LENWORTH CHARLES GRANT *v.* COMMISSIONER OF CORRECTION
(SC 20561)

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

Syllabus

The petitioner, who had been convicted, on a guilty plea under *North Carolina* v. *Alford* (400 U.S. 25), of risk of injury to a child and strangulation in the third degree in connection with a domestic violence incident in which he assaulted the victim in the presence of their minor child, sought a writ of habeas corpus, claiming ineffective assistance of trial counsel. The petitioner's trial counsel, C, had engaged in numerous plea negotiations, and the state made several plea offers, each one calling for a guilty plea and incarceration. Subsequently, C convinced the trial court to fully suspend the period of incarceration in light of the victim's recantation with respect to the incident. The petitioner ultimately pleaded guilty in exchange for a suspended sentence and probation. In his habeas petition, the petitioner alleged that C's performance violated his right to the effective assistance of counsel insofar as C failed to inquire about the petitioner's immigration status and failed to properly advise him of the immigration consequences of his guilty plea. Specifically, the petitioner alleged that C had access to information that the

petitioner was not a United States citizen and failed to inform the petitioner that he would almost certainly be subject to deportation as a consequence of his guilty plea to the felony of risk of injury to a child. At his habeas trial, the petitioner presented testimony from C and the prosecutors involved in the petitioner's criminal case. The petitioner also testified before the habeas court that he did not know whether he would have gone to trial if he had been properly advised of the immigration consequences of his plea. The habeas court found that the prosecutors testified credibly that they were not willing to consider dropping the risk of injury charge against the petitioner and, therefore, that there was no evidence that there was another, more favorable plea offer that was available to the petitioner. The habeas court concluded that, even if it were to presume that C's performance was deficient, the petitioner did not prove that he would have rejected the plea offer and proceeded to trial, or have accepted an alternative offer. Accordingly, the habeas court denied the petitioner's habeas petition. The petitioner ultimately was deported after the habeas court rendered judgment denying his petition. On the granting of certification, the petitioner appealed. *Held* that the habeas court properly denied the petitioner's habeas petition, as the petitioner failed to meet his burden of establishing that, but for C's allegedly deficient performance, there was a reasonable probability that he would have rejected the state's plea offer and proceeded to trial, and, therefore, the petitioner failed to establish prejudice: the petitioner admitted at his habeas trial that, even with the benefit of hindsight and the knowledge that he would be deported, he was not sure that he would have proceeded to trial; moreover, notwithstanding the petitioner's claims that there was a reasonable probability that he would have rejected the state's plea offer and proceeded to trial insofar as the state's case against him was not very strong and his testimony indicated that he would have made decisions that favored better immigration consequences, those factors could not overcome the petitioner's own testimony at the habeas trial that he still was not sure whether he would have proceeded to trial; furthermore, the habeas court made a specific and undisputed factual finding that there was no more favorable plea offer available to the petitioner in light of the credible testimony of the prosecutors that they would not have considered dropping the risk of injury charge against the petitioner, and the petitioner's testimony during the habeas trial that he would have approached the plea agreements "differently" was of no legal import insofar as he had failed to establish that there were any reasonably probable and more favorable alternatives available to him.

Argued October 20, 2021—officially released April 12, 2022

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, geographical area number nineteen, and tried to the

court, *Bhatt, J.*; judgment denying in part the petition, from which the petitioner, on the granting of certification, appealed. *Affirmed.*

Desmond M. Ryan, for the appellant (petitioner).

Sarah Hanna, senior assistant state's attorney, with whom, on the brief, were *Brian W. Preleski*, state's attorney, *Tanya K. Gaul*, former special deputy assistant state's attorney, and *Kelly A. Masi*, senior assistant state's attorney, for the appellee (respondent).

Opinion

MULLINS, J. The petitioner, Lenworth Charles Grant, appeals from the judgment of the habeas court denying in part his petition for a writ of habeas corpus.[1] The petitioner claims that the habeas court incorrectly concluded that he did not demonstrate that he had suffered prejudice from the ineffective assistance of his trial counsel insofar as his trial counsel allegedly failed to properly inform him that he would be subject to deportation as a consequence of his guilty plea to a felony. We disagree and, accordingly, affirm the judgment of the habeas court.[2]

[1] The habeas court granted the petitioner's petition for certification to appeal pursuant to General Statutes § 52-470 (g). The petitioner subsequently appealed from the judgment of the habeas court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[2] It is undisputed that the petitioner was in the custody of the respondent, the Commissioner of Correction, at the time he filed his habeas petition. After the habeas trial, but before the petitioner filed this appeal, the federal government deported the petitioner to his native country of Jamaica. As a result, the respondent initially asserted that the petitioner's appeal was moot because the petitioner had been deported based in part on convictions unconnected to this appeal. After briefing was completed in this case, this court issued its decision in *State* v. *Gomes*, 337 Conn. 826, 256 A.3d 131 (2021), which held that deportation does not render an appeal moot because the court can render practical relief regarding the collateral consequences of a criminal conviction. See id., 838, 845.

Thereafter, this court ordered the parties to file supplemental briefs "addressing the impact, if any, of . . . *Gomes* . . . on the present appeal." (Citation omitted.) In his supplemental brief, the respondent conceded that,

The record reveals the following relevant facts and procedural history. The petitioner is a citizen of Jamaica who had resided in Connecticut since 1997 and held a valid green card.[3] In 2014, the petitioner was involved in a domestic violence incident in which the state accused him of assaulting the complainant,[4] his girlfriend and the mother of his child.[5] The incident occurred while the petitioner and the complainant were riding in a motor vehicle with their eleven month old son. The complainant was driving, and an argument ensued between her and the petitioner. The complainant alleged that the petitioner assaulted her by pulling her hair, slapping her and choking her, causing her to nearly lose control of the vehicle while on the highway. Thereafter, the complainant was treated at a hospital for the injuries she sustained. The police took photographs of her injuries, and the complainant gave a written statement detailing this assault. Subsequently, the complainant recanted in statements to the victim's advocate, the New Britain Police Department and the New Britain public defender's office.[6]

in light of this court's holding in *Gomes*, "the petitioner's deportation does not render his appellate challenge to his conviction in this appeal moot." We agree and thus address the merits of the petitioner's appeal.

[3] "A 'green card' is a document [that] evidences an alien's permanent residence status in the United States." *Singh* v. *Singh*, 213 Conn. 637, 640 n.3, 569 A.2d 1112 (1990).

[4] In accordance with our policy of protecting the privacy interests of the victim of family violence, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

Moreover, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49; we decline to identify any person protected or sought to be protected under a protection order, protective order, or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

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

[6] At the time of this incident, the petitioner was on probation after having pleaded guilty to assault in the third degree in violation of General Statutes

As a result of this incident, in the judicial district of New Britain, geographical area number fifteen, the state charged the petitioner with one count each of risk of injury to a child in violation of General Statutes § 53-21 (a) (1), assault in the third degree in violation of General Statutes § 53a-61, strangulation in the third degree in violation of General Statutes (Rev. to 2013) § 53a-64cc, and disorderly conduct in violation of General Statutes § 53a-182.

In the proceedings before the trial court, "[t]he petitioner was represented by Attorney David Cosgrove of the [New Britain public defender's office]. Attorney Cosgrove engaged in numerous plea negotiations on the petitioner's behalf, where the main focus was to avoid incarceration. Attorney Cosgrove attempted to get the petitioner into [substance abuse and domestic violence] treatment to later use as a bargaining chip. The petitioner stopped going to the first program but was then entered into a second program. There were numerous offers made by the state, all of which involved pleas of guilty to felonies and incarceration. From the outset, the state had taken the position that this case would . . . be resolved [only] if the petitioner served time in prison. Attorney Cosgrove focused his efforts on eliminating that prospect. The first offer involved a sentence of three [years of] incarceration, suspended after service of one year, followed by three [years of] probation. Through further negotiation, the state altered that offer to [reduce] the period of incarceration to eight months. Attorney Cosgrove then convinced the trial court, *Hadden, J.*, to fully suspend the period of incarceration in light of the recantation [by] the complainant and the [substance abuse and domestic violence] treatment the petitioner had [received] during the pendency of this case."[7]

§ 53a-61, arising from a prior domestic violence incident involving the same complainant.

[7] The habeas court found that Attorney Cosgrove was not aware of the petitioner's immigration status until the very end of the plea canvass, despite

Ultimately, the petitioner pleaded guilty, pursuant to the *Alford* doctrine,[8] to one count each of risk of injury to a child and strangulation in the third degree. The petitioner pleaded guilty in exchange for a court indicated sentence of three years of incarceration, fully suspended, and three years of probation.[9] Approximately one year later, the petitioner was found to have violated his probation and was sentenced to three years of incarceration related to this case.

On July 10, 2017, the petitioner filed a petition for a writ of habeas corpus. He was self-represented at that time. Thereafter, counsel for the petitioner entered an appearance and filed an amended petition. The operative petition in this case is the fourth amended petition filed on August 31, 2018. In that petition, the petitioner alleged two separate counts, claiming ineffective assistance of trial counsel regarding the performance of two different attorneys with respect to two separate guilty

the fact that his file contained a transcript from another, unrelated case that referenced the petitioner's birthplace of Jamaica. Although the habeas court did not rule on whether this was deficient performance, and thus we have no occasion to either, we are troubled by trial counsel's lack of awareness of the immigration status of his client.

[8] "Under *North Carolina* v. *Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), a criminal defendant is not required to admit his guilt, but consents to being punished as if he were guilty to avoid the risk of proceeding to trial. . . . A guilty plea under the *Alford* doctrine is a judicial oxymoron in that the defendant does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea nevertheless. The entry of a guilty plea under the *Alford* doctrine carries the same consequences as a standard plea of guilty. By entering such a plea, a defendant may be able to avoid formally admitting guilt at the time of sentencing, but he nonetheless consents to being treated as if he were guilty with no assurances to the contrary." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Simpson*, 329 Conn. 820, 824 n.4, 189 A.3d 1215 (2018).

[9] Around the same time that this guilty plea was entered, in a separate criminal case, the petitioner also pleaded guilty under the *Alford* doctrine to possession of narcotics in violation of General Statutes (Supp. 2014) § 21a-279 (a), arising from an incident in Manchester, and was sentenced to a term of three years of incarceration, execution suspended, and three years of probation.

pleas, one related to his conviction of possession of narcotics, originating out of Manchester (Manchester case), and one related to the conviction of risk of injury to a child and strangulation in the third degree, originating out of New Britain (New Britain case).

In count one, the petitioner alleged ineffective assistance of counsel in the Manchester case, in which he pleaded guilty to possession of narcotics in violation of General Statutes (Supp. 2014) § 21a-279 (a), in exchange for a fully suspended sentence and probation. In this count, he claimed that his trial counsel, Attorney Mark E. Holmes, failed to adequately inform him regarding the immigration consequences of the plea and that, had trial counsel properly informed him, he would have rejected the state's plea offer.[10]

In count two of this petition—the claim that is the subject of this appeal—the petitioner's allegations were directed at his trial counsel's performance in the New Britain case, in which the petitioner pleaded guilty to risk of injury to a child and strangulation in the third degree. In this count, he claimed that the performance of his trial counsel, Attorney Cosgrove, violated his right

[10] The habeas court found that "the petitioner has sustained his burden of proving both deficient performance and prejudice" as to the claim involving the Manchester case. Therefore, the habeas court granted the petition for a writ of habeas corpus as to the first count. The habeas court found that there were other plea offers available to the petitioner that did not involve pleading guilty to a felony. The habeas court further found that "[i]t stands to reason that, if [the petitioner] did not want to go to [prison] because he would be separated from his child, then had he been properly advised on near certain deportation that would forever separate him from his child, he would have availed himself of the [alternative] offers. [Because] all [of] the offers were available to the petitioner after a judicial pretrial, the court finds that the trial court would have imposed sentence in accordance with the offer. Moreover, transcripts from the underlying proceedings indicate that the trial [court] would have accepted the petitioner's plea agreement for the drug paraphernalia conviction." The respondent, the Commissioner of Correction, has not challenged the habeas court's ruling on this count, and that claim is not at issue in this appeal.

to the effective assistance of counsel under the sixth and fourteenth amendments to the United States constitution because, inter alia, Cosgrove failed to inquire about the petitioner's immigration status and failed to properly advise him of the immigration consequences of his plea. Specifically, the petitioner alleges that Cosgrove had access to information that the petitioner was not a United States citizen and failed to inform the petitioner that he would almost certainly be subject to deportation as a consequence of his guilty plea to a felony, namely, risk of injury to a child, that would likely be considered a "crime of child abuse, child neglect, or child abandonment" under federal law. 8 U.S.C. § 1227 (a) (2) (E) (i) (2012).

Indeed, sometime in or around 2017, the federal government initiated removal proceedings against the petitioner based, in part, on his conviction of risk of injury to a child, which is the subject of this appeal. In connection with those proceedings, on May 30, 2019, the petitioner was deported to Jamaica.

At the habeas trial, as it related to the New Britain case, the petitioner testified and presented testimony from Attorney Cosgrove and the prosecutors involved in his case, Attorneys Louis Luba and Mary Rose Palmese. He also presented expert testimony from two attorneys. With respect to the penultimate question of whether the petitioner would have gone to trial had his trial counsel not performed deficiently, the petitioner repeatedly testified that he did not know whether he would have gone to trial if he was properly advised of the immigration consequences of his guilty pleas. For instance, the petitioner was asked, "[a]nd were you interested in potentially going to trial [in] this case?" The petitioner replied in relevant part: "To be honest with you, I mean . . . I've heard a lot of things about trial, and I'm not an expert or anything like that. I mean, I'm . . . not familiar with anything when it comes to trial,

so I'm not sure where I would have gone with that. But, I mean, I was willing to take the first [guilty plea] option that [my trial counsel] had given me . . . ."

After the hearing, the habeas court issued a memorandum of decision, in which the court found in relevant part: "At the habeas trial, [Attorneys Luba and Palmese] . . . both testified credibly that they were not willing to consider dropping the risk of injury [to a child] charge against the petitioner. Attorney Palmese further testified that, under the circumstances of the petitioner's case, particularly the seriousness of the charges and the description of the petitioner's conduct, she would not change the charges. Thus, there is no evidence that there was another, more favorable offer that was available to the petitioner. . . .

"[On the basis of] the record, even if the court presumed that Attorney Cosgrove . . . [performed] deficient[ly] [by] failing to inquire into the petitioner's immigration status and [to] advise the petitioner [concerning] the potential immigration consequences of his plea, the court finds that the petitioner has not proven that he would have rejected the offer and proceeded to trial or accepted an alternative offer." [11] (Citations omitted.) Accordingly, the habeas court denied the petition for a writ of habeas corpus as to count two, the claim involving the New Britain case. This appeal followed.

We begin by setting forth the standard of review applicable to the petitioner's appeal. "The habeas judge, as

[11] There is some ambiguity in the habeas court's memorandum of decision with respect to whether the habeas court applied the precise prejudice standard from *Hill* v. *Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985), by not including the "reasonable probability" language before its conclusion that the petitioner had not met his burden. It is important to note that the petitioner does not assert that the habeas court applied the incorrect legal standard. Instead, the parties agree that the habeas court applied the correct legal standard to the petitioner's claim—namely, whether the petitioner proved that there was *a reasonable probability* that the petitioner would have rejected the plea offer and proceeded to trial. See id.

the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . The application of historical facts to questions of law that is necessary to determine whether the petitioner has demonstrated prejudice under *Strickland* [v. *Washington*, 466 U.S. 668, 698, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], however, is a mixed question of law and fact subject to our plenary review." (Citation omitted; internal quotation marks omitted.) *Small* v. *Commissioner of Correction*, 286 Conn. 707, 717, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008). "To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, [supra, 687]. *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong. . . . It is well settled that [a] reviewing court can find against a petitioner on either ground, whichever is easier." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Small* v. *Commissioner of Correction*, supra, 712–13.

"For claims of ineffective assistance of counsel arising out of the plea process, the United States Supreme Court has modified the second prong of the *Strickland* test to require that the petitioner produce evidence that there is a reasonable probability that, but for counsel's errors, [the petitioner] would not have pleaded guilty and would have insisted on going to trial." (Internal quotation marks omitted.) *Taylor* v. *Commissioner of Correction*, 324 Conn. 631, 643, 153 A.3d 1264 (2017); see, e.g., *Hill* v. *Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). Furthermore, to satisfy the required showing of prejudice, "[i]t is clear enough that a [petitioner] must make more than a bare allegation that he would have pleaded differently and gone to trial . . . ." (Citations omitted; internal quotation marks omitted.) *United States* v. *Horne*, 987 F.2d 833,

836 (D.C. Cir.), cert. denied, 510 U.S. 852, 114 S. Ct. 153, 126 L. Ed. 2d 115 (1993). "Courts should not upset a plea solely because of post hoc assertions from a [petitioner] about how he would have pleaded but for his attorney's deficiencies. [Courts] should instead look to contemporaneous evidence to substantiate a [petitioner's] expressed preferences." *Lee* v. *United States*, U.S. , 137 S. Ct. 1958, 1967, 198 L. Ed. 2d 476 (2017).

On appeal, the petitioner asserts that the habeas court incorrectly concluded that he did not meet his burden of establishing that, but for the deficient performance of his trial counsel, there is a reasonable probability that he would have rejected the state's plea offer and proceeded to trial. We disagree.

