STATE OF CONNECTICUT *v.* QUAVON TORRES (SC 20306)

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

Syllabus

Convicted of the crimes of murder and carrying a pistol without a permit in connection with the shooting death of the victim, the defendant appealed to this court. The defendant, P, and L had been socializing with M, the defendant's cousin, and the defendant's sister in an apartment. L called the victim and asked him for a ride. The victim parked his car outside of a pharmacy across the street from the apartment and went inside of the pharmacy. The defendant, P, and L got into the victim's car while the victim was inside the pharmacy. The victim returned to his car and initially did not notice the defendant in the rear seat behind

* This case originally was scheduled to be argued before a panel of this court consisting of Chief Justice Robinson and Justices McDonald, D'Auria, Kahn, and Ecker. Thereafter, Justices Mullins and Keller were added to the panel and have read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision.

the driver's seat. After the victim drove to a drive-through at a fast food restaurant, the victim noticed that the defendant was in the car and told him to get out. When the defendant refused, the victim got out and walked around the car to the passenger's side in order to retrieve a baseball bat. In response, the defendant exited the car, walked around the rear of the car toward the passenger's side, and fatally shot the victim. On appeal from the judgment of conviction, the Appellate Court reversed the defendant's conviction and remanded the case for a new trial. At the defendant's second trial, M testified, in an offer of proof outside the presence of the jury, that, immediately before the defendant's first trial, she encountered P in the courthouse, and P called M a "snitch" and threatened her. M then testified that, two days later, P's sister and two other individuals had assaulted her. The trial court denied the state's motion in limine to preclude M's testimony with respect to the courthouse encounter between P and M but granted the motion with respect to the assault. At the defendant's second trial, M testified before the jury that P ran by the apartment after the shooting and tossed L the black revolver that allegedly was used to shoot the victim and that was later found by the police. This testimony contradicted M's initial statement to the police about whom she saw with the gun and her testimony at the defendant's first trial. On direct appeal from the judgment of conviction after the defendant's second trial, *held*:

1. The defendant could not prevail on his claim that the trial court improperly excluded evidence that M was assaulted before the defendant's first trial:

a. The trial court's exclusion of evidence relating to the assault did not violate the defendant's sixth amendment rights to present a defense and to confrontation, as the court did not prevent the defendant from presenting evidence in furtherance of his third-party culpability claim or from challenging M's credibility; the defendant was permitted to present his version of the events to the jury and to elicit facts from which the jury could assess M's credibility, including her motive for testifying falsely at the defendant's first trial, as the jury heard M's testimony that P possessed the murder weapon on the day of the shooting, that M initially lied to the police because she was high and felt pressured, that she lied at the defendant's first trial because of P's threat, and that she was telling the truth at the defendant's second trial.

b. Even if this court assumed, without deciding, the trial court improperly precluded testimony relating to the assault of M, the defendant failed to meet his burden of proving harm; the testimony of eyewitnesses to the shooting that implicated the defendant, which was corroborated by video surveillance footage and the statements of P and L to the police shortly after the murder, M's statement to the police implicating the defendant, which was made prior to P's threat and the subsequent assault of M, and certain forensics testimony, when considered together, made it unlikely that any error relating to the preclusion of testimony regarding

the specifics of the assault would have changed the result of the defendant's trial.

(*Three justices dissenting in one opinion*)

2. The defendant could not prevail on his claim that the trial court had violated his sixth amendment right to confrontation and the rules of evidence by preventing defense counsel from impeaching a state's witness, J, with evidence of J's prior criminal convictions; the trial court properly excluded evidence of J's misdemeanor larceny convictions as too remote, as the misconduct underlying those convictions was at least seventeen years old at the time of trial, and the court was permitted, but not required, to find that its remoteness outweighed its probative value.

Argued March 31, 2021—officially released May 10, 2022

Procedural History

Substitute information charging the defendant with the crimes of murder and carrying a pistol without a permit, brought to the Superior Court in the judicial district of New Haven, where the case was tried to the jury before *B. Fischer*, *J.*; thereafter, the court granted in part the state's motion to preclude certain evidence; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

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

Laurie N. Feldman, deputy assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, *Seth R. Garbarsky*, senior assistant state's attorney, and *Sean P. McGuinness*, assistant state's attorney, for the appellee (state).

Opinion

KAHN, J. The defendant, Quavon Torres, appeals from the judgment of the trial court convicting him of the crimes of murder in violation of General Statutes § 53a-54a (a) and carrying a pistol without a permit in violation of General Statutes § 29-35. The defendant's principal claim is that the trial court improperly excluded evidence of an assault of one of the state's witnesses, Tasia Milton. The defendant also claims that the trial court improperly prevented him from impeaching another state's witness, Teresa Jones, with evidence of certain previous

criminal offenses. We disagree with both of these claims and, accordingly, affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On the evening of July 23, 2012, the defendant, Freddy Pickette, and Marcus Lloyd were socializing with the defendant's cousin, Milton, and the defendant's sister, Amber Torres, in a third floor apartment located at 543 Orchard Street in New Haven. At around 7 p.m. that evening, Lloyd called the victim, Donald Bradley, and asked him for a ride to a housing project in New Haven. Shortly thereafter, the victim parked his car outside of a CVS Pharmacy (CVS) located across the street from the apartment, got out of the driver's seat, and went inside of the store. Moments later, the defendant, Pickette, and Lloyd walked through the parking lot and got into the victim's car. Pickette sat in the front passenger seat, Lloyd sat in the rear passenger seat, and the defendant sat in the rear seat on the driver's side of the car.

A short time later, the victim exited the store and got back into the driver's seat, but he did not initially notice that the defendant was the person sitting behind him. Pickette then asked the victim to stop at a Burger King located a short distance to the east along Whalley Avenue. When they got to the drive-through, the victim noticed that the defendant was in the car and told him to get out. When the defendant refused, the victim got out of the driver's seat, walked around to the passenger side of the car, opened one of the doors, and leaned inside in order to retrieve a baseball bat from under a seat. In response, the defendant got out of the car, walked around the trunk toward the passenger side, and fatally shot the victim four times.

The defendant, Pickette, and Lloyd fled the scene of the shooting, heading back west along Whalley Avenue and then up Orchard Street toward the third floor apart-

ment where they had previously been socializing. The defendant and Lloyd ran into the apartment, where they once again encountered Milton and Amber Torres. Pickette split off from the others, crossed Orchard Street, ran through the CVS parking lot, and eventually continued walking west along Whalley Avenue. Once inside of the apartment, the defendant gave Amber Torres a black revolver with a wooden handle and told her "to do something with it . . . ." Amber Torres then picked up the revolver using a washcloth and placed it in a black bag.

The police arrived at the apartment soon thereafter, surrounded the building, and instructed everyone inside to vacate the premises. Eventually, the defendant and Lloyd exited the building and were arrested. During a search of the apartment, the police located a .38 caliber black revolver with a wooden handle in a black bag. Inside of the revolver were two live rounds and four empty chambers. Later, ballistics testing determined that the revolver was the gun used to shoot and kill the victim.

The defendant was subsequently charged with, and convicted of, the crimes of murder and carrying a pistol without a permit. On appeal, the Appellate Court reversed that conviction and remanded the case for a new trial. See *State* v. *Torres*, 175 Conn. App. 138, 154, 167 A.3d 365 (reversing defendant's conviction due to improper in-court identification), cert. denied, 327 Conn. 958, 172 A.3d 204 (2017), cert. denied, U.S. , 138 S. Ct. 1303, 200 L. Ed. 2d 474 (2018). The case was then presented to a jury for a second time, and the defendant was once again convicted of the crimes of murder and carrying a pistol without a permit. The trial court imposed a total effective sentence of fifty years of incarceration on those charges.[1] The defendant now appeals from that

[1] The trial court sentenced the defendant to fifty years of incarceration for the crime of murder and a concurrent sentence of five years of incarceration for the crime of carrying a pistol without a permit, for a total effective sentence of fifty years of incarceration.

conviction directly to this court pursuant to General Statutes § 51-199 (b) (3).

I

The defendant's first claim is that the trial court improperly excluded evidence that Milton was physically assaulted in the days leading up to the defendant's first trial. Specifically, the defendant argues that evidence of this assault was necessary in order to explore Milton's motives, interests, and bias, and that the exclusion of that evidence violated the defendant's rights under the sixth amendment to the United States constitution. The defendant, in the alternative, also implicitly presses the underlying claim of evidentiary error. For the reasons that follow, we reject defendant's constitutional claims and conclude that any evidentiary error was harmless.

The following undisputed facts and procedural history are necessary to our consideration of these claims. Before trial in the present case, the state filed a motion in limine seeking to exclude "any and all evidence relating to an argument between . . . Pickette and . . . Milton on August 14, 2014, and an assault [on] . . . Milton on August 16, 2014 . . . ." In an accompanying memorandum of law, the state argued that evidence regarding the argument and the assault should be excluded as irrelevant, inadmissible hearsay, inadmissible character evidence, and as unduly prejudicial. Defense counsel responded that such evidence was "relevant and [would go] to motive, interest, [and] bias of . . . Milton to lie."

In response to the trial court's request for an offer of proof, Milton testified outside of the presence of the jury as follows. Just prior to the defendant's first trial, Milton allegedly encountered Pickette and another individual in the hallway of the courthouse. An argument ensued, during which Pickette called Milton a "snitch"

and said "they were going to whip [her ass]" if she testified. Milton responded to Pickette by asking, "how am I a snitch when we both [are] in the same predicament?" The second individual then said to Pickette, "don't argue with this girl, you have a sister named Ash Black . . . ." Two days later, Pickette's sister, Ashley Black, and two other individuals "jumped" and "beat on" Milton in New Haven. During this assault, Milton's assailants allegedly told her that she "should mind [her own] business" and mentioned "something about [Pickette] . . . ."

Following the offer of proof, defense counsel argued that the threat and the assault were admissible to show Milton's "motive, interest, bias with respect to [her] testimony, what may or may not have been said in the past, and . . . also . . . to [show the] state of mind and the consciousness of guilt of . . . Pickette . . . ." The trial court denied the state's motion in limine with respect to the argument between Pickette and Milton in the courthouse but granted the motion with respect to the assault of Milton in New Haven. The trial court reasoned that, because Pickette was involved in the argument in the courthouse hallway but not the assault, the connection between Milton's trial testimony and the latter was "too speculative . . . ." Specifically, the trial court reasoned: "Milton just indicated that one of these individuals said to her, mind your own business, nothing that's attributed to this case; that could be mind your own business concerning a domestic [situation] with [a] boyfriend [or] girlfriend. [It is] [f]ar too speculative, so it's not relevant evidence for this jury to hear."

Before the jury in the defendant's second trial, Milton testified that Pickette ran by 543 Orchard Street after the shooting and tossed Lloyd the gun that was later found by the police in the apartment. This testimony contradicted not only Milton's initial statement to the police about whom she saw with the gun but also her

subsequent testimony during the defendant's first trial. Specifically, during her statement to the police on the night of the shooting, Milton said that she had seen the defendant giving the gun to Amber Torres and that she did not see Pickette after the shooting. Notwithstanding her initial statement to the police, Milton testified during the defendant's first trial that she never saw the defendant holding the gun. Milton, however, continued to maintain that she had not seen Pickette after the shooting. The state offered, and the trial court subsequently admitted, both Milton's statement to the police and her testimony from the first trial as prior inconsistent statements for substantive purposes pursuant to *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986).

Milton explained that her statement to the police on the night of the shooting implicated the defendant, her own cousin, rather than Pickette, a person she had never known before, because she was high, nervous, and felt "pressured by the cops." Milton also explained that she had lied at the defendant's first trial because she was afraid of Pickette. Specifically, on direct examination by the prosecutor, Milton gave the following specific testimony about Pickette's threats and the events that followed:

"Q. . . . [Y]ou had an incident with [Pickette] the last time you testified?

"A. Yes.

"Q. And was that here in court?

"A. Yes.

"Q. Where did that happen?

"A. In the hallway.

"Q. In the hallway. And what happened? Tell the jury what happened there.

"A. We had an argument.

"Q. You and [Pickette]?

"A. Yes.

"Q. Tell us what happened.

"A. I don't remember what happened, I just know that me and him had an argument, it got ugly from there.

"Q. . . . [W]as it physical; did anyone hit anybody?

"A. Close enough.

"Q. Well, that's not the question, ma'am. Did anyone hit anybody else?

"A. No.

"Q. Okay. And you had said previously that you had been threatened?

"A. Yes.

"Q. . . . [T]ell the jury how you got threatened.

"A. He threatened me in the hallway, saying he was going to have someone come beat my ass.

"Q. Um-Hm.

"A. They didn't come. *They seen me on the street and then that's when it happened.*" (Emphasis added.)

Notwithstanding the trial court's evidentiary ruling earlier that same day relating to the assault, neither the prosecutor nor defense counsel objected to this testimony.

A

The defendant's primary contention in this appeal is that the trial court's exclusion of evidence related to the

assault of Milton violated his sixth amendment rights to present a defense and to confront the witnesses against him. We disagree.

The following principles govern our review of the defendant's constitutional claims. "It is fundamental that the defendant's rights to confront the witnesses against him and to present a defense are guaranteed by the sixth amendment to the United States constitution . . . [which is] made applicable to state prosecutions through the due process clause of the fourteenth amendment." (Internal quotation marks omitted.) *State* v. *Holley*, 327 Conn. 576, 593, 175 A.3d 514 (2018). A criminal defendant's "right to present a defense is the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies. . . . Therefore, exclusion of evidence offered by the defense may result in the denial of the defendant's right to present a defense." (Internal quotation marks omitted.) Id., 593–94.

"Although [t]he general rule is that restrictions on the scope of cross-examination are within the sound discretion of the trial [court] . . . this discretion comes into play only after the defendant has been permitted cross-examination sufficient to satisfy the sixth amendment. . . . The constitutional standard is met when defense counsel is permitted to expose to the jury the facts from which [the] jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. . . . Indeed, if testimony of a witness is to remain in the case as a basis for conviction, the defendant must be afforded a reasonable opportunity to reveal any infirmities that cast doubt on the reliability of that testimony." (Internal quotation marks omitted.) *State* v. *Leconte*, 320 Conn. 500, 511, 131 A.3d 1132 (2016).

"[W]hether a trial court's . . . restriction of a . . . [witness'] testimony in a criminal trial deprives a defen-

dant of his [constitutional] right to present a defense is a question that must be resolved on a [case-by–case] basis. . . . The primary consideration in determining whether a trial court's ruling violated a defendant's right to present a defense is the centrality of the excluded evidence to the claim or claims raised by the defendant at trial." (Internal quotation marks omitted.) *State* v. *Andrews*, 313 Conn. 266, 276, 96 A.3d 1199 (2014). In order to determine whether a defendant's constitutional right to cross-examination has been satisfied, "[w]e consider the nature of the excluded inquiry, whether the field of inquiry was adequately covered by other questions that were allowed, and the overall quality of the cross-examination viewed in relation to the issues actually litigated at trial." (Internal quotation marks omitted.) *State* v. *Leconte*, supra, 320 Conn. 512.

On the basis of our thorough review of the record before us, we conclude that the exclusion of the assault evidence did not infringe on either the defendant's right to present a defense or his right to confront Milton. The defendant was permitted to present his version of the events to the jury and to elicit the essential facts from which the jury could assess Milton's credibility, which is what the constitution requires under these circumstances. The defendant's third-party culpability defense was, indeed, central to his theory of the case, but the jury heard Milton's testimony that Pickette was the one with the black revolver that day. Milton also testified that she initially lied to the police because she was high and felt pressured, that she lied at the defendant's first trial because of Pickette's threats, and that she was, at the defendant's second trial, telling the truth.

Because defense counsel was permitted to cross-examine Milton about her motive for testifying falsely at the defendant's first trial and to elicit testimony implicating Pickette, the trial court's exclusion of evidence

pertaining to the assault did not violate the defendant's sixth amendment rights. See, e.g., *State* v. *Jordan*, 329 Conn. 272, 287 n.14, 186 A.3d 1 (2018) (concluding that "[t]he constitutional right to present a defense does not include the right to introduce any and all evidence claimed to support it" and that no constitutional violation occurred when "the trial court's exclusion of evidence . . . did not prevent the defendant from presenting other evidence that supported his theory of [defense]"). As a result, defendant's constitutional claims must fail.

