . has an 'inquiry' obligation"). In such circumstances, "[t]he court must investigate the facts and

details of the attorney's interests to determine whether the attorney in fact suffers from an actual conflict, a potential conflict, or no genuine conflict at all." *United States* v. *Levy*, supra, 153. We review the defendant's claim that the trial court failed to inquire into a possible conflict of interest as a question of law, and, as such, it is subject to plenary review. See, e.g., *State* v. *Parrott*, 262 Conn. 276, 286, 811 A.2d 705 (2003).

Applying the foregoing principles to the present case, we conclude that it is apparent both Judge Dewey and Judge Gold had a duty to inquire into the defendant's claim, first raised nearly two years before trial, that defense counsel had a conflict of interest. The defendant's allegation in his motion to dismiss defense counsel that "[a] conflict of interest has arisen" constituted not only "a timely conflict objection at trial"; (internal quotation marks omitted) *State* v. *Vega*, supra, 259 Conn. 388; but an unmistakably clear one such that, under our case law, Judge Dewey minimally was required to inquire as to the nature of the alleged conflict. See *State* v. *Martin*, supra, 201 Conn. 83 (trial court improperly denied defense counsel's motion to withdraw without "*any* inquiry in response to an explicit representation of a possible conflict of interest" (emphasis in original)); see also *State* v. *Parrott*, supra, 262 Conn. 288–89 (concluding that, in response to potential conflict of interest caused by defense counsel's choosing to sit apart from defendant at trial for "personal safety" reasons, trial court conducted adequate inquiry in which it determined that defendant and counsel could communicate during voir dire, defendant wanted counsel to continue to represent him, and counsel felt he " 'absolutely' " could provide adequate representation); *State* v. *Vega*, supra, 390–91 (in response to defendant's allegation that his filing grievance against defense counsel created conflict, trial court adequately inquired and determined that complaints "were vague

and generally amounted to disagreements with [counsel's] tactical or strategic decisions, and his concern that [they] had not had the opportunity to meet . . . more frequently"); *State* v. *Kukucka*, 181 Conn. App. 329, 342, 186 A.3d 1171 (because defendant "did not raise a timely conflict of interest objection before the trial court," duty of inquiry analysis was limited to whether trial court knew or reasonably should have known that conflict potentially existed), cert. denied, 329 Conn. 905, 184 A.3d 1216 (2018).

Likewise, when the defendant complained to Judge Gold that defense counsel was "representing the son of [the victim]," Judge Gold had a duty to inquire regarding the facts surrounding that claim to determine whether counsel was, in fact, representing the victim's son and, if so, whether it adversely had affected her representation of the defendant.[9] See *State* v. *Burns*,

[9] We understand that complaints from defendants about defense counsel are not infrequent and sometimes have no real basis. Nevertheless, this cannot excuse the well established duty to inquire. We want to emphasize that the trial court's duty to inquire is not an onerous one. To the contrary, when there has been a timely conflict objection or the court knows or has reason to know of a potential conflict, the duty of inquiry is limited to determining whether a conflict actually exists, which, in the vast majority of cases, the court can accomplish by asking a few pointed questions. "If the court is satisfied at the inquiry stage that there is no actual conflict or potential for one to develop, its duty ceases." *United States* v. *Cain*, 671 F.3d 271, 293 (2d Cir.), cert. denied sub nom. *Soha* v. *United States*, 566 U.S. 928, 132 S. Ct. 1872, 182 L. Ed. 2d 655 (2012), and cert. denied, 571 U.S. 942, 134 S. Ct. 56, 187 L. Ed. 2d 257 (2013); see also *State* v. *Drakeford*, 261 Conn. 420, 427–28, 802 A.2d 844 (2002) ("[in the absence of] any reason to the contrary, the trial court may rely on [defense counsel's] representation that there is no conflict, and it has no obligation to conduct any further inquiry into the subject" (internal quotation marks omitted)).

We can perceive no reason, moreover, why the court's inquiry need improperly reveal confidential matters between attorney and client. See *Holloway* v. *Arkansas*, 435 U.S. 475, 487, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978) (noting that trial court can explore "the adequacy of the basis of defense counsel's representations regarding a conflict of [interest] without improperly requiring disclosure of the confidential communications of the client"). Trial courts may take appropriate steps to avoid the potential disclosure of such confidential information, including, if necessary, conduct-

Docket No. A-4696-03T4, 2006 WL 3093137, *6 (N.J. Super. App. Div. November 2, 2006) (deeming defense counsel's prior representation of victim's son "potential conflict" that "should have been brought to the court's attention prior to trial and resolved on the record" in murder trial), cert. denied, 191 N.J. 317, 923 A.2d 231 (2007).

The state argues that Judge Dewey satisfied her duty of inquiry by holding a hearing on the defendant's motion to dismiss defense counsel at which the defendant was allowed to argue in support of the motion. The state contends that, because the defendant did not mention the alleged conflict during that hearing, "Judge Dewey might reasonably have believed that the alleged 'conflict of interest' was comprised solely of the defendant's [other] articulated complaints regarding [defense] counsel's performance." This argument is unavailing because, as we repeatedly have stated, the trial court's duty to explore the possibility of conflict when such conflict is brought to its attention is an *affirmative* duty that can be discharged only by the trial court's

ing an in camera inquiry with the defendant and defense counsel that is later summarized on the record. See *United States* v. *Gregoire*, 628 Fed. Appx. 496, 497 (9th Cir. 2015) (remanding case in which District Court improperly failed to inquire into defendant's alleged irreconcilable conflict with appointed counsel to "conduct an adequate inquiry, including an in camera hearing if necessary, to determine the extent of the [pretrial] conflict between [the defendant] and counsel"); *People* v. *Winbush*, 205 Cal. App. 3d 987, 991, 252 Cal. Rptr. 722 (1988) ("[o]nce the request for new counsel is made, the trial court's first duty is to fully explore with [the] defendant, in open court or during an in camera session without the presence of the prosecutor, [the] defendant's reasons for desiring new counsel"); *State* v. *Yelton*, 87 N.C. App. 554, 557, 361 S.E.2d 753 (1987) (observing that "full and searching inquiry to determine whether an actual conflict of interest exists . . . may include *in camera* proceedings or discussions between the trial judge and [the] defendants" (emphasis in original)); *State* v. *Vicuna*, 119 Wn. App. 26, 32–33, 79 P.3d 1 (2003) (suggesting, in response to state's "argument that requiring more rigorous inquiry regarding an alleged conflict could jeopardize attorney-client privilege," that "court may conduct an in camera review with a sealed record").

questioning the defendant and defense counsel about the claimed conflict. See *State* v. *Vega*, supra, 259 Conn. 389; *State* v. *Martin*, supra, 201 Conn. 82.[10]

For the same reason, we find no merit in the state's contention that Judge Gold fulfilled his duty of inquiry merely by asking defense counsel, prior to imposing sentence on the defendant, "if she had anything further to say." According to the state, because defense counsel had "an independent ethical obligation to avoid or seek agreement regarding conflicting representations, and to advise the court promptly if a conflict of interest had existed or arisen during the trial," and because defense counsel declined the opportunity to address the defendant's allegation, Judge Gold "reasonably could have assumed that no conflict of interest existed or that the defendant had agreed to [waive] it." Contrary to the state's assertions, if an attorney's ethical duty to avoid conflicts and to disclose them whenever they arise was sufficient to protect a defendant's right to be represented by counsel free of any such conflicts, the law would not have seen fit to impose on the trial court an independent duty of inquiry.

We recognize that, in the absence of any reason to the contrary, the trial court may rely on defense counsel's representation that there is no conflict, and it has no obligation to conduct any further inquiry into the subject. See *State* v. *Cator*, 256 Conn. 785, 795, 781 A.2d 285 (2001). In the present case, however, defense counsel did not assert that there was no conflict. See *State* v. *Lopez*, 80 Conn. App. 386, 393–94, 835 A.2d 126 (2003)

[10] Although Judge Dewey invited a written motion from the defendant listing his reasons to dismiss defense counsel, she ended the June 13, 2017 hearing without asking him any questions about defense counsel's conflict of interest, which was plainly alleged in his written motion to dismiss. Accordingly, we disagree with the state that Judge Dewey satisfied her duty of inquiry during the June 13, 2017 hearing to address defense counsel's alleged conflict of interest.

(trial court had affirmative duty to inquire about defense counsel's possible conflict of interest when counsel did not assert that there was no conflict or that her representation of defendant would not be compromised at trial), aff'd, 271 Conn. 724, 859 A.2d 898 (2004); see also *State* v. *Martin*, supra, 201 Conn. 82 (in discharging duty of inquiry, "trial court must be able, and be freely permitted, to rely upon [defense] counsel's representation that the possibility of such a conflict does or does not exist. . . . The reliance in such an instance is upon the solemn representation of a fact made by [counsel] as an officer of the court. . . . The course thereafter followed by the court in its inquiry depends upon the circumstances of the particular case." (Citations omitted; internal quotation marks omitted.)). What the trial court is not permitted to do, however, is simply to infer from defense counsel's silence, after the possibility of a conflict has been raised in open court, that no such conflict exists. Cf. *United States* v. *Crespo de Llano*, 838 F.2d 1006, 1012 (9th Cir. 1987) ("*where neither* [*the*] *defendant nor his lawyers objected to multiple representation*, [the] trial court was entitled to assume that they had determined that no conflict existed or that [the] defendant had knowingly accepted the risk of conflict" (emphasis added)), citing *Cuyler* v. *Sullivan*, 446 U.S. 335, 346–48, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980).

Because Judge Dewey and Judge Gold failed to inquire into defense counsel's alleged conflict of interest, we cannot determine, on the basis of the record before us, whether that allegation has any merit. In such circumstances, we must remand the case to the trial court for a determination of whether defense counsel did, in fact, have an actual conflict of interest that adversely affected her representation of the defendant.[11] Compare *Wood* v. *Georgia*, 450 U.S. 261, 272–73,

[11] Citing *Holloway* v. *Arkansas*, 435 U.S. 475, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978), the defendant argues that the trial court's failure to inquire into

101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981) (remanding case to trial court after concluding that it failed to inquire into "sufficiently apparent" conflict of interest, depriving United States Supreme Court of record necessary to determine "whether [defense] counsel was influenced in his basic strategic decisions by the [alleged conflict of interest]"), with *Mickens* v. *Taylor*, 535 U.S. 162, 165, 174, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002) (upholding denial of habeas relief, following evidentiary hearing on claim that trial court failed to inquire into defense counsel's potential conflict of interest because, even if

defense counsel's alleged conflict of interest entitles him to a new trial. The defendant's reliance on *Holloway* is misplaced because that case involved the trial court's failure to inquire into whether an attorney's representation of three murder defendants at the same trial created a conflict of interest for the attorney. Id., 478–80. In reversing the convictions of the defendants, the United States Supreme Court did not require the defendants to show prejudice but, rather, assumed that the representation was inherently prejudicial. Id., 489–91. The court deemed joint representation inherently prejudicial because of what it "tends to prevent the attorney from doing" on behalf of each of his clients, and because a rule requiring a defendant to show prejudice would "not be susceptible of intelligent, evenhanded application," considering the potential for silence in the record as a result of "what the advocate finds himself compelled to *refrain* from doing . . . ." (Emphasis in original.) Id., 489–90. Subsequently, in *Mickens* v. *Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002), a case involving a trial court's failure to inquire into a potential conflict of interest about which it knew or reasonably should have known; id., 164; the Supreme Court expressly limited *Holloway*'s rule of automatic reversal to cases in which "defense counsel [was] forced to represent codefendants over [counsel's] timely objection . . . ." Id., 168. In so doing, the court noted that "[the] [p]etitioner's proposed rule of automatic reversal when there existed a conflict that did not affect counsel's performance, but the trial judge failed to make the . . . mandated inquiry, makes little policy sense." Id., 172. As Justice Kennedy observed in his concurring opinion in *Mickens*, "[t]he trial judge's failure to inquire into a suspected conflict is not the kind of error requiring a presumption of prejudice." Id., 176 (Kennedy, J., concurring). Indeed, automatic reversal in such cases is not only unwarranted but would be profoundly unfair to the state. In such cases, "[t]he constitutional question must turn on whether trial counsel had a conflict of interest that hampered the representation, not on whether the trial judge should have been more assiduous in taking prophylactic measures." Id., 179 (Kennedy, J., concurring).

trial court failed to inquire, petitioner was required, and had failed, to prove actual conflict and adverse effect during evidentiary hearing); see also *Morgan* v. *Commissioner of Correction*, 87 Conn. App. 126, 142–43, 866 A.2d 649 (2005) (remanding case to habeas court after it inadequately inquired into apparent conflict of interest because Appellate Court had "no evidence before [it] in the record that reveal[ed] whether the nature of the grievances constituted an actual conflict of interest"); *State* v. *Mims*, 180 N.C. App. 403, 413, 637 S.E.2d 244 (2006) (remanding case to trial court after it failed to inquire into possible conflict of interest because, "unlike in *Mickens*, an evidentiary hearing ha[d] not been held," and, thus, court was unable to determine if defendant's right to effective assistance of counsel had been denied); *State* v. *Gillard*, 64 Ohio St. 3d 304, 312, 595 N.E.2d 878 (1992) (remanding case to trial court after it inadequately inquired into possible conflict of interest because court "[could] not be sure that an actual conflict of interest existed").