Not only did the petitioner fail to produce contemporaneous evidence that, but for the deficient performance of his trial counsel, there is a reasonable probability that he would have rejected the plea offer and proceeded to trial; see, e.g., id.; but his own testimony at the habeas trial does not support his claim. Instead, the petitioner admitted that, even with the benefit of hindsight and the knowledge that he would be deported, he is not sure that he would have proceeded to trial, even if he had been advised of the immigration consequences of his guilty plea. Accordingly, the petitioner's own testimony, even if credited, fails to meet his burden of showing that it was reasonably probable that he would have rejected the plea offer and insisted on a trial. See, e.g., *United States* v. *Kelly*, 98 Fed. Appx. 902, 905 (2d Cir. 2004) (even if found to be true, allegation that, but for defense counsel's alleged errors, defendant " 'might have elected to go to trial,' " was not enough to show prejudice).

Acknowledging the equivocal testimony of the petitioner, the petitioner's habeas counsel attempts to fill that gap in the record by pointing to other factors that

support the petitioner's contention that, but for the deficient performance of his trial counsel, there is a reasonable probability that he would have rejected the state's plea offer and proceeded to trial.

First, the petitioner asserts that the state's case against him was not very strong because the complainant had recanted her statement, and that this lack of strength supports the notion that the petitioner would have rejected the plea offer and proceeded to trial. Second, the petitioner points to his testimony that he prioritized keeping his family together and would have made decisions that favored better immigration consequences. Although we acknowledge that these factors would be relevant to assessing whether the petitioner's position that he would have rejected the plea offer and proceeded to trial was reasonable, these factors cannot overcome the petitioner's own testimony that, knowing all of these things, he still was not sure whether he would have proceeded to trial.

The petitioner also asserts that he established prejudice because, but for the deficient performance of his trial counsel, he would have accepted a more favorable plea offer. We disagree. The habeas court made a specific factual finding that there was no more favorable plea offer available to the petitioner. Specifically, the habeas court found that "[Attorneys Luba and Palmese] . . . both testified credibly that they were not willing to consider dropping the risk of injury [to a child] charge against the petitioner. . . . Thus, there is no evidence that there was another, more favorable offer that was available to the petitioner." The petitioner does not challenge this factual finding by the habeas court. Therefore, the record does not support a conclusion that there was a reasonable probability that, but for his trial counsel's deficient performance, the petitioner would have accepted a more favorable plea offer.[12]

[12] To the extent that the petitioner also claims that, even if a more favorable plea offer did not exist, his trial counsel should have obtained a different

The petitioner also points to the following testimony in support of his claim that, had his trial counsel properly informed him of the immigration consequences of his plea, the outcome of the New Britain case would have been more favorable to the petitioner. On redirect examination, the petitioner's habeas counsel asked, "[b]ut I'm talking more about when you were deciding whether or not even to enter into . . . these plea agreements, the risk of injury [to a child] plea agreement . . . . Would you have approached them differently had you understood the immigration consequences better than was explained to you by [trial counsel]?" The petitioner responded, "[a]bsolutely." In light of the habeas court's unchallenged finding that there was no other, more favorable plea offer available to the petitioner when he pleaded guilty, the petitioner's testimony does not satisfy his burden of demonstrating that there is a reasonable probability that he would have proceeded to trial or accepted a more favorable plea offer. Quite simply, the petitioner's testimony that he would have approached the matter "differently" is of no legal import when he has failed to establish that there were any reasonably probable alternatives available to him.

We agree with the habeas court that the petitioner did not meet his burden of establishing that there was a reasonable probability that he would have rejected the plea offer and proceeded to trial. It is well established that "[a] court deciding an ineffective assistance of counsel claim need not address the question of counsel's performance, if it is easier to dispose of the claim

plea offer, and that the petitioner would have taken it if he had, we find no support for this claim. In the present case, Attorneys Luba and Palmese testified that they would not have considered dropping the risk of injury to a child charge against the petitioner, and the habeas court found that testimony credible. Under the facts of this case, particularly when the petitioner was already on probation for a domestic violence incident with the same complainant, and Luba and Palmese testified that they were only considering plea offers with prison time because of the seriousness and nature of the offense, we cannot conclude that the petitioner has demonstrated that trial counsel should have obtained a different plea offer.

on the ground of insufficient prejudice." *Nardini* v. *Manson*, 207 Conn. 118, 124, 540 A.2d 69 (1988). Therefore, because we conclude that the habeas court correctly concluded that the petitioner had failed to establish prejudice, we need not address the performance prong. Accordingly, we conclude that the habeas court properly denied the petitioner's petition for a writ of habeas corpus as to the claim involving the New Britain case.

The judgment is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* GERJUAN RAINER TYUS (SC 20462)

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

Syllabus

Convicted of the crime of murder in connection with the shooting death of the victim, the defendant appealed. Prior to the shooting, the defendant was involved in a dispute with the victim, after which the victim drove by the defendant's apartment and shot the defendant, and the defendant fired back at the victim. The defendant's close friend, A, thereafter stated an intention to seek revenge against the victim. Approximately two weeks later, the victim was shot and killed at a café in New London. In an interview with the police after the victim's murder, the defendant told them that, on the night of the victim's murder, he and A had traveled directly from Boston to a nightclub in Norwich located approximately twelve miles away from the café, thereby indicating that he and A were not present at the café at the time of the murder. The defendant and A were subsequently charged with murder and conspiracy to commit murder, but the conspiracy charges were dismissed prior to trial. The trial court granted the state's motion to join the cases against the defendant and A for trial. At trial, A's girlfriend, E, testified that A told her that he had shot someone on the night the victim was killed. Bullet casings from the scene of the shooting at the defendant's apartment and from the murder scene were submitted to the state forensic laboratory. A ballistics analyst, P, examined the evidence and generated a written report containing his findings. S, who also was employed at the labora-

tory, served as a technical reviewer of P's report. P died before trial and was therefore unavailable to testify. The state subsequently sought to admit testimony from S, and the court denied the defendant's motion to preclude S's testimony. The jury found the defendant guilty of murder as a principal or an accessory. The Appellate Court affirmed the defendant's conviction, and the defendant, on the granting of certification, appealed to this court. *Held*:

1. The Appellate Court correctly concluded that the trial court had not abused its discretion in joining the defendant's case with A's case for trial: the state's case against the defendant and the state's case against A both arose from the shooting death of the victim, most of the state's evidence would have been admissible against both the defendant and A if their cases had been tried separately, and the defendant's and A's defenses were not antagonistic because each served as the other's principal alibi witness, the defendant and A both having claimed that they were together at a certain nightclub at the time of the shooting; moreover, the defendant could not prevail on his claim that joinder was improper on the ground that E's testimony regarding A's admission that he had shot someone on the night of the victim's murder could not have been admitted into evidence against the defendant under the coconspirator exception to the hearsay rule, because, contrary to the defendant's claim, that hearsay exception is applicable even in cases, such as the present one, in which the defendant is not facing a conspiracy charge at the time of trial.
2. The defendant could not prevail on his unpreserved claim that the admission into evidence of certain information regarding the location of his cell phone (CSLI) around the time of the victim's murder violated his fourth amendment rights insofar as the police obtained that information without a warrant: the admission of the defendant's CSLI was harmless because evidence other than the defendant's CSLI placed the defendant close to the crime scene at the time of the victim's murder, including CSLI from the cell phone of A, who maintained at trial that he and the defendant were together the entire evening, and there was additional evidence from which the jury could have inferred that the defendant and A had lied about being at the Norwich nightclub at the time of the murder, including testimony from a witness that he saw the defendant and a man matching A's description entering that nightclub fifteen to twenty minutes after the witness was told that the victim had been shot; moreover, there was evidence that the defendant and A were driving in a rented silver vehicle on the night of the murder, and witnesses testified that a man matching A's description ran from the scene of the shooting and entered a vehicle matching the description of the rented vehicle, the defendant's and A's DNA were found in that vehicle, and a substance found in the interior of that vehicle possessed genetic characteristics similar to those of the victim.

3. Although the Appellate Court incorrectly concluded that the defendant's right to confrontation was not violated when the trial court allowed S, an employee of the state forensic laboratory to testify about certain findings made by P, a ballistics analyst with the same laboratory who was unavailable to testify at the defendant's trial, the admission of S's testimony was harmless beyond a reasonable doubt:

a. The defendant's constitutional right to confrontation was violated when the trial court allowed S to testify about certain of P's findings regarding the ballistics evidence in the case, the defendant having been deprived of the opportunity to cross-examine P with respect those findings; although S was asked about his own analysis and conclusions in connection with his independent review of the ballistics evidence, S was also asked during direct examination about certain evidence that P had reviewed, and about which P had made findings, but that S had no recollection of reviewing himself, and, because, in those instances, S relied solely on P's findings rather than his own, the state indirectly communicated P's findings to the jury through S's testimony.

b. The admission of S's testimony about P's findings was harmless beyond a reasonable doubt, as S's testimony was cumulative of other evidence, including S's testimony regarding his analysis and conclusions based on his independent review of the evidence, from which the jury reasonably could have concluded that the firearm that the defendant used to fire back at the victim at the defendant's apartment was the same weapon that was used to kill the victim; moreover, other evidence presented at trial provided the jury with a strong evidentiary basis to conclude that the defendant had ready access to the type of firearm that was used to murder the victim, and there was other compelling evidence of the defendant's guilt, including DNA evidence, motive, and evidence that placed the defendant close to the café at the time of the victim's murder.

Argued October 14, 2021—officially released April 12, 2022

Procedural History

Substitute information charging the defendant with the crimes of murder and conspiracy to commit murder, brought to the Superior Court in the judicial district of New London, where the court, *Jongbloed*, *J.*, granted the defendant's motion to dismiss the charge of conspiracy to commit murder and granted the state's motion to consolidate for trial the defendant's case with that of a codefendant; thereafter, the case was tried to the jury before *A. Hadden*, *J.*; subsequently, the court, *A. Hadden*, *J.*, denied the defendant's motion to preclude certain evidence; verdict and judgment of guilty, from

which the defendant appealed to this court; thereafter, the case was transferred to the Appellate Court, *Lavine*, *Sheldon* and *Harper*, *Js*., which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed*.

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

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

Charles D. Ray, *Dana M. Delger*, pro hac vice, *M. Christopher Fabricant*, pro hac vice, *Don O. Burley*, pro hac vice, *Barbara E. Butterworth*, pro hac vice, *Jessica L. Hannah*, pro hac vice, and *Alexander E. Harding*, pro hac vice, filed a brief for the Innocence Project, Inc., as amicus curiae.

Opinion

KAHN, J. The defendant, Gerjuan Rainer Tyus, appeals from the judgment of the Appellate Court, which affirmed his conviction of murder in violation of General Statutes §§ 53a-54a (a) and 53a-8. In this appeal, the defendant claims that (1) the Appellate Court incorrectly concluded that the trial court had not abused its discretion in joining the defendant's case with that of his codefendant, Darius Armadore, because the evidence in both cases was cross admissible, (2) his fourth amendment rights were violated under *Carpenter* v. *United States*, U.S. , 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018), when the police obtained his cell site location information (CSLI) without a warrant supported by probable cause, and (3) the Appellate Court incorrectly concluded that the defendant's right to confrontation was not violated when the trial court allowed a state's firearms examiner to testify about the findings

of a second firearms examiner, who was deceased and, thus, unavailable to testify at trial. The state disagrees with each of these claims and asserts, in the alternative, that any error was harmless. For the reasons that follow, we agree that the Appellate Court correctly concluded that the trial court had not abused its discretion in joining the defendant's case with the codefendant's case and that the violations of the defendant's constitutional rights were harmless beyond a reasonable doubt. Accordingly, we affirm the judgment of the Appellate Court.

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, the defendant was involved in an ongoing dispute with the victim, Todd Thomas, over jewelry that the victim's brother had given to the defendant. The victim demanded that the defendant return the jewelry, but the defendant refused to do so unless the victim paid him $10,000.

The victim's girlfriend, Devena Colebut, told the police that, after the victim had requested that the jewelry be returned, she and the victim were driving in the victim's white Lexus in New London. She recognized the defendant's vehicle, a blue Range Rover, which began to follow the Lexus. Soon after, she heard three or four gunshots, and the victim pushed her down. The victim made several turns in an attempt to evade the Range Rover.[1]

On December 3, 2006, the victim drove by the defendant's apartment on Willetts Avenue in New London as a passenger in the white Lexus, which was registered to his wife. The victim fired several gunshots from a

[1] At trial, Colebut testified that she did not remember any of these events. In response, the state introduced Colebut's prior statement to the police into evidence pursuant to *State* v. *Whelan*, 200 Conn. 743, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986).

.38 caliber firearm, striking the defendant in the leg and the back. The defendant fired gunshots back at the victim with a nine millimeter firearm. The defendant's acquaintance, Rashard Johnson, who was present at the scene of that shooting, told the police that the defendant had a gun that he thought might be a nine millimeter firearm. Five nine millimeter cartridge casings were subsequently recovered from the scene of the shooting on Willetts Avenue. Those casings were found in front of 28 Willetts Avenue, the very same location the defendant later identified to the police on a hand drawn map as the place he had been standing. Several casings from a .38 caliber firearm were found farther down the street, in front of 24 Willetts Avenue from the location where the victim had fired. Later that same day, while the defendant was being treated for his wounds at the hospital, his close friend, Armadore, visited the defendant at the hospital and was overheard to say, "we're gonna get them niggas . . . ."[2]

On December 15, 2006, the defendant's then girlfriend, Takeisha Betts, went with the defendant to rent a silver Chevrolet Impala and listed herself and the defendant as authorized drivers of that vehicle.[3] The defendant and Armadore drove this rental vehicle to Boston, Mas-

[2] We note that Armadore's counsel challenged the admission of this statement on appeal by claiming that the witness who overhead this statement had improperly identified him as the speaker 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). *State* v. *Armadore*, 186 Conn. App. 140, 153, 198 A.3d 586 (2018), aff'd, 338 Conn. 407, 258 A.3d 601 (2021). The Appellate Court agreed, holding that the identification was improper but concluding that the error was harmless. Id., 156–58. We note that defense counsel made no objection to the admission of this statement.

[3] Betts and the defendant rented a car because Betts, who was pregnant at the time, needed a vehicle in order to get to medical appointments. The defendant was no longer in possession of the blue Range Rover by the time that the shooting occurred, as it had been taken into evidence by the police following the prior shooting on Willetts Avenue.

sachusetts, at approximately 7 p.m. on December 22, 2006. While in Boston, the defendant and Armadore visited family and then picked up three women. One of the women subsequently refused to return to Connecticut with them, so the defendant and Armadore drove the other two women back to Connecticut in the silver Impala.

That evening, the victim was at Ernie's Café on Bank Street in New London. Kevin Thorne, an acquaintance of the defendant, testified that he was at Ernie's Café around that time and that, while he was there, he and the defendant communicated several times over their cell phones in order to arrange a marijuana sale. Shortly after midnight, the victim was shot in the head while he was standing outside of the front entrance of Ernie's Café smoking a cigarette. Thorne was outside of the bar and near the victim at the time of the shooting, and his phone records show that he was on the phone with the defendant around that time.

Witnesses observed a light-skinned African American male wearing a hooded sweatshirt fleeing the scene of the crime toward a municipal parking lot on Golden Street, where he entered the passenger side of a silver vehicle that was waiting there with its motor running. The vehicle immediately sped away. The victim was transferred to Lawrence + Memorial Hospital in New London and was pronounced dead upon arrival.

After the shooting, the defendant and Armadore arrived at Bella Notte, a nightclub in Norwich located approximately twelve and one-half miles north of Ernie's Café. The defendant elected to testify at trial and asserted that he and Armadore had driven straight from Boston to Bella Notte, and that they were there at the time the victim was shot. However, CSLI from two cell phones belonging to the defendant and one cell phone belonging to Armadore showed that they were in New London

at the time of the victim's death. Further, a state's witness, Eduardo Guilbert, testified that he saw the defendant and a man matching Armadore's description entering Bella Notte sometime after Guilbert received a phone call informing him that the victim had been shot.[4]

A few hours later, the defendant dropped Armadore off at the apartment Armadore shared with his then girlfriend, Ritchae Ebrahimi. At trial, Ebrahimi testified that, after Armadore arrived at their home, they argued over his having been with other women that evening, and that he told her he had shot someone that night.

The police recovered one nine millimeter cartridge casing from the scene of the December 23, 2006 shooting at Ernie's Café. Ballistics evidence showed that this cartridge casing had been fired from the same firearm as all five of the nine millimeter cartridge casings that were recovered in front of 28 Willetts Avenue at the scene of the December 3, 2006 shooting.

The police also recovered the silver Impala that the defendant and his girlfriend rented, after it was returned to a rental car company in New London. The police then searched that vehicle for evidence related to the shooting. In addition to both the defendant's and Armadore's DNA, a red, bloodlike substance found on the interior of the Impala's front passenger door possessed genetic characteristics similar to that of the victim's. Angela Przech, an employee at the state forensics laboratory, noted that a bloodlike substance, although not blood, could be skin cells, saliva, sweat, or brain tissue.

[4] Although Guilbert, who had consumed several alcoholic beverages that night, could not recall the precise time these events occurred and initially told the police that the defendant may have arrived at Ernie's Café around 11 p.m., he clearly testified that he had learned of the victim's death before the defendant's arrival. He further testified that the defendant offered to buy him a drink but that he declined because he was about to leave. He left and went to the hospital to meet the victim's family.