B

We turn next to the underlying claim of evidentiary error. Assuming, without deciding, that the trial court improperly precluded additional testimony relating to the assault of Milton, we conclude that the defendant has failed to meet his burden of proving harm.[2] Specifically, we conclude that the accounts provided by witnesses to the shooting itself, video surveillance footage from various security cameras in the surrounding area corroborating those observations, and Milton's statement to the police implicating the defendant, which was made prior to Pickette's threats and the assault, considered together in the context of the record before us as a whole, make it unlikely that any error relating to the preclusion of further testimony about the assault of Milton would have changed the result of the defendant's trial.

"[W]hether [an improper ruling] is harmless in a particular case depends [on] a number of factors, such as the importance of the witness' testimony in the [defen-

[2] As a result, we forgo any analysis of questions, such as relevancy, relating to the predicate question of admissibility. See Conn. Code Evid. § 4-1. We likewise note that, in the present appeal, the defendant has raised no claims with respect to either the sufficiency of the state's evidence or the third-party culpability instruction provided to the jury.

dant'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." (Internal quotation marks omitted.) *State* v. *Fernando V.*, 331 Conn. 201, 215, 202 A.3d 350 (2019). Because this inquiry is evidentiary in nature, rather than constitutional, the defendant bears the burden of proving that the trial court's exclusion of evidence substantially swayed the jury's verdict. Id. Specifically, in order to prevail, the defendant must establish two distinct points: (1) that Milton's various statements about the events at 543 Orchard Street could have influenced the course of the jury's deliberations, and (2) that additional evidence about the assault of Milton, in particular, could have caused the jury to consider those statements in a different light.

In the present case, the state adduced testimony from two particular witnesses who were present at the scene of the shooting itself. The first of those witnesses, Lachell Hall, testified that she saw a car pull into the drive-through lane of a Burger King shortly before the shooting. She saw her nephew, Pickette, seated in the front passenger seat, wearing a black shirt.[3] Hall testified that there were two other people in the car, one seated behind the victim wearing a "[d]arker shirt" that "could've been . . . black," and another behind Pickette wearing a red shirt, but she apparently did not recognize either of them.

Hall testified that she greeted Pickette through a partially opened window as the victim's car was pulling

[3] Hall testified that she referred to Pickette as her nephew because her brother had children with Pickette's mother.

up to the drive-through and that Pickette responded, "hey, Chell . . . ." After the car came to a stop next to the menu board, Hall saw the victim get out of the driver's seat and walk around the car, behind the trunk. Hall testified that the victim then opened a door on the passenger side of the car and bent over to reach inside for something. She was walking toward the car at the time and was only about twenty feet away when "somebody got out [of] the back seat, [who] was behind [the victim], and shot him . . . ." According to Hall, both Pickette and the person wearing the red shirt were still seated on the passenger side of the car when those shots were fired. Although Hall testified on cross-examination that she did not see the gun or exactly where the shots had come from, she stated that the person she had identified as the rear driver's side occupant had walked around to the rear of the car and was standing with his back to her at the moment of the shooting.

Hall's testimony about the initial positions of these individuals in the car was corroborated by video surveillance footage from a security camera located outside of a nearby CVS. Footage from that camera before the shooting shows (1) the victim's car pulling into the CVS parking lot and the victim exiting the driver's seat and walking into the CVS, (2) a person in a red shirt and shorts getting into the rear passenger side seat, (3) a person in a darker colored shirt, white shoes, and long pants getting into the rear driver's side seat, (4) a person wearing a black shirt with a white logo and shorts getting into the front passenger seat, and (5) shortly thereafter, the victim getting back into the driver's seat and the victim's car pulling out of the parking lot. Minutes after the shooting, video surveillance footage from that same store showed the person in the black shirt with the white logo and shorts crossing Orchard Street, running through the parking lot, and then walking west along Whalley Avenue. Because there is no

dispute that the person running through the parking lot in this video recording was Pickette,[4] the jury could have easily inferred that Hall had correctly identified him as the occupant in the front passenger seat of the victim's car.

A second eyewitness, Jones, was walking from a grocery store located on the other side of Whalley Avenue to the Burger King with five of her children. As they were about to cross the street, Jones saw "some guys" standing around a car parked at the Burger King drive-through. Jones indicated that one of those people was wearing a red shirt and khakis and that another was wearing a "Canadian blue" shirt and jeans. Jones expressly testified that the person wearing the blue shirt "pulled out his gun and started shooting." Specifically, Jones told the jury that the shooter "was around the back of the vehicle, more near the passenger side," that she witnessed the shooter extending his arm to fire, and that she heard approximately five shots. Jones further testified that Pickette, whom she knew and recognized, was not the shooter.

Although the accounts provided by Hall and Jones differed in some respects, the description of the appearance and movements of the shooter that they provided to the jury both clearly implicated the defendant. Hall's testimony that the shooter had been seated directly behind the victim, in conjunction with video surveillance footage from the CVS parking lot, tends to exculpate the two people who were seated on the passenger side of the car. Although Hall testified that the shooter's shirt "could've been . . . black," she also testified that Pickette, the only other person who was wearing a black shirt that day, was not the shooter. Likewise,

[4] The defendant and Lloyd, who was wearing a red shirt, were arrested at 543 Orchard Street shortly after the shooting. At trial, Pickette also identified himself as the person running through the CVS parking lot on the video recording.

Jones' testimony that the shooter was wearing a "Canadian blue" shirt and long pants was sufficiently specific to exclude the other potential suspects inside of the car.[5] Video surveillance footage from a Subway restaurant moments after the shooting clearly shows the three men who had previously entered the victim's car in the CVS parking lot running away from the scene of the shooting in the following order: first, a man wearing a black shirt and shorts, second, a man wearing a red shirt and shorts, and, third, a man wearing long pants and a shirt consistent with the "Canadian blue" description provided by Jones. A conclusion that the person standing near the trunk had shot the victim, who was reaching into the passenger side of the car at the time, is, likewise, consistent with the absence of stippling[6] and the presence of blood on the inside of the rear passenger door of the victim's vehicle. Finally, the observations of the shooter provided by both Hall and Jones were also consistent with the initial statements provided by Pickette and Lloyd to the police shortly after the murder, which were admitted into evidence at trial pursuant to *Whelan*.[7] Milton's observations on the day of the murder were, by contrast, related only to the events at 543 Orchard Street. Those observations, although relevant, are less probative with respect to

[5] Pickette was wearing a black shirt, and Lloyd was wearing a red shirt. Both of those two men were wearing shorts.

[6] At trial, Susan Williams, a physician employed by the Office of the Chief Medical Examiner, testified that she conducted the victim's autopsy and had observed no stippling during the course of her examination. Williams stated that this observation tended to indicate that the barrel of the gun was more than two feet away from the victim at the time of the shooting.

[7] Indeed, it is a rare case in which the jury is provided with direct testimony from a witness who is able to give a comprehensive, detailed account of all of the events surrounding a murder. More commonly, evidence is derived from a variety of sources, such as in-court testimony and *Whelan* statements, that are not perfectly consistent in all respects. The fact that the state's case required a comparison of multiple statements does not, however, compel the conclusion that the evidence against the defendant was weak.

the identity of the shooter than those from the eyewitnesses to the shooting itself.

The fact that Milton's initial statement to the police, which predated both Pickette's threats and the subsequent assault, failed to implicate Pickette provides another reason to conclude that any evidentiary error was harmless.[8] In order for the jury to have credited Milton's testimony in the present case that Pickette had brought the gun back to 543 Orchard Street, it would have had to conclude that Milton lied during her initial statement to the police when she said that it was the defendant who brought the gun back to the apartment after the shooting. Even if the defendant had been allowed to produce additional evidence to show that the assault of Milton had made her afraid to implicate Pickette at the first trial, that same fear would not have explained why, in her previous statement to the police, she chose to implicate the defendant, her own cousin, and not Pickette, a person she had not previously known.

In summary, we conclude that the defendant has not satisfied his burden of proving that the trial court's evidentiary error substantially swayed the jury's verdict. In our view, the accounts of the shooting from Hall, Jones, Lloyd, and Pickette, the video surveillance foot-

[8] By referring to Milton as a "snitch" and telling her to mind her own business, it is just as plausible that Pickette was trying to prevent Milton from implicating the defendant. Indeed, it was only *after* the assault that Milton began denying that she had seen the defendant with the gun on the day of the shooting. This understanding is consistent with (1) the fact that both Pickette and Lloyd initially declined to identify the defendant as the shooter at his first trial; see *State* v. *Torres*, supra, 175 Conn. App. 152; (2) Pickette's and Lloyd's inability to recall particular details of the shooting in the present trial and the subsequent admission of their initial statements to the police, which implicated the defendant, pursuant to *Whelan*, and (3) Milton's testimony during the offer of proof in the present case that she viewed herself as being in "the same predicament" as Pickette, namely, being called to testify against the defendant.

age from security cameras in the surrounding area corroborating those accounts, and Milton's statement to the police, which implicated the defendant and predated both Pickette's threats and the subsequent assault, considered together, make it unlikely that additional evidence about the specifics of the assault would have caused the jury to have reached a different result. For these reasons, the defendant's claim of evidentiary error must also fail.

II

The defendant's second claim is that the trial court violated both his sixth amendment right to confrontation and our rules of evidence by preventing him from impeaching Jones with evidence of certain prior criminal convictions. We disagree.

The following additional facts and procedural history are relevant to our resolution of this claim. As explained in part I B of this opinion, Jones was an eyewitness to the victim's murder. At trial, defense counsel sought to impeach Jones with her prior criminal history, which consisted of a felony assault conviction in 1997, and three misdemeanor larceny convictions in 2002. In particular, defense counsel claimed that the facts underlying Jones' 2002 larceny convictions were relevant to her character for truth and veracity. The prosecutor responded that "the underlying facts would certainly be collateral" and were "well beyond" the ten year limitation on the admissibility of prior criminal convictions. The trial court granted the state's motion to exclude Jones' criminal history on the ground "that these three matters are too remote in time. A felony conviction from 1997 is twenty-two years old, [and the convictions for] issuing a bad check [in] 2002, [are] seventeen years old. They're too remote in time, so I will not allow inquiries on that." See Conn. Code. § Evid. 6-7 (providing that witness may be impeached by "[a] crime . . . punishable by imprisonment for more than

one year" and that "the court shall consider," among other things, "the remoteness in time of the conviction").

On appeal, the defendant renews his claim that the exclusion of Jones' 2002 misdemeanor larceny convictions was improper because these convictions were relevant to Jones' character for truth and veracity. The defendant further argues that he was deprived of his sixth amendment right to confront Jones because "[h]e was foreclosed from exposing the jury to facts from which it could have appropriately drawn inferences relating to the reliability of Jones' eyewitness account." The state does not dispute that the evidence was relevant to impeach Jones' credibility but, instead, argues that "[t]he trial court properly excluded [it] on the grounds of remoteness." We agree with the state.

We begin our analysis with the admissibility of the challenged evidence under the Connecticut Code of Evidence. See, e.g., *State* v. *Annulli*, 309 Conn. 482, 491, 71 A.3d 530 (2013). Sections 4-4 and 6-6 of the Connecticut Code of Evidence govern whether witnesses may be asked about specific conduct in order to impeach their character for truthfulness. "These rules [prevent] the use of a general trait of character or propensity to prove that a person acted that way on a specific occasion . . . but make an exception for evidence of a witness' character for untruthfulness. Subdivision (3) [of § 4-4 (a)] authorizes the court to admit evidence of a witness' character for untruthfulness or truthfulness to attack or support that witness' credibility. . . . Section 6-6 addresses the admissibility of such evidence and the appropriate methods of proof. . . . Specifically, § 6-6 (b) (1) permits the questioning of a witness about instances of the witness' conduct if the conduct is probative of the witness' veracity. Conn. Code Evid. § 6-6 (b) (1) ([a] witness may be asked, in good faith, about specific instances of conduct of the witness, if probative of the witness' character for untruthfulness).

"[T]he right to cross-examine a witness pertaining to specific acts of misconduct is limited in three distinct ways. . . . First, cross-examination may only extend to specific acts of misconduct other than a felony conviction if those acts bear a special significance [on] the issue of veracity. . . . Second, [w]hether to permit cross-examination as to particular acts of misconduct . . . lies largely within the discretion of the trial court. . . . Third, extrinsic evidence of such acts is inadmissible." (Citations omitted; internal quotation marks omitted.) *State* v. *Rivera*, 335 Conn. 720, 730, 240 A.3d 1039 (2020). Under the second limitation, which is the proviso at issue in the present case, even if specific acts of misconduct are indicative of a witness' lack of truthfulness and veracity, "[i]t does not follow . . . that . . . the court must permit the cross-examination. . . . In considering whether the court abused its discretion in this regard, the question is not whether any one of us, had we been sitting as the trial judge, would have exercised our discretion differently. . . . Rather, our inquiry is limited to whether the trial court's ruling was arbitrary or unreasonable." (Citation omitted; internal quotation marks omitted.) Id., 731; see also *State* v. *Martin*, 201 Conn. 74, 88, 513 A.2d 116 (1986) (trial court has discretionary authority to disallow cross-examination on specific acts of misconduct if it determines that prejudicial effect of evidence outweighs its probative value). "We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion." (Internal quotation marks omitted.) *State* v. *Cecil J.*, 291 Conn. 813, 818, 970 A.2d 710 (2009).

We conclude that the trial court did not abuse its discretion in excluding the 2002 misdemeanor larceny convictions as too remote. The more remote a witness' specific acts of misconduct, the less probative they are of the witness' current character for truth and veracity.

Indeed, we previously have observed that remoteness alone, apart from any other consideration, may justify, although not require, the exclusion of specific acts of misconduct. *Vogel* v. *Sylvester*, 148 Conn. 666, 676, 174 A.2d 122 (1961); see also, e.g., *State* v. *James*, 211 Conn. 555, 571–72, 560 A.2d 426 (1989) ("[e]ven if the evidence did involve untruthfulness, the court was well within its discretion in excluding it because of its remoteness in time, its minimal bearing on credibility, and its tendency to inject a collateral issue into the trial"); *State* v. *Morgan*, 70 Conn. App. 255, 274, 797 A.2d 616 ("[a]lthough inquiry into . . . [specific] acts [of misconduct] might have borne on the issue of [the witness'] credibility, the court was free to determine, as it did, that the remoteness of the acts tended to outweigh their probative value"), cert. denied, 261 Conn. 919, 806 A.2d 1056 (2002); E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 6.28.4, p. 390 ("even if the conduct does relate to veracity, the court still has discretion to exclude it if the evidence has slight relevance due to remoteness in time or other considerations"). The misconduct underlying Jones' 2002 misdemeanor larceny convictions was at least seventeen years old at the time of trial, and, under these circumstances, the trial court was permitted, but not required, to find that its remoteness outweighed its probative value. We therefore reject the defendant's claim that the trial court abused its discretion in excluding the challenged evidence.[9]

[9] The defendant also claims that he is entitled to a new trial because of prosecutorial impropriety. Specifically, the defendant claims that he was deprived of a fair trial because the prosecutor made the following three statements in his rebuttal summation: (1) "[t]he shooter was seen on multiple occasions by multiple witnesses behind the driver's seat of this vehicle," (2) "[t]he shooter happened to be wearing a blue shirt and grey sweatpants that night," and (3) "[b]lue shirt, how they ran after-the-fact, arm extended; all of those are consistent . . . ."

None of these arguments rises to the level of prosecutorial impropriety. The first argument is adequately supported by Hall's testimony that "somebody got out the back seat that was behind [the victim] and shot him" and

The judgment is affirmed.

In this opinion ROBINSON, C. J., and MULLINS and KELLER, Js., concurred.

ECKER, J., with whom McDONALD and D'AURIA, Js., join, dissenting. The defendant, Quavon Torres, was convicted of murder in violation of General Statutes § 53a-54a (a) and carrying a pistol without a permit in violation of General Statutes § 29-35 following a jury trial at which evidence central to his third-party culpability defense improperly was excluded. In light of the importance of the excluded evidence to the defendant's theory of the case, the lack of physical evidence implicating the defendant in the charged crimes, and the contradictory and inconsistent evidence adduced at

the initial statements given by Pickette and Lloyd to the police. The factual assertions in the second argument, likewise, can reasonably be inferred from Milton's description of the defendant's attire on that day, Jones' testimony that the shooter was wearing a blue shirt and long pants, and the undisputed fact that both Pickette and Lloyd were wearing shorts. Finally, although the defendant correctly notes that the third argument failed to expressly distinguish between Jones' testimony that the shooter's shirt was "Canadian blue" and Hall's testimony that the shooter's shirt was "[d]arker" and "could've been . . . black," the prosecutor had already expressly acknowledged that distinction in his initial summation, stating: "Now, granted, [Hall] tells the police that night that she thinks the shooter or the person that got out of the back driver's side is wearing a darker shirt or a black shirt, she's not exactly sure. She certainly wasn't expecting to see a shooting. It's understandable that she might mess up a few details, but she testifies that it was a dark colored shirt. Blue is a darker color."