On remand, the trial court is instructed to conduct a hearing at which the defendant shall have the burden of establishing "(1) that [defense] counsel actively represented conflicting interests[12] and (2) that an actual conflict of interest adversely affected his [counsel's] performance."[13] (Footnote added; internal quotation

[12] The record does not reveal whether the conflict alleged by the defendant before Judge Dewey is the same as the conflict he alleged before Judge Gold, which was that defense counsel was representing the son of the victim. To the extent that it is relevant, the trial court should consider on remand whether the defendant's alleged conflicts of interest before Judge Dewey and Judge Gold are the same and whether that has any impact on the defendant's ability to satisfy his burden on remand.

[13] "Prejudice may be presumed in some sixth amendment contexts, such as the actual or constructive denial of assistance of counsel altogether or various forms of state interference with counsel's assistance. . . . In the context . . . of counsel allegedly burdened by a conflict of interest . . . there is no presumption of prejudice per se. Prejudice is presumed only if the defendant demonstrates that counsel actively represented conflicting interests and that . . . conflict of interest adversely affected [counsel's]

marks omitted.) *State* v. *Parrott*, supra, 262 Conn. 287; see also *Cuyler* v. *Sullivan*, supra, 446 U.S. 348. As we previously have explained, an attorney may be subject to conflicting interests when "interests or factors personal to him [or her] . . . are inconsistent, diverse or otherwise discordant with [the interests] of his [or her] client . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Crespo*, supra, 246 Conn. 690. To prove adverse effect, a defendant must "demonstrate that some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." (Internal quotation marks omitted.) *State* v. *Vega*, supra, 259 Conn. 387.

Following the hearing on remand, the trial court is directed to make its findings of fact and conclusions of law in writing, which shall promptly be filed with the Office of the Appellate Clerk for our review. See, e.g., *State* v. *Pollitt*, 199 Conn. 399, 416–17, 508 A.2d 1 (1986) (remanding case to trial court with order to conduct evidentiary hearing on suppression of evidence claim and instructing court, after making "its findings of fact and conclusions of law," to "promptly file such findings and conclusions with the clerk of this court for our review"); see also Practice Book § 60-2 ("[this]

performance. . . . The Second Circuit Court of Appeals has honed this test further. Once a defendant has established that there is an actual conflict, he must show that a lapse of representation . . . resulted from the conflict. . . . To prove a lapse of representation, a defendant must demonstrate that some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." (Citations omitted; internal quotation marks omitted.) *State* v. *Vega*, supra, 259 Conn. 387; see also *State* v. *Crespo*, supra, 246 Conn. 689 n.21 ("If an actual conflict of interest burdens the defendant's counsel, the defendant need not establish actual prejudice. . . . The defendant need only demonstrate that . . . counsel's performance was adversely affected by the conflict." (Citation omitted; internal quotation marks omitted.)).

court may, on its own motion or upon motion of any party . . . (8) remand any pending matter to the trial court for the resolution of factual issues where necessary"). At that time, depending on the trial court's findings, this court will determine whether it is necessary to reach the defendant's remaining claim on appeal that the trial court improperly admitted into evidence testimony from lay witnesses identifying him in a surveillance video recording.

The case is remanded for further proceedings in accordance with this opinion.

In this opinion the other justices concurred.

KRISTINE CASEY ET AL. *v.* GOVERNOR NED LAMONT
(SC 20494)

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

Syllabus

Pursuant to statute (§ 28-9 (a)), "[i]n the event of serious disaster . . . the Governor may proclaim that a state of civil preparedness emergency exists . . . ."

The plaintiffs, the owners of a pub located in Connecticut, sought relief in connection with the issuance of certain executive orders by the defendant, the governor of the state of Connecticut, amid the COVID-19 pandemic. In response to the pandemic, the governor proclaimed a civil preparedness emergency pursuant to § 28-9 (a) and issued the challenged executive orders in an attempt to contain and mitigate the spread of COVID-19, including orders that limited various activities at bars and restaurants throughout the state. The plaintiffs closed their pub after determining that it would not be profitable to operate the pub while complying with the executive orders. The plaintiffs sought an injunction precluding the enforcement of the executive orders and a judgment declaring the orders unconstitutional. The trial court denied the plaintiffs' requests for relief and rendered judgment for the governor. The plaintiffs appealed to this court upon certification by the Chief Justice pursuant to statute (§ 52-265a) that a matter of substantial public interest was involved. *Held*:

1. The governor did not exceed his statutory authority when he issued the challenged executive orders: on the basis of the text and legislative history of both § 28-9 (a) and another related statute (§ 28-1 (2)) that refers to civil preparedness emergencies under § 28-9 and that defines the term "major disaster," as well as a declaration by the president of the United States that the COVID-19 pandemic was of sufficient severity and magnitude to be deemed a major disaster under federal law that embraces a narrower definition of "major disaster" than that set forth in § 28-1 (2), this court concluded that the COVID-19 pandemic constituted a "serious disaster" for which the governor could proclaim the existence of a civil preparedness emergency under § 28-9 (a); moreover, such a proclamation empowered the governor, pursuant to § 28-9 (b) (1), to modify or suspend any law or requirement that conflicts with the efficient and expeditious execution of civil preparedness functions or the protection of public health, and, pursuant to § 28-9 (b) (7), to take steps that are reasonably necessary in light of the emergency to protect the health, safety and welfare of the people of Connecticut, and all of the challenged executive orders fell within either or both of those provisions.

2. The plaintiffs could not prevail on their claim that § 28-9 (b) (1) and (7) was an unconstitutional delegation by the General Assembly of its legislative powers to the governor, in violation of the separation of powers provision of the Connecticut constitution: in enacting § 28-9, the General Assembly set forth the policy for the governor to follow in the event of a serious disaster and provided standards that both limited the governor's authority to act and were sufficient to guide the exercise of his authority, as the governor could act under § 28-9 (b) (1) only after he proclaimed a civil preparedness emergency or declared a public health emergency, his actions under that provision were limited in duration and to suspending or modifying, rather than repealing, laws, and only to the extent that they were in conflict with the execution of civil preparedness functions or were required to protect public health, and the governor could act under § 28-9 (b) (7) only after he proclaimed a civil preparedness emergency and only to the extent reasonably necessary to protect the health, safety and welfare of the people of Connecticut; moreover, it was reasonable for the legislature to conclude that the executive branch would be far better suited to respond to a serious disaster with the speed and flexibility needed to protect the public health and welfare, as the legislature is not in session continuously and would not be well positioned to mount a rapid response to a serious disaster, especially one that develops and evolves quickly and unpredictably, and thus requires an ongoing and agile response; furthermore, a legislative committee with statutory authority to disapprove of the governor's public health emergency declaration provided oversight of his actions, and

the legislature had the ability to impose greater oversight or to amend or repeal § 28-9 to further limit the governor's authority.

Argued December 11, 2020—officially released March 29, 2021*

Procedural History

Action to enjoin the defendant from enforcing certain executive orders, and for other relief, brought to the Superior Court in the judicial district of New Haven and transferred to the judicial district of Waterbury, Complex Litigation Docket, where the case was tried to the court, *Bellis*, *J.*; judgment denying the plaintiffs' request for injunctive and declaratory relief, and the plaintiff, upon certification by the Chief Justice pursuant to General Statutes § 52-265a that a matter of substantial public interest was at issue, appealed to this court. *Affirmed.*

Jonathan J. Klein, for the appellants (plaintiffs).

Philip Miller, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, *Clare E. Kindall*, solicitor general, and *Alma Rose Nunley*, assistant attorney general, for the appellee (defendant).

Opinion

McDONALD, J. For more than one year now, the world has been in the unyielding grip of a highly virulent infectious disease that, to date, has infected approximately 127 million people worldwide and has killed more than 2.7 million individuals. Of those deaths, about 20 percent, or approximately 549,000, have been in the United States of America. In Connecticut alone, more than 305,000 people have been infected and more than

* March 29, 2021, the date that this decision was released as a slip opinion, is the operative date for the beginning of all time periods for the filing of any postopinion motions or petitions.

7800 have died.[1] These numbers, while jarring on their own, tell but one part of the enormous toll inflicted on society since the pandemic's onset. Around the country—indeed the world—large segments of economic activity have been severely disrupted, if not fallen into collapse, millions of people have lost their employment, many hospitals and other health-care operations have been overrun by gravely ill and dying patients, and extraordinary lockdowns ordered by government officials, in an effort to abate the rate of infection, have limited the free flow of personal and commercial activity. As this opinion is issued, it is uncertain when, or how, the pandemic will end.

The disease that has caused so much death and damage is known as COVID-19. It is a respiratory disease caused by a virus that is transmitted easily from person to person and can result in serious illness or death. According to the Centers for Disease Control and Prevention (CDC), the virus is primarily spread through respiratory droplets from infected individuals coughing, sneezing, or talking while in close proximity to other people. Centers for Disease Control & Prevention, How COVID-19 Spreads (last updated October 28, 2020), available at https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html (last visited March 29, 2021). On January 31, 2020, the United States Department of Health and Human Services declared a national public health emergency, effective January 27, 2020, on the basis of the rising number of confirmed COVID-19 cases in the United States. United States Department of Health & Human Services, Press Release, Secretary Azar Declares Public Health Emer-

[1] See Coronavirus Resource Center, Johns Hopkins University & Medicine, COVID-19 Dashboard by the Center for Systems Science and Engineering (CSSE) at John Hopkins University (JHU), available at https://coronavirus.jhu.edu/map.html (last visited March 29, 2021); Connecticut Department of Public Health, Connecticut's COVID-19 Response, available at https://portal.ct.gov/coronavirus (last visited March 29, 2021).

gency for United States for 2019 Novel Coronavirus (January 31, 2020), available at https://www.hhs.gov/about/news/2020/01/31/secretary-azar-declares-public-health-emergency-us-2019-novel-coronavirus.html (last visited March 29, 2021). The CDC explained that COVID-19 "represents a tremendous public health threat." Centers for Disease Control & Prevention, Press Release, Update on COVID-19 (February 21, 2020), available at https://www.cdc.gov/media/releases/2020/t0221-cdc-telebriefing-covid-19.html (last visited March 29, 2021).