Both the defendant and Armadore were interviewed by the police relating to their whereabouts during the night of and at the time of the shooting. During his initial interview with the police, the defendant stated that he and Armadore arrived at Bella Notte before 11:30 p.m. and that he did not see anyone he knew at Bella Notte. In a subsequent interview, however, the defendant said that he recognized a female friend at Bella Notte. Further, during an interview with the police shortly after the shooting, the defendant stated that he and Armadore had driven to Boston in a black car, but, after returning to Connecticut, they exchanged it for a rented silver car. In his March, 2008 interview with the police, the defendant stated that he and Armadore drove to Boston in a rental car. During his interview with the police in December, 2006, Armadore stated that he and the defendant traveled to Boston in a silver Impala to visit family. Both the defendant and Armadore testified at trial that they did not recall telling the police that they had ridden in a silver Impala that evening. Specifically, Armadore denied telling the police that he ever had ridden in a silver Impala with the defendant on the evening in question. The jury, however, was presented with forensic evidence showing that both Armadore and the defendant had been inside of the silver Impala rented by the defendant and his girlfriend. Throughout the investigation and even during their trial testimony, both the defendant and Armadore maintained that they were together at all times that evening and night.

On November 20, 2012, the defendant and Armadore were arrested and charged with murder in violation of § 53a-54a and conspiracy to commit murder in violation of § 53a-54a and General Statutes § 53a-48. The conspiracy charges were later dismissed as to both defendants on the ground that they were barred by the statute of limitations. The state then filed long form informations charging the defendant and Armadore with murder,

both as a principal and as an accessory, in violation of §§ 53a-54a (a) and 53a-8.

The state subsequently filed a motion to join for trial the cases against the defendant and Armadore. The trial court granted that motion, over the objections of counsel, and the case was tried before a single jury, which returned guilty verdicts as to both the defendant and Armadore.[5] The court sentenced the defendant to a term of fifty-five years of incarceration.

The defendant appealed from the judgment of conviction to this court, which transferred the appeal to the Appellate Court.[6] Before the Appellate Court, the defendant claimed "(1) that the trial court abused its discretion in granting the state's motion to join his case for trial with that of . . . Armadore; (2) that 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 unable to testify at trial; and (3) that the court erred in denying his request for a limiting instruction to the jury concerning the testimony of the state's firearms examiner." *State* v. *Tyus*, 184 Conn. App. 669, 670–71, 195 A.3d 737 (2018). The Appellate Court disagreed with those claims and, accordingly, affirmed the trial court's judgment of conviction. Id., 685. This certified appeal followed. See *State* v. *Tyus*, 335 Conn. 907, 227 A.3d 77 (2020). Additional facts and procedural history are set forth subsequently in this opinion as necessary.

The present appeal presents three certified questions: (1) whether the Appellate Court correctly concluded that

[5] The jury did not specify whether its verdict against the defendant was based on principal or accessorial liability.

[6] Armadore filed a separate appeal, and his conviction and sentence were affirmed in *State* v. *Armadore*, 338 Conn. 407, 258 A.3d 601 (2021).

the trial court had not abused its discretion in joining the defendant's case with that of Armadore because the evidence in both cases was cross admissible; (2) whether, in light of the United States Supreme Court's recent decision in *Carpenter*, the defendant's fourth amendment rights were violated when the police obtained his historical CSLI without a warrant; and (3) whether the Appellate Court correctly concluded that the defendant's right to confrontation was not violated when the trial court allowed a substitute firearms examiner to testify about the findings of the primary examiner, who was unable to testify at trial.[7] We address these three claims in turn.

I

The defendant first claims that the Appellate Court incorrectly concluded that the trial court had not abused its discretion in joining the defendant's case with that

[7] The defendant also claims that the Appellate Court improperly upheld the trial court's refusal to give a limiting instruction concerning the firearms examiner's testimony. We agree with the Appellate Court that the trial court's general instruction on expert testimony was sufficient to guide the jury in its assessment of Stephenson's testimony. See *State* v. *Tyus*, supra 184 Conn. App. 682. As the Appellate Court aptly noted, the defendant's requested instruction that "Stephenson's opinions in this case are not to be treated by [the jury] as scientifically definitive" and "that the probability of [Stephenson's] opinion being correct is for [the jury] . . . alone to determine" is substantially similar to the instruction that was actually given. (Internal quotation marks omitted.) Id., 684–85. The jury was instructed that "[s]uch [expert] testimony is presented to you to assist you in your deliberations. No such testimony is binding upon you, however, and you may disregard such testimony either in whole or in part. It is for you to consider the testimony with the other circumstances in the case, and using your best judgment, determine whether you will give any weight to it, and, if so, what weight you will give to it. The testimony is entitled to such weight as you find the expert's qualifications in his or her field entitle it to receive, and it must be considered by you, but it is not controlling upon your judgment." (Internal quotation marks omitted.) Id. Thus, the trial court properly instructed the jury that it alone could assess the credibility of the expert witnesses, including Stephenson. For this reason, we conclude that this claim is wholly without merit.

of Armadore's case because the evidence in both cases was cross admissible.[8] We disagree.

The following additional facts and procedural history are relevant to our consideration of this claim. Before trial, the state filed a motion for joinder of the defendant's case with Armadore's for trial pursuant to Practice Book § 41-19. The state argued that joining the cases would promote judicial economy because the witnesses, physical evidence, and scientific evidence presented for each case would be identical. The state also argued that the defendant's and Armadore's defenses would not be antagonistic, and, therefore, neither would suffer substantial injustice by having their cases tried together.

In an objection to the state's motion for joinder, defense counsel argued that the defendant would be substantially prejudiced by joining his case with Armadore's because Ebrahimi's testimony that Armadore told her he had shot someone on December 23, 2006, would constitute inadmissible hearsay against him. Specifically, counsel argued that the only way the state

[8] In his brief to this court and before the Appellate Court, the defendant claimed, for the first time, that the admission of "inflammatory evidence pertaining [solely] to Armadore" unfairly prejudiced [the defendant] because it made him appear violent and guilty by association. The evidence he points to relates to Armadore's testimony about domestic violence incidents between Armadore and his girlfriend. Defense counsel neither objected to any of the evidence that the defendant now claims prejudiced him at trial nor asked the trial court for a limiting instruction regarding that evidence. Because those claims are not properly preserved, we decline to address them. See, e.g., *State* v. *Cabral*, 275 Conn. 514, 530–31, 881 A.2d 247 ("[t]he standard for the preservation of a claim alleging an improper evidentiary ruling at trial is well settled. This court is not bound to consider claims of law not made at the trial. . . . In order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . In objecting to evidence, counsel must properly articulate the basis of the objection so as to apprise the trial court of the precise nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling." (Internal quotation marks omitted.)), cert. denied, 546 U.S. 1048, 126 S. Ct. 773, 163 L. Ed. 2d 600 (2005).

could introduce Armadore's confession against the defendant would be pursuant to the coconspirator exception to the hearsay rule but that this exception would not apply because the conspiracy charge against the defendant had been dismissed. The trial court heard argument on the motion for joinder and orally granted that motion, finding that a joint trial would not be unfairly prejudicial to either the defendant or to Armadore.

On appeal, the defendant renews his claim that the joinder of his case with Armadore's case was improper because Armadore's confession to his girlfriend was not admissible against him under the coconspirator exception to the hearsay rule because the conspiracy charges against him had been dismissed. He, thus, argues that its introduction and use in his joint trial with Armadore resulted in unfair prejudice. The Appellate Court rejected this claim, reasoning that it was based on the erroneous legal premise that a coconspirator's statements are only admissible in criminal cases involving conspiracy charges. *State* v. *Tyus*, supra, 184 Conn. App. 678–79. The Appellate Court concluded that, because the defendant provided no other basis for the objection to the joinder, the trial court did not err in joining the cases for trial. Id., 679. We agree with the well reasoned decision of the Appellate Court on this particular point and are, thus, unpersuaded by the defendant's claim.

As the Appellate Court aptly noted, Practice Book § 41-19 provides that "[t]he judicial authority may, upon its own motion or the motion of any party, order that two or more informations, whether against the same defendant or different defendants, be tried together." This court has observed that "[t]he argument for joinder is most persuasive when the offenses are based [on] the same act or criminal transaction, since it seems unduly inefficient to require the state to resolve the same issues at numerous trials. . . . In contrast, when

the cases are not of the same character, the argument for joinder is far less compelling because the state must prove each offense with separate evidence and witnesses [thus] eliminat[ing] any real savings in time or efficiency which might otherwise be provided by a single trial." (Internal quotation marks omitted.) *State* v. *LaFleur*, 307 Conn. 115, 157, 51 A.3d 1048 (2012). Further, "[a] joint trial expedites the administration of justice, reduces the congestion of trial dockets, conserves judicial time, lessens the burden [on] citizens who must sacrifice both time and money to serve [on] juries, and avoids the necessity of recalling witnesses who would otherwise be called to testify only once." (Internal quotation marks omitted.) *State* v. *Booth*, 250 Conn. 611, 622, 737 A.2d 404 (1999), cert. denied sub nom. *Brown* v. *Connecticut*, 529 U.S. 1060, 120 S. Ct. 1568, 146 L. Ed. 2d 471 (2000).

Although joint trials may serve to conserve judicial resources, we note that trials may not be joined if a "substantial injustice is likely to result unless a separate trial be accorded." *State* v. *White*, 229 Conn. 125, 158, 640 A.2d 572 (1994). "A separate trial will be ordered [when] the defenses of the accused are antagonistic, or evidence will be introduced against one which will not be admissible against others, and it clearly appears that a joint trial will probably be prejudicial to the rights of one or more of the accused." (Internal quotation marks omitted.) *State* v. *Booth*, supra, 250 Conn. 620. We also note that "[t]he phrase prejudicial to the rights of the [accused] means something more than that a joint trial will probably be less advantageous to the accused than separate trials." (Internal quotation marks omitted.) Id.

Further, "we will reverse a trial court's ruling on joinder only [when] the trial court commits an abuse of discretion that results in manifest prejudice to one or more of the defendants." *State* v. *Vinal*, 198 Conn.

644, 649, 504 A.2d 1364 (1986). "[I]t is the defendant's burden on appeal to show that joinder was improper by proving substantial prejudice that could not be cured by the trial court's instructions to the jury . . . . [I]n deciding whether to [join informations] for trial, the trial court enjoys broad discretion, which, in the absence of manifest abuse, an appellate court may not disturb." (Citation omitted; internal quotation marks omitted.) *State* v. *Devon D.*, 321 Conn. 656, 665, 138 A.3d 849 (2016).

In the present case, the state's case against the defendant arose from the same criminal incident as its case against Armadore, namely, the shooting death of the victim. Further, at the time of the trial, most of the state's evidence would have been admissible against both the defendant and Armadore had their cases been tried separately. Finally, the defendant's and Armadore's defenses to the charges were not antagonistic. Indeed, each served as the other's principal alibi witness, as both claimed that they were together at Bella Notte at the time of the shooting.

Defense counsel's only opposition to joinder before the trial court, and the basis for the defendant's related claim of error before the Appellate Court and in the present appeal, is that Armadore's confession that he shot someone could only have been admitted into evidence against the defendant under the coconspirator exception to the hearsay rule if he was facing a conspiracy charge. Counsel claimed that this exception could not possibly apply in the defendant's case because the conspiracy charges against both him and Armadore were barred by the statute of limitations. The defendant's argument, in fact, assumed that Armadore's confession would have been admitted against the defendant under the coconspirator exception to the hearsay rule

had his conspiracy charge remained pending.[9] Defense counsel asserted no other evidentiary or other basis for excluding Armadore's confession, and counsel neither objected to Ebrahimi's testimony regarding Armadore's confession at trial nor requested the issuance of a limiting instruction to the jury.

Thus, the defendant's argument that joinder was improper rests squarely on his contention that the absence of a conspiracy charge made Ebrahimi's testimony about Armadore's confession inadmissible against him. As the Appellate Court correctly concluded, this argument must fail as a matter of law. *State* v. *Tyus*, supra, 184 Conn. App. 678–79. Section 8-3 of the 2009 edition of the Connecticut Code of Evidence provides in relevant part: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

"(1) Statement by a party opponent. A statement that is being offered against a party and is . . . (D) a statement by a coconspirator of a party while the conspiracy is ongoing and in furtherance of the conspiracy . . . ." (Emphasis omitted.)

We agree with the Appellate Court that neither the plain language of this rule, nor the common law it is based on, limits the application of the exception only to criminal cases involving charges of conspiracy. See Conn. Code Evid. (2009) § 8-3 (1), commentary ("[t]he [hearsay exception for statements of coconspirators] is applicable in civil and criminal cases alike"); see also

[9] Specifically, as the Appellate Court noted, defense counsel assumed, in his objection to the state's motion for joinder, that "the state will be able to show that Armadore's statement was made (1) while the conspiracy was ongoing and (2) in furtherance of the conspiracy." (Internal quotation marks omitted.) *State* v. *Tyus*, supra, 184 Conn. App. 677 n.5. Counsel also "assume[d] that the state will also have made the threshold showing of the existence of a conspiracy in order that this statement [may] be properly offered, let alone admitted." (Internal quotation marks omitted.) Id.

State v. *Marion*, 175 Conn. 211, 219–20 n.8, 397 A.2d 533 (1978) (noting that application of coconspirator exception to hearsay rule requires prima facie showing of existence of conspiracy); *Cooke* v. *Weed*, 90 Conn. 544, 550, 97 A. 765 (1916) (noting that statement made by alleged coconspirator of defendant was "admissible under the [well settled] rule relating to the declarations of coconspirators" in civil trial for damages when defendant had not been charged with conspiracy). Because this was the defendant's only basis before the trial court for claiming that his case should not have been joined with Armadore's for trial, we conclude that the Appellate Court did not err in determining that the trial court's joinder of the defendant's and Armadore's cases was proper.

II

We now turn to the first of the defendant's constitutional claims. The defendant claims that his constitutional rights were violated when the police obtained three days of his CSLI without a warrant. The state responds by arguing that the admission of the defendant's CSLI into evidence was not error, but, if it was, that error was harmless. Because we ultimately agree with the state that the admission of the CSLI was harmless beyond a reasonable doubt, we need not decide whether it was an error.

The defendant claims for the first time[10] that, in light of the United States Supreme Court's recent decision in

[10] *Carpenter* was decided approximately one month after the defendant's appeal was argued before the Appellate Court. As such, the defendant also claims 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. The state argues that the defendant is not entitled to retroactive application of *Carpenter* because he did not pursue any claim, before either the trial court or the Appellate Court, that his CSLI data should have been suppressed. This court first applied the holding of *Carpenter* in *State* v. *Brown*, 331 Conn. 258, 202 A.3d 1003 (2019). In *Brown*, the police had obtained two months of the defendant's CSLI pursuant to an ex parte order. Id., 265–66. The defendant moved to suppress the CSLI. Id., 268. The

Carpenter, his fourth amendment rights were violated when the police obtained three days of his CSLI without a warrant. *Carpenter* held that, under the fourth amendment to the United States constitution, "the [g]overnment must generally obtain a warrant supported by probable cause" before acquiring CSLI; *Carpenter* v. *United States*, supra, 138 S. Ct. 2221; because individuals maintain "a legitimate expectation of privacy in the record[s] of [their] physical movements as captured through CSLI." Id., 2217. The defendant thus argues that his constitutional rights were violated when the police obtained his CSLI without a warrant. The state argues that *Carpenter* did not conclude whether CSLI collection of less than seven days without a warrant constitutes a search, and, therefore, because only three days of CSLI were obtained in the present case, the defendant's rights were not violated.

Additional facts and procedural history are required to resolve this claim. Approximately two weeks after the victim's murder, Detective Franklin S. Jarvis of the New London Police Department filed ex parte orders, pursuant to General Statutes (Rev. to 2007) § 54-47aa (b), to compel the disclosure of historical CSLI for two cell phones belonging to the defendant, and one belonging to Armadore from the day of the murder to the day

appeal in *Brown* was pending before the Appellate Court when *Carpenter* was decided. In *Brown*, this court applied *Carpenter* and held that obtaining CSLI without a warrant violated the defendant's fourth amendment rights. Id., 273. Thus, it is clear that we apply the rule from *Carpenter* retroactively to cases pending on appeal, subject to review under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). See *Griffith* v. *Kentucky*, 479 U.S. 314, 322, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987) ("[A]t 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." (Citations omitted; footnote omitted; internal quotation marks omitted.))

after the murder. At the time, § 54-47aa (b) required only "a reasonable and articulable suspicion that a crime has been or is being committed" to obtain such historical CSLI. The orders were subsequently granted and the records were submitted to Detective Richard Curcuro of the New London Police Department. Those records were then sent to James J. Wines, an agent with the Federal Bureau of Investigation's cellular analysis survey team, who analyzed the CSLI and prepared a slideshow presentation with his analysis. Neither defense counsel nor Armadore's counsel sought to suppress Wines' expert testimony or his slideshow containing the CSLI, which were admitted without objection.[11]

Because the CSLI evidence provided a comprehensive chronicle of the cell phone users' past physical movements, the data showed that all three phones activated cell towers in New London 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 of the victim. Specifically, both of the defendant's phones activated cell sites west of the Thames River in New London, approximately 0.4 miles from Ernie's Café, between 12:04 a.m. and 12:13 a.m. Armadore's phone activated a cell site east of the Thames River, approximately three miles from Ernie's Café, at 12:15 a.m. The evidence also showed that the cell phones activated cell towers north of New London from approx-

[11] 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 prosecutor had Wines redact the defendant's name, insofar as it revealed 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 two of these phone numbers were connected to a cell phone registered to or used by the defendant and that the other phone number was connected to a cell phone registered to Armadore.

imately 12:42 to 12:44 a.m., and activated a cell tower farther north near Bella Notte, between approximately 1:12 and 1:55 a.m.