Moreover, even if we were to agree that the prosecutor's arguments were imprecisely worded, none of the challenged statements drew an objection from defense counsel or was repeated. See *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987). The jury was also clearly instructed that representations made by counsel during closing summations were not to be considered as evidence and that it was the jury's recollection of the facts—not those of the attorneys—that controlled. As a result, we conclude that the defendant has failed to meet his burden of demonstrating that the alleged improprieties so infected the trial with unfairness as to deprive him of his constitutional right to a fair trial. See, e.g., *State* v. *Luster*, 279 Conn. 414, 442, 902 A.2d 636 (2006).

trial, I conclude that the evidentiary error was harmful. Because I would reverse the judgment of conviction and remand the case for a new trial, I respectfully dissent.[1]

The majority opinion accurately sets forth the relevant facts and procedural history, but the following facts warrant particular emphasis. There was no physical evidence, such as DNA or fingerprint evidence, linking the defendant to the murder or the murder weapon, and, although there were eyewitnesses to the shooting, none of the eyewitnesses testified at trial that the defendant was the perpetrator of the charged crimes. Indeed, at trial, none of the state's witnesses implicated the defendant in either the commission of the murder or possession of the murder weapon; their inculpatory version of events came in the form of prior inconsistent statements introduced into evidence under *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986), thus requiring the jury to choose between conflicting accounts of events. The state's case, in short, depended on the credibility of the witnesses and, in particular, the reasons for various changes in those witnesses' versions of events over time.

At trial, the fundamental question for the jury was the identity of the individual who had shot and killed the victim, Donald Bradley. The state claimed that the defendant was the shooter, but the defendant raised a third-party culpability defense, arguing that Freddy Pickette was the guilty party. According to the defendant's theory of the case, Pickette shot and killed the victim and brought the gun back to 543 Orchard Street

[1] I see no need to reach the defendant's prosecutorial impropriety claims. To the extent that the defendant's claim regarding the exclusion of evidence of Teresa Jones' specific acts of misconduct would be likely to arise on remand, I agree with the majority that a trial court has broad discretion to exclude such evidence on the basis of its remoteness in time. See part II of the majority opinion.

in New Haven after he fled the scene. The trial court considered the defendant's third-party culpability defense, supported by the testimony of his cousin, Tasia Milton,[2] to be strong enough to warrant submission to the jury.

Milton testified at trial that she was sitting outside of 543 Orchard Street when she heard gunshots and saw the defendant and Marcus Lloyd running toward her with "[Pickette] a little behind them." Although Pickette did not enter the building, he ran by 543 Orchard Street and tossed a gun to Lloyd. The defendant and Lloyd entered the building and ran up to the third floor apartment in which they and Pickette had been socializing together earlier in the evening. Milton testified that she had "never seen [the defendant] with the gun" but that she saw Pickette with the gun earlier that day.

Milton's trial testimony was inconsistent in part with her statement to the police on the night of the murder, as well as her testimony at the defendant's first trial.[3] On the night of the murder, Milton reported to the police that, after hearing gunshots, she fled upstairs to the third floor apartment of 543 Orchard Street, quickly followed by the defendant and Lloyd. According to Milton's statement to the police, Pickette did not return

[2] Milton was not the only witness with a familial relationship to the defendant or Pickette. Amber Torres, who testified on behalf of the state, is the defendant's sister. Additionally, the two eyewitnesses to the shooting, Lachell Hall and Teresa Jones, both are related to Pickette. Hall is Pickette's aunt; see footnote 10 of this opinion; and Jones testified that she had known Pickette "since he was a child" because her "nephew is his brother."

[3] The defendant was convicted at the first trial of murder and carrying a pistol without a permit. On appeal, the Appellate Court reversed the defendant's conviction and remanded the case for a new trial. See *State* v. *Torres*, 175 Conn. App. 138, 154, 167 A.3d 365 (2017) (reversing defendant's conviction because witness made suggestive in-court identification, contrary to *State* v. *Dickson*, 322 Conn. 410, 453, 141 A.3d 810 (2016), cert. denied, U.S. , 137 S. Ct. 2263, 198 L. Ed. 2d 713 (2017)), cert. denied, 327 Conn. 958, 172 A.3d 204 (2017), cert. denied, U.S. , 138 S. Ct. 1303, 200 L. Ed. 2d 474 (2018).

to the apartment after the shooting. She stated that the defendant gave his sister, Amber Torres, a black gun with a wooden handle and told her to "do something with [it]." Milton testified at the defendant's first trial substantially in conformance with these statements.[4]

At the defendant's second trial, the state introduced Milton's prior inconsistent statement to the police and trial testimony as substantive evidence of the defendant's guilt and to undermine Milton's credibility, which was central to the defendant's third-party culpability defense. The state pointed out that Milton had not previously informed the police or testified that Pickette tossed the gun to Lloyd following the shooting, contrary to her testimony at the defendant's second trial. The defendant sought to rehabilitate Milton's credibility and to bolster his third-party culpability defense by eliciting testimony from Milton that, when she gave her statement to the police, she was young, "high," "nervous," and felt "pressured by the cops . . . ." Additionally, Milton testified that she did not mention Pickette's possession of the gun at the defendant's first trial because "[Pickette had] threatened [her] in the [courthouse] hallway, saying [that] he was going to have someone come beat [her] ass."

The evidentiary issue at the center of the present appeal arises because, although the defendant was permitted to adduce evidence of Pickette's threat to Milton, he was precluded from presenting evidence that she also had been physically assaulted by Pickette's sister two days later, consistent with the threat made by Pickette

[4] Although Milton denied seeing the defendant or anyone else holding a gun, she testified at the first trial that she heard reference to it when the defendant and Lloyd returned to the third floor apartment at 543 Orchard Street following the shooting and the defendant told Amber Torres to "just do something" with the gun. Consistent with her prior statement to the police, Milton testified at the first trial that Pickette never returned to the apartment.

and his compatriot. The state moved to preclude the evidence of the physical assault on the grounds that it was irrelevant, inadmissible hearsay, inadmissible character evidence, and unduly prejudicial. Defense counsel opposed the state's motion, arguing that the physical assault of Milton was "relevant and [went] to [Milton's] motive, interest, [and] bias . . . to lie [at the first trial]."

Milton testified as follows outside the presence of the jury in response to the trial court's request for an offer of proof: Just prior to the defendant's first trial, Milton encountered Pickette and a female witness in the hallway of the courthouse. An argument ensued, during which Pickette called Milton a "snitch" and said that "they were going to whip [her ass]" if she testified. The female witness said to Pickette, "don't argue with [Milton], you have a sister named Ash Black . . . ." Two days later, Pickette's sister, Ashley Black, and two other individuals "jumped" and "beat on" Milton in the Fair Haven section of New Haven. During the assault, Milton's assailants told her that she "should mind [her own] business" and mentioned "something about [Pickette] . . . ." Both events occurred days before Milton was called to testify at the defendant's first trial.

Following the offer of proof, the trial court ruled that Pickette's threats to Milton in the courthouse were relevant and admissible, but the physical assault of Milton in Fair Haven was not. The trial court reasoned that Pickette was involved in the argument but was not involved in the assault and that the connection between Milton's trial testimony and the assault was "far too speculative. . . . The witness . . . Milton, just indicated that one of these individuals said to her, 'mind your own business.' Nothing that's attributed to this case. That could be mind your own business concerning a domestic with [a] boyfriend, [a] girlfriend. Far too speculative, so it's not relevant evidence for this jury

to hear." As a result, the defendant was prohibited at his second trial from rehabilitating Milton's credibility and bolstering his third-party culpability defense by presenting evidence that Milton had been assaulted by Pickette's sister shortly before Milton testified at the defendant's first trial.

The defendant claims on appeal that the trial court improperly excluded evidence of the assault because it was "relevant and material to the defendant's third-party culpability [defense] that Pickette was the shooter," as well as to Milton's "motive not to implicate Pickette during the defendant's first . . . trial and . . . to rehabilitate her credibility at the defendant's second trial, and explain why she did not previously implicate Pickette." The defendant further contends that the evidentiary error was harmful because Milton's testimony was the "strongest evidence in support of his third-party culpability claim." I agree.

The trial court indisputably has wide discretion to determine the relevancy of evidence, and, under the abuse of discretion standard, every reasonable presumption must be made in favor of upholding the court's ruling. See, e.g., *State* v. *Best*, 337 Conn. 312, 318, 253 A.3d 458 (2020). That said, it is axiomatic that relevant evidence is admissible unless "otherwise provided by the constitution of the United States, the constitution of the state of Connecticut, the [Connecticut] Code [of Evidence], the General Statutes or the common law." Conn. Code Evid. § 4-2. This rule reflects a cornerstone principle of evidence law.[5]

[5] See, e.g., *Curtis* v. *Bradley*, 65 Conn. 99, 109, 31 A. 591 (1894) ("[b]eing relevant, [the evidence] must be admitted, unless excluded under some legal principle, or rule of public policy, which forbids the admission of certain classes of evidence, no matter how relevant and material"); see also E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 4.1.4, pp. 145–46.

"Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . Evidence is relevant if it tends to make the existence or nonexistence of any other fact more probable or less probable than it would be without such evidence." (Internal quotation marks omitted.) *State* v. *Best*, supra, 337 Conn. 317; see Conn. Code Evid. § 4-1. To be relevant, evidence need not be conclusive or even compelling. See, e.g., E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 4.1.4, p. 146 ("[a] party is not required to offer such proof of a fact that it excludes all other hypotheses"). "All that is required is that the evidence tend to support a relevant fact even to a slight degree, so long as it is not prejudicial or merely cumulative." (Internal quotation marks omitted.) *State* v. *Wilson*, 308 Conn. 412, 429, 64 A.3d 91 (2013).

It is well established that third-party culpability evidence is relevant if there is "a direct connection between a third party and the charged offense . . . ." (Internal quotation marks omitted.) *State* v. *Baltas*, 311 Conn. 786, 810, 91 A.3d 384 (2014). "Evidence that would raise only a bare suspicion that a third party, rather than the defendant, committed the charged offense would not be relevant to the jury's determination." (Internal quotation marks omitted.) Id., 811. In the present case, it is undisputed that there was a direct connection between Pickette and the charged crimes in light of Milton's testimony that Pickette ran by 543 Orchard Street and tossed Lloyd the gun used to murder the victim. Indeed, the defense theory was sufficiently strong that the trial court instructed the jury regarding the defendant's claim that a "third party . . . Pickette, may be responsible for the crimes the defendant is charged with committing . . . ."[6] See, e.g., *State* v.

[6] The trial court instructed the jury: "There has been evidence that a third party, not the defendant, committed the crimes for which the defendant is charged. This evidence is not intended to prove the guilt of the third party

Arroyo, 284 Conn. 597, 610, 935 A.2d 975 (2007) (holding that defendant was entitled to third-party culpability instruction only "if the evidence pointing to a third party's culpability, taken together and considered in the light most favorable to the defendant, establishes a direct connection between the third party and the charged offense, rather than merely raising a bare suspicion that another could have committed the crime").

The direct connection between Pickette and the charged crimes does not resolve the evidentiary issue, however, because "[t]he general rule is that threats [or assaults] against witnesses are not relevant and are thus inadmissible as evidence . . . ."[7] *State* v. *Walker*, 214 Conn. 122, 129, 571 A.2d 686 (1990). *Walker* also delineated two exceptions to this general rule. See id., 129–30. First, evidence of threats or assaults against a witness is relevant and admissible if the defendant is linked in some way to the making of the threats or assaults. "[E]vidence of threats [or assaults] against witnesses is generally admissible either on the theory that such conduct is inconsistent with the defendant's claim of innocence or on the theory that the making of such threats [or assaults] evinces a consciousness of guilt. . . . Obviously, if the threats [or assaults] cannot be linked to the defendant, evidence of such [conduct] directed toward a witness would be of no probative

but is part of the total evidence for you to consider. The burden remains on the state to prove each and every element of the offense beyond a reasonable doubt. It is up to you and to you alone to determine whether any of this evidence, if believed, tends to directly connect a third party to the crimes with which the defendant is charged. If, after a full and fair consideration and comparison of all the evidence, you have left in your mind reasonable doubt indicating that the alleged third party . . . Pickette, may be responsible for the crimes the defendant is charged with committing, then it would be your duty to render a verdict of not guilty as to the [defendant]."

[7] Although *Walker* involved verbal threats against a witness rather than a physical assault, the parties do not dispute that the principles elucidated in *Walker* are applicable to this case.

value for those purposes." (Citations omitted.) Id., 129. Second, such evidence is relevant and admissible, regardless of the connection to the defendant, to explain a witness' prior inconsistent statements and to rehabilitate the witness' credibility. "A witness who has been impeached by the admission of a prior inconsistent statement is generally entitled to explain such contradictory statement. . . . Pursuant to the rule permitting explanations of prior inconsistent statements, it is generally held that evidence of threats [or assaults] to a witness or fear on the part of a witness, in order to explain an inconsistency, is admissible in criminal cases for credibility rehabilitation purposes even if the [conduct] or fear [has] not been linked to the defendant [or the allegedly culpable third party]." (Citations omitted; internal quotation marks omitted.) Id., 130.

Both *Walker* exceptions apply in the present case. *Walker* articulated the first exception in the context of threats against a witness allegedly attributable to the defendant in that case; see id., 128, 131; but it applies equally when the threats or assaults are allegedly attributable to an individual who is the subject of a defendant's third-party culpability defense. Thus, once it has been established that there is a direct connection between the allegedly culpable third party and the crimes charged and that there is a link between the allegedly culpable third party and the threats or assaults on a witness, such evidence is relevant to a defendant's third-party culpability defense.

The evidence was more than sufficient to establish a clear link between Pickette and the assault. The record reflects that, prior to the defendant's first trial, while Milton was waiting in the courthouse hallway in connection with the present case, Pickette called her a "snitch," and he and another witness threatened "to whip [her ass]" if she testified. The other witness told Pickette not to "argue with [Milton]" because he has "a sister

named Ash Black . . . .” Two days later, Milton was assaulted by three individuals, one of whom was Pickette’s sister, Ashley Black. During the assault, Milton’s assailants told her to “mind [her own] business” and mentioned “something about [Pickette] . . . .” Given the temporal proximity between the threats and the assault, and the facts that Pickette’s sister was one of the assailants and that Pickette was mentioned during the assault, it is entirely reasonable for the defendant to posit to the jury the inference that Pickette carried out his threat “to whip [Milton’s ass]” by sending his sister to assault Milton prior to her testimony at the defendant’s first trial. See, e.g., *State* v. *Robertson*, 254 Conn. 739, 756–57, 760 A.2d 82 (2000) (evidence was sufficient to link defendant to threats against witness because defendant stated in recorded conversation that “someone ‘need[s]’ to talk to [the witness who was threatened] ‘some more’ ”); *State* v. *Taft*, 25 Conn. App. 578, 584–85, 595 A.2d 918 (evidence was sufficient to link defendant to threats against witness because, one day before trial, witness was approached by two men who shoved him “against his car and said, ‘we have a message from [the defendant], don’t show up tomorrow’ ”), cert. denied, 220 Conn. 921, 598 A.2d 144 (1991). Far from being speculative, Pickette’s connection to the assault seems likely on this record. Accordingly, the assault of Milton was relevant and admissible to demonstrate Pickette’s culpability in the commission of the charged crimes and his consciousness of guilt.