With this context in mind, we turn to the matter before us, which requires this court to consider the extent of the governor's authority to issue executive orders during the civil preparedness emergency he declared pursuant to General Statutes § 28-9 in response to the COVID-19 pandemic. In particular, we consider whether the defendant, Governor Ned Lamont, lawfully issued certain executive orders that limited various commercial activities at bars and restaurants throughout the state. To that end, we must determine whether the COVID-19 pandemic constitutes a "serious disaster" pursuant to § 28-9 and whether that statute empowers the governor to issue the challenged executive orders. Because we conclude that § 28-9 provides authority for the governor to issue the challenged executive orders, we also consider whether § 28-9 is an unconstitutional delegation of legislative authority to the governor in violation of the separation of powers provision of the Connecticut constitution. See Conn. Const., art. II. We conclude that the statute passes constitutional muster.

The pleadings and the record reveal the following undisputed facts and procedural history. On March 10, 2020, "[i]n response to the global pandemic of [COVID-19]," Governor Lamont "declare[d] a public health emergency and civil preparedness emergency throughout the [s]tate, pursuant to [General Statutes §§] 19a-131a and 28-9 . . . ." Governor Lamont has renewed

the declaration of both emergencies twice, most recently on January 26, 2021. The emergencies currently remain in effect until April 20, 2021. On March 13, 2020, three days after Governor Lamont's declaration, President Donald J. Trump made "an emergency determination under [§] 501 (b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. [§§ 5121 –5207 (Stafford Act)]." Letter from President Donald J. Trump to Acting Secretary of the Department of Homeland Security Chad F. Wolf (March 13, 2020) p. 1. On March 28, 2020, President Trump determined that, beginning on January 20, 2020, the impacts of the COVID-19 pandemic on Connecticut "are of sufficient severity and magnitude to warrant a major disaster declaration under the [Stafford Act] . . . ." Federal Emergency Management Agency, Connecticut, Major Disaster and Related Determinations, 85 Fed. Reg. 31,542 (May 26, 2020).

Following Governor Lamont's declaration of the public health and civil preparedness emergencies, he promulgated a series of executive orders in an attempt to contain and mitigate the spread of COVID-19. Relevant to this appeal, on March 16, 2020, he issued Executive Order No. 7D, which provides, among other things, that "any location licensed for [on premise] consumption of alcoholic liquor in the [s]tate of Connecticut . . . shall only serve food or [nonalcoholic] beverages for [off premise] consumption." Executive Order No. 7D (March 16, 2020). In response to the rapidly evolving COVID-19 pandemic, Governor Lamont continued to promulgate a series of executive orders modifying Executive Order No. 7D. Specifically, in April, 2020, Governor Lamont issued Executive Order No. 7X, which extended to May 20, 2020, Executive Order No. 7D's limitations on bars and restaurants. Given that the state had made some progress in stemming the spread of COVID-19, in May, 2020, Governor Lamont issued guid-

ance called "Reopen Connecticut" to begin reopening portions of the state's economy. The goal of Reopen Connecticut was to "[p]roactively protect public health and speed up the pace of economic, educational, and community recovery while restoring Connecticut's quality of life." N. Lamont, Reopen Connecticut: Sector Rules for May 20th Reopen (May 18, 2020) (Reopen Connecticut), available at https://portal.ct.gov/-/media/DECD/Covid_Business_Recovery/CTReopens_Offices_C4_V1.pdf (last visited March 29, 2021). In service of that goal, Governor Lamont issued Executive Order No. 7MM, which permitted restaurants to serve food outside and ordered that "[a]lcoholic liquor may be served only in connection with outdoor dining . . . ." Executive Order No. 7MM (May 12, 2020). Thereafter, he issued Executive Order No. 7ZZ, which allowed the resumption of some indoor dining except that the ban on "the sale of alcohol by certain permittees without the sale of food . . . shall remain in effect and [is] extended through July 20, 2020." Executive Order No. 7ZZ (June 16, 2020). In July, 2020, and in response to certain developments related to COVID-19, Governor Lamont announced that he was suspending phase 3 of the Reopen Connecticut plan, which was previously scheduled to start on July 20, 2020.

In compliance with Executive Order No. 7D, and after determining that it would not be profitable to operate a takeout business, the plaintiffs, Kristine Casey and Black Sheep Enterprise, LLC, closed their establishment, Casey's Irish Pub, on March 16, 2020. Casey is the permittee of a café liquor permit for the pub, which has fifteen stools at the bar, two high-top tables, a pool table, and a maximum capacity of fifty-nine patrons. The pub does not typically serve hot meals, and approximately 90 percent of its revenue comes from the sale of alcohol. The parties agree that, because of the physical location of the pub, "[o]utdoor service is not a viable

option . . . because the tables would completely block the sidewalk, and there would be no protection from cars approaching to park . . . .'' The parties also stipulate that ''[p]reparing takeout meals and sealed alcoholic beverages for [off premise] consumption is not a viable option . . . as Casey knows from her experience in operating the pub and dealing with her customer base that, without the pub atmosphere, there would be insufficient interest from her clientele to justify the expense of providing such service.'' The plaintiffs' pub remains closed, and the parties stipulate that ''it is not economically or physically feasible for [the plaintiffs] to reopen the pub.'' Since the pub's shutdown, the plaintiffs have continued to pay rent in the amount of $3200 per month and operating expenses totaling approximately $14,000 per month without any income stream.

In June, 2020, the plaintiffs commenced this action against Governor Lamont, requesting the court to declare that he acted beyond his statutory and constitutional authority when he issued Executive Order Nos. 7D, 7G, 7N, 7T, 7X, 7MM and 7ZZ.[2] The operative complaint sought a ''temporary and permanent injunction'' against the enforcement of the challenged executive orders. The complaint also requested a judgment declar-

[2] In addition to Executive Order Nos. 7D, 7X, 7MM, and 7ZZ, the provisions of which we have set forth in the text of this opinion, Executive Order No. 7G clarified the limits of Executive Order No. 7D on businesses such as the pub, allowing them ''to sell sealed containers of alcoholic liquor for [pickup] at such restaurant, café or tavern'' under certain conditions, including a requirement that the alcohol purchase ''accompany a [pickup] order of food prepared on the premises . . . .'' Executive Order No. 7G (March 19, 2020). Executive Order No. 7N directed businesses that remained open to serve food and drink for off-premise consumption to ''limit entrance of customers into their locations to the minimum extent necessary to pick up and/or pay for orders, use touchless payment systems, and require remote ordering and payment . . . .'' Executive Order No. 7N (March 26, 2020). Executive Order No. 7T expanded the list of sealed containers of alcohol that liquor permit holders could sell under the conditions set forth in Executive Order No. 7G.

ing the executive orders unconstitutional. The parties filed a stipulation of facts, and, after the filing of briefs, the case was tried to the court by way of oral argument and based on the briefs and the parties' stipulation of facts.[3]

Thereafter, the trial court, *Bellis*, *J.*, issued a memorandum of decision, in which it denied the plaintiffs' request for injunctive and declaratory relief, and the court rendered judgment for Governor Lamont. The court reasoned that the COVID-19 pandemic constitutes a "serious disaster" under § 28-9 (a) and Governor Lamont's executive orders were authorized by § 28-9 (b) (1) and (7). The court also concluded that § 28-9 is not an unconstitutional delegation of legislative authority to the governor because, when the General Assembly passed § 28-9, "it set forth a clear legislative policy" and "gave the governor the ability to implement measures to achieve this goal."

The plaintiffs appealed directly to this court pursuant to General Statutes § 52-265a, and the Chief Justice subsequently certified that this action involves a matter of substantial public interest. On appeal, the plaintiffs do not contend that the restrictions Governor Lamont imposed on the pub were unreasonable or were not related to the public health, safety, and welfare of the people of this state. Rather, they claim that Governor Lamont exceeded his statutory authority by issuing the challenged executive orders. The plaintiffs further contend that, even if Governor Lamont's executive orders are valid under § 28-9, § 28-9 (b) (1) and (7) is an unconstitutional delegation by the General Assembly of its legislative powers in violation of the separation of powers provision of the Connecticut constitution. See Conn. Const., art. II.

[3] Oral argument was conducted using remote technologies because the Superior Court buildings at the time were closed to the public for most purposes as a result of the pandemic.

Governor Lamont disagrees and contends that, because the COVID-19 pandemic is a "serious disaster," § 28-9 provides him with statutory authority to limit the pub's operation. Governor Lamont further contends that § 28-9 does not violate the separation of powers provision of the Connecticut constitution because it does not infringe on legislative authority and it provides sufficient standards for implementation.[4]

Following oral argument, we issued a per curiam ruling on December 31, 2020, in which we affirmed the judgment of the trial court, explaining that Governor Lamont's actions to date had been constitutional. We indicated at that time that a full opinion would follow. This is that opinion.

I

We begin with the plaintiffs' contention that, by issuing the challenged executive orders, Governor Lamont exceeded his statutory authority. Whether the governor has statutory authority to issue the challenged executive orders during a proclaimed civil preparedness emergency turns on whether the COVID-19 pandemic

[4] Following oral argument, we ordered the parties to file supplemental briefs addressing the questions of whether Governor Lamont abandoned reliance on § 19a-131a as a legal basis to support the challenged executive orders and, assuming he did not, whether his authority resulting from a public health emergency declaration, alone, supports the challenged executive orders. In their supplemental brief, the plaintiffs contend, as the trial court concluded, that Governor Lamont abandoned reliance on § 19a-131a. Assuming he did not abandon reliance on § 19a-131a, the plaintiffs claim that the governor's authority resulting from a public health emergency, alone, does not support any of the challenged executive orders. Governor Lamont contends that he has not abandoned reliance on § 19a-131a as a legal basis to support the actions taken pursuant to § 28-9 (b) (1). He also contends, however, that he can rely on § 19a-131a as authority to issue only Executive Order Nos. 7MM and 7ZZ because those are the only orders that fall within the governor's authority to modify statutes during a public health emergency pursuant to § 28-9 (b) (1). Because the parties agree that § 19a-131a, alone, does not provide authority for Governor Lamont to issue all of the challenged executive orders, we must consider whether § 28-9 provides that authority.

constitutes a "serious disaster" under § 28-9 (a). This presents 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). We review § 28-9 in accordance with General Statutes § 1-2z and our familiar principles of statutory construction. See, e.g., *Sena* v. *American Medical Response of Connecticut, Inc.*, 333 Conn. 30, 45–46, 213 A.3d 1110 (2019).

We begin with the text of § 28-9 (a), which provides in relevant part: "In the event of serious disaster, enemy attack, sabotage or other hostile action or in the event of the imminence thereof, the Governor may proclaim that a state of civil preparedness emergency exists, in which event the Governor may personally take direct operational control of any or all parts of the civil preparedness forces and functions in the state. Any such proclamation shall be effective upon filing with the Secretary of the State. . . ." Governor Lamont does not contend that the COVID-19 pandemic has resulted from an "enemy attack, sabotage or other hostile action . . . ." General Statutes § 28-9 (a). Rather, the governor relies on the term "serious disaster" to justify the civil preparedness emergency proclamation. The plaintiffs contend that the COVID-19 pandemic is not a "serious disaster" because the General Assembly did not intend that term "to include the contagion of disease." Governor Lamont contends that, regardless of whether the statute is plain and unambiguous, the COVID-19 pandemic constitutes a "serious disaster."

The term "serious disaster" is not defined in § 28-9 or in Chapter 517 of the General Statutes. The term "major disaster," however, is defined in the definitional provision of Chapter 517.[5] Specifically, General Statutes § 28-

[5] We subsequently discuss in this opinion whether there is any analytic difference between a "serious disaster" and a "major disaster," and conclude there is not.

1 (2) defines "major disaster" as "*any catastrophe including, but not limited to*, any hurricane, tornado, storm, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm or drought, or, regardless of cause, any fire, flood, explosion, or man-made disaster in any part of this state that, (A) in the determination of the President, causes damage of sufficient severity and magnitude to warrant major disaster assistance under the [Stafford Act], as amended from time to time, to supplement the efforts and available resources of this state, local governments within the state, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused by such catastrophe, or (B) in the determination of the Governor, requires the declaration of a civil preparedness emergency pursuant to section 28-9." (Emphasis added.)