Because the defendant's claim related to the admission of CSLI is unpreserved, we look to the familiar test set forth in *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). In order for a defendant to prevail under that test, he or she must show that "(1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Footnote omitted.) *State* v. *Golding*, supra, 239–40; see *In re Yasiel R.*, supra, 781 (modifying third prong of *Golding*). "The first two [prongs of *Golding*] involve a determination of whether the claim is reviewable; the second two . . . involve a determination of whether the 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, without deciding, that the defendant's *Carpenter* claim is reviewable under the first two prongs of *Golding* and that a constitutional violation existed under the third prong,[12] it fails under the fourth

[12] We observe that there may not be a meaningful distinction between the state's obtaining more or less than seven days of CSLI without a warrant. See *Carpenter* v. *United States*, supra, 138 S. Ct. 2217 ("time-stamped data [provides] an intimate window into a person's life, revealing not only his [or her] particular movements, but through them his [or her] familial, political, professional, religious, and sexual associations" (internal quotation marks omitted)). Allowing CSLI collection for a period of three days, in the absence of compelling reasons or exigent circumstances, may not adequately alleviate those concerns. See id., 2222. Indeed, several of our sister states have

prong. For the reasons set forth subsequently in this opinion, we conclude that the state has sustained its burden of demonstrating that any claimed error by the trial court in admitting the CSLI evidence was harmless beyond a reasonable doubt. See *State* v. *Armadore*, 338 Conn. 407, 437, 258 A.3d 601 (2021) ("[i]t is well settled that constitutional search and seizure violations are not structural improprieties requiring reversal, but rather, are subject to harmless error analysis" (internal quotation marks omitted)). As a result, the defendant's constitutional claim related to the admission of his CLSI data must fail.

We begin with the applicable standard of review. "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 [beyond a reasonable doubt]."

concluded that obtaining less than seven days of CSLI may constitute a search for which a warrant is required. See, e.g., *Commonwealth* v. *Wilkerson*, 486 Mass. 159, 165–66, 156 N.E.3d 754 (2020) ("[c]ollecting more than six hours of CSLI data invades a defendant's reasonable expectation of privacy, and, therefore, under the [f]ourth [a]mendment to the United States [c]onstitution . . . requires a warrant supported by a showing of probable cause); *People* v. *Simpson*, 62 Misc. 3d 374, 380, 88 N.Y.S.3d 763 (2018) ("this [c]ourt finds that the period of time in *Carpenter*—seven days—is less significant to the ultimate decision by the [c]ourt than the underlying rationale supporting the [c]ourt's express holding"); *State* v. *Gibbs*, Docket No. 2017-001846, 2020 WL 4814266, *4 (S.C. App. August 19, 2020) (concluding that CSLI obtained by authorities over five day period constituted search under fourth amendment).

(Internal quotation marks omitted.) Id. Thus, we begin our analysis of that question by placing those pieces of evidence in the context of the other evidence admitted at trial.

First, even without the evidence of the defendant's historical CSLI, there was other compelling evidence admitted at trial that placed the defendant close to the scene of the crime at the time of the shooting. The historical CSLI from Armadore's cell phone was admitted into evidence and was relied on by Wines, who testified that this cell phone was located in New London, approximately three miles from Ernie's Café, minutes after the 911 call was received that reported the shooting. See id., 438–47 (holding that criminal defendant does not have privacy right in his codefendant's CSLI, and, thus, does not have standing to challenge admission of that evidence). Armadore specifically testified at trial that he had this cell phone with him throughout the night of the shooting and that he was receiving calls on it. Both the defendant and Armadore readily admitted to the police, and, indeed, even maintained at trial, that they were together on the night the victim was shot and killed. The confluence of these two pieces of evidence constitutes highly persuasive proof that puts the defendant precisely where he claimed not to be at the time of the shooting, namely, in the city of New London. This evidence directly and categorically contradicts the defendant's assertion that both he and Armadore drove directly from Boston to Bella Notte on the night of the murder.

Even without CSLI, there was additional evidence presented from which the jury could have reasonably inferred that the defendant and Armadore had lied about being at Bella Notte when the shooting occurred, further strengthening the state's case. As stated previously in this opinion, Guilbert testified at trial that he had witnessed the defendant and a man matching

Armadore's description enter Bella Notte approximately fifteen to twenty minutes after Guilbert received a phone call informing him that the victim had been shot. Thus, records of the defendant's historical CSLI were cumulative of other evidence showing that the defendant was not at Bella Notte at the time of the shooting, as he claimed.

Still other circumstantial evidence indicative of the defendant's guilt was presented by the state at trial. There was evidence that the defendant and Armadore went to Boston on the night of the shooting in a rented silver Impala. Multiple witnesses testified that, immediately after the shooting, a man fitting Armadore's description ran from the scene of the shooting and entered the passenger side of a running, silver vehicle matching the appearance of the defendant's rented Impala. Both the defendant's and Armadore's DNA were found in the Impala, even though Armadore testified at trial that he had never been in that vehicle. Additionally, and perhaps more persuasively, a red, bloodlike substance consistent with being either skin cells, saliva, sweat, or brain tissue, found on the interior of the Impala's front passenger door, possessed genetic characteristics similar to those of the victim. The defendant's own contradictory statements to the police during the course of the investigation are particularly damaging, as they are indicative of an effort to hide his role in the shooting. Further, both the defendant and Armadore testified that they were together the entire evening. The state also presented evidence that, hours after the shooting, Armadore confessed to his girlfriend, Ebrahimi, that he had shot someone that night.

Finally, the state presented particularly strong evidence of motive in the present case. The defendant and the victim had an ongoing dispute over the return of certain jewelry that was in the defendant's possession. Specifically, there was evidence that the defendant,

while riding in his Range Rover, previously shot at the victim and his girlfriend. Just three weeks prior to the victim's death, the victim drove by the defendant's residence on Willetts Avenue and shot the defendant in the leg and back. While visiting the defendant at the hospital where he was receiving treatment for those wounds, Armadore stated an intention to seek revenge for the victim's shooting of the defendant.

Because the admission of the defendant's historical CSLI was cumulative of other evidence contained in the record, and because the state presented other significant evidence of motive, intent, and the defendant's participation in the crime, we conclude that the state met its burden of showing that the admission of that evidence was harmless beyond a reasonable doubt.

III

The defendant next claims that the Appellate Court erred in concluding that his right to confrontation was not violated by the testimony of the substitute firearms examiner, who testified about the findings of the primary examiner. We agree with the defendant that the Appellate Court erred by not determining that a constitutional violation occurred; however, we conclude that the violation was harmless beyond a reasonable doubt.

A

The following additional facts and procedural history are relevant to our review of this claim. As stated previously in this opinion, the police recovered five nine millimeter casings from the Willetts Avenue shooting and one nine millimeter casing from the scene of the victim's death. Those casings were then submitted to the state forensic laboratory, where a ballistics analyst, Gerald Petillo, examined the evidence and generated a written report containing his conclusions. James Stephenson, who was also employed at the laboratory at

the time, was the "technical reviewer" of Petillo's report. As part of his technical review, Stephenson also physically examined the casings recovered from the two shootings.

Petillo died prior to trial and, therefore, was unavailable to testify. The state subsequently sought to admit testimony from Stephenson in lieu of Petillo. In response, the defendant filed a motion in limine, seeking to preclude Stephenson from testifying and also to exclude any evidence related to the firearms examination conducted in this case. In that motion, the defendant argued that Stephenson would be testifying as a surrogate expert based on Petillo's examination, which would violate the defendant's right to confrontation under *Bullcoming* v. *New Mexico*, 564 U.S. 647, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011), and *Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009). The state opposed the defendant's motion, arguing that there was no confrontation clause violation because Stephenson conducted "his own review and comparison of the actual physical evidence . . . ." Stephenson testified, outside of the jury's presence, that he reviewed Petillo's findings but also conducted his own examination of the evidence and reached his own conclusions. The court then denied the motion to preclude Stephenson's testimony.

At trial, Stephenson testified that, when analysts at the state forensic laboratory examine shell casings, they look for class characteristics such as the manufacturer and caliber designations to determine from what types of firearms they may have been fired. They then look for "individual marks that occur only during the firing process" that indicate whether the casings came from a sole source. After finding the marks, the objects can then be viewed through a comparison microscope to look "for those areas of agreement that occurred during

the firing process to determine whether two objects were fired from the same source."

Stephenson also testified about his role as a technical reviewer. He noted that the primary examiner, Petillo, had conducted an examination of the casings using a comparison microscope. Stephenson then testified that his role as technical reviewer was to look at the same evidence and "to determine whether they came to the same conclusions during the examination process." Specifically, Stephenson noted that the "[t]echnical reviewer was the position of signing off after the . . . review of all the . . . evidence . . . ." He also expressly stated that, if the technical reviewer disagreed with the primary examiner's conclusion that items were fired from the same source, the evidence would have to be reviewed again, and both reviewers would have to come to an agreement, or "it would be an inconclusive result, because the [technical reviewer] couldn't come to the same result as the [primary] examiner had come to during his examination."

Stephenson ultimately testified that his own examination of the .38 caliber casings found near 24 Willetts Avenue led him to conclude that all of the casings had been fired from the same firearm. He also opined as to his scientific conclusion that all of the nine millimeter casings found near 28 Willetts Avenue were fired from the same firearm. Finally, Stephenson testified that his review had also led him to conclude that the nine millimeter cartridge casing found at Ernie's Café was fired from the same firearm that had fired the nine millimeter casings found near 28 Willetts Avenue.

On appeal, the defendant claims that the trial court improperly admitted Stephenson's testimony in violation of his sixth amendment right to confrontation because his testimony was predicated on Petillo's findings and conclusions. The defendant argues that Petillo's findings and conclusions constituted testimonial

hearsay and that, because Petillo was unavailable for cross-examination, Stephenson could not testify as to Petillo's conclusions without violating the defendant's constitutional right to confrontation. For the reasons that follow, we agree with the defendant that parts of Stephenson's testimony were improperly used as an implicit conduit for Petillo's findings.

We begin with the applicable standard of review. "Under *Crawford* v. *Washington*, [541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)], hearsay statements of an unavailable witness that are testimonial in nature may be admitted in accordance with the confrontation clause only if the defendant previously has had the opportunity to cross-examine the unavailable witness." *State* v. *Smith*, 289 Conn. 598, 618, 960 A.2d 993 (2008). "Nontestimonial [hearsay] statements, however, are not subject to the confrontation clause and may be admitted under state rules of evidence" if they fall under a hearsay exception. Id. A threshold inquiry of whether the admission of the statement presents a constitutional due process claim is whether the hearsay statement was testimonial in nature, which presents a question of law over which our review is plenary. See, e.g., id., 618–19.

We recently addressed an almost identical claim, also involving expert testimony by Stephenson, who acted as a technical reviewer for Petillo in *State* v. *Lebrick*, 334 Conn. 492, 521–22, 223 A.3d 333 (2020). In *Lebrick*, we held that "Stephenson's testimony was admissible, even if predicated in material part on testimonial hearsay, as long as the underlying hearsay was not admitted into evidence or otherwise put before the jury for the truth of the matter asserted." Id., 527. In that case, we concluded that, "[a]lthough the jury was informed that Stephenson had reviewed 'a number of reports and photographs in preparation for [his] testimony,' the contents of those reports were not presented to the jury. When the state attempted to elicit information regarding

'which reports [Stephenson had] reviewed,' the defendant objected to this line of inquiry, and the trial court implicitly sustained the defendant's objection, ruling that Stephenson's testimony must be limited to 'his own conclusions.' Thus, the jury was not informed of the nature of the reports on which Stephenson had relied, who generated the reports, what information they contained, or whether Stephenson's expert opinions were consistent with the reports." Id. As such, we concluded that the trial court did not err in allowing Stephenson's testimony. See id.

Stephenson's testimony in the present case is, however, meaningfully different from his testimony in *Lebrick*. In the present case, Stephenson testified before the jury that, in his role as the technical reviewer of the primary examiner's analysis, he reviewed Petillo's initial notes. In addition, he informed the jury that, if his independent conclusions, as a technical reviewer, had not matched the primary examiner's (Petillo's), findings, the results would have been considered inconclusive. The defendant claims that, from this general testimony, the jury could have readily inferred that, because the results reached were not considered inconclusive, Petillo's results must have matched Stephenson's. Although it is unclear how the jury would have known whether any aspects of Petillo's findings were deemed inconclusive without his actual conclusions or report having been directly admitted, what made Stephenson's testimony in this case problematic was his direct testimony about Petillo's findings. During Stephenson's direct examination, the prosecutor specifically inquired if he had reviewed Petillo's findings as to specific conclusions, rather than focusing on Stephenson's own independent analysis and conclusions. For example, at the outset of Stephenson's testimony relating to the examination of specific cartridges, the following colloquy occurred:

"Q: And who was the original examiner in this particular case?

"A: . . . Petillo.

"Q: And what was your role with respect to the examination of those cartridge cases?

"A: Reviewing the cartridge cases in the comparison microscope to make a determination [as to] whether his conclusions were correct at the time.

"Q: And did you come to an opinion as to what his conclusions were?

"A: I did.

"Q. Did you also come to a conclusion as to whether or not, to a reasonable degree of certainty in the field of ballistics or firearms examination, as to whether or not those were all fired from the same clip?

"A: I did.

"Q: And what was your conclusion with respect to that?

"A: They had been fired in the same firearm."

Although Stephenson was asked about his own analysis and conclusions, there were other times during his direct examination when he was shown other pieces of evidence, such as two bullets contained in state's exhibits 62 and 116, which he had no recollection of independently reviewing. When Stephenson was specifically asked about that evidence, he relied on Petillo's findings. Thus, by inquiring directly about Petillo's report with respect to particular pieces of evidence that Stephenson did not have any recollection of independently reviewing, the state indirectly communicated Petillo's findings to the jury through Stephenson's testimony.[13]

[13] We recognize that, in some cases in which, due to the passage of time and the unavailability of the evidence, such as bodily fluids or DNA samples, a subsequent examiner may by necessity be limited to a review of the analysis of the original examiner, the subsequent examiner should *testify only as to his or her own independent conclusions* based on the review of the analysis conducted by the prior examiner. See, e.g., *Williams* v. *Illinois*, 567 U.S. 50, 56–58, 132 S. Ct. 2221, 183 L. Ed. 2d 89 (2012) (expert testimony

We, therefore, disagree with the Appellate Court that "the only inculpatory conclusions or statements regarding the firearms evidence that were presented to the jury were made by Stephenson . . . ." *State* v. *Tyus*, supra, 184 Conn. App. 682. Because the defendant was deprived of the opportunity to cross-examine Petillo with respect to Petillo's conclusions, his constitutional right to confrontation was violated.

B

Having concluded that the trial court committed error by permitting Stephenson to implicitly testify as to Petillo's conclusions, we next turn to the question of whether that particular error requires reversal of the defendant's conviction, when considered in the context of the record as a whole. Because the defendant's claim is constitutional in nature, the state bears the burden of establishing that this error was harmless beyond a reasonable doubt. See, e.g., *State* v. *Edwards*, 334 Conn. 688, 706–707, 224 A.3d 504 (2020). "That determination must be made in light of the entire record [including the strength of the state's case without the evidence admitted in error]. . . . Additional factors . . . . include the importance of the challenged evidence to the prosecution's case, whether it is cumulative, the extent of cross-examination permitted, and the presence or absence of corroborating or contradicting evidence or testimony." (Citation omitted; internal quotation marks omitted.) Id., 707.

did not violate defendant's right to confrontation when expert reached independent conclusions after relying on DNA report generated by third-party laboratory from rape kit). In this case, Stephenson's direct testimony was not so limited by the state. By contrast, in *Lebrick*, Stephenson testified only about his own conclusions based on comparisons of photographs of the ballistics evidence, without any reference to Petillo's conclusions. *State* v. *Lebrick*, supra, 334 Conn. 527. Although defense counsel did cross-examine Stephenson about Petillo's findings, this is not a situation in which defense counsel opened the door to the admission of Petillo's findings, because the prosecutor indirectly introduced them during Stephenson's direct examination.

Stephenson's testimony about Petillo's findings and conclusions was redundant to other evidence presented at trial. First, Stephenson's testimony about his own independent observations and conclusions provided powerful evidence from which the jury could have reasonably concluded that the firearm that the defendant used to fire back at the victim after the December 3, 2006 shooting was the same weapon used to shoot and kill the victim three weeks later. Second, even if Stephenson's testimony had been omitted in its entirety, Johnson's testimony and the physical casings, which were submitted into evidence at trial, firmly established the fact that a nine millimeter semiautomatic firearm was used by the defendant to fire back at the victim on Willetts Avenue. It is likewise undisputed that a casing from a nine millimeter semiautomatic firearm was discovered at the scene of the victim's murder. Thus, even without a detailed forensic examination of the casings admitted into evidence, the jury would still have had a strong evidentiary basis to conclude that the defendant had ready access to the type of firearm that was subsequently used to kill the victim.