Even in the absence of a link between Pickette and the assault, the evidence also was admissible under the second exception set forth in *Walker* because it was relevant to explain Milton’s prior inconsistent statement and to rehabilitate her credibility. See *State* v. *Walker*, supra, 214 Conn. 130. The fact that Milton was assaulted by Pickette’s sister just days before Milton’s testimony at the defendant’s first trial was probative of Milton’s

state of mind at the time she testified at that trial. This evidence supports a reasonable inference that Milton had a motive to avoid implicating Pickette in the commission of the crimes charged by testifying falsely at the first trial. See, e.g., *State* v. *Alvarez*, 216 Conn. 301, 320, 579 A.2d 515 (1990) (evidence of witness' fear was admissible "to show that [the witness] was afraid and therefore had a motive to testify falsely"); *State* v. *Walker*, supra, 214 Conn. 131 (evidence of threats against witness was admissible and "relevant to show [the witness'] state of mind"); *State* v. *Talton*, 63 Conn. App. 851, 855–57, 779 A.2d 166 (evidence that witness feared retaliation for identifying defendant properly was admitted into evidence to explain witness' prior inconsistent statement and to rehabilitate witness' credibility), cert. denied, 258 Conn. 907, 782 A.2d 1250 (2001). For the same reason, evidence of the assault was relevant and admissible to rehabilitate Milton's inconsistent testimony during the second trial that it was Pickette, rather than the defendant, who possessed the murder weapon after the shooting. The defendant was entitled to argue that her testimony changed because the fear caused by the assault prior to the first trial had dissipated by the time of the second trial, and, accordingly, contrary to the state's contention, her testimony at the second trial was more credible. I therefore conclude that the trial court abused its discretion in excluding evidence of the assault.

I disagree with the majority that the error was harmless because, in my view, the defendant has met his burden of demonstrating harm.[8] See part I B of the majority opinion. "[W]hether [an improper ruling] is harmless in a particular case depends [on] a number

[8] Because the defendant has fulfilled his burden of demonstrating harm, I see no need to address whether the evidentiary error rose to the level of a constitutional violation. Accordingly, I express no opinion on the conclusions reached in part I A of the majority opinion.

of factors, such as the importance of the witness' testimony in the [defendant'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. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error. . . . Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) *State* v. *Fernando V.*, 331 Conn. 201, 215, 202 A.3d 350 (2019). Although the question is a close one, after considering the foregoing factors and the trial as a whole, I am persuaded that the evidentiary error affected the jury's verdict on this record.

Milton's testimony was essential to the defendant's third-party culpability defense that it was Pickette who murdered the victim and brought the gun back to 543 Orchard Street. As I previously explained, the central issue in the case was the identity of the perpetrator; Milton's testimony, which placed the murder weapon in Pickette's hands immediately after the shooting, was persuasive evidence of Pickette's guilt, and she was the only witness who connected the gun to Pickette. Milton was thus a critical witness in support of the defendant's third-party culpability defense, and her credibility and motive to testify falsely at the defendant's first trial were crucial issues to be resolved by the jury. The fact that Milton had been physically assaulted by Pickette's sister just days before she testified at the defendant's first trial, consistent with Pickette's earlier threat "to whip [her ass]" if she testified, would have illustrated

to the jury the extent of Milton's motive to testify falsely at the first trial to avoid implicating Pickette. Because this evidence was vital to the jury's assessment of Milton's credibility, the defendant's third-party culpability defense, and the pivotal issue of identity, I believe that its improper exclusion was harmful.[9] See, e.g., *State* v. *Fernando V.*, supra, 331 Conn. 223–24 ("[when] credibility is an issue and, thus, the jury's assessment of who is telling the truth is critical, an error affecting the jury's ability to assess a [witness'] credibility is not harmless error" (internal quotation marks omitted)); *State* v. *Cerreta*, 260 Conn. 251, 265, 796 A.2d 1176 (2002) (improper exclusion of third-party hair and fingerprint evidence was not harmless because it "would have given cre-

[9] The majority suggests that the exclusion of the assault of Milton was harmless because "it is just as plausible that Pickette was trying to prevent Milton from implicating the defendant," and, therefore, Pickette's threatening and assaultive conduct may have been intended to protect the defendant, rather than Pickette himself. Footnote 8 of the majority opinion. The state does not rely on the explanation now offered by the majority, and for good reason. On the night of the shooting, Pickette exculpated himself in the charged crimes by telling the police that the defendant had shot the victim, and, therefore, I find Pickette's alleged charitable motive to be dubious at best.

To support its plausibility argument, the majority relies on Pickette's testimony at the defendant's first and second trials, in which Pickette declined to identify the defendant as the shooter, as well as Milton's testimony during the offer of proof that, when she was threatened in the courthouse hallway, "she viewed herself as being in 'the same predicament' as Pickette, namely, being called to testify against the defendant." Footnote 8 of the majority opinion. The majority's reliance on Pickette's testimony at the defendant's first trial and Milton's testimony during the offer of proof (which occurred outside the presence of the jury) is misplaced because this testimony was not admitted into evidence for the jury's consideration. In conducting a harmless error analysis, "we must examine the impact of the . . . [excluded] evidence on *the trier of fact and the result of the trial*"; (emphasis added; internal quotation marks omitted) *State* v. *Fernando V.*, supra, 331 Conn. 215; in light of the evidence properly before the jury. See *State* v. *Thompson*, 305 Conn. 806, 823 n.16, 48 A.3d 640 (2012) ("[harmless error] review must be confined to the record"). The jury was unaware of Pickette's testimony at the defendant's first trial or Milton's testimony during the offer of proof, and I fail to see how the jury could have drawn any inferences, plausible or otherwise, on the basis of testimony it never heard.

dence to the defendant's claim of innocence"); *State* v. *Colton*, 227 Conn. 231, 254, 630 A.2d 577 (1993) ("[t]he exclusion of evidence bearing on the motivation of a chief witness for the state, particularly when no other evidence corroborated material aspects of the witness' testimony, is harmful error"); *State* v. *Rinaldi*, 220 Conn. 345, 357–58, 599 A.2d 1 (1991) (improper exclusion of evidence central to defendant's defense that he was not source of semen found in sexual assault victim was not harmless error).

The state's case against the defendant was not particularly strong. The eyewitnesses to the murder provided conflicting accounts as to the details surrounding the shooting and the identifying characteristics of the shooter. Lachell Hall, Pickette's aunt,[10] testified that she saw Pickette sitting in the front passenger seat of the victim's vehicle as it drove through the Burger King drive-through lane. Hall saw the car stop and the victim exit the driver's seat, walk around the back of the vehicle, and reach for something inside. She also saw a black man wearing a black or dark colored shirt exit the rear passenger seat on the driver's side of the vehicle. Hall heard three to four gunshots, but she did not see a gun and could not tell from what direction the gunshots were fired. Hall did not see the shooter and could not identify the passenger in the rear of the vehicle.

Teresa Jones also witnessed the shooting. Jones was exiting the supermarket across the street from the Burger King when she saw "some guys standing around a car" talking in the Burger King drive-through lane. One of the men, who was standing near the trunk of the vehicle wearing a "Canadian blue" shirt and blue jeans, pulled out a silver gun and shot into the car

[10] Hall testified that she had known Pickette "[s]ince he was a kid" and that she "claim[s] him as [her] nephew" because her "brother [has] kids with his mother . . . ."

approximately five times. Immediately afterward, the shooter and an individual wearing a red shirt ran in the direction of Orchard Street. When Jones later viewed a photographic array prepared by the police, she was unable to identify the defendant as one of the men involved in the shooting. Jones did identify Pickette, whom she referred to as Freddy Morrison,[11] as one of the men standing around the victim's vehicle prior to the shooting. Jones informed the police that the shooter looked like Freddy Morrison but was not Freddy Morrison.

The testimony of Hall and Jones differed in certain critical respects.[12] According to Hall, someone wearing a black or dark colored shirt exited the rear passenger seat of the victim's vehicle immediately prior to the shooting,[13] but, according to Jones, the shooter was standing outside of the car talking with other individuals immediately prior to the shooting. Hall testified that Pickette was seated in the front passenger seat of the car when the shooting occurred, but Jones testified that he was standing outside of the vehicle. Hall testified that the occupant of the rear passenger seat was wearing a black or dark colored shirt, but Jones testified that the

[11] Pickette testified that his grandfather's last name is Morrison.

[12] A third witness, Dominique Padilla, also testified at the defendant's trial. Padilla did not witness the shooting but testified that she heard three to four gunshots from the direction of Burger King as she was exiting the parking lot of a nearby McDonald's. Afterward, she saw two dark skinned kids run by, one wearing a red shirt and the other a blue shirt. Padilla was unable to identify the defendant, Pickette, or Lloyd as the individuals she saw running away from Burger King that night.

[13] In my view, Hall's testimony about the initial positions of the defendant, Pickette, and Lloyd in the victim's vehicle was not corroborated by footage from a security camera located outside of a nearby CVS Pharmacy. Given the poor quality of the footage and the fact that both the rear driver's side and front passenger's side occupants were wearing dark colored shirts, it is difficult to discern in the footagewhich individual is the defendant and which is Pickette. The most that can be said of the footage is that it supports a reasonable inference that either the defendant or Pickette was seated in the rear passenger seat of the vehicle prior to the victim's murder.

shooter was wearing a Canadian blue shirt. Furthermore, Jones testified that the murder weapon was silver, whereas the undisputed evidence adduced at trial established that the murder weapon was black with a wooden handle. Neither Hall nor Jones was able to identify the defendant as the individual who had shot and killed the victim.

Thus, we have a crime with no direct or uncontroverted evidence to establish the shooter's identity. The defendant's DNA and fingerprints were not found on the gun used to commit the murder, and the video evidence does not show who shot the victim. There were multiple eyewitnesses, but none of them alone provided a comprehensive account of the shooting.[14] None of the eyewitnesses, moreover, testified that the defendant was the perpetrator of the charged crimes. All of the relevant witnesses gave testimony that materially conflicted with either the testimony of another witness or their own prior testimony. And most of the witnesses either had a direct interest in the outcome as potential suspects (Pickette and Lloyd), or were related to the defendant or Pickette. See footnote 2 of this opinion. As a result, this was a case in which every significant piece of evidence relevant to witness credibility, the identity of the shooter, and the defendant's third-party culpability defense was important to the jury's verdict.

[14] The majority states that "it is a rare case in which the jury is provided with direct testimony from a witness who is able to give a comprehensive, detailed account of all of the events surrounding a murder." Footnote 7 of the majority opinion. This observation misses the point. The majority's focus on the importance of the eyewitness testimony and its conclusion that this testimony is more "probative with respect to the identity of the shooter" than Milton's testimony requires a critical assessment of the strength of the state's eyewitness evidence. Part I B of the majority opinion. The present case involved eyewitness testimony that was conflicting and, at times, contradicted by the undisputed evidence in the record. The inconsistent nature of the eyewitness testimony undermines the overall strength of the state's case and casts doubt on the majority's reliance on this selective evidence to conclude that the evidentiary error was harmless.

I do not dispute that the majority pieces together a version of the varying witness accounts to create a sufficient evidentiary basis to support the defendant's conviction, but the legal sufficiency of the evidence is not the issue, and the majority's marshaling of evidence sufficient to support the conviction misapprehends the point of harmless error analysis. "Legal sufficiency of the evidence is not the test for harmless error even if only a nonconstitutional error is involved. The harmlessness of an error depends [on] its impact on the trier and the result"; *State* v. *Bruno*, 197 Conn. 326, 336, 497 A.2d 758 (1985) (*Shea*, *J.*, concurring), cert. denied, 475 U.S. 1119, 106 S. Ct. 1635, 90 L. Ed. 2d 181 (1986); not on whether the evidence, when viewed in the light most favorable to the jury's verdict, was sufficient to support an inference of guilt.

To ascertain the impact that the excluded evidence would have had on the jury, it is important to focus on the quality of the state's evidence. Although there was significant testimony from multiple sources implicating the defendant, the persuasive force of every inculpatory statement was weakened by a countervailing, contradictory, or conflicting statement, usually from the same witness. For example, during Pickette's and Lloyd's testimony at the defendant's trial, neither implicated the defendant in the commission of the charged crimes, although they previously had identified him as the shooter.[15] Similarly, the defendant's sister, Amber Tor-

[15] Pickette testified that he did not see a gun, did not see the defendant get out of the vehicle, and did not see who shot the victim. Pickette's prior inconsistent statement to the police that the defendant exited the vehicle and shot the victim with a black gun was admitted into evidence under *State* v. *Whelan*, supra, 200 Conn. 753.

Lloyd testified that he did not remember the murder because it was years ago and he was on drugs at the time. Lloyd's prior inconsistent statement to the police, in which he informed the police that the defendant had a gun, had exited the vehicle after the victim got out, and later had given the gun to Amber Torres after they fled to Orchard Street, was admitted into evidence under *Whelan*.

res, testified that she was unable to remember anything about the day of the murder, but her prior inconsistent statement that she found a gun in the apartment after the shooting was admitted into evidence under *Whelan*.[16] The case against the defendant was built on a patchwork of facts and inferences derived from the inconsistent testimony of numerous witnesses; no single piece of evidence carried dispositive force, and the addition of Milton's excluded testimony to the mosaic may well have substantially swayed the jury's verdict.

Lastly, the fact that Milton failed to implicate Pickette in her initial statements to the police in no way renders the evidentiary error harmless. Milton, like many witnesses, including Pickette, Lloyd, and Amber Torres,[17] gave in-court testimony that differed significantly from a prior recitation of events. She candidly acknowledged that she lied to the police in 2012, but testified that she did so because she was young, "high," "nervous," and felt "pressured by the cops . . . ." It was up to the jury to sift through these shifting narratives and to decide what portion, if any, of these witnesses' testimony and prior statements were worthy of belief. To perform the essential function of assessing the believability of Milton's testimony, on which the defendant's third-party culpability defense largely depended, the jury needed all of the information pertinent to Milton's credibility, including evidence of Milton's assault prior to the defendant's first jury trial. See *State* v. *Fernando V.*, supra, 331 Conn. 223 ("[i]t cannot be harmless error to remove from the fact finder the very tools by which to make a credibility determination" (internal quotation marks omitted)); see also *State* v. *Morgan*, 274 Conn. 790, 800, 877 A.2d 739 (2005) ("because the jury has the

[16] Amber Torres informed the police that, after the shooting, she found a gun lying on the couch in the back bedroom of the third floor apartment and that she used a washcloth to move the gun to a black bag.

[17] See footnotes 15 and 16 of this opinion.

opportunity to observe the conduct, demeanor and attitude of the witnesses and to gauge their credibility, [i]t is axiomatic that evidentiary inconsistencies are for the jury to resolve, and it is within the province of the jury to believe all or only part of a witness' testimony'' (internal quotation marks omitted)).

In light of the conflicting and contradictory statements by the state's witnesses and the lack of physical evidence, I conclude that the improper exclusion of evidence of Milton's assault was harmful to the defendant's third-party culpability defense and that a new trial is required. Accordingly, I dissent.

STATE OF CONNECTICUT *v.* NUELITO MOREL-VARGAS (SC 20572)

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

Syllabus

Convicted of the crime of sexual assault in the first degree, the defendant appealed. The defendant, a non-English speaker who required the use of an interpreter, did not testify in his own defense at trial. The prosecutor, before deciding whether to rest the state's case, indicated that she would proceed directly to closing argument if the defense was not going to introduce any evidence. Defense counsel replied that he had had extensive conversations with the defendant regarding his decision whether to testify and that it was unlikely that the defense would introduce evidence, but that he would like to confer with the defendant one more time. The court granted a short recess to allow defense counsel the opportunity to confer with the defendant. Thereafter, defense counsel informed the trial court that the defendant would not testify, and the defendant did not express any disagreement or concern in response to counsel's representation. Although the trial court inquired of defense counsel whether it should conduct a canvass, defense counsel replied, "I think we're all right." After the jury returned to the courtroom, defense counsel again indicated that the defense would "rest on the state's case," and the defendant remained silent. On appeal, the defendant claimed, inter alia, that, as a matter of constitutional law, a criminal defendant personally must inform the trial court, either orally or in writing, that he is waiving his right to testify, that counsel's in-court representation

that the defendant waived his right to testify was invalid and, therefore, that his conviction must be reversed. *Held*:

1. The defendant could not prevail on his unpreserved claim that his conviction must be reversed on the ground that he did not affirmatively inform the trial court that he was waiving his right to testify, this court having concluded that a trial court is not constitutionally required to obtain such an on-the-record waiver from the defendant, himself: this court concluded, consistent with the majority of courts that have ruled on the issue, that the right to testify is a personal constitutional right that can be waived only by the defendant, rather than a tactical right that defense counsel may waive on a criminal defendant's behalf as a matter of trial strategy; nevertheless, the right to testify is not among the personal constitutional rights that require an affirmative waiver on the record by the criminal defendant, himself, as the majority of courts have concluded that a criminal defendant's waiver of that right may be inferred from the defendant's act of not taking the stand or from defense counsel's in-court representation that the defendant has elected not to testify combined with the defendant's coincident silence, and, in the absence of evidence of a problem in the attorney-client relationship, the representation by defense counsel that a defendant is waiving his right to testify, together with the defendant's silence at the time of counsel's in-court representation, satisfies the constitutional requirement of a knowing, intelligent and voluntary waiver; moreover, courts have declined to create a per se canvass requirement on the ground that a colloquy with a judge regarding the right to testify may, in some circumstances, run the risk of improperly influencing a criminal defendant's decision not to testify; furthermore, the defendant could not prevail on his claim that this court's decision in *State* v. *Gore* (288 Conn. 770), which held that the right to a jury trial is a personal constitutional right that a criminal defendant must personally waive, required a contrary conclusion, as this court had held in other cases prior to *Gore* that the waiver of the right to self-representation and the right against self-incrimination, both personal constitutional rights, could be effectuated in the absence of an affirmative, on-the-record indication from the defendant, himself, and nothing in *Gore* suggested that its holding was applicable to all personal constitutional rights.