Because the term "catastrophe" is not defined in § 28-1, we look to its common dictionary definition. See, e.g., *Studer* v. *Studer*, 320 Conn. 483, 488, 131 A.3d 240 (2016); see also General Statutes § 1-1 (a). "Catastrophe" is often defined as "a momentous tragic usu[ally] sudden event marked by effects ranging from extreme misfortune to utter overthrow or ruin . . . ." Webster's Third New International Dictionary (1961) p. 351; accord Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) p. 194. The COVID-19 pandemic has caused vast disruption to everyday life, and it has had a devastating impact on our economy. K. Phaneuf, "CT Economy Will Struggle Until at Least 2030 To Recover from COVID, UConn Report Warns," CT Mirror, October 23, 2020, available at https://ctmirror.org/2020/10/23/ct-economy-will-struggle-until-at-least-2030-to-recover-from-covid-uconn-report-warns/ (last visited March 29, 2021). Most tragically, the United States has now recorded more COVID-19 deaths than the total number of Americans killed during World Wars I and II combined. See Congressional

Research Service, American War and Military Operations Casualties: Lists and Statistics (Updated July 29, 2020) p. 2, available at https://crsreports.congress.gov/product/pdf/RL/RL32492 (last visited March 29, 2021). Thus, by any reasonable measure, the COVID-19 pandemic certainly fits the dictionary definition of catastrophe.

The plaintiffs note, however, that the enumerated list that follows the term "catastrophe" in § 28-1 (2) is limited to "weather conditions, seismic activity, fire, explosion and man-made conditions . . . ." As a result, the plaintiffs argue that there is no language in § 28-1 (2) that indicates any legislative "intent to include the contagion of disease." The plaintiffs argue, albeit implicitly, that we should apply the statutory interpretation rule of ejusdem generis, which provides that, "when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed." (Internal quotation marks omitted.) *State* v. *Terwilliger*, 314 Conn. 618, 658, 104 A.3d 638 (2014).

Although it is true that the listed examples of catastrophes do not include the contagion of disease, the plaintiffs' argument fails to consider that the list is preceded by the phrase "*including, but not limited to* . . . ." (Emphasis added.) General Statutes § 28-1 (2). By including this phrase, the legislature evinced its intent that a "major disaster" not be limited in scope to the enumerated events, as the plaintiffs contend.[6] See

[6] The Pennsylvania Supreme Court recently reached a similar conclusion under Pennsylvania law. See *Friends of Danny DeVito* v. *Wolf*, Pa. , 227 A.3d 872, 888–89, cert. denied, U.S. , 141 S. Ct. 239, 208 L. Ed. 2d 17 (2020). Under state law, the governor of Pennsylvania is authorized to declare a disaster emergency "upon finding that a disaster has occurred or that the occurrence or the threat of a disaster is imminent." 35 Pa. Stat. and Cons. Stat. Ann. § 7301 (c) (West Supp. 2020). The Pennsylvania Emergency Management Services Code defines "disaster" as "[a] man-made disaster, natural disaster or war-caused disaster." 35 Pa. Stat. and Cons. Stat. Ann. § 7102 (West Supp. 2020). Similar to the definition of "major

United States v. *West*, 671 F.3d 1195, 1200–1201 (10th Cir. 2012) (citing cases holding that doctrine of ejusdem generis is inapplicable when statutory enumeration is preceded by phrase "including, but not limited to"); see also *Tomick* v. *United Parcel Service, Inc.*, 324 Conn. 470, 479, 153 A.3d 615 (2016) ("[r]eading the phrase 'including but not limited to,' as expansive"); *Lusa* v. *Grunberg*, 101 Conn. App. 739, 756, 923 A.2d 795 (2007) ("the phrase [including but not limited to] convey[s] a clear intention that the items listed in the definition do not constitute an exhaustive or exclusive list" (internal quotation marks omitted)). Indeed, as Governor Lamont contends, an expansive reading is warranted in this context given that the General Assembly instructed him to exercise the powers delegated to him under § 28-9 broadly for "the protection of the public health"; General Statutes § 28-9 (b) (1); and "to protect the health, safety and welfare of the people of the state . . . ." General Statutes § 28-9 (b) (7). A narrow interpretation of the circumstances under which the governor would have authority to proclaim a civil preparedness emer-

disaster" in § 28-1 (2), the Pennsylvania Emergency Management Services Code defines "natural disaster" as "[a]ny hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, earthquake, landslide, mudslide, snowstorm, drought, fire, explosion *or other catastrophe which results in substantial damage to property, hardship, suffering or possible loss of life*." (Emphasis in original.) 35 Pa. Stat. and Cons. Stat. Ann. § 7102 (West Supp. 2020). The plaintiffs in *Friends of Danny DeVito* claimed that the COVID-19 pandemic was not a "natural disaster" because it was "not of the same type or kind" as those listed in the statutory definition in § 7102. *Friends of Danny DeVito* v. *Wolf*, supra, 888. The Pennsylvania Supreme Court rejected this argument and concluded that the COVID-19 pandemic qualified as a natural disaster. Id. The court explained that the "specific disasters in the definition of 'natural disaster' themselves lack commonality"; id.; and, by "including the language 'other catastrophe which results in substantial damage to property, hardship, suffering or possible loss of life,' it [was] clear that the General Assembly intended to *expand* the list of disaster circumstances that would provide [the Pennsylvania governor] with the necessary powers to respond to exigencies involving vulnerability and loss of life." (Emphasis in original.) Id., 889.

gency, as the plaintiffs contend, would frustrate this legislative intent.

Moreover, it would be absurd for the statutory scheme to be interpreted such that the governor could declare a civil preparedness emergency for an event such as a snowstorm, but not for the worst pandemic that has impacted the state in more than one century. We decline to construe the meaning of "major disaster" in such a manner. 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)).

To the extent the meaning of "major disaster" is ambiguous given the tension between the enumerated list of catastrophes and the legislature's use of the phrase "including, but not limited to," we look to extratextual sources to gain further insight into whether the legislature intended that a global pandemic could constitute a major disaster. The legislative history of both §§ 28-1 (2) and 28-9 provides further support for the conclusion that the General Assembly did not intend the term "major disaster" to be limited only to catastrophes caused by weather conditions, seismic activity, fire, explosion and man-made conditions, as the plaintiffs contend. Under earlier versions of § 28-9, the governor was authorized to proclaim a civil preparedness emergency "[i]n the event of serious natural disaster, enemy attack, sabotage or other hostile action or in the event of the imminence thereof . . . ." General Statutes (1958 Rev.) § 28-9; see also General Statutes (1955 Supp.) § 1913d (adding "serious natural disaster" to list of events). At that time, Chapter 517 did not contain a definition of "disaster" or "serious national disaster." In 1975, however, the General Assembly inserted a definition of "disaster" into § 28-1. See Public Acts 1975, No. 75-643, § 1 (P.A.

75-643), codified at General Statutes (Rev. to 1977) § 28-1 (b). It provided in relevant part: " 'Disaster' means occurrence or imminent threat of widespread or severe damage, injury or loss of life or property resulting from any natural or manmade cause, including but not limited to, fire, flood, earthquake, wind, storm, wave action, oil spill or other water contamination . . . *epidemic*, air contamination, blight, drought, infestation, explosion, riot or hostile military or paramilitary action." (Emphasis added.) P.A. 75-643, § 1. Accordingly, at least as early as 1975, the General Assembly clearly anticipated that an epidemic could constitute a "disaster."

Since 1975, the General Assembly has amended the definitions in § 28-1 on several occasions in order to align state law with the federal Stafford Act. See *Sena* v. *American Medical Response of Connecticut, Inc.*, supra, 333 Conn. 50 n.13. Specifically, in 1979, the General Assembly removed the definition of "disaster" from § 28-1 and added the definition of "major disaster" to better align state and federal law. Public Acts 1979, No. 79-417, § 1 (P.A. 79-417), codified at General Statutes (Rev. to 1981) § 28-1 (b); see 22 H.R. Proc., Pt. 5, 1979 Sess., p. 1648 ("The intent of this [b]ill is to align the [s]tate laws with the [f]ederal laws. . . . Further, [the bill] inserts two new definitions for major disasters and emergency, while repealing the old definition for disaster. Again, this is done to align [f]ederal and [s]tate legislation."). Public Act No. 79-417 defined "major disaster" in relevant part as "any hurricane, storm, flood, high water, wind driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, drought, fire, explosion, or other catastrophe in any part of this state which, in the determination of the president, causes damage of sufficient severity and magnitude to warrant major disaster assistance under the Federal Disaster Relief Act of 1974 . . . ." P.A. 79-417, § 1. This definition was nearly identi-

cal to the federal definition of "major disaster" in the federal Disaster Relief Act of 1974. See Disaster Relief Act of 1974, Pub. L. No. 93-288, § 102, 88 Stat. 143, 144, codified at 42 U.S.C. § 5122 (2) (Supp. IV 1974). Although the definition of "major disaster" did not list epidemic or pandemic, there is nothing in the legislative history to indicate that the General Assembly intended that an epidemic or pandemic of sufficient severity could not constitute a "major disaster," when, just four years earlier, it evinced its intent that it could constitute a "disaster." The changes to the definition were merely intended to align state and federal law.[7]

The plaintiffs' contention that the term "major disaster" is limited to weather conditions, seismic activity, fire, explosion and man-made conditions is further belied by the legislature's changes to the definition of "major disaster" in Number 06-15 of the 2006 Public Acts (P.A. 06-15). In 1988, Congress amended the Disaster Relief Act of 1974 and changed the definition of "major disaster" to "any *natural catastrophe* (including any hurricane, tornado, storm, high water, winddriven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought) . . . ." (Emphasis added.) The Disaster Relief and Emergency Assistance Amendments of 1988, Pub. L. No. 100-707, § 103, 102 Stat. 4689, 4690, codified at 42 U.S.C. § 5122 (2) (1988). Rather than adopting the new federal definition, as the General Assembly had previously done, in P.A. 06-15, it enacted a broader definition of "major disaster" by omitting the word "natural" and adding the phrases "including, but not limited to" and "manmade disaster . . . ." P.A. 06-15, § 1, codified

[7] Indeed, we note that General Statutes § 28-9a, which sets forth additional actions the governor may take in the event of an emergency or major disaster, explicitly provides that " '[m]ajor disaster,' 'emergency' and 'temporary housing' as used in this section have the same meanings as the terms are defined, or used, in the [federal] Disaster Relief Act of 1974 . . . ." (Citation omitted.) General Statutes § 28-9a (d).

at General Statutes (Rev. to 2007) § 28-1 (2). Thus, the current statutory definition of "major disaster" under Connecticut law is broader than the federal definition, which is limited to "natural catastrophe[s]"; 42 U.S.C. § 5122 (2) (2018); and encompasses a wider category of catastrophes beyond those listed in the federal definition. See General Statutes § 28-1 (2). Significantly, however, although the federal definition of "major disaster" is narrower than the state definition, President Trump concluded that the impacts of the COVID-19 pandemic on Connecticut were "of sufficient severity and magnitude to warrant a *major disaster declaration* under the [Stafford Act] . . . ." (Emphasis added.) Federal Emergency Management Agency, supra, 85 Fed. Reg. 31,542. It would be illogical to conclude that the effects of the COVID-19 pandemic in this state were of sufficient severity to constitute a "major disaster" under the narrower federal definition of "major disaster" but not sufficient to satisfy the broader state definition of the same term.[8] We decline to construe the statute in such a manner. Accordingly, we conclude that the COVID-

[8] Just as the federal government was faced with major logistical challenges in order to stem the spread of COVID-19, such as distributing supplies from a national stockpile, so, too, was this state. Chapter 517 contains various provisions that demonstrate the need for a civil preparedness emergency to address the logistical challenges posed by a pandemic of the magnitude presented by the COVID-19 pandemic. See General Statutes § 28-1 (4) (defining "civil preparedness" to include "all those activities and measures designed or undertaken (A) to minimize or control the effects upon the civilian population of major disaster or emergency" such as "the procurement and stockpiling of necessary materials and supplies"); General Statutes § 28-11 (a) (during civil preparedness emergency or public health emergency, governor may take possession "(3) of any antitoxins, pharmaceutical products, *vaccines* or other biological products" (emphasis added)); General Statutes § 28-16 ("commissioner [of emergency services and public protection] is empowered, in anticipation of . . . any disaster, to purchase and maintain a stockpile of medical supplies . . . and any other supplies which in his opinion are necessary and desirable to afford relief and assistance to the people of the state in an emergency"). These provisions make clear that civil preparedness emergencies, under § 28-9, and public health emergencies, under § 19a-131a, are related and interconnected.