As we noted in part II of this opinion, there was also other compelling evidence, including Armadore's CSLI that placed the defendant close to the scene of the crime at the time of the murder, a getaway car that resembled the car rented by the defendant, a bloodlike substance with DNA similar to that of the victim that was found in that car, and a confession by Armadore. There was also strong evidence of motive in that the victim and the defendant had an ongoing dispute over the return of jewelry in the defendant's possession. That feud resulted in two prior shooting incidents, including one in which the victim shot and wounded the defendant three weeks before his murder.

Because Stephenson's testimony regarding Petillo's conclusions was cumulative of other evidence, and

because the state presented other significant evidence of intent and of the defendant's guilt and participation in the crime, we conclude that the state met its burden of showing that the admission of that evidence was harmless beyond a reasonable doubt.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

RAKSHITT CHUGH *v.* AASHISH KALRA ET AL. (SC 20562)

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

Syllabus

The plaintiff C sought to recover compensatory and punative damages from the defendants, K and T Co., for, inter alia, breach of a partnership agreement in connection with a failed business venture. In 2004, C and K had agreed to form a partnership to pursue investment opportunities. In furtherance of that agreement, they established numerous companies, including and principally T Co., an investment advisory company incorporated in the Cayman Islands. C and K each held a 50 percent equity interest in T Co. through entities controlled by C and K. The shares of stock representing C's interest were owned by A Co. and H Co., and the shares of stock representing K's interest were owned by P Co. Over time, C and K's relationship deteriorated, and, in 2012, with no notice to C, T Co.'s board of directors voted to remove C as a director, which left K exclusively in charge of T Co. Thereafter, K proceeded to treat T Co. and its assets as his own, and C was excluded from any involvement in T Co.'s affairs. A Co. and H Co. subsequently filed a petition in the Grand Court of the Cayman Islands to wind up T Co. and to liquidate and divide its assets between K and C. P Co. opposed the petition by asserting as an affirmative defense that C had breached his fiduciary duty to T Co. in numerous ways. The Cayman Islands court granted the petition and rejected P Co.'s affirmative defense, concluding that there was no merit to any of the allegations against C. Meanwhile, K, through P Co., brought an action in federal court against C, A Co., and other related entities. T Co. was thereafter substituted as the plaintiff in the federal action and claimed that C had breached his fiduciary duty to T Co. in numerous ways. T Co.'s specific allegations against C substantially reprised the allegations P Co. had asserted in the winding up proceeding. Following the decision of the Cayman Islands court, the District Court

granted the motion for summary judgment filed by the defendants in the federal action on the ground that T Co. was collaterally estopped from pursuing its claims. While the federal action was still pending, C filed the present action against K and T Co., alleging, breach of partnership agreement, breach of fiduciary duty, and libel per se. The libel claim was predicated on a 2013 press release K had issued following the decision of the Cayman Islands court, in which K accused C of stealing T Co.'s customer database and misappropriating its business opportunities, and of paying Cayman Islands liquidators to interfere in the federal action. Following a trial, at which C's expert witness on damages, S, testified that the press release had cost C more than $20 million in lost profit, the jury returned a verdict in favor of C, awarded him $9.4 million in damages, and authorized the imposition of punitive damages, which the trial awarded in the amount of approximately $3 million. K filed a motion to set aside the verdict, arguing, with respect to the verdict on the libel claim, that the record was devoid of evidence supporting S's testimony regarding lost profit because his testimony was predicated on the false assumption that C's hedge fund and private equity fund had $250 million under management in 2012 when it was undisputed that C and his companies had no money under management at that time. The trial court denied K's motion to set aside the verdict, concluding that any error involving the admission of S's testimony was harmless because it was clear that the jury, having awarded C only $4 million in compensatory damages in connection with the libel claim, did not fully accept S's testimony and because, although the jury was instructed that it could award C compensatory damages only if he proved that he lost profits as a result of the harm to his reputation from the press release, that instruction was an incorrect statement of the law, as C was not required to prove actual damages or lost profits in a libel per se case. Thereafter, the trial court rendered judgment for C, from which K appealed. *Held*:

1. K could not prevail on his claim that C's claims in the present action were barred by the federal compulsory counterclaim rule (Fed. R. Civ. P. 13 (a) (1)) on the ground that they were compulsory counterclaims in the federal action, as that rule was inapplicable because there had been no decision on the merits of the claims T Co. asserted in the federal action; in light of the equitable principles of res judicata, estoppel, and waiver underlying rule 13 (a) (1), a court need not apply the rule when to do so would be unjust, such as when a decision on the merits was not rendered in the prior action, and, therefore, regardless of whether K had been a party to the federal action, rule 13 (a) (1) would not bar C's claims in the present action because the District Court determined that T Co. was collaterally estopped from pursuing it claims in the federal action, and it would be anomalous for this court to conclude that C's claims were barred by principles of res judicata, estoppel, or

waiver due to C's failure to assert them as counterclaims in an action that itself was barred by those principles.

2. There was no merit to K's claims that C's breach of partnership agreement and breach of fiduciary duty claims failed as a matter of law under *Karanian* v. *Maulucci* (185 Conn. 320), in which the court indicated that, if partners adopt the corporate form to insulate against personal liability, they cease to be partners, and that any partnership C and K created ceased to exist when they incorporated T Co., among other entities, in 2006: *Karanian* did not control C's claims because, unlike the partners in that case, who intended to and did reorganize their partnership into a corporation, there was no evidence in the present case that C and K ever intended to adopt the corporate form in place of their partnership, but, rather, the evidence indicated that C and K's partnership was an overarching entity comprised of numerous companies owned by C, K, and their families, acting in concert to further the remunerative goals of the partnership, and K cited no authority holding that a partnership cannot operate in such a manner; moreover, insofar as K claimed that the evidence did not support a finding that he and C were ever partners, although the evidence of a partnership was not overwhelming, it was sufficient to support the jury's finding of an oral agreement between C and K to carry on, as co-owners, a business for profit and that they carried on that business from 2004 until at least 2013.
3. The trial court abused its discretion in admitting S's testimony on damages with respect to C's libel per se claim: it was undisputed that S's testimony that C sustained more than $20 million in lost profit as the result of K's 2013 press release had no basis in fact; moreover, the trial court improperly instructed the jury that it could award special damages only if it found that C had proven lost profit and that instructional error was not harmless, as this court could not conclude that the jury would have awarded C $4 million in general damages in connection with C's libel claim but for that error, there was no other evidence to support the award for lost profit, and, therefore, the damages award could not stand; furthermore, because the record revealed that a component of the trial court's punitive damages award was a success fee for C's counsel in the amount of 25 percent of the total compensatory damages award, which included the $4 million award for C's libel claim, the punitive damages award also could not stand; accordingly, the judgment was reversed as to C's libel claim and the case was remanded for a new trial on that claim and for a hearing in damages.

Argued October 13, 2021—officially released April 12, 2022

Procedural History

Action to recover damages for, inter alia, breach of a partnership agreement, and for other relief, brought to the Superior Court in the judicial district of Hartford

and transferred to the Complex Litigation Docket, where ARC Capital, LLC, and Peak XV Capital, LLC, were added as plaintiffs; thereafter, the court, *Schuman, J.*, granted the defendants' motion to dismiss certain counts of the complaint; subsequently, the plaintiffs withdrew the complaint in part; thereafter, the court, *Schuman, J.*, granted in part the defendants' motion for summary judgment and rendered judgment thereon; subsequently, the court, *Schuman, J.*, denied in part the defendants' motion to preclude certain evidence; thereafter, the case was tried to the jury before *Schuman, J.*; verdict for the named plaintiff; subsequently, the court, *Schuman, J.*, denied the named defendant's motion to set aside the verdict and for judgment notwithstanding the verdict, and rendered judgment for the named plaintiff, from which the named defendant appealed. *Reversed in part; further proceedings.*

John W. Cerreta, with whom was *Joseph T. Nawrocki*, for the appellant (named defendant).

John G. Balestriere, pro hac vice, with whom were *Stefan Savic* and, on the brief, *Matthew W. Schmidt*, pro hac vice, for the appellee (named plaintiff).

Opinion

KELLER, J. This case is the latest in a series of cases arising out of a failed business venture between the named plaintiff, Rakshitt Chugh,[1] and the named defendant, Aashish Kalra.[2] Chugh commenced the present action seeking compensatory and punitive damages for,

[1] Two companies controlled by Chugh, Peak XV Capital, LLC (Peak XV), and ARC Capital, LLC (ARC Capital), were also added as plaintiffs in this action. The trial court granted the defendants' motion to dismiss ARC Capital from the case for lack of standing and to dismiss Peak XV from the case with respect to every claim except the libel claim. For the sake of clarity, we refer in this opinion to Chugh, Peak XV, and ARC Capital by name.

[2] Trikona Advisers Limited (TAL) was also named as a defendant in this case. For the sake of clarity, we refer in this opinion to Kalra and TAL collectively as the defendants and individually by name when appropriate.

inter alia, breach of partnership agreement, breach of fiduciary duty, and libel per se. A jury found in favor of Chugh on those three counts, awarding him damages in the amount of $9,400,000[3] and authorizing the imposition of punitive damages, which the trial court awarded in the amount of $2,965,488.29. On appeal,[4] Kalra claims that the trial court improperly denied his motions to set aside the verdict and for judgment notwithstanding the verdict because (1) Chugh's claims are barred by the compulsory counterclaim rule set forth in rule 13 (a) (1) of the Federal Rules of Civil Procedure,[5] (2) as a matter of law, no partnership existed between the parties during the relevant time frame, and (3) with respect to the libel claim, the trial court improperly admitted the testimony of Chugh's expert witness on damages because there was no evidence to support the testimony. We agree with Kalra's third claim and, accordingly, reverse in part the judgment of the trial court.

Because issues related to the underlying action have been litigated on prior occasions in numerous other forums,[6] when appropriate, we quote directly from the

[3] The trial court later ordered a remittitur in the amount of $451,171.24.

[4] Kalra appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2.

[5] Rule 13 (a) of the Federal Rules of Civil Procedure provides in relevant part: "(1) *In General.* A pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party if the claim:

(A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and

(B) does not require adding another party over whom the court cannot acquire jurisdiction. . . ."

[6] In *Trikona Advisers Ltd.* v. *Haida Investments Ltd.*, 318 Conn. 476, 479 n.5, 122 A.3d 242 (2015), this court observed that "[t]hese parties have filed several actions in multiple domestic and international courts. For example, other than the present action, the parties have filed actions in the United States District Court for the District of Connecticut, the New York Supreme Court, the Grand Court of the Cayman Islands, India, and Mauritius."

decisions in those cases in setting forth the relevant facts and procedural history. Chugh and Kalra, both of whom are naturalized citizens of the United States, were born in India but immigrated to the United States to pursue postsecondary educational and employment opportunities. In 2002, Chugh's brother, who had attended high school with Kalra in India, introduced them in New York City. The two men became friends, and, between 2002 and 2004, Kalra worked as a consultant for Byte Consulting, Inc., a company founded by Chugh in 2000. By 2004, they were meeting nearly every day for lunch. It was during one of their lunch meetings, in early 2004, that they agreed to form a partnership to pursue investment opportunities in India. At the time, India had just announced that it would open its doors to foreign investment in real estate and infrastructure projects in early 2005, an opportunity that they saw themselves as uniquely positioned to exploit. They agreed that theirs would be a 50/50 partnership and that all strategic decisions relating to the business, including where to set up offices and whom to hire, would have to be unanimous.

In furtherance of the partnership agreement, Chugh and Kalra established numerous companies around the world.[7] Principal among them was Trikona Advisors Limited (TAL), an investment advisory company incorporated in the Cayman Islands. "Each man held a [50] percent equity stake in TAL through entities controlled by them. Chugh's shares were owned by ARC Capital, LLC (ARC Capital), and Haida Investments [Limited

[7] Evidence adduced at trial reveals that, as of September 27, 2012, twelve companies comprised what the parties referred to as the "Trikona Group": TAL in the Cayman Islands, Trikona Capital Advisers, LLC, in Delaware, Trinity Capital Limited, TSF Advisers Mauritius Limited, Trikona Advisers Mauritius Limited, Trikona Capital Limited in the Cayman Islands, Trikona Capital Advisers Limited in the United Kingdom, Sankalp Buildwell PVT Limited in India, Trikona Capital Mauritius Limited, Trikona Investments Limited in Mauritius, Trikona Asset Holdings Limited in Mauritius, and TCK Advisers PVT Limited in India.

(Haida)], and Kalra's shares were owned by Asia Pacific [Ventures Limited (Asia Pacific)]. At the same time, the two men formed Trinity Capital [PLC (Trinity)], a closed-end fund listed on the London Stock Exchange, through which they solicited investments. Kalra and Chugh managed Trinity through TAL. Trinity paid TAL a fee for its management services, calculated at [2] percent of Trinity's net asset value plus a performance fee.

"The 2008 economic crisis took its toll on TAL and soured the relationship between Chugh and Kalra. Trinity's shareholders began pressuring the Trinity board [of directors (board)] to sell the company's assets and [to] distribute capital which, while it might benefit the shareholders, would reduce TAL's management fees by lowering Trinity's net asset value. Chugh and Kalra differed on how to respond to the Trinity board's proposed asset sale: Kalra opposed the move, while Chugh wanted to be more conciliatory to the shareholders. TAL tried to prevent the sell-off by acquiring the shares of [QVT Financial LP (QVT)], one of Trinity's main shareholders, but the deal collapsed when TAL could not secure the necessary financing. Frustrated, Kalra advocated taking legal action against QVT for breach of contract, but was ultimately dissuaded from that course by Chugh and outside legal counsel." *Trikona Advisors Ltd.* v. *Chugh*, 846 F.3d 22, 26–27 (2d Cir. 2017).

"The souring of Kalra and Chugh's relationship culminated on January 11, 2012, when, with no notice to Chugh, TAL's board of directors voted to remove him as a director. This left Kalra exclusively in charge of TAL. Thereafter, Kalra proceeded to treat TAL and its assets as his own and Chugh was excluded from further involvement in the business." Id., 27. "TAL's collapse spawned a number of legal proceedings in the United States and abroad, [including] a [winding up] proceed-

ing in the Cayman Islands and [a] federal civil [action] in Connecticut . . . .'' Id.

''On February 13, 2012, ARC [Capital] and Haida, which held Chugh's TAL shares and were controlled by Chugh, filed a petition in the Grand Court of the Cayman Islands (Cayman court), seeking to 'wind up' TAL, a Cayman corporation. The [petition] sought to liquidate the business and [to] divide its assets between Chugh and Kalra. Asia Pacific, which held Kalra's TAL shares and was controlled by Kalra, opposed [the] petition. Under Cayman Islands law, a court may order a company to be wound up if it is 'of [the] opinion that it is just and equitable' to do so. . . . [ARC Capital and Haida] argued to the Cayman court that it would be just and equitable to liquidate the company because: (1) TAL had experienced a 'loss of substratum,' i.e., a loss of its ability to 'carry on the business for which it was established,' due to its dire financial condition and the complete breakdown in trust between Kalra and Chugh; (2) Kalra had wrongfully caused Chugh to be removed from TAL's board and thereby deprived Chugh of his 'legitimate expectation of being involved in [TAL's] management'; and (3) after he had removed Chugh from the board, Kalra proceeded to misuse TAL's assets for his sole benefit.

''[Asia Pacific] opposed the [winding up of TAL] by asserting the affirmative defense that Chugh had breached his fiduciary duty to TAL in several ways, and that his removal from the board was therefore justified. Specifically, [it] argued that: (1) Chugh intentionally sabotaged TAL's attempt to acquire [QVT's] shares in Trinity and had 'caused' TAL to pay QVT $2 million for covenants of 'extremely limited value'; (2) Chugh had later 'prevented' TAL from bringing suit against QVT for breach of contract, over Kalra's objections; (3) Chugh 'forced' Kalra to agree to an unfavorable settlement with Trinity in the breach of contract arbitration arising

out of [a] failed [business] deal; and (4) Chugh 'stole' TAL's assets and customer information for use in establishing Peak XV [Capital, LLC (Peak XV) and other entities] and interfered in the distribution of payments due to Kalra. [Asia Pacific] framed these arguments as jurisdictional defenses, arguing that if any one of these allegations were true, Chugh would be precluded from invoking the Cayman court's equitable jurisdiction under the doctrine of unclean hands.