2. In the exercise of its supervisory authority over the administration of justice, this court required, in future cases, that a trial court presiding over a criminal trial either canvass the defendant prior to the waiver of his right to testify in order to ensure that the waiver is made knowingly, intelligently and voluntarily, or, alternatively, inquire of defense counsel directly to determine whether counsel has adequately advised the defendant regarding the waiver of his right to testify, but only when defense counsel advises the trial court that counsel believes that a direct canvass carries the risk of inadvertently interfering with a decision made by the

defendant after extensive conversations with counsel regarding trial strategy.

3. This court declined to review the defendant's unpreserved claim that the prosecutor had committed improprieties during her direct examination of the victim by virtue of her allegedly excessive use of leading questions, in violation of the defendant's right to a fair trial, as the defendant's challenge to the prosecutor's use of leading questions was purely evidentiary in nature rather than a constitutional claim that, even though unpreserved, could be reviewed on appeal under this court's decisions in *State* v. *Williams* (204 Conn. 523) and *State* v. *Warholic* (278 Conn. 354).

Argued October 22, 2021—officially released May 10, 2022

Procedural History

Substitute information charging the defendant with the crime of sexual assault in the first degree, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Kavanewsky*, *J.*; verdict and judgment of guilty, from which the defendant appealed. *Affirmed.*

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

James M. Ralls, assistant state's attorney, with whom, on the brief, were *Joseph T. Corradino*, state's attorney, and *Pamela Esposito*, assistant state's attorney, for the appellee (state).

Opinion

McDONALD, J. In this appeal, we must decide which procedures are required for a defendant to validly waive his right to testify on his own behalf at or during a criminal trial. The defendant, Nuelito Morel-Vargas, appeals from the judgment of conviction, rendered after a jury trial, of one count of sexual assault in the first degree. On appeal, the defendant, who did not testify at trial, challenges defense counsel's purported waiver of his right to testify. Specifically, the defendant con-

tends that defense counsel's representation on the record, in the presence of a defendant, that the defendant has waived his right to testify, together with the defendant's coincident silence, is insufficient to constitute a waiver of that right. We disagree with the defendant and conclude that the constitution does not require that a defendant, himself, personally assert the waiver of his right to testify on the record. Nevertheless, we acknowledge that an on-the-record canvass of a defendant is the best practice to ensure that the defendant's waiver of his constitutional right to testify is made knowingly, intelligently and voluntarily. Therefore, we exercise our supervisory authority to require, prospectively, that a trial court either canvass the defendant or, in certain circumstances, inquire of defense counsel directly to determine whether counsel properly advised the defendant regarding the waiver of his right to testify.

The jury reasonably could have found the following facts. In 2015, the defendant was charged with sexual assault in the first degree. The charges stemmed from a sexual assault that occurred after the defendant drove the victim, S,[1] home from a friend's party.

At trial, the defendant, a non-English speaker who required the use of an interpreter, did not testify in his own defense. As the prosecutor was deciding whether she would rest the state's case-in-chief, she indicated that, "if the defense [was] not going to put on evidence," she would proceed directly to closing argument. Defense counsel replied that it was unlikely that the defense would introduce evidence but requested "one last opportunity to briefly discuss with [his] client his decision to testify or not." Counsel further indicated: "We had extensive conversations about [the defendant's

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

decision whether to testify] already, and I think we settled on a decision. But I just—after—we're at the point where he's now seen everything, and I just want to make sure that that is still where he's at." The court, while remaining on the bench, allowed a recess for defense counsel to confer with the defendant.

After the court returned from the recess, defense counsel informed the court, "I've had an opportunity to confer with my client, Your Honor, thank you; and he's not going to testify." The court responded, "[o]kay. Do you wish me to canvass in that regard, or are you all right?" Defense counsel replied, "I think we're all right." Thereafter, the state rested its case. The trial court then asked defense counsel whether the defense would present any evidence, and defense counsel indicated that the defense would "rest on the state's case." Subsequently, the jury found the defendant guilty, and he was sentenced to fifteen years of incarceration, execution suspended after eight years, followed by ten years of probation and registration on the sex offender registry for life. The defendant appealed to the Appellate Court from the trial court's judgment, and the appeal was transferred to this court.

The defendant raises two claims on appeal. First, he claims that the constitution[2] requires that the defendant, himself, affirmatively inform the trial court, either orally or in writing, that he is waiving his right to testify. As a result, the defendant contends, his counsel's in-court representation that the defendant waived his right to

[2] The defendant refers to the right to testify afforded by the federal and state constitutions in general only. Because the defendant has not provided a separate analysis of the right to testify under our state constitution, and he has not claimed that the state provisions provide greater protection than their federal counterparts, for purposes of this appeal, we treat the right to testify arising from the state and federal constitutions as coextensive. See, e.g., *State* v. *Gore*, 288 Conn. 770, 776 n.7, 955 A.2d 1 (2008) (applying this analysis to right to jury trial); *State* v. *Velasco*, 253 Conn. 210, 237 n.19, 751 A.2d 800 (2000) (applying this analysis to right to impartial jury).

testify was invalid, and his conviction must be reversed. Although, in the defendant's view, the constitution requires an affirmative indication of the waiver of the right to testify on the record from the defendant personally, the defendant concedes that the constitution does not mandate the form that this particular waiver must take. Accordingly, the defendant requests that, consistent with the approach we took in *State* v. *Gore*, 288 Conn. 770, 786–90, 955 A.2d 1 (2008), we exercise our supervisory authority to create a procedural rule that would require trial courts to canvass defendants to ensure that the waiver of their right to testify is made knowingly, intelligently and voluntarily. Second, as a separate ground for reversing his conviction, the defendant argues that he was deprived of a fair trial due to certain instances of prosecutorial impropriety based on the prosecutor's excessive use of leading questions during her direct examination of S.

We conclude that defense counsel's in-court representation that the defendant waived his right to testify, together with the defendant's coincident silence, satisfied the constitutional requirement for a valid waiver. Nevertheless, because we recognize that an on-the-record canvass is the best practice, we exercise our supervisory authority over the administration of justice to require, prospectively, that a trial court, when presiding over a criminal trial, either canvass the defendant or, in certain circumstances, inquire of defense counsel whether counsel adequately advised the defendant regarding the waiver of his right to testify. Finally, we conclude that the defendant's claim alleging prosecutorial impropriety is unreviewable.

I

A

The defendant first contends that his conviction must be reversed because the trial court did not obtain an

affirmative indication on the record from the defendant, himself, that he had personally waived his right to testify on his own behalf, as required by the federal and state constitutions. The defendant does not contend that he was unaware of his right to testify, that he intended to testify at trial, or that his counsel prohibited him from testifying. Instead, he argues that the trial court's failure to obtain an on-the-record waiver from the defendant himself merits reversal. The state argues that, although the right to testify is a personal constitutional right, it does not follow that, to effectively waive that right, the defendant himself must affirmatively articulate his waiver on the record. According to the state, although certain personal constitutional rights must be waived by a defendant on the record, the waiver of other personal constitutional rights—including the right to testify—can be accomplished through other means.

We begin with the standard of review and relevant legal principles. The defendant did not raise this claim at trial and seeks review pursuant to *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). Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 239–40; see *In re Yasiel R.*, supra, 781 (modifying third prong of *Golding*). Because the record is adequate for review, and the defendant's claim, which alleges a violation of his funda-

mental right to testify, is of constitutional magnitude; see, e.g., *Rock* v. *Arkansas*, 483 U.S. 44, 51, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987); our inquiry focuses on whether the violation alleged by the defendant exists.

In *Rock* v. *Arkansas*, supra, 483 U.S. 44, the United States Supreme Court held that there is a constitutional right to testify in one's own defense. Id., 51. We must now address significant questions concerning this right left unanswered by *Rock*. First, we must determine whether the right to testify is a tactical right, which defense counsel may waive on the defendant's behalf as a matter of trial strategy—an affirmative determination of which would end our inquiry; see, e.g., *State* v. *Culbreath*, 340 Conn. 167, 179, 263 A.3d 350 (2021) ("defense counsel may waive certain tactical trial rights that are not personal to the defendant . . . as part of trial strategy" (internal quotation marks omitted))—or a personal constitutional right, which can be waived by the defendant alone. Second, if the right to testify in one's own defense is a personal constitutional right, we must decide what is constitutionally required to demonstrate that a criminal defendant, himself, knowingly, intelligently and voluntarily waived that right. Specifically, we must determine whether the record must contain some affirmative indication from a defendant, himself, that the defendant is waiving his right to testify, or, alternatively, whether defense counsel's in-court expression of the waiver on the defendant's behalf, combined with the defendant's silence while counsel makes this representation, may constitute a knowing, intelligent and voluntary waiver. We undertake these inquiries in turn.

We note initially that "[w]hat suffices for waiver depends on the nature of the right at issue. [W]hether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly

informed or voluntary, all depend on the right at stake. . . . For certain fundamental rights, the defendant must personally make an informed waiver. . . . For other rights, however, waiver may be effected by action of counsel." (Citations omitted; internal quotation marks omitted.) *New York* v. *Hill*, 528 U.S. 110, 114, 120 S. Ct. 659, 145 L. Ed. 2d 560 (2000). Included in the former category of rights are decisions personal to a criminal defendant—namely, decisions that affect personal constitutional rights—such as the decision of whether to enter a guilty plea, waive a jury trial, and pursue an appeal. See *State* v. *Gore*, supra, 288 Conn. 779 n.9. Included in the latter category are tactical rights, which primarily involve trial strategy and tactics, such as "the statutory protection of a probable cause hearing . . . the right to call witnesses . . . and the composition of a jury charge." (Citations omitted.) Id.[3]

Although this court previously has recognized the tactical versus personal rights distinction in other contexts; see, e.g., id., 778–81; *State* v. *Gibbs*, 254 Conn. 578, 610–11, 758 A.2d 327 (2000); it has never affirmatively analyzed whether a criminal defendant's right to testify is a tactical or personal right. A review of our jurisprudence in this area, however, reveals that this court has considered the right to testify as belonging to the defendant. See *State* v. *Jan G.*, 329 Conn. 465, 474, 186 A.3d 1132 (2018) ("[t]he defendant's right to testify . . .

[3] The distinction between personal constitutional rights and tactical rights is largely premised on promoting expeditious litigation. "Tactical decisions appropriately may be waived by counsel acting alone because [t]he adversary process could not function effectively if every tactical decision required client approval. . . . [G]iving the attorney control of trial management matters is a practical necessity. . . . Numerous choices affecting conduct of the trial, including the objections to make, the witnesses to call, and the arguments to advance, depend . . . [on] tactical considerations of the moment and the larger strategic plan for the trial. . . . To hold that every instance of waiver requires the personal consent of the client himself or herself would be impractical." (Citation omitted; internal quotation marks omitted.) *State* v. *Gore*, supra, 288 Conn. 779 n.10.

cannot be waived by counsel" (internal quotation marks omitted)). After considering the tactical versus personal rights distinction in the present case, consistent with the vast majority of other state and federal courts that have addressed this question, we conclude, and the parties agree, that a defendant's right to testify is a personal constitutional right that can be waived only by the defendant. See, e.g., *Brown* v. *Artuz*, 124 F.3d 73, 77 (2d Cir. 1997) ("every [federal court of appeals] that has considered this question has placed the defendant's right to testify in the 'personal rights' category—i.e., waivable only by the defendant himself regardless of tactical considerations"), cert. denied, 522 U.S. 1128, 118 S. Ct. 1077, 140 L. Ed. 2d 135 (1998); see also, e.g., id. (citing cases); *Boyd* v. *United States*, 586 A.2d 670, 674 (D.C. 1991) (citing cases).

We reach this conclusion for two reasons. First, although the United States Supreme Court in *Rock* did not explicitly classify the right to testify in one's own defense as a personal constitutional right, the court did compare a criminal defendant's right to testify with the right of self-representation and described the defendant's right to testify as "[*e*]*ven more fundamental to a personal defense* than the right of self-representation . . . ." (Citation omitted; emphasis added.) *Rock* v. *Arkansas*, supra, 483 U.S. 52. The court's designation of the right to testify in one's own defense as "more fundamental" than the right to self-representation—which the court deemed a personal constitutional right in *Faretta* v. *California*, 422 U.S. 806, 819–20, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)—logically implies that the decision of whether to testify is also personal to the defendant. Second, in *Rock*, the Supreme Court noted that a criminal defendant's right to testify is "a necessary corollary to the [f]ifth [a]mendment's guarantee against compelled testimony. . . . Every criminal defendant is privileged to testify in his own defense, or

to refuse to do so." (Citation omitted; internal quotation marks omitted.) *Rock* v. *Arkansas*, supra, 52–53. Indeed, "[a] criminal defendant clearly cannot be compelled to testify by defense counsel who believes it would be in the defendant's best interest to take the stand. It is only logical, as the Supreme Court has recognized, that the reverse also be true: A criminal defendant cannot be compelled to remain silent by defense counsel." *United States* v. *Teague*, 953 F.2d 1525, 1532 (11th Cir.), cert. denied, 506 U.S. 842, 113 S. Ct. 127, 121 L. Ed. 2d 82 (1992).

We pause to explain one fleeting reference in *State* v. *Paradise*, 213 Conn. 388, 567 A.2d 1221 (1990), overruled in part on other grounds by *State* v. *Skakel*, 276 Conn. 633, 888 A.2d 985, cert. denied, 549 U.S. 1030, 127 S. Ct. 578, 166 L. Ed. 2d 428 (2006), that could be misunderstood to suggest that the right to testify in one's own defense is a tactical right. In *Paradise*, this court held that a trial judge does not have an affirmative duty to canvass a criminal defendant regarding the waiver of the defendant's right to testify. See id., 404–405. In our summary analysis of the issue, we did not explicitly apply the distinction between personal and tactical rights. The following language is included in our analysis: " '[Although] the due process clause of the [f]ifth [a]mendment may be understood to grant the accused the right to testify, the "if" and "when" of whether the accused will testify is primarily a matter of trial strategy to be decided between the defendant and his attorney.' " Id., 405, quoting *United States* v. *Systems Architects, Inc.*, 757 F.2d 373, 375 (1st Cir.), cert. denied, 474 U.S. 847, 106 S. Ct. 139, 88 L. Ed. 2d 115 (1985). It is clear to us that the court's recognition that the "if" and "when" of whether the accused will testify is primarily a matter of trial strategy does not establish that the court in *Paradise* considered the right to testify in one's own defense to be a tactical right.