19 pandemic constitutes a "major disaster," as that term is defined in § 28-1 (2).

Logically, it would seem that the meaning of the term "major disaster" set forth in § 28-1 (2) is substantially similar to the term "serious disaster" in § 28-9 (a). See Webster's Third New International Dictionary, supra, pp. 1363, 2073 (defining "major" as "involving grave risk: serious" and defining "serious" as "grave in disposition, appearance, or manner"). As this court has often explained, however, "we assume that the legislature has a different intent when it uses different terms in the same statutory scheme." *Southern New England Telephone Co.* v. *Cashman*, 283 Conn. 644, 662, 931 A.2d 142 (2007) (*Katz*, *J.*, concurring). Thus, we must determine whether a major disaster also constitutes a serious disaster. This question is quickly resolved based on a review of the statutory scheme. Section 28-1 (2) provides that a "major disaster" includes "any catastrophe" that "(B) in the determination of the Governor, requires the declaration of a civil preparedness emergency pursuant to section 28-9." The General Assembly's reference to a civil preparedness emergency under § 28-9 in the definition of "major disaster" set forth in § 28-1 (2) makes clear that it intended that any event that constitutes a "catastrophe" under § 28-1 (2) also constitutes a "serious disaster" if the governor declares a civil preparedness emergency under § 28-9. Put differently, if an event constitutes a "catastrophe" under § 28-1 (2), and the governor determines that the proclamation of a civil preparedness emergency under § 28-9 is required to address it, then the "catastrophe" necessarily is both a "major disaster" and a "serious disaster."[9]

[9] Section 28-1 (2) also provides that a "major disaster" includes "any catastrophe" that "(A) in the determination of the President, causes damage of sufficient severity and magnitude to warrant major disaster assistance under the [Stafford Act] . . . to supplement the efforts and available resources of this state . . . in alleviating the damage, loss, hardship, or suffering caused by such catastrophe . . . ." As we have explained, President Trump's determination that the impacts of the COVID-19 pandemic on

Because, as we have explained, the COVID-19 pandemic constitutes a "catastrophe," and Governor Lamont has declared a civil preparedness emergency under § 28-9, we conclude that the COVID-19 pandemic constitutes a "serious disaster" under § 28-9 (a).

Having concluded that the COVID-19 pandemic constitutes a serious disaster and, therefore, that Governor Lamont was statutorily authorized to proclaim a civil preparedness emergency, we must determine whether such proclamation empowered him to issue the challenged executive orders. Relevant to this appeal, subsection (b) of § 28-9 provides in relevant part that, "upon [a civil preparedness emergency] proclamation, the following provisions of this section and the provisions of section 28-11 shall immediately become effective and shall continue in effect until the Governor proclaims the end of the civil preparedness emergency:

"(1) Following the Governor's proclamation of a civil preparedness emergency pursuant to subsection (a) of this section or declaration of a public health emergency pursuant to section 19a-131a, the Governor may modify or suspend in whole or in part, by order as hereinafter provided, any statute, regulation or requirement or part thereof whenever the Governor finds such statute, regulation or requirement, or part thereof, is in conflict with the efficient and expeditious execution of civil preparedness functions or the protection of the public health. The Governor shall specify in such order the reason or reasons therefor and any statute, regulation or requirement or part thereof to be modified or suspended and the period, not exceeding six months unless sooner revoked, during which such order shall be enforced. . . .

this state were "of sufficient severity and magnitude to warrant a major disaster declaration under the [Stafford Act]"; Federal Emergency Management Agency, supra, 85 Fed. Reg. 31,542; provides further support for the conclusion that the COVID-19 pandemic constitutes a serious disaster.

* * *

"(7) The Governor may take such other steps as are reasonably necessary in the light of the emergency to protect the health, safety and welfare of the people of the state, to prevent or minimize loss or destruction of property and to minimize the effects of hostile action . . . ."

In short, following the proclamation of a civil preparedness emergency pursuant to § 28-9 (a), subsection (b) (1) empowers the governor to modify or suspend any statute, regulation or requirement that conflicts with the efficient and expeditious execution of civil preparedness functions or the protection of the public health. Subsection (b) (7) additionally empowers the governor to take other steps that are reasonably necessary in light of the emergency to protect the health, safety, and welfare of the people of the state. All of the challenged executive orders fall squarely within either or both of these provisions.

Executive Order Nos. 7D and 7G, which closed bars and restaurants to all on premise service of food and beverages, were promulgated as part of a series of community mitigation strategies that were designed to encourage social distancing and protect public health and safety and to "increase containment of the virus and to slow transmission of the virus . . . ." Executive Order No. 7G (March 19, 2020). As the trial court noted, it is "now common knowledge that COVID-19 is spread by people who are in close physical contact with each other, and it is also well known that people who are drinking alcohol in bars tend to gather in close proximity in order to socialize." Other executive orders similarly provided logistical guidance to bars and restaurants in an effort to limit the number of people within these establishments or otherwise effectuate Executive Order

No. 7D. See Executive Order No. 7N (March 26, 2020) (directing businesses that remained open to serve food and drink for off premise consumption to "limit entrance of customers into their locations to the minimum extent necessary to pick up and/or pay for orders, use touchless payment systems, and require remote ordering and payment"); Executive Order No. 7T (April 2, 2020) (expanding list of sealed containers of alcohol that liquor permit holders could sell under conditions set forth in Executive Order No. 7G); Executive Order No. 7X (April 10, 2020) (extending Executive Order No. 7D's limitations on bars and restaurants through May 20, 2020). Governor Lamont noted the importance of each executive order to "reduc[ing] [the] spread of COVID-19," "increas[ing] containment of the virus," and "slow[ing] transmission of the virus . . . ." Executive Order No. 7G (March 19, 2020); accord Executive Order No. 7T (April 2, 2020). These executive orders fell within Governor Lamont's authority under § 28-9 (b) (7) to "take such other steps as are reasonably necessary in the light of the emergency to protect the health, safety and welfare of the people of the state . . . ." Indeed, the plaintiffs do not contend that the restrictions Governor Lamont imposed on the pub were unreasonable or were not related to the public health, safety, and welfare of the people of this state.

Finally, Governor Lamont issued Executive Order Nos. 7MM and 7ZZ as the state began making progress in stemming the spread of COVID-19 in order to "[p]roactively protect public health and speed up the pace of economic, educational, and community recovery while resorting Connecticut's quality of life." Reopen Connecticut, supra. Executive Order No. 7MM permitted restaurants to serve food outside and ordered that "[a]lcoholic liquor . . . be served only in connection with outdoor dining . . . ." Executive Order No. 7MM

(May 12, 2020). Governor Lamont explained in the executive order that, when on premise dining was first permitted, it was limited to outdoor service because "public health experts ha[d] determined that the risk of transmission of COVID-19 [was] reduced in outdoor areas, including where there is more sunlight, greater air movement, and greater space to maintain distance between people . . . ." Id. Thereafter, Governor Lamont issued Executive Order No. 7ZZ, which allowed the resumption of indoor dining except that the ban on "the sale of alcohol by certain permittees without the sale of food . . . [was to] remain in effect and [was] extended through July 20, 2020." Executive Order No. 7ZZ (June 16, 2020). As with his earlier executive orders restricting activities at bars and restaurants, Executive Order Nos. 7MM and 7ZZ also fell within Governor Lamont's authority under § 28-9 (b) (7) to "take such other steps as are reasonably necessary in the light of the emergency to protect the health, safety and welfare of the people of the state . . . ." In each of the challenged executive orders, Governor Lamont explained the public health rationale that required the action in order to protect the health, safety, and welfare of the people of this state.

Moreover, Executive Order Nos. 7MM and 7ZZ are also authorized by the governor's authority under § 28-9 (b) (1) to modify or suspend a statute if it conflicts with "the efficient and expeditious execution of civil preparedness functions or the protection of the public health." Executive Order No. 7MM specifically provides that "[t]itle 30 of the . . . General Statutes, including [§§] 30-22 (a) and 30-22a (a) . . . are modified to the extent they conflict with, or create additional requirements [with respect to], the sale of alcoholic liquor . . . ." Executive Order No. 7MM (May 12, 2020). General Statutes § 30-22a sets forth the terms of café liquor

permits for the sale of alcoholic liquor. Executive Order No. 7MM plainly modified § 30-22a (a), directing that, if a café intends to resume sales of alcoholic liquor for on premise consumption, such liquor may be consumed only outdoors and can be sold only in conjunction with the sale of food. Executive Order No. 7ZZ expanded on this modification of § 30-22a (a) by also requiring that the sale of food be accompanied by the sale of alcoholic liquor upon the resumption of indoor dining. Executive Order No. 7ZZ also explicitly provides that "[§] 28-9 (b) . . . authorizes the modification or suspension . . . of any statute . . . that conflicts with the efficient and expeditious execution of civil preparedness functions or the protection of public health . . . ." Executive Order No. 7ZZ (June 16, 2020). Both executive orders are thus also supported by the governor's authority under § 28-9 (b) (1), which authorizes the governor to modify or suspend any statute, regulation or requirement, if it conflicts with the efficient and expeditious execution of civil preparedness functions or the protection of the public health. Accordingly, we conclude that Governor Lamont did not exceed his statutory authority when he issued the challenged executive orders in an effort to contain the spread of COVID-19.

II

We now consider the plaintiffs' contention that § 28-9 (b) (1) and (7) is an unconstitutional delegation by the General Assembly of its legislative powers to the governor, in violation of the separation of power provision of the Connecticut constitution. See Conn. Const., art. II.

We begin with the relevant legal principles. A challenge to "[t]he constitutionality of a statute presents a question of law over which our review is plenary. . . . It [also] is well established that a validly enacted statute carries with it a strong presumption of constitutionality,

[and that] those who challenge its constitutionality must sustain the heavy burden of proving its unconstitutionality beyond a reasonable doubt. . . . The court will indulge in every presumption in favor of the statute's constitutionality . . . . Therefore, [w]hen a question of constitutionality is raised, courts must approach it with caution, examine it with care, and sustain the legislation unless its invalidity is clear." (Internal quotation marks omitted.) *Keane* v. *Fischetti*, 300 Conn. 395, 402, 13 A.3d 1089 (2011).

"The [c]onstitution of this state provides for the separation of the governmental functions into three basic departments, legislative, executive and judicial, and it is inherent in this separation, since the law-making function is vested exclusively in the legislative department, that the [l]egislature cannot delegate the law-making power to any other department or agency." (Internal quotation marks omitted.) *University of Connecticut Chapter*, *AAUP* v. *Governor*, 200 Conn. 386, 394, 512 A.2d 152 (1986). We have explained that "[t]he primary purpose of [the separation of powers] doctrine is to prevent commingling of different powers of government in the same hands. . . . The constitution achieves this purpose by prescribing limitations and duties for each branch that are essential to each branch's independence and performance of assigned powers. . . . It is axiomatic that no branch of government organized under a constitution may exercise any power that is not explicitly bestowed by that constitution or that is not essential to the exercise thereof. . . . [Thus] [t]he separation of powers doctrine serves a dual function: it limits the exercise of power within each branch, yet ensures the independent exercise of that power." (Internal quotation marks omitted.) *Persels & Associates*, *LLC* v. *Banking Commissioner*, 318 Conn. 652, 668–69, 122 A.3d 592 (2015).