"The Cayman court tried the [winding up] proceeding over seven days in January of 2013. At the trial's conclusion, the court granted [the] petition. It found that 'each of' [ARC Capital and Haida's] allegations was supported by evidence, and that these allegations 'taken together' supported a finding that it was just and equitable to wind up TAL.[8] It also rejected each of [Asia Pacific's] affirmative defenses, concluding that there was 'no merit whatsoever [to] the allegations made against . . . Chugh.' " (Citation omitted.) Id., 27–28. Indeed, the Cayman court found that Asia Pacific's allegations against Chugh, including its claim that Chugh had stolen TAL's assets and destroyed its business, were "completely at odds with the evidence of what actually happened . . . ." *In re Trikona Advisors Ltd.*, Grand Court of the Cayman Islands, Docket No. FSD 18 of 2012 (AJJ) (January 31, 2013). The court concluded that, in fact, it was Kalra who had engaged in "blatantly improper self-dealing," calling Kalra's testimony to the contrary "disingenuous" and his evidence "wholly unreliable." Id. The court further stated that, after listening to Kalra testify over the course of several days, it had come to the conclusion that there was nothing he would not do, "no matter how dishonest, to ensure that . . . Chugh . . . [is] excluded from any share in [TAL's] remaining [net asset value]." Id. It further stated that Kalra had

[8] A copy of the Cayman court's memorandum of decision was entered into evidence at the trial in the present case.

commenced an action in the United States District Court for the District of Connecticut against Chugh in which he had asserted all of the baseless allegations against Chugh that he had asserted in the winding up proceeding. See id. The court described Kalra's action in the District Court as "a thoroughly dishonest abuse of process." Id. On May 15, 2013, the Cayman court issued a "Default Costs Certificate," ordering Asia Pacific to pay ARC Capital's and Haida's litigation expenses in the winding up proceeding in the amount of $760,067.65.[9]

As the Cayman court indicated, "[o]n December 28, 2011, two months before the commencement of the [winding up] proceeding . . . Kalra, through Asia Pacific, sued . . . [Chugh, ARC Capital, and other related entities (Chugh defendants)] in the [D]istrict [C]ourt in Connecticut. After TAL's board removed Chugh, TAL was substituted as [the] plaintiff. TAL's . . . operative complaint . . . assert[ed] eleven causes of action against the Chugh [d]efendants sounding in breach of fiduciary duty, aiding and abetting breach of fiduciary duty, unfair competition, theft of trade secrets, civil conspiracy, conversion, statutory theft, unjust enrichment, and abuse of process. TAL alleged that Chugh breached his fiduciary duty by: (1) undermining TAL's negotiating positions in the QVT [deal] and [another business deal]; (2) causing TAL to enter into an unfavorable settlement of its claims against

[9] ARC Capital brought an action in the trial court against Asia Pacific and Kalra, seeking to domesticate and enforce the Cayman court's costs order. The trial court later consolidated that case and the present case for trial. "In count three of the domestication complaint, [ARC Capital] sought to pierce the corporate veil of Asia Pacific and to hold Kalra liable for the full amount of the costs judgment." The jury found in favor of ARC Capital on count three, but the trial court granted Kalra's motion to set aside the verdict on the ground that the evidence was insufficient to support the jury's finding that Kalra had used his control of Asia Pacific to commit a fraud or wrong that proximately caused ARC Capital's inability to collect what Asia Pacific owed it under the costs order. ARC Capital did not appeal from that ruling.

Trinity; (3) interfering with payments due to Kalra; and (4) misappropriating TAL's customer information and assets in the course of founding Peak XV to unfairly compete with TAL. These claims substantially reprised the allegations [Asia Pacific] asserted as affirmative defenses to [the winding up] petition in the [Cayman court].

"Following the ruling of the Cayman court in the [winding up] proceeding . . . the Chugh [d]efendants moved for summary judgment in the [D]istrict [C]ourt based on collateral estoppel. They argued that in deciding the petition the Cayman court had already made findings of fact in Chugh's favor on all of [the] assertions regarding TAL's collapse, and that [TAL] was therefore collaterally estopped from relitigating those factual disputes. The [D]istrict [C]ourt agreed, and . . . granted [the] motion for summary judgment." *Trikona Advisers Ltd.* v. *Chugh*, supra, 846 F.3d 28–29. The United States Court of Appeals for the Second Circuit affirmed the District Court's judgment. Id., 35.

On January 8, 2014, while the federal action was still pending, Chugh filed the underlying action against the defendants, alleging, inter alia, breach of partnership agreement, breach of fiduciary duty, and libel per se.[10] The libel claim was predicated on a March 13, 2013 press release Kalra had issued, following the Cayman court's ruling, in which Kalra accused Chugh of stealing TAL's customer database and misappropriating its business opportunities. He also accused Chugh of paying the Cayman Island liquidators "$500,000 to interfere in the Connecticut litigation [then pending in the District Court] against [Chugh]." The trial court subsequently stayed the state court proceeding pending the outcome

[10] The operative complaint alleged three additional claims that were dismissed or withdrawn before trial: breach of an ancillary settlement agreement, breach of an implied contract to form a joint venture, and breach of the implied covenant of good faith and fair dealing.

of TAL's postjudgment motions and appeal in the federal action. Following the lifting of the stay, the defendants filed a motion for summary judgment in which they argued, inter alia, that Chugh's claims[11] were barred by rule 13 (a) (1) of the Federal Rules of Civil Procedure because all of the claims were compulsory counterclaims in the federal action. They further argued that Chugh's breach of partnership agreement and breach of fiduciary duty claims failed as a matter of law because Chugh and Kalra never entered into a partnership agreement and that, even if they had, the agreement ended as a matter of law in 2006 when TAL incorporated in the Cayman Islands because, under *Karanian* v. *Maulucci*, 185 Conn. 320, 323–24, 440 A.2d 959 (1981), a company cannot be both a partnership and a corporation at the same time. Finally, the defendants argued that the libel claim also failed as a matter of law because the 2013 press release addressed a matter of public concern, and, therefore, any statement contained therein was constitutionally protected speech. They further argued that they were entitled to summary judgment on the libel claim because truth is a complete defense to libel, and the press release was an "essentially true" recitation of the federal complaint.

The trial court denied in part the defendants' motion for summary judgment. With respect to their contention that Chugh's claims were compulsory counterclaims in the federal action, the court concluded that Chugh was not required to assert them in the federal action because Kalra was not a party to that action "and there is no authority squarely holding that a party must cite in a nonparty to assert compulsory counterclaims against the nonparty." In light of the court's determination that rule 13 (a) (1) of the Federal Rules of Civil Procedure was inapplicable because Kalra was not an opposing party in the federal action, it did not address Chugh's

[11] See footnote 1 of this opinion.

assertion that the rule also was inapplicable because Chugh's claims in the present case did not arise out of the same transaction or occurrence that was the subject matter of the federal complaint.

The trial court also denied the motion for summary judgment with respect to the defendants' contention that, under *Karanian*, any partnership between the parties ended with TAL's incorporation. Citing *Bartomeli* v. *Bartomeli*, 65 Conn. App. 408, 783 A.2d 1050 (2001), the court concluded that merely because a company cannot be both a corporation and a partnership does not mean that the partnership between Chugh and Kalra ended with TAL's incorporation. Whether the partnership continued to exist after 2006, the court concluded, was a genuine issue of material fact for the jury to decide. The court also noted that, pursuant to Chugh's theory of the case, the partnership was not congruent with TAL but, rather, consisted of all of the companies comprising the Trikona Group, such that TAL's incorporation could not have been a superseding event for the partnership. Finally, the court rejected the defendants' argument that they were entitled to summary judgment on the libel claim because the statements contained in the 2013 press release involved a matter of public concern, and, as such, they were protected by the first amendment to the federal constitution. The court explained that the first amendment "does not absolutely bar defamation claims against public figures or claims involving matters of public concern but, rather, merely affects the standard of proof" and whether the standard was met in this case was a question of fact for the jury. The court similarly rejected the defendants' contention that they were entitled to summary judgment because the statements contained in the press release were factually true, explaining that whether the statements were true was also a question of fact properly reserved for the jury.

After the jury returned a verdict in favor of Chugh on the breach of partnership agreement, breach of fiduciary duty, and libel claims, Kalra filed a motion to set aside the verdict on the same grounds asserted in the motion for summary judgment. Additionally, Kalra argued that the court should set aside the verdict as to the libel claim on the ground that the record was devoid of evidence supporting the testimony of Chugh's expert witness on damages, Professor Fabio Savoldelli, that the 2013 press release cost Chugh between $20.2 and $27.7 million in lost profits. Kalra argued that Savoldelli's testimony was predicated on the false assumption that Chugh's hedge fund and private equity fund had $250 million under management in 2012 when, in fact, it was undisputed that Chugh and his companies had no money under management in 2012. He further argued that "Savoldelli calculated damages based on an assumption that Chugh raised capital through 2012 and then invested that money thereafter." Given that assumption, Kalra argued, "the 2013 press release could not conceivably have affected Chugh's ability to raise capital through 2012."

The trial court denied Kalra's motion to set aside the verdict. Although the court acknowledged that Kalra's argument for setting aside the verdict as to the libel claim had "strong logical appeal," it concluded that any error involving the admission of Savoldelli's testimony was harmless because it was clear that the jury, having awarded Chugh only $4 million in compensatory damages, "did not fully accept Savoldelli's testimony . . . ." The trial court further concluded that Savodelli's testimony was harmless because, although the jury was instructed that it could award Chugh compensatory damages only if Chugh proved " 'that he lost profits as a result of the harm that the statement in question did to his reputation,' " that instruction was an incorrect statement of the law, and, in fact, Chugh "was not required

to prove actual damages or lost profits in a libel per se case."

On appeal, Kalra renews his claims before the trial court that (1) Chugh's entire action is barred by the federal compulsory counterclaim rule, (2) Chugh's breach of partnership agreement and breach of fiduciary duty claims fail as a matter of law under *Karanian*, and (3) there was no evidence to support the testimony of Chugh's expert witness on damages relative to the libel claim, and, therefore, the trial court abused its discretion in admitting that testimony. We address each claim in turn.

I

We begin with Kalra's claim that the trial court incorrectly concluded that Chugh's claims were not compulsory counterclaims in the federal action because Kalra was not a party to that action. Rule 13 (a) (1) of the Federal Rules of Civil Procedure provides in relevant part that "[a] pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against *an opposing party* if the claim: (A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and (B) does not require adding another party over whom the court cannot acquire jurisdiction." (Emphasis added.) Kalra argues that, in applying this rule, federal courts have held that the phrase "opposing party" should be construed liberally to include not only parties who were formally named in the prior action but any party who was in privity with the named party or had control over the action. See *Metropolitan Life Ins. Co.* v. *Kubichek*, 83 Fed. Appx. 425, 431 (3d Cir. 2003) ("the rationales supporting a liberal reading of 'transaction or occurrence' in [rule] 13 (a) should also apply to 'opposing party,' such that the potential counterclaimant is obligated to assert his or her counterclaim against even an

unnamed party if it arises out of the same transaction or occurrence and if the unnamed party is the functional equivalent of the named party, is controlling the litigation, or is an alter ego of the named party"). But see 6 C. Wright et al., Federal Practice and Procedure (3d Ed. 2010) § 1404, pp. 13–14 ("The first sentence of [r]ule 13 (a) requires . . . a pleading to state a counterclaim that the pleader has against an 'opposing party' at the time of its service. The federal courts have not given a definitive answer to the question of who is an opposing party for purposes of a counterclaim, but the point has caused relatively few difficulties." (Footnote omitted.)). Chugh responds that the trial court correctly determined that rule 13 (a) (1) did not bar his claims in the present case because Kalra was not a party to the federal action. He further contends that rule 13 (a) (1) is inapplicable for the additional reason that his claims in the present case do not arise out of the same transaction or occurrence that was the subject matter of the federal complaint. We conclude that rule 13 (a) (1) is inapplicable because there was no decision on the merits in the federal action. Accordingly, we need not decide whether Kalra was an "opposing party" under a liberal reading of rule 13 (a) (1), or whether Chugh's claims in the present case arose out of the same transaction or occurrence as the complaint in the federal action.

We begin our analysis by noting that Connecticut is not a compulsory counterclaim state. "In Connecticut, the fact that a defendant in a prior action did not assert a related cause of action in that prior action does not foreclose the defendant from asserting those claims in a new action filed in the future. As explained in the commentary to the Restatement (Second) of judgments: 'The justification for the existence of such an option is that the defendant should not be required to assert his claim in the forum or the proceeding chosen by the plaintiff but should be allowed to bring suit at a time

and place of his own selection.' 1 Restatement (Second), [Judgments] § 22, comment (a), pp. 186–87 [1982]." (Footnote omitted.) *State* v. *Bacon Construction Co.*, 160 Conn. App. 75, 88, 124 A.3d 941, cert. denied, 319 Conn. 953, 125 A.3d 532 (2015); see also *Lowndes* v. *City National Bank*, 79 Conn. 693, 696, 66 A. 514 (1907) ("[w]hile the law encourages, it does not compel, the settlement of all controversies between the same parties by a single action"); *Hansted* v. *Safeco Ins. Co. of America*, 19 Conn. App. 515, 520 n.4, 562 A.2d 1148 ("[b]ecause Connecticut does not have a compulsory counterclaim rule . . . [the plaintiff] cannot be precluded from bringing the present claim on the ground that he failed to bring [it as] a counterclaim in [the prior action]" (citation omitted)), cert. denied, 212 Conn. 819, 565 A.2d 540 (1989).

Remarkably, this is the first time that this court has been asked to consider the applicability of rule 13 (a) to, and its preclusive effect on, a state court proceeding. Other state appellate courts that have considered this issue, however, generally have held that the rule ought to be applied in the same manner that it is applied by the federal courts. See, e.g., *Nottingham* v. *Weld*, 237 Va. 416, 420, 377 S.E.2d 621 (1989) ("It has been held that a state court must give a federal court order, dismissing a diversity case for failure to prosecute, the same preclusive effect it would have been given in the federal courts, even though state law would have permitted the maintenance of a subsequent action following a dismissal by that state's courts. . . . Although courts have disagreed, the majority, and we think the better view is that the forum court must look to the original court's construction of its compulsory counterclaim rule, and accord it full faith and credit." (Citation omitted; footnote omitted.)). But see *Van Pembrook* v. *Zero Mfg. Co.*, 146 Mich. App. 87, 105, 380 N.W.2d 60 (1985) (rejecting claim that principles of comity or full

faith and credit required Michigan Court of Appeals to give effect to Missouri compulsory counterclaim rule: "[i]n recognizing and enforcing the laws of another state, this [c]ourt is disinclined to overrule the positive law of this forum to give foreign law effect especially when it would contravene the fixed policy of the law of this state"); 6 C. Wright et al., supra, § 1417, p. 161 (questioning the applicability of rule 13 (a) to states that do not have compulsory counterclaim rule: "The rule itself and the [a]dvisory [c]ommittee [n]ote accompanying it are silent on whether [r]ule 13 (a) was intended to be a rule of administration for the federal courts or was expected to have wider application. Indeed, it is doubtful whether the rulemakers are given the power by the Rules Enabling Act [28 U.S.C. § 2072 (2018)] to decide that question or to extend the effect of the federal rules to the state courts." (Footnote omitted.)).

Rooted in principles of res judicata, estoppel, and waiver; see *Tyler* v. *DH Capital Management, Inc.*, 736 F.3d 455, 460 (6th Cir. 2013); the purpose of rule 13 (a) of the Federal Rules of Civil Procedure is "to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters." *Southern Construction Co.* v. *Pickard*, 371 U.S. 57, 60, 83 S. Ct. 108, 9 L. Ed. 2d 31 (1962); see also *Super Natural Distributors, Inc.* v. *MuscleTech Research & Development*, 140 F. Supp. 2d 970, 978–79 (E.D. Wis. 2001) ("[r]ule 13 (a) was designed to balance the interest of the counterclaimant in prosecuting the counterclaim in a forum of its own choosing against the [court's] interest in conserving judicial resources" (internal quotation marks omitted)). In light of the equitable principles underlying the rule, it is apparent that a court need not apply it when to do so would work an injustice; see *Carnation Co.* v. *T.U. Parks Construction Co.*, 816 F.2d 1099, 1103 (6th Cir. 1987) ("the waiver or

estoppel theory [underlying rule 13 (a)] allows more discretion not to hold [that a] claim is barred [when] to do so is manifestly unjust"); such as when a decision on the merits was not rendered in the prior action because it was dismissed on grounds of res judicata or for failure to state a claim on which relief could be granted. See, e.g., *Tyler* v. *DH Capital Management, Inc.*, supra, 460 (plaintiff's failure to plead compulsory counterclaims in prior action was not bar to later action because "the principles of res judicata . . . apply [only] to adjudications on the merits"); id., 459 ("a party is not required to assert a counterclaim [when] it successfully files a [preanswer] motion to dismiss"); *Martino* v. *McDonald's System, Inc.*, 598 F.2d 1079, 1083 (7th Cir.) ("[t]he principle of res judicata at issue . . . treats a judgment *on the merits* as an absolute bar to relitigation between the parties and those in privity with them" (emphasis added)), cert. denied, 444 U.S. 966, 100 S. Ct. 455, 62 L. Ed. 2d 379 (1979); see also *National Union Fire Ins. Co. of Pittsburgh* v. *Jett*, 118 F.R.D. 336, 338 (S.D.N.Y. 1988) ("Rule 13 [(a)] requires that a compulsory counterclaim be raised only when it is related to the 'subject matter of the opposing party's claim.' Dismissal of an action is a judicial determination that the plaintiff has no claim. Therefore, compulsory counterclaims that were not raised prior to dismissal are not barred in future proceedings."); *Horn & Hardart Co.* v. *National Railroad Passenger Corp.*, 659 F. Supp. 1258, 1264 (D.D.C. 1987) ("In this case, the policy driving rule 13 (a) must give way to a more important concern. When [the defendant] filed a rule 12 (b) motion in response to [the plaintiff's] complaint in [the prior action], [the defendant] was in effect arguing that [the plaintiff] had not proffered a valid claim. In holding for [the defendant], the [c]ourt confirmed the [defendant's] contention. The so-called claim did not require a pleading in response. . . . In such a case, the party opposing

an invalid claim should not be required to fully litigate any claims of its own . . . ." (Citation omitted.)), aff'd, 843 F.2d 546 (D.C. Cir.), cert. denied, 488 U.S. 849, 109 S. Ct. 129, 102 L. Ed. 2d 102 (1988); 6 C. Wright et al., supra, § 1417, pp. 154–55 ("courts have avoided the application of [claim preclusion] rules when no decision on the merits was rendered in the first action").