Rather, the reference merely reflects the court's uncontroversial acknowledgment that the decision of whether to testify—although ultimately the defendant's choice—is a strategic decision, involving consultation between the defendant and his counsel. Indeed, a personal constitutional right can still be exercised strategically. See, e.g., *Brooks* v. *Tennessee*, 406 U.S. 605, 612, 92 S. Ct. 1891, 32 L. Ed. 2d 358 (1972) ("[w]hether the defendant is to testify is an important tactical decision as well as a matter of constitutional right"); *United States* v. *Teague*, supra, 953 F.2d 1532 (holding that right to testify "is personal to the defendant and cannot be waived either by the trial court or by defense counsel," and also acknowledging that "[t]he decision whether a criminal defendant should take the witness stand in his own trial unquestionably has tremendous strategic importance").[4]

Having concluded that the right to testify in one's own defense is a personal constitutional right, we must next determine whether the constitution mandates the form the waiver of that right must take. The defendant

[4] Indeed, there are indications in our decision in *Paradise* that the court recognized that the right to testify is a personal constitutional right. In support of our determination that federal law does not require that a trial judge canvass a criminal defendant to ensure that he validly waived his right to testify, we cited cases recognizing that, notwithstanding the conclusion that a trial court is not required to canvass a defendant regarding the waiver of his right to testify, only a defendant can waive this right. See *State* v. *Paradise*, supra, 213 Conn. 405; see also, e.g., *Siciliano* v. *Vose*, 834 F.2d 29, 30 (1st Cir. 1987) (declining to require trial court to follow specific procedure explicitly canvassing defendant on right to testify, as trial court "could inappropriately influence *the defendant* to waive *his* constitutional right not to testify" (emphasis altered)); *United States* v. *Bernloehr*, 833 F.2d 749, 751 (8th Cir. 1987) ("[b]ecause the right to testify is a fundamental constitutional guarantee, only the defendant is empowered to waive the right"); *United States* v. *Janoe*, 720 F.2d 1156, 1161 n.10 (10th Cir. 1983) ("[t]he decisions which are to be made *by the accused* after full consultation with counsel are . . . [1] what pleas to enter . . . [2] whether to waive jury trial . . . and . . . [3] *whether to testify in his or her own behalf*" (emphasis altered; internal quotation marks omitted)), cert. denied, 465 U.S. 1036, 104 S. Ct. 1310, 79 L. Ed. 2d 707 (1984).

argues that defense counsel's in-court expression of the waiver on a defendant's behalf, combined with the defendant's silence while counsel makes this representation, is insufficient to constitute a knowing, intelligent and voluntary personal waiver. The defendant contends that the constitution requires that a criminal defendant, himself, affirmatively inform the trial court, either orally or in writing, of his decision to waive his right to testify. Specifically, the defendant asks this court, as a constitutional minimum, to adopt the "colloquy approach," as described in *Boyd* v. *United States*, supra, 586 A.2d 675–76, which would require a trial court to engage in a brief, on-the-record colloquy with the defendant to ensure that he has knowingly waived his right to testify.[5] The state disagrees and argues that, although the right to testify in one's own defense is a personal constitutional right, not all personal constitutional rights require affirmative waivers by a defendant, himself, on the record. The state argues that the waiver of the right to testify, like the waiver of the right to silence, to represent oneself at trial, or to take an appeal, does not require an on-the-record indication from a defendant, himself, that he has chosen to waive his right. We agree with the state.

As we have explained, "[i]n general, federal and state constitutional and statutory rights can be waived"; (internal quotation marks omitted) *New Haven* v. *Local 884, Council 4, AFSCME, AFL-CIO*, 237 Conn. 378, 385, 677 A.2d 1350 (1996); and "[t]he mechanism by which

[5] The defendant argues that, in *Paradise*, we implicitly adopted the " 'demand approach,' " as described in *Boyd* v. *United States*, supra, 586 A.2d 676. Under this approach, "a defendant who fails to complain about the right to testify during trial is conclusively presumed to have waived that right." Id. Contrary to the defendant's contention, we have never adopted the waiver approaches described in *Boyd*, and we decline to do so today. Nevertheless, to the extent that this court's decision in *Paradise* left open questions regarding the procedural requirements necessary for a defendant to waive his right to testify, we now clarify those requirements.

a right may be waived . . . varies according to the right at stake." (Internal quotation marks omitted.) *State* v. *Kitchens*, 299 Conn. 447, 467, 10 A.3d 942 (2011). The standard for an effective waiver of a constitutional right related to the procedure for the determination of guilt or innocence, such as the right to testify in one's own defense, "is that it must be knowing and intelligent, as well as voluntary. . . . Relying on the standard articulated in *Johnson* v. *Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938), we have adopted the definition of a valid waiver of a constitutional right as the intentional relinquishment or abandonment of a known right. . . . In determining whether this strict standard has been met, a court must inquire into the totality of the circumstances of each case. . . . When such a claim is first raised on appeal, our focus is on compliance with these constitutional requirements rather than on observance of analogous procedural rules prescribed by statute or by the [rules of practice]. . . . Our task, therefore, is to determine whether the totality of the record furnishes sufficient assurance of a constitutionally valid waiver of the right to [testify]. . . . Our inquiry is dependent [on] the particular facts and circumstances surrounding [each] case, including the background, experience, and conduct of the [defendant]. . . . In examining the record, moreover, we will indulge every reasonable presumption against waiver of fundamental constitutional rights and . . . [will] not presume acquiescence in the loss of fundamental rights. . . . [Id.] In addition, a waiver of a fundamental constitutional right is not to be presumed from a silent record. See *Boykin* v. *Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)." (Citations omitted; internal quotation marks omitted.) *State* v. *Gore*, supra, 288 Conn. 776–77.

In determining the form that the waiver of a criminal defendant's constitutional right to testify must take,

we recognize that, in some areas involving personal constitutional rights, this court has required an affirmative waiver by the defendant, himself, on the record, following a trial court's inquiry. See, e.g., *State* v. *Braswell*, 318 Conn. 815, 828, 123 A.3d 835 (2015) (assistance of counsel); *State* v. *Gore*, supra, 288 Conn. 783–84 (jury trial); *State* v. *Carter*, 243 Conn. 392, 397–98, 703 A.2d 763 (1997) (guilty plea). For certain other personal constitutional rights, however, we have determined that a trial court may properly infer waiver from the defendant's conduct. See, e.g., *State* v. *Pires*, 310 Conn. 222, 246–49, 77 A.3d 87 (2013) (right to self-representation); *State* v. *Castonguay*, 218 Conn. 486, 491–92 n.2, 590 A.2d 901 (1991) (right against self-incrimination).

The majority of courts that have considered the requirements for a valid waiver of the right to testify have determined that a criminal defendant's waiver of this right may be inferred from the defendant's conduct, namely, from the defendant's act of not taking the stand; see, e.g., *State* v. *Thomas*, 128 Wn. 2d 553, 559, 910 P.2d 475 (1996); or defense counsel's in-court representation that the defendant has elected not to testify, together with the defendant's coincident silence. See, e.g., *United States* v. *Ortiz*, 82 F.3d 1066, 1072 (D.C. Cir. 1996). For example, in *Ortiz*, the United States Court of Appeals for the District of Columbia Circuit rejected the defendant's argument that, "whenever [a criminal] defendant does not testify," "there is a per se requirement that the [trial] court inquire directly of the defendant whether he knowingly and intelligently waives his right to testify." Id., 1071. The District of Columbia Circuit reasoned that it is ultimately defense counsel, not the trial court, who has the obligation to advise a defendant of his right to testify "in a manner that would enable the defendant to make a knowing and intelligent choice." Id., 1070. "This advice is crucial because there can be no effective waiver of a fundamental constitu-

tional right unless there is an intentional relinquishment or abandonment of a *known* right or privilege." (Emphasis in original; internal quotation marks omitted.) *United States* v. *Teague*, supra, 953 F.2d 1533.[6] In the absence of evidence of a problem in the attorney-client relationship, the representation by defense counsel that a defendant is waiving his right to testify, together with the defendant's silence at the time of counsel's in-court representation, satisfies the constitutional requirement of a knowing, intelligent and voluntary waiver. A per se rule requiring a canvass would "inappropriate[ly] [interfere] with the client-counsel relationship when the court can . . . readily determine *from counsel* whether the defendant has been properly advised." (Emphasis added.) *United States* v. *Ortiz*, supra, 1071. Indeed, we may presume, in the absence of evidence to the contrary, that defense counsel provided the defendant with the information necessary to make an informed decision regarding the waiver of his right to testify. See, e.g., *State* v. *Castonguay*, supra, 218 Conn. 492 n.2.

Courts have also declined to create a per se canvass requirement on the ground that a colloquy with a judge regarding the right to testify may, in some circumstances, risk improperly influencing a defendant's decision *not* to testify. See, e.g., *United States* v. *Martinez*, 883 F.2d 750, 760 (9th Cir. 1989), vacated on other grounds, 928 F.2d 1470 (9th Cir.), cert. denied, 501 U.S. 1249, 111 S. Ct. 2886, 115 L. Ed. 2d 1052 (1991). As the United States Court of Appeals for the Third Circuit

[6] Other courts have similarly placed the onus on defense counsel, not the trial judge, to ensure that a defendant has been adequately advised of his right to testify. See, e.g., *Brown* v. *Artuz*, supra, 124 F.3d 79; *United States* v. *Teague*, supra, 953 F.2d 1533; *United States* v. *Campione*, 942 F.2d 429, 439 (7th Cir. 1991); *DeLuca* v. *Lord*, 858 F. Supp. 1330, 1355–60 (S.D.N.Y. 1994), aff'd, 77 F.3d 578 (2d Cir.), cert. denied, 519 U.S. 824, 117 S. Ct. 83, 136 L. Ed. 2d 40 (1996); *State* v. *Johnson*, 298 Neb. 491, 506, 904 N.W.2d 714 (2017).

has explained, "[t]he right to testify qualitatively differs from those constitutional rights [that] can be waived only after the [trial] court inquires into the validity of the waiver. In anchoring the accused's right to testify to the [c]onstitution, the [United States] Supreme Court in *Rock* . . . described it as a necessary corollary to the [f]ifth [a]mendment's guarantee against compelled testimony . . . . Exercise of either the right to testify or the right not to testify necessarily would waive the other right. Thus, a trial court's advice as to the right to testify could inappropriately influence the defendant to waive his [or her] constitutional right not to testify, thus threatening the exercise of this other, converse, constitutionally explicit, and more fragile right." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *United States* v. *Pennycooke*, 65 F.3d 9, 11 (3d Cir. 1995); see, e.g., *United States* v. *Anderson*, 1 F.4th 1244, 1259 (11th Cir. 2021) (recognizing that certain questions posed by trial court regarding defendant's right to testify "might disturb the attorney-client relationship, undermine the defendant's ability to make a knowing and intelligent decision, or overpower the defendant's will"); *United States* v. *Campione*, 942 F.2d 429, 439 (7th Cir. 1991) ("[d]iscussing the issue [of whether the defendant will testify] directly with the defendant may inappropriately involve the judge in the unique attorney-client relationship, raising . . . [f]ifth [a]mendment problems" (internal quotation marks omitted)). Moreover, courts have deemed it "ill-advised to have judges intrude into the attorney-client relationship or disrupt trial strategy with a poorly timed interjection." (Internal quotation marks omitted.) *State* v. *Lee*, 12 Wn. App. 2d 378, 390, 460 P.3d 701, review denied, 195 Wn. 2d 1032, 468 P.3d 622 (2020).

We find these rationales persuasive and, accordingly, consistent with the majority of federal courts of appeals that have ruled on this issue, conclude that a trial court

is not constitutionally required to obtain an on-the-record waiver from the criminal defendant, himself. See, e.g., *Brown* v. *Artuz*, supra, 124 F.3d 79; *United States* v. *Ortiz*, supra, 82 F.3d 1071–72; *United States* v. *Pennycooke*, supra, 65 F.3d 11–12; *United States* v. *Brimberry*, 961 F.2d 1286, 1289–90 (7th Cir. 1992); *United States* v. *Teague*, supra, 953 F.2d 1533 n.8; *United States* v. *McMeans*, 927 F.2d 162, 163 (4th Cir. 1991); *United States* v. *Martinez*, supra, 883 F.2d 760. In so holding, we emphasize that it is defense counsel's responsibility to advise his or her client, the defendant, of the benefits and hazards regarding the decision of whether to testify, to discuss the strategic benefits involved, and to inform the defendant that this decision is ultimately the defendant's to make. Indeed, "[although] defense counsel serves as an advocate for [his or her] client, it is *the client* who is the master of his or her own defense." (Emphasis added; internal quotation marks omitted.) *State* v. *Ayala*, 324 Conn. 571, 601, 153 A.3d 588 (2017).

The defendant nevertheless contends that our holding in *State* v. *Gore*, supra, 288 Conn. 770, requires that a criminal defendant, himself, inform the trial court of his decision to waive his right to testify. Specifically, the defendant argues that, because we held in *Gore* that the right to a jury trial is among "[t]he fundamental rights" that "a criminal defendant personally must waive"; id., 778–79; see also id., 779 n.9; a defendant is required to assert on the record, himself, the waiver of all personal constitutional rights, including his right to testify. Although we agree with the defendant insofar as we recognize that the decision to waive the right to testify must be made personally by a criminal defendant; see *State* v. *Gore*, supra, 779 n.9; it does not follow that the constitution therefore mandates that a trial court obtain an on-the-record waiver of this particular right directly from the defendant, himself.

In *Gore*, following our conclusion that the right to a jury trial is a personal constitutional right, we addressed the form that the waiver of that right must take. See id., 781. Specifically, we explained: "[W]e must decide what is constitutionally required to demonstrate that the defendant, himself, knowingly, intelligently and voluntarily waived a jury trial. . . . [W]e must determine whether the record must contain some affirmative indication from the defendant personally that he or she is waiving the right to a jury trial, or, alternatively, *whether counsel's expression of the waiver on the defendant's behalf, combined with the defendant's silence while counsel waives the right to a jury trial*, may constitute a knowing, intelligent and voluntary waiver." (Emphasis added.) Id., 777. Accordingly, although we ultimately concluded that the waiver of the right to a jury trial required that "the record . . . contain some affirmative indication from the defendant personally that he or she is waiving the right"; id.; we nevertheless confirmed that, for certain other personal constitutional rights, waiver can be accomplished through defense counsel's in-court representation that a defendant has chosen to waive the right, combined with the defendant's coincident silence. See id. At the time *Gore* was decided, we had already concluded that the waiver of the right to self-representation and the right against self-incrimination—both personal constitutional rights—could be effectuated in the absence of an affirmative, on-the-record indication from a defendant. See, e.g., *State* v. *Pires*, supra, 310 Conn. 246–49 (right to self-representation); *State* v. *Castonguay*, supra, 218 Conn. 491–92 n.2 (right against self-incrimination). Nothing in *Gore* suggested a one-size-fits-all requirement applicable to all personal constitutional rights. Thus, our holding in this case that the constitution does not require a defendant, himself, to waive his right to testify on the record is not inconsistent with our holding in *Gore* that the

waiver of certain personal constitutional rights may be expressed by defense counsel on the defendant's behalf. See *State* v. *Gore*, supra, 288 Conn. 777.

Moreover, a number of courts that require an on-the-record, affirmative indication from a defendant, himself, to effectuate a waiver of the right to a jury trial do not require the same to demonstrate a waiver of the right to testify. Compare *State* v. *Upton*, 658 So. 2d 86, 88 (Fla. 1995) (concluding that, because "there was no affirmative showing on the record" that defendant personally waived his right to jury trial, state could not prove waiver was knowingly, intelligently and voluntarily made), with *Torres-Arboledo* v. *State*, 524 So. 2d 403, 410–11 (Fla.) (deciding that right to testify "does not fall within the category of fundamental rights [that] must be waived on the record by the defendant himself"), cert. denied, 488 U.S. 901, 109 S. Ct. 250, 102 L. Ed. 2d 239 (1988). Compare *People* v. *Cook*, 285 Mich. App. 420, 422–23, 776 N.W.2d 164 (2009) (noting that defendant's waiver of right to jury trial did not comply with statute that required trial court to advise defendant in open court of right to trial by jury before defendant can be said to validly waive right), with *People* v. *Simmons*, 140 Mich. App. 681, 684, 364 N.W.2d 783 ("declin-[ing] to require an on-the-record waiver of defendant's right to testify"), appeal denied, 422 Mich. 963 (1985). Compare *Jones* v. *Commonwealth*, 24 Va. App. 636, 639, 484 S.E.2d 618 (1997) ("[t]o waive trial by jury, the [defendant] must give express and intelligent consent . . . and that consent . . . must be entered of record" (citation omitted)), with *Vay* v. *Commonwealth*, 67 Va. App. 236, 260, 795 S.E.2d 495 (2017) (determining that defense counsel's in-court representation that defendant would not testify, coupled with defendant's silence while counsel made this representation, was sufficient to constitute waiver of defendant's right to testify). Compare *State* v. *Stegall*, 124 Wn. 2d 719, 724–25, 881

P.2d 979 (1994) (requiring defendant's personal expression of waiver of right to twelve person jury), with *State* v. *Thomas*, supra, 128 Wn. 2d 559 (concluding that defendant's on-the-record indication that he has waived his right to testify is not required for valid waiver of that right).