Unlike the separation of powers doctrine that has developed under the federal constitution, "the historical evolution of Connecticut's governmental system [has] established a 'tradition of harmony' among the separate branches of government . . . ." *State* v. *McCleese*, 333 Conn. 378, 419, 215 A.3d 1154 (2019). "Recognizing that executive, legislative and judicial powers frequently overlap, we have consistently held that the doctrine of the separation of powers cannot be applied rigidly." *Bartholomew* v. *Schweizer*, 217 Conn. 671, 676, 587 A.2d 1014 (1991). As we have recognized, "the great functions of government are not divided in any such way that all acts of the nature of the function of one department can never be exercised by another department; such a division is impracticable, and if carried out would result in the paralysis of government. Executive, legislative and judicial powers . . . of necessity overlap each other, and cover many acts which are in their nature common to more than one department." (Internal quotation marks omitted.) *Seymour* v. *Elections Enforcement Commission*, 255 Conn. 78, 107, 762 A.2d 880 (2000), cert. denied, 533 U.S. 951, 121 S. Ct. 2594, 150 L. Ed. 2d 752 (2001). For example, the General Assembly does not have exclusive responsibility for legislating. Rather, the legislature and the governor work together to pass legislation. See, e.g., Conn. Const., art. IV, § 15 ("Each bill which shall have passed both houses of the general assembly shall be presented to the governor. . . . If the governor shall approve a bill, he shall sign and transmit it to the secretary of the state, but if he shall disapprove, he shall transmit it to the secretary with his objections, and the secretary shall thereupon return the bill with the governor's objections to the house in which it originated.").

A statute will be held unconstitutional on the ground that it violates the separation of powers only if it "(1) confers on one branch of government the duties which

belong exclusively to another branch . . . or (2) if it confers the duties of one branch of government on another branch which duties significantly interfere with the orderly performance of the latter's essential functions." (Citation omitted.) *University of Connecticut Chapter*, *AAUP* v. *Governor*, supra, 200 Conn. 394–95. Applying these standards to § 28-9 (b) (1) and (7), we conclude that the plaintiffs cannot meet their heavy burden of establishing that the statute is a violation of the separation of powers provision of article second of the Connecticut constitution on the basis that it impermissibly delegates legislative authority to the governor.

Section 28-9 sets forth the General Assembly's policy that the state must be able to mount a rapid and agile response to a "serious disaster," and the executive branch, namely, the governor, is most capable of carrying out that response. Significantly, although the "lawmaking power is in the legislative branch of our government and cannot constitutionally be delegated . . . the General Assembly may carry out its legislative policies within the police power of the state by delegating to an administrative agency the power to fill in the details." (Citation omitted; internal quotation marks omitted.) *New Milford* v. *SCA Services of Connecticut, Inc.*, 174 Conn. 146, 149, 384 A.2d 337 (1977). Put differently, the General Assembly has "the right to determine in the first instance what is the nature and extent of the danger to the public health, safety, morals and welfare and what are the measures best calculated to meet that threat." *Buxton* v. *Ullman*, 147 Conn. 48, 55, 156 A.2d 508 (1959), appeal dismissed sub nom. *Poe* v. *Ullman*, 367 U.S. 497, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (1961). Once the General Assembly has made that determination, it may carry out that policy by delegating to the executive branch the power to "fill in the details" in order to effectuate that policy.[10] "In order to render admissible

[10] There are numerous statutory examples of the General Assembly's delegating to the governor the responsibility of protecting the people of this

such delegation of legislative power, however, it is necessary that the statute declare a legislative policy, establish primary standards for carrying it out, or lay down an intelligible principle to which the administrative officer or body must conform, with a proper regard for the protection of the public interests and with such degree of certainty as the nature of the case permits . . . ." (Internal quotation marks omitted.) *Hogan* v. *Dept. of Children & Families*, 290 Conn. 545, 572, 964 A.2d 1213 (2009). As the United States Supreme Court has explained, "[s]o long as Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power." (Internal quotation marks omitted.) *Mistretta* v. *United States*, 488 U.S. 361, 372, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989); see also *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635, 72 S. Ct. 863, 96 L. Ed. 1153 (1952) (Jackson, J., concurring in the judgment and opinion of the court) ("[w]hen the [p]resident acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate"). That is, "[t]he constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion." *Gundy* v. *United States*, U.S. , 139 S. Ct. 2116,

state. See, e.g., General Statutes § 3-1 (governor shall "take any proper action concerning . . . the enforcement of the laws of the state and the protection of its citizens"); General Statutes § 3-6a (governor may restrict "movement of persons and vehicles upon the streets and highways of the state" during "extreme weather conditions or other acts of nature"); General Statutes § 16a-11 (governor may declare "energy emergency" and order energy emergency plan); General Statutes § 19a-70 (governor may proclaim emergency due to short supply of "antitoxin or other biologic product" during epidemic and appoint advisory committee to recommend "the priority of the supply, distribution and use of such biologic products in the interest of the health, welfare and safety of the people of the state").

2123, 204 L. Ed. 2d 522 (2019) (plurality opinion). "[T]he answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides." Id.

In enacting § 28-9, the General Assembly set forth the policy for the governor to follow in the event of a serious disaster. Specifically, through § 28-9 (b) (1), the General Assembly's policy directs that, upon the proclamation of a civil preparedness emergency, or upon the declaration of a public health emergency under § 19a-131a, the governor may "modify or suspend . . . any statute, regulation or requirement or part thereof whenever the Governor finds such statute, regulation or requirement, or part thereof, *is in conflict with the efficient and expeditious execution of civil preparedness functions or the protection of the public health*." (Emphasis added.) Section 28-9 (b) (1) further requires the governor to specify the reasons for suspending or modifying the statute, regulation or requirement and "the period, *not exceeding six months* unless sooner revoked, during which such order shall be enforced." (Emphasis added.) The legislature set forth the standards that limit the governor's authority to act under § 28-9 (b) (1) in three primary ways. First, the governor may act pursuant to subsection (b) (1) only after the governor has proclaimed a civil preparedness emergency or declared a public health emergency. Second, the governor's actions are limited to modifying or suspending—not repealing—statutes or other regulations only to the extent that they are in conflict with the execution of civil preparedness functions or are required to protect the public health, and the governor is required to specify the reasons for the modification or suspension. Finally, the governor's actions have temporal limitations, namely, the period of time the modification or suspension may be enforced is limited to six months.[11] There-

[11] We acknowledge that the governor has twice renewed the civil preparedness emergency and, at the same time, declared new civil preparedness

fore, any actions the governor takes under subsection (b) (1) are temporary, that is, he cannot modify or suspend any statutes or regulations permanently.

Section 28-9 (b) (7) similarly makes clear that the governor may take other steps to address the serious disaster, only if they "are reasonably necessary in the light of the emergency to protect the health, safety and welfare of the people of the state, to prevent or minimize loss or destruction of property and to minimize the effects of hostile action." In other words, the governor may act under subsection (b) (7) only after he has proclaimed a civil preparedness emergency, and his actions are limited to those that are *reasonably necessary* to protect the health, safety, and welfare of the people of this state. Moreover, the governor may act only to the extent that the health, safety, and welfare of the people are implicated by this *particular* serious disaster. The governor would not, for example, be able to issue an executive order forbidding restaurants from selling unhealthy foods during the COVID-19 pandemic. Although eating healthy foods is undoubtedly related to the health and welfare of the people of this state, such an action is not reasonably necessary to address the current pandemic. Likewise, should a hurricane of

emergencies, and has renewed the executive orders modifying or suspending statutes and regulations. The statutory six month temporal limitation, however, requires the governor, at a minimum, to continuously evaluate the necessity of the executive orders and to justify their continued existence. As we discuss hereinafter, although this is a broad grant of authority, and there may well be instances in which a challenger to the governor's continued actions can demonstrate that they have lasted an improper duration, that issue is not squarely before us, and nothing in this opinion should be construed as offering an opinion on that separate issue. Indeed, the plaintiffs do not challenge the governor's renewal of the emergencies. Similarly, the plaintiffs acknowledge that they "are not challenging the good intentions of [Governor Lamont] in issuing his executive orders" and "are not asking [this] court to second-guess the policy judgments of [Governor Lamont] or to determine whether his executive orders and the sector rules make sense or are fair."

sufficient severity require the governor to proclaim a civil preparedness emergency, mandating that Connecticut citizens wear masks would not be a proper action under subsection (b) (7) merely because it might have the incidental health benefit of reducing the spread of the common cold. Rather, the governor's actions under subsection (b) (7) must be reasonably necessary to address the specific serious disaster that warranted the civil preparedness emergency proclamation.

Our case law supports the conclusion that § 28-9 (b) (1) and (7) is not an unconstitutional delegation of legislative authority. In *University of Connecticut Chapter*, *AAUP* v. *Governor*, supra, 200 Conn. 386, this court upheld the constitutionality of General Statutes (Rev. to 1985) § 4-85 (b), which authorized the governor to "reduce budgetary allotments by up to 5 percent under certain specified circumstances." Id., 387. The plaintiffs argued that the statute violated the separation of powers provision because it attempted to delegate a strictly legislative function, namely, budgeting. Id., 393. This court rejected that argument. We explained that, rather than interfering with a legislative function, § 4-85 (b) enabled the governor "to supervise the execution of the budget." Id., 396. We explained that this role was particularly suited to the executive branch, which is "most capable of having detailed and contemporaneous knowledge regarding finances. Under the constitutional separation of powers, the governor uses that knowledge in making such spending decisions and to see that the laws are faithfully executed." Id., 397. Here, the General Assembly similarly expressed its policy that the governor is most appropriately suited to use the expertise of the executive branch—particularly in this case, the Department of Public Health—to respond to a potentially, rapidly evolving serious disaster and to take the most appropriate steps to safeguard the people of this state. In *University of Connecticut Chapter*, *AAUP*, we

also rejected the plaintiffs' argument that the standards " 'deems necessary' " and " 'a change of circumstances' " did not provide sufficient standards to the governor. Id., 398. We noted that requiring more specific standards "would hamper the flexibility needed for the governor to monitor and administer expenditures and to supervise the execution of the budget." Id., 399. The standards set forth in subsection (b) (1) and (7) similarly provide sufficient standards to guide the governor's exercise of his authority.

By contrast, in *State* v. *Stoddard*, 126 Conn. 623, 633–34, 13 A.2d 586 (1940), this court reversed a defendant's criminal conviction and struck down a statute that authorized the milk administrator to set the minimum price for milk. The only guidance the General Assembly provided to the administrator in setting the price was to "take into consideration the type of container used and other cost factors [that] should influence the determination of such prices." (Internal quotation marks omitted.) Id., 625. This court concluded that this language did not provide "such prescribed standards or principles, courses of procedure, and rules of decision as is [required] to justify the delegation of powers attempted thereby . . . ." Id., 633. We conclude that, contrary to the plaintiffs' assertions, the standards imposed by subsection (b) (1) and (7) provide greater guidance to the governor than did the statute in *Stoddard*.

We acknowledge that subsection (b) (1) and (7) is a broad grant of authority from the General Assembly to the governor. A broad grant of authority, however, is not the same as limitless or standardless authority. As we have explained, although the General Assembly may not delegate its "law-making" function, it may delegate "some *considerable* segment of its legislative authority." (Emphasis added.) *Salmon Brook Convalescent Home, Inc.* v. *Commission on Hospitals & Health Care*,

177 Conn. 356, 363, 417 A.2d 358 (1979). The United States Supreme Court has similarly explained that, once the legislature has made a policy determination, "[i]t is no objection" that the legislation "call[s] for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework." *Yakus* v. *United States*, 321 U.S. 414, 425, 64 S. Ct. 660, 88 L. Ed. 834 (1944); see also *Whitman* v. *American Trucking Associations, Inc.*, 531 U.S. 457, 475, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001) ("[a] certain degree of discretion, and thus of [law-making], inheres in most executive or judicial action" (internal quotation marks omitted)). In a recent concurrence in connection with the United States Supreme Court's denial of injunctive relief pertaining to the California governor's COVID-19 restrictions on the number of people permitted in houses of worship, Chief Justice John Roberts emphasized the need for elected leaders to have broad authority to respond to rapidly evolving emergencies. See *South Bay United Pentecostal Church* v. *Newsom*, U.S. , 140 S. Ct. 1613, 207 L. Ed. 2d 154 (2020) (Roberts, C. J., concurring in denial of application for injunctive relief). He explained that "[t]he precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. . . . When [elected] officials undertake . . . to act in areas fraught with medical and scientific uncertainties, *their latitude must be especially broad*." (Citation omitted; emphasis added; internal quotation marks omitted.) Id.