Accordingly, even if Kalra had been a party to the federal action, rule 13 (a) of the Federal Rules of Civil Procedure would not bar Chugh's claims in the present case in light of the District Court's determination that TAL was collaterally estopped from pursuing the claims in the federal action. As we indicated, after the Cayman court issued its ruling in the winding up proceeding, the District Court granted the Chugh defendants' motion for summary judgment, stating that "Asia Pacific . . . attempted to defend against the winding up of TAL on the ground of unclean hands, arguing that [ARC Capital and Haida] . . . were barred from invoking the court's equitable jurisdiction because of Chugh's breaches of fiduciary duty, which were attributable to [them]. As evidence of Chugh's misconduct, Asia Pacific put on evidence relating to each of TAL's claims in this litigation." *Trikona Advisers, Ltd.* v. *Chugh*, United States District Court, Docket No. 3:11-cv-2015 (SRU) (D. Conn. June 5, 2015), aff'd, 846 F.3d 22 (2d Cir. 2017). The court further stated: "The unclean hands defense was a dispositive issue in the Cayman [court] proceeding, and the bulk of the winding up proceeding was devoted to the parties' attempts to prove or disprove Chugh's alleged misconduct." Id. "Having chosen to fight [through Asia Pacific] the winding up petition by advancing as a defense all of the substantive claims raised in this litigation, [TAL] cannot now avoid the consequences of its actions. Even under the . . . restrictive approach [of the Restatement (Second) of Judgments], [its] claims are barred by the doctrine of issue preclusion." Id.

It would be anomalous, to say the least, were we to conclude that Chugh's claims in the present case are barred by principles of res judicata, estoppel, or waiver due to his failure to assert them as counterclaims in a case that itself was barred by those principles. We do not read rule 13 (a) of the Federal Rules of Civil Procedure or the case law interpreting it as requiring such a result, and, therefore, we will not impose it.[12] As the United States Court of Appeals for the Fifth Circuit stated in a similar context, "[i]f one hauled into [c]ourt as a defendant has a claim but the adversary plaintiff has not, the nominal defendant ought to be allowed to name the time and place to assert it. . . . It is one thing to concentrate related litigation once it is properly precipitated. It is quite another thing for the [Federal

[12] Kalra contends, nonetheless, that, because the Chugh defendants filed an answer in the federal action several months before filing their motion for summary judgment, Chugh's claims in the present case were compulsory counterclaims in that action. Kalra argues that rule 13 (a) of the Federal Rules of Civil Procedure requires a compulsory counterclaim to be filed at the time of the defendant's responsive "pleading," regardless of the final disposition of the case, and that only in the absence of such a pleading is the defendant relieved of the obligation to file such a counterclaim. See, e.g., *Bluegrass Hosiery, Inc.* v. *Speizman Industries, Inc.*, 214 F.3d 770, 772 (6th Cir. 2000) ("Rule 13 (a) . . . only requires a compulsory counterclaim if the party who desires to assert a claim has served a pleading. . . . In other words, [r]ule 13 (a) does not apply unless there has been some form of pleading." (Citation omitted.)) Under Kalra's reading of rule 13 (a), therefore, if the Chugh defendants had moved for summary judgment prior to filing their answer, Chugh's claims in the present case would not be barred because a motion for summary judgment is not a pleading under the Federal Rules of Civil Procedure. See *National Union Fire Ins. Co. of Pittsburgh* v. *Jett*, supra, 118 F.R.D. 337–38 ("[The plaintiff] never filed a pleading in the [prior] action. Its motion to dismiss or for summary judgment was not a pleading as defined in [rule 7 of the Federal Rules of Civil Procedure]. Therefore, its claims were not required to be raised in the [prior] action.") For the reasons previously set forth, we conclude that Kalra's interpretation of rule 13 (a) is not only inconsistent with the equitable principles underlying that rule but is in no way compelled by the case law interpreting it. Indeed, if Chugh *had* asserted his claims as counterclaims in the federal action, there is no reason to think that the District Court would not have allowed him to withdraw them without prejudice once that court determined that all of TAL's claims were barred by collateral estoppel.

Rules of Civil Procedure] to compel the institution of litigation." *Lawhorn* v. *Atlantic Refining Co.*, 299 F.2d 353, 357 (5th Cir. 1962). In light of the foregoing, we reject Kalra's claim that rule 13 (a) (1) bars Chugh's claims in the present case on the ground that all of them were compulsory counterclaims in the federal action.[13]

II

We next address Kalra's claim that Chugh's breach of partnership agreement and breach of fiduciary duty claims fail as a matter of law under *Karanian* v. *Maulucci*, supra, 185 Conn. 320, in light of language in that case that, "[i]f [partners] adopt the corporate form, with the corporate shield extended over them to protect them against personal liability, they cease to be partners and have only the rights, duties and obligations of stock-

[13] We note, moreover, that it is not at all clear that rule 13 (a) of the Rules of Civil Procedure has any applicability to a state court action that was commenced while the federal court action was still pending, which occurred here. "Although it is well established [in the federal courts] that a party is barred from suing on a claim that should have been pleaded as a compulsory counterclaim in a prior action, one closely related question remains unsettled. What would prevent a defendant who does not want to assert a claim as a compulsory counterclaim in the opposing party's suit from bringing an independent action on that claim while the first action still is pending? Neither claim preclusion nor waiver or estoppel [is an] appropriate [theory] for barring a second suit of this type. Preclusion becomes operative only upon the termination of an action and therefore can have no bearing on the second action in the situation under discussion since the first suit still is pending." (Footnote omitted.) 6 C. Wright et al., supra, § 1418, p. 164 "Clearly the language of [r]ule 13 (a) cannot be construed as empowering the federal court to restrain [state court] proceedings. Thus, if a party asserts a claim in a state court that should be a compulsory counterclaim in an already pending federal action, the federal court cannot enjoin the prosecution of the state proceeding. In this situation the general objective underlying [r]ule 13 (a) of avoiding multiple suits is outweighed by the express statutory policy prohibiting federal interference with the functioning of state judicial systems. The result is that in the absence of voluntary restraint by one of the courts, both the federal and the state actions will proceed toward judgment and the first to reach that point will serve as the basis for asserting a defense of claim or issue preclusion in the action that still is being adjudicated." (Footnote omitted.) Id., pp. 174–75.

holders. They cannot be partners inter sese and a corporation as to the rest of the world." (Internal quotation marks omitted.) Id., 324, quoting *Jackson* v. *Hooper*, 76 N.J. Eq. 592, 599, 75 A. 568 (1910). Kalra argues that "*Karanian* is fatal to Chugh's claim of an enduring partnership agreement that survived corporate formation . . . . Any oral partnership created over lunch in 2004 . . . definitively ceased to exist when Chugh and Kalra incorporated TAL, Trinity, and the subsidiary corporate entities in 2006." Chugh responds that *Karanian* is irrelevant to the outcome of this case for the simple reason that "there is no evidence . . . that Chugh and Kalra intended to adopt the corporate form and [to] replace their partnership with a corporation, as opposed to simply choosing to own corporations within the Trikona Group partnership." (Internal quotation marks omitted.) Chugh further contends that, under Connecticut law, a partnership can own any type of assets, including corporations, and that the jury reasonably found, on the basis of the evidence presented, that Chugh and Kalra's partnership consisted of owning and running a series of companies comprising the Trikona Group, but the partnership was not itself subsumed within any one of those companies. We agree with Chugh.

General Statutes § 34-301 (12) defines "partnership" as "an association of two or more persons to carry on as co-owners a business for profit . . . ." Section 34-301 (13) defines "partnership agreement" as "[an] agreement, whether written, oral or implied, among the partners concerning the partnership, including amendments to the partnership agreement." This court previously has recognized that "general and limited partners are bound in a fiduciary relationship and, as such, must act as trustees and represent the interests of each other." (Internal quotation marks omitted.) *Hi-Ho Tower, Inc.* v. *Com-Tronics, Inc.*, 255 Conn. 20, 39, 761 A.2d 1268

(2000); see also *Iacurci* v. *Sax*, 313 Conn. 786, 800, 99 A.3d 1145 (2014) (partners "are per se fiduciaries"). Whether Chugh and Kalra entered into an oral partnership agreement in 2004 was a question of fact for the jury. See, e.g., *Bender* v. *Bender*, 292 Conn. 696, 728, 975 A.2d 636 (2009) ("[i]t is well settled that the existence of a contract is a question of fact"). Whether, under *Karanian*, that agreement ended as a matter of law in 2006 is a question of law subject to this court's plenary review. See, e.g., *Fish* v. *Fish*, 285 Conn. 24, 37, 939 A.2d 1040 (2008) (trial court's determination of proper legal standard is question of law subject to plenary review).

We agree with Chugh that *Karanian* is not controlling of his breach of partnership agreement and breach of fiduciary duty claims. To understand why, we must revisit the facts of that case. In *Karanian*, the trial court found that the plaintiff's father, Charles Karanian, and the defendant, Richard Maulucci, Sr., "agreed (1) to enter into a joint enterprise to open and operate a roller-skating rink in Wallingford . . . (2) to a 50 percent share for each of them in the business; (3) to change eventually the joint enterprise into a corporation and (4) to contribute [$20,000] each to the business as a capital investment. Karanian made his contribution and named the plaintiff as the holder of the beneficial interest of his investment. Maulucci . . . never fulfilled his promise to make a similar contribution of cash.

"In September, 1977, Maulucci . . . filed with the [O]ffice of the [S]ecretary of the [S]tate a certificate of incorporation, an appointment of statutory agent for service, and an organizational and first annual report.

* * *

"In the latter part of March, 1978, Maulucci . . . barred Karanian from the business premises and took over complete control of the business operation. The

dispute between the parties had escalated to the point where it was no longer feasible for them to operate the business as equal owners. As a result, the plaintiff commenced [an] action, claiming an accounting, damages, the appointment of a receiver and other relief.

"On the basis of these facts, [the trial court concluded] that [a]s a consequence of the neglect to implement the agreement to operate as a corporation, the corporate entity may be a shield for Karanian and Maulucci against the outside world so as to protect them from personal liability for corporate activities, but as between themselves, they, in essence and in reality, have only a partnership, with each having a [50] percent interest therein." (Emphasis omitted; internal quotation marks omitted.) *Karanian* v. *Maulucci*, supra, 185 Conn. 322–23.

On appeal, both parties claimed that the trial court erred in concluding that, as between themselves, Karanian and Maulucci were partners, despite having incorporated their business by filing the necessary paperwork with the Secretary of the State. See id., 323. This court agreed and, in doing so, quoted *Jackson* v. *Hooper*, supra, 76 N.J. Eq. 599, for the proposition that, when partners in a business venture " 'adopt the corporate form, with the corporate shield extended over them to protect them against personal liability, they cease to be partners and have only the rights, duties and obligations of stockholders. They cannot be partners inter sese and a corporation as to the rest of the world.' " *Karanian* v. *Maulucci*, supra, 185 Conn. 324.

Unlike in the present case, however, the trier of fact in *Karanian* found not only that the parties intended to reorganize their joint venture into a corporation but that they did, in fact, complete such a reorganization. See id., 322. On appeal, the sole issue before this court was whether, in light of these findings, the trial court

properly could find, over the parties' objections, that their business was *both* "a corporation and a partnership at the same time." Id., 324. On the basis of the record and the undisputed facts, which included a certified copy of the certificate of incorporation endorsed by the Secretary of the State, this court concluded that "the roller-skating business conducted by [the parties] operated as a corporation and not as a partnership." Id., 324–25. Because the parties in *Karanian* did not claim that their partnership survived the incorporation of the roller-skating rink—indeed, both sides maintained that there was no partnership—this court had no reason to consider whether a partnership could survive incorporation and, if so, under what circumstances.

Courts that have considered this issue, however, as Kalra acknowledges in his appellate brief, consistently have held that a partnership can operate through a corporation, so long as it is the intent of the partners to do so and the rights of third parties, such as creditors or shareholders, are not adversely affected. As the Second Circuit Court of Appeals has explained: "When the parties intend to merge their entire joint venture agreement, including their rights inter sese and the conduct of the business enterprise planned or conducted under the agreement, into the form of a corporation, they are bound by the result and are relegated to their rights as corporate stockholders. . . .

"[However] when the parties to a joint venture agreement, in forming a corporation to carry out one or more of its objectives, intend to reserve certain rights inter sese under their agreement, which do not interfere with or restrict the management of the affairs of the corporation, its exercise of corporate powers, or the rights of third parties doing business with it, these rights being extrinsic to the corporate entity and its operations, such joint venture agreement may be enforced." (Citations omitted.) *Sagamore Corp.* v. *Diamond West Energy*

Corp., 806 F.2d 373, 378 (2d Cir. 1986); see id., 378–79 (citing cases); see also *Arditi* v. *Dubitzky*, 354 F.2d 483, 486–87 (2d Cir. 1965) ("There is little logical reason why individuals cannot be partners inter sese and a corporation as to the rest of the world, so long as the rights of the third parties such as creditors are not involved. . . . The courts of New York and New Jersey have come to recognize this . . . at least to the extent of permitting suit [on] joint venture obligations if it is apparent that the intention of the parties was that the corporation should be only a means of carrying out the joint venture . . . or a way of organizing different branches of a wide-reaching joint enterprise . . . ." (Citations omitted; internal quotation marks omitted.)); *Paretti* v. *Cavalier Label Co.*, 702 F. Supp. 81, 83–84 (S.D.N.Y. 1988) ("[i]n New York, entrepreneurs may consider themselves to be partners even though their business is organized as a corporation, so long as the partnership agreement does not interfere with the rights of third parties such as creditors"); *Eng* v. *Brown*, 21 Cal. App. 5th 675, 696, 230 Cal. Rptr. 3d 771 (2018) ("Partners may, by agreement, continue their relations as copartners in conjunction with their relationship as stockholders of a corporation, and the law would take cognizance of such dual relationship and deal with the parties in the light of their [agreements between themselves], independently of their incorporation . . . . [C]ourts will enforce preincorporation agreements among partners or joint venturers who have incorporated in order to carry out the agreement between or among the partners or joint venturers." (Citations omitted; internal quotation marks omitted.)), review denied, California Supreme Court, Docket No. S248552 (July 11, 2018); *Gruber* v. *Wilner*, 213 Ga. App. 31, 34, 443 S.E.2d 673 (1994) ("[i]t is generally held that a joint venture agreement continues in effect following the formation of a corporation created to implement it if the intention of

the parties to this effect is clear" (emphasis omitted; internal quotation marks omitted)); *Koestner* v. *Wease & Koestner Jewelers, Inc.*, 63 Ill. App. 3d 1047, 1050, 381 N.E.2d 11 (1978) ("[a]n emphasis on substance over form has led numerous courts to conclude that . . . [t]here is little logical reason why individuals cannot be partners inter sese and a corporation as to the rest of the world, so long as the rights of third parties such as creditors are not involved" (internal quotation marks omitted)); *Blank* v. *Blank*, 222 App. Div. 2d 851, 853, 634 N.Y.S.2d 886 (1995) ("[l]acking a compelling reason to preclude individuals from acting as partners between themselves and as a corporation to the rest of the world . . . courts have sanctioned such an arrangement as long as the rights of third parties, like creditors, are not involved and the parties' rights under the partnership agreement are not in conflict with the corporation's functioning"); *Schuster* v. *Largman*, 308 Pa. 520, 531, 162 A. 305 (1932) (principle that business cannot be partnership and corporation at same time "does not mean that a partnership may not organize corporations to handle a portion of its business and own all of the stock in them"); *Jolin* v. *Oster*, 44 Wis. 2d 623, 630, 172 N.W.2d 12 (1969) (citing cases and noting that "a preincorporation joint adventure or partnership agreement providing for the use of a corporation as a medium for the venture survives the corporation").

In the present case, there is simply no evidence that Chugh and Kalra ever intended to adopt the corporate form in place of their partnership. To the contrary, as the trial court stated in denying Kalra's motion to set aside the verdict, the partnership, as presented to the jury, was an "overarching entity" comprised of numerous companies owned by Chugh, Kalra, and their respective families, acting in concert to further the remunerative goals of the partnership. Kalra cites no authority, and we are aware of none, holding that a partnership

cannot operate in this manner.[14] Nor did Kalra argue at trial that a partnership cannot operate in this manner or take exception to the trial court's instruction to the jury that it could.[15] His sole contention, rather, was that the evidence did not support a finding that he and Chugh were ever partners.[16] The jury evidently disagreed.

[14] Although acknowledging the substantial body of law holding that the intent of the parties controls whether a partnership survives incorporation of the partnership business, Kalra argues that there are numerous courts, such as the New York Court of Appeals, that have "never abrogated" the so-called "categorical rule" set forth in *Jackson* v. *Hooper*, supra, 76 N.J. Eq. 599, the 1910 New Jersey case cited in *Karanian*, that a partnership cannot be both a partnership and a corporation at the same time. Kalra cites just one case, *D'Orazio* v. *Mainetti*, 24 App. Div. 3d 915, 805 N.Y.S.2d 455 (2005), as an example of a court that "enforce[ed] the categorical . . . rule and recognize[d] no exceptions [to it]." We disagree that the court in *D'Orazio* applied a different standard from any of the other New York cases cited in this opinion. Although the court in *D'Orazio* recognized the general rule that, "[w]hen parties adopt the corporate form, with the corporate shield extended over them to protect them against personal liability, they cease to be partners and have only the rights, duties and obligations of stockholders"; (internal quotation marks omitted) id., 916; the court "agree[d] that the record as a whole contain[ed] sufficient proof to raise a question of fact as to whether the firm operated as a partnership despite its legal incorporation, [but it did] not find such proof sufficient to establish, as a matter of law, that [the parties] indeed continued to operate as a de facto partnership following the firm's incorporation . . . ." Id., 917. Thus, the court reversed the trial court's summary judgment and remanded the case for a trial to determine the "factual issue" of whether the parties intended for their partnership to survive the incorporation of their business. Id.