In this case, the record indicates that the defendant had "extensive conversations" with his counsel regarding his decision whether to testify. Before the state rested its case, defense counsel spoke with the defendant again regarding his decision whether to testify, giving the defendant an additional opportunity to exercise his right after viewing and hearing all of the state's evidence. Furthermore, the defendant was present in court when defense counsel informed the trial judge that the defendant would not testify, and the defendant did not express any disagreement or concern with counsel's representation, much less any desire to the contrary. The defendant was also present when the jury returned and defense counsel indicated that the defense would "rest on the state's case," and the defendant again remained silent. As we have explained, in the absence of evidence to the contrary, we presume, for purposes of a constitutional challenge, that defense counsel provided the defendant with the information necessary to make an informed decision regarding whether to testify. *State* v. *Castonguay*, supra, 218 Conn. 492 n.2. The record in this case is devoid of any indication that the defendant's silence was the product of anything other than a knowing, intelligent and voluntary waiver. Accordingly, we conclude that defense counsel's in-court representation that the defendant waived his right to testify, together with the defendant's coincident silence, was sufficient to satisfy the constitutional requirement for a valid waiver of the defendant's right to testify. The defendant's unpreserved constitutional claim therefore fails *Golding*'s third prong.

B

Having concluded that the constitution does not require a defendant, himself, to assert affirmatively his waiver of the right to testify on the record, we next address the defendant's request that we exercise our supervisory authority to require that a trial court canvass a defendant prior to the waiver of his right to testify.[7] See, e.g., *State* v. *Gore*, supra, 288 Conn. 786–87 (exercising supervisory authority to require prospectively that trial courts canvass criminal defendants to ensure valid waiver of right to jury trial).

We begin with the relevant legal principles that guide our analysis. "It is well settled that [a]ppellate courts possess an inherent supervisory authority over the administration of justice." (Internal quotation marks omitted.) *State* v. *Rose*, 305 Conn. 594, 607, 46 A.3d 146 (2012). "Under our supervisory authority, we have adopted rules intended to guide the lower courts in the administration of justice in all aspects of the criminal process. . . . The exercise of our supervisory powers is an extraordinary remedy to be invoked only when circumstances are such that the issue at hand, [although]

[7] Alternatively, the defendant requests that, "in light of the exceptional circumstances of this case," namely, that the defendant is a non-English speaker and relied exclusively on the assistance of an interpreter throughout trial, we exercise our supervisory authority to reverse the defendant's conviction. Specifically, the defendant argues that "the fast pace of proceedings and the delay between the in-court colloquies and interpretation for the defendant created a risk that the defendant did not have time to raise an objection," and, thus, "the absence of a canvass [regarding the defendant's right to testify] resulted in exceptional circumstances necessitating reversal." We are unpersuaded. The defendant does not allege that his use of an interpreter prevented him from understanding his right to testify or that he would have testified if he "ha[d] time to raise an objection" to defense counsel's expression of the defendant's waiver. Further, he does not cite any cases, and we have found none, in which this court exercised its supervisory authority to reverse a defendant's conviction in a similar circumstance. We therefore decline the defendant's invitation to exercise our supervisory authority to reverse his conviction on that basis.

not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Lockhart*, 298 Conn. 537, 576, 4 A.3d 1176 (2010).

Consistent with our decision in *State* v. *Paradise*, supra, 213 Conn. 404–405, we decline to exercise our supervisory authority to create a per se rule requiring trial courts to canvass criminal defendants in all cases because there may be circumstances under which a canvass is inadvisable. See, e.g., *United States* v. *Martinez*, supra, 883 F.2d 760. For example, by advising a defendant of his right to testify, a trial court may inadvertently influence the defendant to waive his "more fragile right" not to testify. *Siciliano* v. *Vose*, 834 F.2d 29, 30 (1st Cir. 1987); see, e.g., *United States* v. *Bernloehr*, 833 F.2d 749, 752 n.3 (8th Cir. 1987) (stating that per se canvass requirement presents "a danger of improper comment on or judicial interference with the defendant's right not to testify"). A canvass could, in some instances, "frustrate a thoughtfully considered decision by the defendant and counsel who are designing trial strategy"; *State* v. *Albright*, 96 Wis. 2d 122, 134, 291 N.W.2d 487, cert. denied, 449 U.S. 957, 101 S. Ct. 367, 66 L. Ed. 2d 223 (1980); as there is a risk that the defendant may interpret the canvass as an implicit recommendation by the trial judge that the defendant should testify. In situations in which defense counsel believes that a canvass would encourage the defendant to testify after extensive conversations have led the defendant to a contrary decision—thereby upsetting carefully crafted trial strategy—a per se canvass requirement could, indeed, have deleterious consequences. See, e.g., *United States* v. *Pennycooke*, supra, 65 F.3d 11 ("A colloquy on the right to testify [in certain circumstances] . . .

inadvertently might cause the defendant to think that the [trial] court believes the defense has been insufficient. This belief in turn might prompt the defendant to abandon an appropriate defense strategy without good reason." (Citations omitted.)).

Nevertheless, we recognize that, in the majority of cases, a canvass of the defendant is the best practice. Often, "the best means of demonstrating the defendant's state of mind are his own declarations on the record." (Internal quotation marks omitted.) *People* v. *Curtis*, 681 P.2d 504, 515 (Colo. 1984). Furthermore, a canvass facilitates any appellate review or collateral challenge by placing the defendant's waiver on the record. See, e.g., *Boyd* v. *United States*, supra, 586 A.2d 675 (noting that colloquy allows court "[to determine] whether there is an intelligent and competent waiver by the [defendant]" (internal quotation marks omitted)); *State* v. *Walen*, 563 N.W.2d 742, 751–52 (Minn. 1997) ("placement on the record of a defendant's waiver of his right to testify often will save both the court and defense counsel considerable time at any postconviction proceeding").

Recognizing the benefits of a canvass in the context of the right to testify, while also acknowledging that a canvass may, in some circumstances, be inadvisable, we have chosen to craft a rule that adequately balances these two competing considerations. Accordingly, we take this opportunity to exercise our supervisory authority prospectively to require a trial court, when presiding over a criminal trial, to either canvass the defendant prior to his waiver of his right to testify or, alternatively, to inquire of defense counsel directly to determine whether counsel has adequately advised the defendant regarding the waiver of his right to testify. This latter option—a judicial inquiry of defense counsel—shall be used, however, only when defense counsel advises the trial court that counsel believes that a direct

canvass carries the risk of inadvertently interfering with a decision made by the defendant after extensive conversations with counsel regarding trial strategy.

Although we do not prescribe the exact form that this canvass of a criminal defendant or inquiry of defense counsel should take, both inquiries must be sufficient to satisfy the trial court, at minimum, that (1) defense counsel informed the defendant that the defendant has the right to testify, as well as the right not to testify, and should the defendant choose not to testify, the fact finder may not draw any adverse inferences from the defendant's choice not to testify, (2) defense counsel explained to the defendant that the right to testify belongs to the defendant alone, and no one, including defense counsel, can prevent the defendant from testifying, (3) the defendant has consulted with counsel in making the decision not to testify, and counsel has discussed with the defendant the advantages and disadvantages of testifying, (4) the defendant has had enough time to discuss with counsel the right to testify and the strategic decision not to testify, and the defendant has understood the information counsel has provided, and (5) the defendant has personally waived the right to testify knowingly, intelligently and voluntarily. Cf. *Momon* v. *State*, 18 S.W.3d 152, 162 (Tenn. 1999) (requiring that, in every trial in which defendant does not testify, defense counsel canvass defendant outside presence of jury to inquire of defendant whether defendant has made knowing, intelligent and voluntary waiver of right to testify to ensure that defense counsel does not "unilaterally deprive . . . [the defendant] of the fundamental right to testify").

This approach strikes the proper balance between the competing concerns of ensuring that criminal defendants understand their fundamental right to testify on their own behalf, on the one hand, and minimizing the danger, in some circumstances, that judicial interven-

tion may inadvertently pressure defendants into testifying, on the other. It seeks to preserve a defendant's fundamental right to testify, while also protecting the relationship and confidences between a defendant and his counsel. This approach also facilitates appellate review by placing, on the record, the circumstances of a defendant's waiver of his right to testify. Cf. id. (describing benefits of approach adopted by court, which will require defense counsel to conduct on-the-record canvass of defendant prior to valid waiver of defendant's right to testify).

II

The defendant's final claim on appeal is that the prosecutor committed improprieties on several occasions during her direct examination of S, in violation of the defendant's right to a fair trial. Specifically, the defendant contends that the prosecutor's excessive use of leading questions in at least "three separate contexts"[8] throughout the course of her direct examination of S assumed facts not in evidence and stood to bolster S's testimony. The state, however, contends that, because defense counsel did not object to the prosecutor's use of leading questions at trial, the defendant's claims are unpreserved evidentiary issues, rather than constitutional ones, and are therefore unreviewable. We agree with the state.

Defense counsel did not object to the prosecutor's use of leading questions at trial, and the defendant now argues on appeal that his claim should nevertheless be reviewed under *State* v. *Williams*, 204 Conn. 523, 529 A.2d 653 (1987), and *State* v. *Warholic*, 278 Conn. 354, 897 A.2d 569 (2006). Although we have held that unpreserved claims of prosecutorial impropriety are to be

[8] These "three separate contexts" involved questions regarding the timing of S's observation of blood after the alleged assault, the accuracy of the photographs of S's injuries, and the substance of S's prior statements.

reviewed under the factors set forth in *State* v. *Williams*, supra, 540; see, e.g., *State* v. *Spencer*, 275 Conn. 171, 178, 881 A.2d 209 (2005); that rule does not apply to "unpreserved evidentiary claims masquerading as constitutional claims . . . ." *State* v. *Golding*, supra, 213 Conn. 241.

Although the defendant argues that the prosecutor's use of leading questions throughout the course of her direct examination of S constituted prosecutorial impropriety, our review of the record reveals that his claims are unreviewable because they raise nothing more than unpreserved evidentiary issues.[9] As the state notes, "the defendant does not cite a single fact elicited by leading questions that could not also have been elicited by nonleading questions, had [defense counsel] raised any objection" during the prosecutor's direct examination of S. Thus, the defendant's claims, at bottom, take issue with the form of the prosecutor's questions and not the information elicited. See, e.g., *State* v. *Jose G.*, 290 Conn. 331, 343, 963 A.2d 42 (2009) ("An

[9] We do not suggest that a prosecutor's use of leading questions can never rise to the level of prosecutorial impropriety. For instance, a prosecutor may not pose a question, in any form, "that implies the existence of a factual predicate when the prosecutor knows that no such factual basis exists." *State* v. *Salamon*, 287 Conn. 509, 564, 949 A.2d 1092 (2008). Nothing of the kind occurred in the present case. Furthermore, even if reviewed through the lens of a claim of prosecutorial impropriety, the defendant's claim would fail on the merits because the "the [trial] court has discretion to allow [leading questions on direct examination] in certain circumstances." Id., 559, citing Conn. Code Evid. § 6-8 (b). The commentary to § 6-8 (b) (3) of the Connecticut Code of Evidence explains that "the court may allow the calling party to put leading questions . . . to a witness who has trouble communicating." (Citations omitted.) Conn. Code Evid. § 6-8 (b) (3), commentary. Our review of the record in this case reveals that S responded to the prosecutor's open-ended questions with cursory, often one word answers, and she was not descriptive throughout her direct examination. Thus, our review leads us to believe that the prosecutor's use of leading questions was necessary to develop S's testimony, which very well may explain why defense counsel did not raise an objection. Accordingly, we conclude that the prosecutor's use of leading questions in this case was not improper.

objection that a question is leading is a *procedural* objection aimed at the *manner* in which a question is being asked, not at the evidence sought to be elicited. . . . In other words, it is not the propriety of the evidence being questioned, but, rather, the manner in which it is being obtained." (Citation omitted; emphasis altered.)). Accordingly, we conclude that the defendant's challenges, on appeal, to the prosecutor's use of leading questions during her direct examination of S are purely evidentiary in nature and are unpreserved. The claim is not one of prosecutorial impropriety, and, therefore, it is not reviewable under *Williams* or *Warholic*.

The judgment is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* TERRANCE POLICE (SC 20528)

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

Syllabus

Convicted, on a conditional plea of nolo contendere, of the crimes of robbery in the first degree and assault in the first degree, the defendant appealed, challenging the trial court's denial of his motion to dismiss the information. In 2012, the victim was shot and robbed by an unknown assailant while she was standing near her car in a parking lot. The police thereafter conducted a search of an area near the crime scene and recovered various items, which were submitted to the state forensic science laboratory for testing. In its DNA report, employees at the laboratory concluded that the DNA found on each item consisted of a mixture of DNA profiles and that the victim was not a source of or contributor to the mixed profiles. Following the release of video surveillance footage that captured images of the suspect fleeing the crime scene, an anonymous caller contacted the police and reported that the suspect in the video footage looked like his cousin, the defendant, and that the defendant had told relatives that he had shot the victim. As part of their investigation, the police compared the DNA profiles generated from the crime scene evidence with those in a database that contains the DNA profiles

of convicted felons. Because the police had been erroneously informed that the defendant's DNA profile was in the database, when the database search did not return a match, the police ceased their investigation of the defendant. In April, 2017, approximately six months before the expiration of the applicable five year statute of limitations ((Rev. to 2011) § 54-193 (b)), the police applied for a John Doe arrest warrant, alleging in an accompanying affidavit that there was probable cause for the statute of limitations to be tolled pending the arrest of an unknown male responsible for the assault and robbery of the victim, and allegedly identifiable through the DNA profiles obtained from the crime scene evidence and general descriptions given by the victim and witnesses to the attack. The trial court signed the John Doe arrest warrant on the basis of the information contained in the affidavit. In April, 2018, more than five months after the statute of limitations had expired, the mother of the defendant's child contacted the police and reported that the defendant had confessed to her that he was the assailant. The police, pursuant to a search warrant, then obtained a DNA sample from the defendant, which they submitted to the state forensic science laboratory. The laboratory retested the crime scene evidence and compared the defendant's DNA with the new DNA profiles generated from the retesting. In supplemental DNA reports, employees at the laboratory concluded, inter alia, that it was at least 100 billion times more likely that the defendant was a contributor to the mixed DNA profiles than if they had originated from all unknown individuals. In May, 2018, the defendant was arrested pursuant to the John Doe arrest warrant and charged with robbery and assault in connection with the attack of the victim. Thereafter, the defendant filed a motion to dismiss the information, claiming, inter alia, that the John Doe arrest warrant did not satisfy the particularly requirement of the fourth amendment to the United States constitution and, therefore, that the issuance of that warrant in April, 2017, did not toll the statute of limitations. In denying the defendant's motion to dismiss, the trial court, specifically relying on one or both of the 2018 supplemental DNA reports, concluded that the John Doe arrest warrant identified the defendant with "nearly irrefutable precision" and, therefore, satisfied the particularity requirement of the fourth amendment. After the trial court accepted the defendant's conditional plea of nolo contendere, the defendant appealed, claiming, inter alia, that the trial court improperly had denied his motion to dismiss the information because a John Doe arrest warrant that identifies a suspect on the basis of a general description and mixed partial DNA profiles violates the particularity requirement of the fourth amendment and, therefore, cannot serve to toll the statute of limitations applicable to the charged crimes. *Held*:

1. The record was adequate for review of the defendant's unpreserved claim that a John Doe arrest warrant that identifies a suspect through mixed partial DNA profiles violates the particularity requirement of the fourth

amendment; there was no merit to the state's claim that, insofar as the defendant did not raise his claim in the trial court, the state was deprived of the opportunity to present evidence that might have established that the defendant's DNA profile would have been included in one of the 2012 mixed partial profiles if they had been compared, because, in determining the validity of an arrest warrant, the only information that a reviewing court properly may consider is that which was presented to the judicial authority that issued the warrant, which must either appear in the warrant itself or be incorporated by reference therein, and, in the present case, the record included the John Doe arrest warrant and, therefore, contained all of the facts necessary for this court's review of the defendant's claim.