In enacting § 28-9 (b), the General Assembly was as precise as it could be in defining the contours of the governor's authority given that there are myriad serious disasters that could arise and the actions the governor would be required to take could vary significantly from one serious disaster to another. See, e.g., *University*

of Connecticut Chapter, *AAUP* v. *Governor*, supra, 200 Conn. 398 ("these standards are constitutionally sufficient under our law in that they are as definit[e] as is reasonably practicable under the circumstances" (internal quotation marks omitted)); see also *American Power & Light Co.* v. *Securities & Exchange Commission*, 329 U.S. 90, 105, 67 S. Ct. 133, 91 L. Ed. 103 (1946) ("[t]he legislative process would frequently bog down if Congress were constitutionally required to appraise [beforehand] the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation"); *Hogan* v. *Dept. of Children & Families*, supra, 290 Conn. 572 ("[i]n order to render admissible such delegation of legislative power . . . it is necessary that the statute declare a legislative policy, establish primary standards for carrying it out . . . and *with such degree of certainty as the nature of the case permits*" (emphasis added; internal quotation marks omitted)).[12] What could be statutorily or constitutionally appropriate in one serious disaster may not be in another. As Senator Martin M. Looney explained during a special, statutorily created legislative committee's September 4, 2020 meeting to discuss Governor Lamont's public health emergency declaration, § 28-9 is broad because the governor must be able to quickly address the serious disaster. Declaration of a Public Health Emergency Committee Meeting (September 4, 2020), available at https://ct-n.com/ctnplayer.asp?odID=17659 (13:10 through 13:36) (last visited March 29, 2021). Requiring more specific standards "would hamper the flexibility needed" for the governor to respond to the myriad different circumstances that may constitute a

[12] We note that "[o]nly twice in this country's history (and that in a single year) [has the United States Supreme Court] found a delegation excessive—in each case because Congress had failed to articulate *any* policy or standard to confine discretion." (Emphasis in original; internal quotation marks omitted.) *Gundy* v. *United States*, supra, 139 S. Ct. 2129 (plurality opinion).

serious disaster. *University of Connecticut Chapter, AAUP* v. *Governor*, supra, 399.

Moreover, it is reasonable for the legislature to conclude that the executive branch of government would be far better suited to respond to a serious disaster with the speed and flexibility needed to protect the public health and welfare. Specifically, the legislature itself is not in session continuously and would not be well positioned to mount a rapid response to a serious disaster, especially one that develops and evolves quickly or unpredictably, and thus requires an ongoing and agile response. Indeed, the former speaker of the House of Representatives, Joe Aresimowicz, noted during the September, 4, 2020 meeting of the Declaration of a Public Health Emergency Committee that, because the Connecticut legislature is part-time, they are "not structured to handle [a serious disaster]." Declaration of a Public Health Emergency Committee Meeting, supra, (17:56). Similarly, Senator Mary Daugherty Abrams, the senate chairperson of the Public Health Committee, explained there are times "we need to take swift, deliberate action as a government to protect the public's health, and the Executive Branch is best equipped to do that. . . . There are 187 members of the legislative body, and the thought that we could all come together swiftly and deliberately to respond to what's come up with the COVID . . . crisis is not realistic." Id., (1:09:19 through 1:09:54).

In rejecting a similar argument that emergency powers of the governor of Kentucky during the COVID-19 pandemic violated the separation of powers provision of that state's constitution, the Supreme Court of Kentucky explained that it was reasonable for the governor to have greater authority in times of emergency "given [the] government's tripartite structure *with a legislature that is not in continuous session*." (Emphasis added.) *Beshear* v. *Acree*, 615 S.W.3d 780, 806 (Ky. 2020).

The court further explained that "[h]aving a citizen legislature that meets part-time as opposed to a full-time legislative body that meets year-round, as some states have, generally leaves [the Kentucky] General Assembly without the ability to legislate quickly in the event of emergency unless the emergency arises during a regular legislative session." (Footnote omitted.) Id., 807. The same rationale applies here.

That having been said, we pause to note that the legislature chose not to include a mechanism for more direct legislative oversight of a declared civil preparedness emergency, as it did for a man-made disaster under § 28-9 (a) or a public health emergency declaration under § 19a-131a. See General Statutes § 28-9 (a) ("[a]ny such proclamation, or order issued pursuant thereto, issued by the Governor because of a disaster resulting from man-made cause may be disapproved by majority vote of a joint legislative committee"); see also General Statutes § 19a-131a (b) (1) ("[a]ny . . . declaration [of a public health emergency] issued by the Governor may be disapproved and nullified by majority vote of a committee consisting of the president pro tempore of the Senate, the speaker of the House of Representatives, the majority and minority leaders of both houses of the General Assembly and the cochairpersons and ranking members of the joint standing committee of the General Assembly having cognizance of matters relating to public health"). Several high courts of our sister states have noted the importance of such legislative oversight under similar statutory schemes. See, e.g., *Beshear* v. *Acree*, supra, 615 S.W.3d 811–12 ("the [Kentucky] General Assembly [is allowed] to make the determination itself if the [g]overnor has not declared an end to the emergency 'before the first day of the next regular session of the General Assembly' "); *Desrosiers* v. *Governor*, 486 Mass. 369, 384, 158 N.E.3d 827 (2020) ("the [Massachusetts] [l]egislature also has at its disposal a way to curb

the [g]overnor's powers under the [Massachusetts Civil Defense Act], should it desire to do so"); *Elkhorn Baptist Church* v. *Brown*, 366 Or. 506, 526, 466 P.3d 30 (2020) ("the [Oregon] [g]overnor's emergency powers are limited in that they can be terminated by the [Oregon] legislature"). This observation does not alter our constitutional analysis in the present case but warrants mention.

Legislative oversight has not been altogether lacking. In the related context of considering Governor Lamont's public health emergency declaration, a legislative committee, namely, the Declaration of a Public Health Emergency Committee, formed pursuant to § 19a-131a (b) (1), has met twice since Governor Lamont first declared the civil preparedness and public health emergencies. The committee, consisting of the president pro tempore of the Senate, the speaker of the House of Representatives, the majority and minority leaders of both houses, and the cochairpersons and ranking members of the Public Health Committee, met for the first time in the history of this state on March 11, 2020, just one day after the governor first declared the public health and civil preparedness emergencies. During that meeting, the committee met "to consider [Governor Lamont's] declaration of a public health emergency." Declaration of a Public Health Emergency Committee, Meeting Minutes (March 11, 2020) p. 1, available at https://www.cga.ct.gov/ph/tfs/20200311_Public%20Health%20Emergency%20Committee/20200311/Minutes_pdf (last visited March 29, 2021). Senator Looney explained to the committee that, "under the statutes, this committee has the right to veto the [g]overnor's plan within [seventy-two] hours of this taking action . . . ." Id., p. 2. When asked by Senator Leonard A. Fasano whether the committee would be required to reconvene if Governor Lamont decided to reinvoke his authority after six months, Senator Looney explained that, if the governor "wanted to extend it beyond that time, it would

require a new order, and [the committee] would have a new opportunity to meet like [it] did this time." Id. Finally, Senator Looney closed the meeting by noting that "it is within the committee's capacity to convene again by Friday [March 13, 2020] at 2:25 p.m., but, barring some other emergency, the committee has met the statutory requirements." Id., p. 4. The committee did not meet again within seventy-two hours of the first proclamation.

Thereafter, the committee met again on September 4, 2020, three days after Governor Lamont's September 1, 2020 declarations. After discussion regarding the scope of Governor Lamont's authority under both a civil preparedness emergency and a public health emergency,[13] the committee took up a motion to disapprove of Governor Lamont's declaration of a public health emergency pursuant to § 19a-131a. Declaration of a Public Health Emergency Committee Meeting, supra, (1:28:10 through 1:28:17). The motion failed, and the committee did not vote to disapprove of Governor Lamont's public health emergency declaration. Id., (1:43:29 through 1:44:11). We take this inaction as an indication of the committee's acquiescence in Governor Lamont's actions pursuant to his public health emergency authority. Although we most often employ this principle when "the legislature [fails] to take corrective action as manifesting the legislature's acquiescence in our construction of a statute"; (internal quotation marks

[13] We note that several members of the committee, including Senator Fasano and Representative Aresimowicz, noted that the committee was not authorized to take any action with respect to Governor Lamont's actions pursuant to the civil preparedness emergency declaration. See, e.g., Declaration of a Public Health Emergency Committee Meeting, supra, (08:27 through 09:06), remarks of Senator Fasano; id., (09:13 through 09:42), remarks of Representative Aresimowicz. As we previously discussed in this opinion, we fail to see why the legislature chose not to include a provision for legislative oversight of a governor's proclaimed civil preparedness emergency, other than for a man-made disaster. Certainly, this could be addressed by the General Assembly in its current, or a future, legislative session, if the legislature deems it appropriate.

omitted) *Spiotti* v. *Wolcott*, 326 Conn. 190, 202, 163 A.3d 46 (2017); the same principle is insightful here. In this case, the legislative committee with the statutory authority to disapprove of Governor Lamont's public health emergency declaration met on two occasions and declined to exercise its disapproval powers either time. Although not the equivalent of full legislative ratification, this procedure should significantly ameliorate concerns regarding legislative oversight. Should the plaintiffs seek to impose greater oversight of the governor's authority under the statutory scheme, whether in the context of a public health emergency or a civil preparedness emergency, the proper avenue is through an amendment to the statute 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, [whose members] are elected to pass laws." (Internal quotation marks omitted.)).

In sum, § 28-9 sets forth the General Assembly's policy that, in the event of a serious disaster, the health, safety, and welfare of Connecticut's residents is of utmost importance. Section 28-9 (b) affords the governor considerable latitude to employ the "necessary means" for accomplishing that policy objective. *Norwalk Street Railway Co.'s Appeal*, 69 Conn. 576, 594, 37 A. 1080 (1897). But that latitude is neither standardless nor limitless. In addition to the limitations explicated previously, in the event an aggrieved party believes the governor has taken any particular action that exceeds his lawful authority or violates the state constitution, that party may seek redress from the courts. The legislature may also deem it proper to impose greater oversight of the governor's actions during a proclaimed civil preparedness emergency or other-

wise amend or repeal § 28-9 to further limit the governor's authority.