[15] The trial court instructed the jury that, "[a]lthough one company cannot be both a corporation and a partnership, it is possible that there can be a partnership separate and apart from a corporate entity or group of corporate entities. . . . Ultimately, the existence of a partnership is a question of the intention of the parties to be determined by you from all the facts and circumstances."

[16] During closing arguments, Kalra's counsel argued: "As further evidence [that the partnership] didn't exist, [Chugh] testified that he never registered the partnership here in Connecticut where he and . . . Kalra lived, that, when he filed tax returns, he never disclosed the partnership to the Internal Revenue Service. Remember, partnerships are about profits, and profits are taxable. He never disclosed the partnership to any department of the [United States] Treasury. He never disclosed the partnership to any regulator like the Securities and Exchange Commission here in the United States. . . .

Chugh's and Kalra's testimony in this regard could not have been more diametrically opposed. Whereas Chugh testified that the two men were introduced in 2002, that they were eating lunch with one another nearly every day by 2004, and that they decided to form a partnership to pursue investment opportunities in India at the beginning of 2004,[17] Kalra testified that he did not know Chugh in 2004, that the two men "never ever discussed a partnership agreement," and that it was "completely unthinkable" that he would have entered into such an agreement with Chugh, in 2004 or any other time. During cross-examination, however, Kalra acknowledged that he repeatedly referred to Chugh as his "partner" during the Cayman winding up proceeding in 2013—and elsewhere over the years—and that he testified during that proceeding that he "did not want [a] winding down [of TAL]," but, rather, he just "did not want to be partners with . . . Chugh anymore." He also acknowledged that he and Chugh "associate[d] for a profit in business" under the umbrella of the Trikona Group and that "a substantial benefit of

Why is this important? It is important because it is clear evidence that the partnership did not exist." Counsel further argued: "Ladies and gentlemen, there is either a partnership or there is not. . . . And we know certainly, it was never written. As a matter of fact, there isn't even a memorandum or a note, nothing, [no] writing of any kind that was submitted by [Chugh] that you could say, here's proof, here's proof there was a partnership."

[17] Specifically, Chugh testified that, "in early 2004, we were having . . . lunch at a Chinese restaurant, and, at that time, I proposed that [we] partner up for this Indian real estate opportunity. We agreed that it was going to be a 50/50 partnership. In my mind at [the] time, you know, it was a pretty simple relationship. We trusted each other. We said everything is going to be equal . . . . And we're going to make decisions . . . completely equally on every single thing. . . . So, it was a 50/50 partnership in that every single decision that we made, whether it was any spending that we did, any employees that we hired, any offices that we opened, any strategic decisions that we made, any investments that we made, every single decision was unanimous, both of [us] checked with each other, and we agreed on it. If there was some disagreement between us, one of us convinced the other person . . . to go ahead or not to go ahead with [a] decision. But pretty much everything was unanimously decided between the two of us."

working in the Trikona Group was to make . . . money for [themselves and their respective families].'' Although Chugh's evidence of a partnership was not overwhelming, we agree with the trial court that it was sufficient to support the jury's finding of an oral agreement between Chugh and Kalra to carry on, as co-owners, a business for profit—to wit, the Trikona Group—and that the two men carried on that business from 2004 until at least 2013.

III

We turn, therefore, to Kalra's claim that the trial court abused its discretion in admitting the testimony of Chugh's expert witness on damages, Savoldelli, because there was insufficient evidence to support his testimony. Chugh responds that the trial court correctly determined that any error in the admission of Savoldelli's testimony was harmless because the jury obviously did not ''fully accept'' his testimony and the trial court incorrectly instructed the jury that Chugh was required to prove damages relative to the libel per se claim when, in fact, he was not required to prove damages. We agree with Kalra.

The following additional facts and procedural history are relevant to our resolution of this claim. Prior to trial, Kalra filed a motion in limine to preclude Savoldelli's testimony on the ground that it had no basis in scientific fact but was wholly speculative and conjectural. Kalra argued that Savoldelli had testified, during his deposition, that his damages estimate assumed that Chugh could have raised $250 million for his investment fund, Peak XV, but for Kalra's defamatory statements, because ''Chugh was one of two partners at [Trinity] and that fund had raised on the order of $500 million . . . .'' Savoldelli stated that ''[he] conservatively just assumed that each of the two [partners]'' had raised one half of Trinity's funds and, therefore, that Chugh would have

been able to raise that same amount for his own investment fund. In his motion in limine, Kalra argued that Savoldelli's expert testimony was inadmissible under *State* v. *Porter*, 241 Conn. 57, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998), which requires that "proposed scientific testimony . . . be demonstrably relevant to the facts of the particular case in which it is offered, and not simply . . . valid in the abstract." Id., 65. Kalra argued that, under this standard, Savodelli's testimony must be excluded because it was undisputed that Chugh and Peak XV failed to raise any funds between 2009 and 2015.

In its ruling on the motion in limine, the trial court noted that it had "heard the parties in chambers" with respect to the issues raised in the motion and that it had decided to "allow [their] experts to testify about the market conditions during the time in question and the qualities or conditions necessary to raise funds . . . ." The court further stated that it would "allow the experts to render a damages opinion or analysis that focuses on the amount that the market would yield assuming a particular base amount, provided there is evidence to support that assumption."

At trial, Savoldelli testified that the 2013 press release, which accused Chugh of bribery, would have been "fatal" to Chugh's two investment funds. He further testified that his damages estimate "assum[ed]" that the two funds "had 250 million [dollars] under management as of 2012" and that, by applying a "cash flow analysis begin[ning] effectively midway through the year in 2012," he was able to determine that the companies would have earned $20.2 to $27.7 million between 2012 and 2026, but for the 2013 press release. At the conclusion of the evidence, the trial court instructed the jury in relevant part: "[If] you reject the defendant's affirmative defense [with respect to the libel claim], then you

should consider what damages, if any, to award the plaintiff for libel. Ordinarily, the plaintiff would have to prove that a libelous statement caused harm to his reputation. However, certain written defamatory statements are so harmful in and of themselves that the plaintiff is entitled to recover at least nominal damages for injury to reputation without proving that the publication actually caused harm to the plaintiff. I have determined that the statement in question falls into this category; therefore, if you find that the plaintiff has proven the first two elements of libel and that the defendant has not proven his affirmative defense, then you must award the plaintiff at least $1 in nominal damages.

"Nominal damages should be awarded if you find that the defamatory material is of an insignificant character, or because you find that the plaintiff ha[s] bad character, so that no substantial harm has been done to the plaintiff's reputation, or because there is no proof that serious harm has been done to the plaintiff's reputation.

"It is up to you to decide whether to award . . . Chugh only nominal damages or, instead, to award him compensatory damages for any proven injury to his reputation and economic loss; thus, on this count, if you reach the issue of damages in accordance with these instructions, and if [Chugh] proves that he lost profits as a result of the harm that the statement in question did to his reputation, you should award compensatory damages instead of nominal damages."

During deliberations, the jury sent a note to the judge inquiring whether there was "a cap" on what it could award in nominal damages. In response, the trial court instructed the jury: "No, but here is some additional guidance on the meaning of nominal damages. Nominal damages are a trivial sum of money awarded to a litigant

who has established a cause of action but has not established that he is entitled to compensatory damages.''

Following the jury's verdict, Kalra filed a motion to set aside the verdict as to the libel claim on a variety of grounds, but primarily because there was no evidence to support Savoldelli's testimony that Chugh had lost more than $20 million as a result of the 2013 press release. Kalra argued that the trial court should have recognized that Savoldelli's testimony was irrelevant and, therefore, inadmissible under *Porter* given that his damages estimate assumed that Chugh's investment funds had $250 million under management in 2012 when, in fact, according to Chugh's own testimony, they had no money under management in 2012. The trial court denied the motion, reasoning that any error relating to Savoldelli's testimony was harmless. Specifically, the court reasoned: ''[Kalra's] argument, which he presented to the jury, has strong logical appeal. Unfortunately, [Chugh's] brief does not respond to it. . . . The court is left with little guidance as to how to handle this newly raised issue.

''The court concludes that any error involving the admission of Savoldelli's testimony was harmless. To begin with, the jury did not fully accept Savoldelli's testimony of damages exceeding $20 million. Instead, the jury awarded $4 million in lost profits on the libel [claim] . . . .

''Further, [Chugh], under our law, was not required to prove actual damages or lost profits in a libel per se case. The court charged that, because the [2013] press release was libelous per se, the jury should award [Chugh] at least nominal damages and then decide to award him compensatory damages 'if [he] proves that he lost profits as a result of the harm that the statement in question did to his reputation . . . .' In contrast, [Chugh] requested the following charge: 'If you find that

. . . Kalra's statements were libelous per se, you must award . . . Chugh general damages for injury to reputation regardless of whether he demonstrated special damages. In determining the amount of general damages to award for the injury to [Chugh's] reputation, you should consider what reputation [Chugh] had in the community when the writing was made and all of the circumstances surrounding the making of the writing. You may also compensate [Chugh] for damages that he will likely incur in the future. . . . General and special damages together comprise what are called compensatory damages, or damages that compensate . . . Chugh for his loss.' . . . [Chugh's] request to charge . . . was a correct statement of the law. . . . Although [Chugh] does not raise the jury charge issue in his own postverdict briefs, the fact remains that the charge as given was more favorable to [Kalra] than that to which he was entitled. . . . Therefore, [Kalra] cannot prevail on his challenge to the damages award on libel." (Citations omitted; footnotes omitted.)

It is well established that, "[b]efore a party is entitled to a new trial because of an erroneous evidentiary ruling, he or she has the burden of demonstrating that the error was harmful. . . . In other words, an evidentiary ruling will result in a new trial only if the ruling was both wrong and harmful." (Citation omitted; internal quotation marks omitted.) *Klein* v. *Norwalk Hospital*, 299 Conn. 241, 254, 9 A.3d 364 (2010). The same standard applies to claims of instructional error. That is, "not every improper jury instruction requires a new trial because not every improper instruction is harmful. [W]e have often stated that before a party is entitled to a new trial . . . he or she has the burden of demonstrating the error was harmful. . . . An instructional impropriety is harmful if it is likely that it affected the verdict." (Internal quotation marks omitted.) *Burke* v. *Mesniaeff*, 334 Conn. 100, 121, 220 A.3d 777 (2019).

It is true, as the trial court stated, that Chugh was not required to prove lost profits to recover compensatory damages. In a libel per se case, the jury may award the plaintiff general damages in an amount it deems sufficient to compensate him for the injury to his reputation and the mental suffering caused by the defamatory statement. See, e.g., *Battista* v. *United Illuminating Co.*, 10 Conn. App. 486, 492, 523 A.2d 1356 ("When the defamatory words are actionable per se, the law conclusively presumes the existence of injury to the plaintiff's reputation. He is required neither to plead nor to prove it. . . . The individual plaintiff is entitled to recover, as general damages, for the injury to his reputation and for the humiliation and mental suffering [that] the libel caused him." (Citation omitted; internal quotation marks omitted.)), cert. denied, 204 Conn. 802, 525 A.2d 1352 (1987), and cert. denied, 204 Conn. 803, 525 A.2d 1352 (1987); see also *Gleason* v. *Smolinski*, 319 Conn. 394, 435, 125 A.3d 920 (2015) ("there is no dispute that the subject matter of these statements is defamatory per se because they charge crimes punishable by imprisonment and, therefore, the plaintiff is relieved from the burden of pleading and proving damages to her reputation"); *Proto* v. *Bridgeport Herald Corp.*, 136 Conn. 557, 572–73, 72 A.2d 820 (1950) (upholding general damages award of $5150 in libel per se case and concluding that, "[i]n view of the seriousness of the calumny published by the defendant and of the widespread publication given to it throughout the community in which the plaintiff had been brought up, had attended school and had engaged in business, we cannot say that the amount is excessive"); *Miles* v. *Perry*, 11 Conn. App. 584, 587, 594, 529 A.2d 199 (1987) (upholding general damages award of $25,000 in libel per se case).

In order to recover *lost profits*, however, "[a] plaintiff must present sufficiently accurate and complete evi-

dence for the trier of fact to be able to estimate those profits with reasonable certainty." *Beverly Hills Concepts, Inc.* v. *Schatz & Schatz, Ribicoff & Kotkin*, 247 Conn. 48, 70, 717 A.2d 724 (1998); see also *Simone Corp.* v. *Connecticut Light & Power Co.*, 187 Conn. 487, 495, 446 A.2d 1071 (1982) ("[d]amages for losses of profits are recoverable only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty" (internal quotation marks omitted)). This applies equally to a case of libel per se. See, e.g., *DeVito* v. *Schwartz*, 66 Conn. App. 228, 235, 784 A.2d 376 (2001) ("The . . . plaintiff is entitled to recover, as general damages, for the injury to his reputation and for the humiliation and mental suffering which the [defamation] caused him. . . . To recover special damages, however, the plaintiff must prove that he suffered economic loss that was legally caused by the defendant's defamatory statements, even [when] the defamation is per se. See 3 Restatement (Second), Torts § 622 (1977). General and special damages together comprise compensatory damages. See 4 Restatement (Second), Torts, § 904 (1979)." (Citation omitted; internal quotation marks omitted.)).

In the present case, it is undisputed that Savoldelli's testimony that Chugh sustained lost profits in excess of $20 million had no basis in fact. Because the jury was instructed to award special damages *only* if it found that Chugh had proven lost profits, and because there was no other evidence to support the lost profits award, the damages award cannot stand.

In reaching a contrary conclusion, the trial court cited *State* v. *Gradzik*, 193 Conn. 35, 475 A.2d 269 (1984), for the proposition that any evidentiary insufficiency occasioned by that court's instructional error was harmless. *Gradzik*, however, does not support the trial court's ruling. In that case, the defendant was convicted of burglary in the third degree. Id., 36. At the close of

evidence, the trial court instructed the jury that it could find the defendant guilty only if it found that "the defendant had unlawfully entered the building by entering the cellar." Id., 37–38. On appeal, the defendant claimed "that the court erred in denying his motion [for a judgment of acquittal] because there was insufficient evidence from which the jury could conclude that he had entered the cellar. The state counter[ed] that the motion was properly denied because there was sufficient evidence that the defendant had entered the cellar and, in the alternative, that the defendant had unlawfully entered the hatchway which is part of the building. Because [this court] agree[d] that the defendant's presence in the hatchway constituted an unlawful entry into the building, we [concluded that we did not need to] decide whether there was sufficient evidence that the defendant had entered the cellar" because it was "beyond cavil that the hatchway is part of the building in question" and the defendant had "concede[d] that he was in the hatchway . . . ." Id., 38.

Thus, we concluded in *Gradzik* that, even if the evidence was insufficient to support a finding that the defendant had entered the cellar, the error was harmless because the evidence was undeniably sufficient to support a conviction under the correct standard. Id., 38–39. In the present case, however, there is simply no evidence that Chugh sustained lost profits in the amount of $4 million—or in any other amount—as a result of the 2013 press release. Nor are we able to conclude that the jury would have awarded him $4 million in general damages but for the instructional impropriety.[18]

[18] We do not doubt that a properly instructed jury would have awarded Chugh general damages given the jury's finding that Kalra acted with malice in publishing the 2013 press release and its award of punitive damages in connection with the libel claim. Indeed, it is clear that the jury struggled with the limitations imposed on it by the trial court's instructions with respect to the damages award, i.e., that special damages could be awarded *only* if the jury found that Chugh had proven lost profits—which he clearly had not proven—but, otherwise, the jury could award only nominal damages.

A properly instructed jury might have awarded him more or less; we simply have no way of knowing. In light of the foregoing, we cannot conclude that the instructional error in this case was harmless. Accordingly, the verdict must be set aside as to the libel claim, and the case remanded for a new trial on that claim.[19] In addition, we agree with Kalra that a new hearing on punitive damages is also required because the record reveals that a component of the punitive damages award was a "success fee" for Chugh's attorney in the amount of 25 percent of the total compensatory damages award, which included the $4 million libel award.

The judgment is reversed with respect to the libel per se claim and the punitive damages award, and the case is remanded for a new trial on that claim and for a hearing in damages consistent with this opinion; the judgment is affirmed in all other respects.

In this opinion the other justices concurred.

This is evident in the jury's question asking the court whether there was an upper limit on the amount of nominal damages it could award. What we cannot determine, however, without resort to conjecture, is the *amount* of general damages that the jury would have awarded but for the trial court's error. It is for this reason that a new trial on the libel claim is required.

[19] We note that Kalra also sought plain error review of the trial court's instruction to the jury, in accordance with Kalra's request to charge, that Kalra bore the burden of proving the truth of the matter asserted in the 2013 press release. Because we conclude that Kalra is entitled to a new trial due to the court's error relative to the damages instruction, we need not decide whether he is entitled to plain error review of this additional instructional error claim.