Our conclusion that, although subsection (b) (1) and (7) represents a broad grant of authority to the governor, it is nonetheless constitutional finds support in the analysis of similar issues from the high courts of our sister states. For example, the Pennsylvania Supreme Court recently rejected a separation of powers challenge to that state's Emergency Management Services Code, which permits the governor of Pennsylvania to proclaim a disaster emergency and to take actions similar to those authorized by § 28-9. 35 Pa. Stat. and Cons. Stat. Ann. § 7301 (c) (West Supp. 2020); see *Friends of Danny DeVito* v. *Wolf*, Pa. , 227 A.3d 872, 892–93, cert. denied, U.S. , 141 S. Ct. 239, 208 L. Ed. 2d 17 (2020); see also *Wolf* v. *Scarnati*, Pa. , 233 A.3d 679, 705 (2020) (recognizing that court had determined in *Friends of Danny DeVito* that Pennsylvania governor's exercise of authority delegated under Emergency Management Services Code did not violate separation of powers doctrine under Pennsylvania constitution). The court noted in *Scarnati* that the "[Pennsylvania] General Assembly, in enacting the statute, 'ma[de] the basic policy choices.' . . . The General Assembly decided that the [g]overnor should be able to exercise certain powers when he or she makes a 'finding that a disaster has occurred or that the occurrence of the threat of a disaster is imminent.' " (Citation omitted.) *Wolf* v. *Scarnati*, supra, 704. The court also explained that "the [Pennsylvania] General Assembly . . . provided 'adequate standards which will guide and restrain' the [g]overnor's powers. . . . The General Assembly gave the [g]overnor specific guidance about what he can, and cannot, do in responding to a disaster emergency. . . . *The powers delegated to the* [*g*]*overnor are admittedly* [*far reaching*], *but nonetheless are specific*. For example, the [g]overnor can '[s]uspend

the provisions of any regulatory statute . . . if strict compliance with the provisions . . . would in any way prevent, hinder or delay necessary action in coping with the emergency.' . . . *Broad discretion and standardless discretion are not the same thing. Only those regulations that hinder action in response to the emergency may be suspended.* It may be the case that the more expansive the emergency, the more encompassing the suspension of regulations. But this shows that it is the scope of the emergency, not the [g]overnor's arbitrary discretion, that determines the extent of the [g]overnor's powers under the statute. The General Assembly itself chose the words in [the Emergency Management Services Code]. The General Assembly, under its lawmaking powers, could have provided the [g]overnor with less expansive powers under the Emergency Management Services Code. It did not do so." (Citations omitted; emphasis altered.) Id., 704–705.

The Supreme Court of Oregon has similarly reasoned that, although the emergency powers of the governor of Oregon are broad under that state's statutory scheme, they are not unlimited. *Elkhorn Baptist Church* v. *Brown*, supra, 366 Or. 525. The court reasoned that the governor's actions must be "exercised in a manner consistent with the reason for which they are granted; that is, they must be exercised to address the declared emergency. . . . Second, the [g]overnor's emergency powers . . . may be exercised only during a declared state of emergency, [and Oregon's emergency powers law] requires the [g]overnor to terminate by proclamation when the emergency no longer exists, or when the threat of an emergency has passed." (Internal quotation marks omitted) Id., 525–26. Finally, the court noted that the courts may intervene if the governor's regulations exceed constitutional limits. Id., 526.

Likewise, the Supreme Court of Kentucky held that the extent of the Kentucky governor's authority during

an emergency was not an unconstitutional delegation of legislative authority in violation of the separation of powers provisions of the Kentucky constitution. *Beshear* v. *Acree*, supra, 615 S.W.3d 806, 812. The court acknowledged that the governor's authority is broad, but, "[g]iven the wide variance of occurrences that can constitute an emergency, disaster or catastrophe, the criteria are necessarily broad and result-oriented, protect life and property . . . and . . . public . . . health . . . allowing the [g]overnor working with the executive branch and emergency management agencies to determine what is necessary for the specific crisis at hand. Floods, tornadoes and ice storms require different responses than threats from nuclear, chemical or biological agents or biological, etiological, or radiological hazards but the emergency powers are always limited by the legislative criteria, i.e., they must be exercised in the context of a declared state of emergency . . . designed to protect life, property, health and safety and to secure the continuity and effectiveness of government . . . and exercised to promote and secure the safety and protection of the civilian population." (Citations omitted; internal quotation marks omitted.) Id., 811.

The Supreme Judicial Court of Massachusetts also recently rejected a separation of powers challenge to the Massachusetts governor's authority to issue emergency orders. *Desrosiers* v. *Governor*, supra, 486 Mass. 382, 384–85. The court reasoned that, "because the [g]overnor's actions were carried out pursuant to the authority granted to the [g]overnor in the [Massachusetts Civil Defense Act], the emergency orders [did] not violate [the separation of powers provision of the Massachusetts constitution]." Id., 382. The court also noted that the act did not interfere with the functions of the legislature. Id., 383.

The plaintiffs, however, point to a recent decision of the Supreme Court of Michigan that they claim supports

their contention that § 28-9 (b) (1) and (7) is an unconstitutional delegation of legislative authority. In a divided opinion, the Michigan high court concluded that the governor of Michigan did not possess the authority to exercise emergency powers under the Michigan Emergency Powers of the Governor Act because that act was an unlawful delegation of legislative power to the executive branch in violation of the Michigan constitution. *In re Certified Questions from the United States District Court, Western District of Michigan, Southern Division*, 506 Mich. 332, 372, 958 N.W.2d 1 (2020). The court reasoned that the powers conferred by the act were "remarkably broad"; id., 363; and there were not sufficient standards in place to constrain the governor's actions. See id., 367–71. The plaintiffs in the present case contend that, as with the Michigan statute, subection (b) (1) and (7) "impermissibly confers truly unlimited power on the governor . . . ." We are not persuaded. As the Chief Justice of the Michigan Supreme Court noted in her concurring and dissenting opinion in that case, the statute does not violate the separation of powers provision because "there are many ways to test the [g]overnor's response to this life-and-death pandemic." *In re Certified Questions from the United States District Court, Western District of Michigan, Southern Division*, supra, 422 (McCormack, C. J., concurring in part and dissenting in part). Namely, "the statute allows a legal challenge to the [g]overnor's declaration that COVID-19, as a threshold matter, constitutes a 'great public crisis' that 'imperil[s]' 'public safety.' . . . For another example, any order issued under the statute could be challenged as not 'necessary' or 'reasonable' to 'protect life and property or to bring the emergency situation within the affected area under control.' . . . In these ways and others, the courts can easily be enlisted to assess the exercise of executive power, measuring the adequacy of its factual and legal bases against the statute's language." (Citations omit-

ted.) Id. The Chief Justice also noted that the legislature itself might revisit its decision to have passed the statute in the first place. Id. Specifically, "[i]f the [l]egislature saw fit, it could repeal the statute. Or, the [l]egislature might amend the law to alter its standards or limit its scope. Changing the statute provides a ready mechanism for legislative balance." Id. The Chief Justice further explained that the governor is also politically accountable to voters, which serves as an additional check. Id. Finally, the Chief Justice noted that the majority had departed from one part of their long-standing test for delegation of legislative power, namely, that "the standard must be as reasonably precise as the subject matter requires or permits." Id., 423 (McCormack, C. J., concurring in part and dissenting in part). We find the reasoning of the Chief Justice's concurrence and dissent to be more persuasive.

As we noted in our per curiam ruling in the present case, we are mindful of the incredibly difficult economic situation that the plaintiffs and thousands of others across the state are in given the COVID-19 pandemic. Individuals and families have been economically upended as a result of the pandemic. We are also mindful of the more than 300,000 Connecticut residents who have been infected with COVID-19 and, most tragically, the nearly 8000 Connecticut citizens who have passed away in the more than yearlong pandemic. As we explained, the governor is charged with protecting the health, safety, and welfare of the citizens of this state, and the COVID-19 pandemic has presented a dynamic and unpredictable "serious disaster." The question of when various restrictions imposed as a result of the pandemic should be lifted is a fact intensive inquiry that involves an understanding of ever evolving scientific guidance, including the effects and impacts of newly discovered strains of the virus and their resistance to recently approved vaccines. It is likely that reasonable

minds may differ as to when each restriction should be lifted, but, as Chief Justice Roberts explained, "[w]hen [elected] officials undertake . . . to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad." (Internal quotation marks omitted.) *South Bay United Pentecostal Church* v. *Newsom*, supra, 140 S. Ct. 1613 (Roberts, C. J., concurring in denial of application for injunctive relief). As long as Governor Lamont is acting within this admittedly broad statutory and constitutional authority—which we conclude that he is—it is not the job of this court to second-guess those policy decisions.

The judgment is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* REGGIE BATTLE
(SC 20396)

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

Syllabus

The defendant, whose probation had been revoked after a finding of a violation thereof, appealed to the Appellate Court from the trial court's dismissal of his motion to correct the allegedly illegal sentence imposed in connection with the revocation of his probation. The defendant claimed that his sentence was illegal because the violation of probation statute (§ 53a-32 (d)) did not authorize the trial court to impose a sentence of special parole following a probation violation and revocation. The Appellate Court concluded that the sentence imposed was not illegal insofar as it included a period of special parole but concluded that the trial court should have denied the defendant's motion to correct rather than having dismissed it. On the granting of certification, the defendant appealed to this court. *Held* that, following an examination of the record and briefs on appeal and consideration of the arguments presented by the parties, this court concluded that the Appellate Court's thorough and well reasoned opinion fully addressed the issue presented, and,

accordingly, this court adopted that opinion as the proper statement of the issue and the applicable law concerning that issue.

Argued October 19, 2020—officially released April 1, 2021*

Procedural History

Information charging the defendant with the crimes of carrying a pistol without a permit and criminal possession of a pistol, and with violation of probation, brought to the Superior Court in the judicial district of Hartford, where the defendant was presented to the court, *Alexander*, *J.*, on a plea of guilty; judgment of guilty in accordance with plea; thereafter, the court, *Dewey*, *J.*, dismissed the defendant's motion to correct an illegal sentence, and the defendant appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Bright* and *Moll*, *Js.*, which remanded the case to the trial court with direction to render judgment denying the defendant's motion to correct, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Temmy Ann Miller, for the appellant (defendant).

Mitchell S. Brody, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, former state's attorney, *Sharmese L. Walcott*, state's attorney, and *Elizabeth Tanaka*, former assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. The sole issue in this certified appeal is whether General Statutes § 53a-32 (d)[1] affords a trial

* April 1, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] General Statutes § 53a-32 (d) provides: "If such violation is established, the court may: (1) Continue the sentence of probation or conditional discharge; (2) modify or enlarge the conditions of probation or conditional discharge; (3) extend the period of probation or conditional discharge, provided the original period with any extensions shall not exceed the periods authorized by section 53a-29; or (4) revoke the sentence of probation or conditional discharge. If such sentence is revoked, the court shall require the defendant to serve the sentence imposed or impose any lesser sentence. Any such lesser sentence may include a term of imprisonment, all or a

court the authority to impose a sentence that includes a period of special parole following a probation violation and revocation. The defendant, Reggie Battle, appeals, upon our grant of his petition for certification,[2] from the judgment of the Appellate Court remanding the case to the trial court with direction to deny his motion to correct an illegal sentence pursuant to Practice Book § 43-22. See *State* v. *Battle*, 192 Conn. App. 128, 147, 217 A.3d 637 (2019). On appeal, the defendant contends that the Appellate Court improperly construed § 53a-32 (d) (4) in concluding that the sentence imposed upon the revocation of his probation was not illegal. We disagree and, accordingly, affirm the judgment of the Appellate Court.

On appeal, the defendant claims that the plain and unambiguous language of § 53a-32 (d) (4) did not authorize the trial court to impose a sentence of special parole upon the revocation of probation because that sanction is not one that is mentioned in the statute. After examining the record and briefs on appeal and considering the arguments of the parties, we conclude that the judgment of the Appellate Court should be affirmed. The Appellate Court's thorough and well reasoned opinion fully addresses the certified question, along with the complete facts and procedural history of this case, and, accordingly, there is no need for us to repeat the discussion contained therein. We therefore adopt the Appel-

portion of which may be suspended entirely or after a period set by the court, followed by a period of probation with such conditions as the court may establish. No such revocation shall be ordered, except upon consideration of the whole record and unless such violation is established by the introduction of reliable and probative evidence and by a preponderance of the evidence."

[2] We granted the defendant's petition for certification to appeal from the Appellate Court, limited to the following issue: "Did the Appellate Court correctly conclude that, under . . . § 53a-32, a trial court, following a probation violation and revocation, may impose a sentence that includes a period of special parole?" *State* v. *Battle*, 333 Conn. 942, 219 A.3d 373 (2019).

late Court's opinion as the proper statement of the issues and the applicable law concerning those issues. See, e.g., *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, 333 Conn. 343, 357, 216 A.3d 629 (2019); *State* v. *Henderson*, 330 Conn. 793, 799, 201 A.3d 389 (2019).

The judgment of the Appellate Court is affirmed.