2. This court having concluded that the John Doe arrest warrant at issue failed to satisfy the particularity requirement of the fourth amendment, the trial court improperly denied the defendant's motion to dismiss the information: although a John Doe arrest warrant that describes a suspect by reference to his or her unique DNA profile generally can satisfy the particularity requirement of the fourth amendment, the John Doe arrest warrant in the present case, which identified the suspect on the basis of a general physical description that could apply to any number of people and on the basis of mixed partial DNA profiles that were not positively known to include the suspect's unique DNA profile, and which failed to state the statistical rarity of any of the profiles, did not describe with particularity the person responsible for the attack of the victim and, therefore, did not toll the applicable statute of limitations; moreover, contrary to the state's contention, the trial court improperly relied on one or both of the 2018 supplemental DNA reports in determining that the 2012 DNA report, which the police had relied on to establish probable cause for the John Doe arrest warrant, identified the suspect with the particularity required by the fourth amendment, as the 2018 reports were not contained in the John Doe arrest warrant or incorporated therein by reference; accordingly, the judgment of conviction was reversed and the case was remanded with direction to render judgment dismissing the information.

Argued November 17, 2021—officially released May 10, 2022

Procedural History

Substitute information charging the defendant with the crimes of robbery in the first degree and assault in the first degree, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Blawie*, *J.*, denied the defendant's motion to dismiss the information; thereafter, the defendant was presented to the court, *White*, *J.*, on a conditional plea of nolo

contendere; judgment of guilty, from which the defendant appealed. *Reversed*; *judgment directed*.

Pamela S. Nagy, supervisory assistant public defender, with whom, on the brief, was *Mark Rademacher*, assistant public defender, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom were *Richard J. Colangelo, Jr.*, former chief state's attorney, and, on the brief, *Paul J. Ferencek*, state's attorney, and *Jennifer F. Miller*, assistant state's attorney, for the appellee (state).

Opinion

KELLER, J. This appeal presents a significant issue of first impression not only for this state but, to our knowledge, the rest of the country as well: whether a John Doe arrest warrant that identified the suspect on the basis of a general physical description and several mixed partial DNA profiles to which the suspect may or may not have been a contributor, and that did not state the probability that a random person would match any of those profiles, satisfies the particularity requirement of the fourth amendment to the United States constitution for purposes of commencing a prosecution within the applicable statute of limitations.

After he was charged with one count each of robbery in the first degree and assault in the first degree, the defendant, Terrance Police, filed a motion to dismiss the information on the ground that the charges were time barred by the five year statute of limitations set forth in General Statutes (Rev. to 2011) § 54-193 (b).[1] The trial court denied the motion, and, subsequently, the defendant entered a plea of nolo contendere condi-

[1] General Statutes (Rev. to 2011) § 54-193 (b) provides in relevant part: "No person may be prosecuted for any offense . . . for which the punishment is or may be imprisonment in excess of one year, except within five years next after the offense has been committed."

Hereinafter, unless otherwise indicated, all references to § 54-193 in this opinion are to the 2011 revision of the statute.

tioned on his right to appeal. The trial court thereafter sentenced the defendant to ten years of imprisonment on each count, five of which were mandatory, to run concurrently, for a total effective sentence of ten years of imprisonment. On appeal,[2] the defendant claims, inter alia, that a John Doe arrest warrant that identifies the suspect on the basis of a general description and several mixed partial DNA profiles is void for lack of particularity and, therefore, cannot commence prosecution for purposes of satisfying the statute of limitations. We agree and, accordingly, reverse the judgment of the trial court.

The following facts, as found by the trial court, and procedural history are relevant to our resolution of this appeal. On the afternoon of October 10, 2012, Norwalk police officers responded to reports of a robbery and shooting outside of the Stop and Shop supermarket on Connecticut Avenue in Norwalk. Upon arrival, they found the victim in the parking lot, suffering from a gunshot wound to the abdomen. The victim reported that she had been standing near her car looking at her phone when an unknown black male, whom she described as approximately eighteen to thirty years old with a medium build and a light beard, wearing jeans and a dark hooded sweatshirt, attacked her. The victim informed the police that her assailant had opened the driver's side door of her car, pushed her inside, and, during a struggle, shot her in the abdomen with a small silver handgun. Fearing for her life, the victim surrendered her wedding and engagement rings, as well as an iPhone with a pink Kate Spade phone case, to the suspect, who then fled on foot with the victim's belongings toward a nearby Best Buy store.

The police subsequently obtained footage from several video surveillance cameras in the area, all of which

[2] The defendant appealed to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2.

captured images of the suspect fleeing the scene. The footage depicts the suspect wearing a dark colored zip up hooded sweatshirt and using his left hand to pull the hood over his head. The police thereafter conducted a search of the area behind the Best Buy store, where they recovered a sweater and a dark blue zip up hooded sweatshirt with a Kate Spade cell phone case in the pocket, which the victim later confirmed belonged to her. From the same area, the police also recovered a small, silver .22 magnum five shot revolver containing two spent shell casings and three live rounds. The recovered items were later sent to the state forensic science laboratory (laboratory) for testing. The laboratory issued its DNA report on December 21, 2012. It concluded that the various pieces of crime scene evidence were found to have on them mixtures of DNA for which there were multiple contributors and, notably, that the victim was eliminated as the source of, or as a contributor to, those mixed profiles.

In an effort to identify the perpetrator, the police released the video surveillance footage to the public. On December 29, 2012, an anonymous caller contacted the police and stated that the man seen in the video footage looked like his cousin, the defendant. Although the defendant had denied any involvement in the crime to his mother, the anonymous caller indicated that the defendant had told other relatives that he had shot the victim. In investigating this tip, the police were informed, albeit erroneously, that, in 2008, in connection with a prior felony conviction, a sample of the defendant's DNA had been obtained and entered into the Combined DNA Index System (CODIS).[3] The police thereafter sub-

[3] In furtherance of their investigation, the police obtained the prison records of the defendant, which incorrectly indicated that a sample of his DNA was obtained in 2008 pursuant to General Statutes § 54-102g, which provides that persons convicted of a felony in Connecticut must submit to the taking of a DNA sample for inclusion in the CODIS database, which is a searchable statewide index of the DNA profiles of convicted felons that contains approximately 116,000 DNA profiles as of 2019.

mitted the DNA profiles generated from the crime scene evidence to CODIS for comparison, but there were no matches. Upon receiving the results of the search, the police contacted the laboratory to ensure that the database was current, and the laboratory indicated that it was. Because the CODIS search failed to identify the defendant as a contributor to any of the DNA profiles, and because the police were under the impression that the defendant's DNA was in CODIS, the police ceased their investigation of him. The police nevertheless continued their investigation of the crime by conducting weekly searches of both the Connecticut and national DNA databases and by pursuing other potential suspects. Although all investigative leads were exhausted by July, 2013, the police continued to conduct periodic searches through CODIS, each time yielding a negative result.

On April 6, 2017, approximately six months before the expiration of the five year statute of limitations, the Norwalk police applied for a John Doe arrest warrant, alleging in the sworn affidavit that there was probable cause for the statute of limitations to be tolled pending the arrest of an unknown male responsible for the 2012 assault and robbery of the victim, a person allegedly identifiable through the DNA profiles obtained from the crime scene evidence and general descriptions given by the victim and witnesses to the attack.[4] On May 1,

[4] Paragraph 20 of the John Doe arrest warrant application, which set forth the DNA profiles, stated as follows: "That, on January 11, 2013, Sergeant Orr received a DNA [d]atabase [s]earch [r]eport from the [laboratory] (laboratory case number ID12-001734). The report contained the results of the amplified items with Identifiler Plus Alleles Detected. For item listed as #6-S1 (Swab tips - inside sleeve cuffs and neck hem of sweatshirt) Identifiler Plus Alleles Detected were identified as D8S1179: 12, 13, 14; D21S11: 30; D7S820: 9, 10; CSF1PO: 12; D3S1358: 15, 16; TH01: 7; D13S317: 11, 12; D16S539: 9, D2S1338: 20, 21; D19S433: 11, 15.2; vWA: 16; TPOX: 11; D18S51: 16; AMEL: X, Y; D5S818: 11; and FGA: 24. For item listed as [#6-S2] (Swab tips - outside of cell phone-type cover) Identifiler Plus Alleles Detected were identified as D8S1179:12, 13, 14, 15; D21S11: 30, 31; D7S820: 9, 10; CSF1PO: 10, 12; D3S1358: 14, 15, 16; TH01: 7, 8; D13S317: 11, 12; D16S539: 9, 11; D2S1338: 19, 20, 21; D19S433: 11, 15.2; vWA: 15, 16, 18; TPOX: 9, 11, 12; D18S51: 16,

2017, the trial court signed the John Doe arrest warrant on the basis of the information contained in the affidavit.

17; AMEL: X, Y; D5S818: 9, 10, 11, 13; and FGA: 23, 24, and 26. For item listed as #6-S3 (Cutting - left pocket of sweatshirt) Identifiler Plus Alleles Detected were identified as D8S1179: 12, 13, 14, 15; D21S11: 28, 30, 30.2, 31, 35; D7S820: 8, 9, 10, 11, 12; CSF1PO: 7, 10, 11, 12; D3S1358: 14, 15, 16, 17; TH01: 6, 7, 8; D13S317: 10, 11, 12; D16S539: 9, 10, 11, 12, 13; D2S1338: 17, 18, 20, 21, 22, 26; D19S433: 11, 12, 13, 13.2, 14, 15.2; vWA: 14, 15, 16, 17, 18; TPOX: 6, 8, 9, 11, 12; D18S51: 13, 15, 16, 20, 21; AMEL: X, Y; D5S818: 11, 12, 13; and FGA: 22, 23, 24, 25, 26, and 29."

The John Doe arrest warrant application provided no interpretative guidance as to the meaning of the results of the DNA database search report set forth in paragraph 20. Independent research by this court informs us that the number-letter combinations that appear in the report refer to certain loci on the DNA molecule that are present in all human beings. See M. Chin et al., Forensic DNA Evidence: Science and the Law (2019) § 2.2, pp. 2-2 through 2-4 ("[DNA] is a large molecule coiled up tightly inside the nucleus of most cells in the human body. . . . [E]ach cell that contains DNA . . . has two copies of each autosome and two sex chromosomes. . . . Each human chromosome contains coding and [noncoding] regions. . . . [Noncoding] regions of DNA . . . are sequences of bases that do not translate into information for protein synthesis. A number of these [noncoding] regions are of specific interest in forensic DNA typing, and have been chosen as the standardized markers used for identification purposes. . . . These [noncoding] regions (or 'loci') are represented in all human DNA molecules, but there is a high degree of variability in type between unrelated individuals. . . . Between individuals and in human populations, different alleles can exist at given locations (loci) on the DNA molecule. These differences are called polymorphisms, and are the reason forensic DNA identification is possible. The most common forensic DNA test in use today targets a core set of [thirteen] loci that are highly variable between individuals . . . ." (Citations omitted.)); see also National Institute of Standards and Technology, FBI CODIS Core STR Loci, (last modified August 26, 2015), available at https://strbase.nist.gov/fbicore.htm (last visited May 4, 2022) (stating that thirteen core loci for CODIS purposes are CFS1PO, FGA, THO1, TPOX, VWA, D3S1358, D5S818, D7S820, D8S1179, D13S317, D16S539, D18S51, and D21S11). The corresponding numbers set out after each locus are the alleles found at those locations. See 7 C. Fishman & A. McKenna, Jones on Evidence (7th Ed. 2019) § 60:26, p. 856 ("DNA from a single individual can have no more than two alleles at each locus. This follows from the fact that individuals inherit chromosomes in pairs, one from each parent. An individual who inherits the same allele from each parent (a homozygote) can contribute only that one allele to a sample, and an individual who inherits a different allele from each parent (a heterozygote) will contribute those two alleles. Finding three or more alleles at [any given] locus therefore indicates a mixture of DNA from more than one person." (Internal quotation marks omitted.)). Because a majority of the loci listed in paragraph 20 contain

Approximately one year later, on April 2, 2018, the Norwalk police received a phone call from a woman who reported that she had seen the video footage released to the public years prior and recognized the perpetrator as her child's father, the defendant. The woman informed the police that the defendant also had confessed to her that he committed the 2012 assault and robbery of the victim. Given this new development, Sergeant Paul Podgorski of the Norwalk Police Department contacted the laboratory and spoke with forensic science examiner Jessica Best. Best explained that, although the defendant's DNA was in CODIS,[5] it was possible that no match was ever made to the DNA found at the crime scene because of the low quality of the defendant's sample and because the DNA profiles generated from the crime scene evidence were mixtures of the DNA of several different individuals.[6] Best therefore recommended a direct comparison with a sample of the defendant's DNA via a buccal swabbing. Accordingly, the police drafted a search warrant for the defendant's DNA, which the trial court signed on April 6, 2018.

On April 13, 2018, approximately six months after the statute of limitations had expired, the laboratory

more than two alleles, it is apparent that the DNA profiles were generated from a mixture of the DNA of multiple individuals.

[5] At this point, the police and the laboratory personnel were still operating under the mistaken impression that the defendant's DNA was in the CODIS database.

[6] The defendant contends, and our independent research confirms, that the DNA mixtures at issue would not have been sufficient for entry into the CODIS database. See Federal Bureau of Investigation, National DNA Index System (NDIS) Operational Procedures Manual (2021) § 4.2.1.5, p. 41, available at https://www.fbi.gov/file-repository/ndis-operational-procedures-manual.pdf/view (last visited May 4, 2022) ("[a] forensic mixture DNA records submitted to NDIS shall not have more than [four] alleles at any locus"); see id., § 4.2.1.7, p. 42 ("[f]orensic mixture and forensic partial DNA records submitted to NDIS shall . . . have a minimum of [eight] of the [o]riginal CODIS [c]ore [l]oci and satisfy a statistical threshold for match rarity of one in ten million at moderate stringency (moderate match estimate)").

retested the crime scene evidence and compared the defendant's DNA against the new DNA profiles generated from the retesting. In a supplemental DNA report, the laboratory concluded as follows: (1) The results from the inside sleeve cuffs and neck hem of the sweatshirt were consistent with the DNA profile being a mixture of four contributors, with the profile being at least 100 billion times more likely to occur if it originated from the defendant and three unknown individuals than if it originated from four unknown individuals; (2) the results from the right handle of the .22 magnum handgun were consistent with the DNA profile being a mixture of three contributors, with the profile being at least 100 billion times more likely to occur if it originated from the defendant and two unknown individuals than if it originated from three unknown individuals; and (3) the results from the inside sleeve cuffs and neck hem of the sweater were consistent with the DNA profile being a mixture of four contributors with the profile being at least 100 billion times more likely to occur if it originated from the defendant and three unknown individuals than if it originated from four unknown individuals.[7] The rest of the results were either inconclusive or excluded the defendant.

On May 4, 2018, the police arrested the defendant pursuant to the 2017 John Doe arrest warrant. After his arrest, the defendant filed a motion to dismiss the

[7] The laboratory later issued another supplemental DNA report on April 16, 2018. Its conclusions in this report differed slightly from those in the April 13, 2018 supplemental DNA report. Specifically, it concluded: (1) The results from the outside of the victim's cell phone case were consistent with the DNA profile being a mixture of three contributors, with the profile being at least 1.2 billion times more likely to occur if it originated from the defendant and two unknown individuals than if it originated from three unknown individuals; and (2) the results from the right handle of the .22 magnum handgun were consistent with the DNA profile being a mixture of two contributors with the profile being 30,000 times more likely to occur if it originated from the defendant and one unknown individual than if it originated from two unknown individuals.

information, claiming, inter alia, that the state had failed to bring the charges against him within the applicable five year statute of limitations. Specifically, the defendant argued that (1) "it is the role of the legislature, not the courts, to determine the statutes of limitations and any exceptions thereto," (2) "the state's use of a John Doe DNA arrest warrant to satisfy the statute of limitations thwarts the intent and purpose of the statute and does not meet the particularity requirement of the fourth amendment to the United States constitution [or] the reasonable certainty requirement under Connecticut law," and (3) "the court should not be guided by cases from other jurisdictions that have allowed [the use of] John Doe DNA [arrest] warrants to toll the statute of limitations, because those cases concerned charges of serious sexual assaults, [whereas] the charges in the present case are for robbery and assault."

In response, the state argued that a John Doe DNA arrest warrant tolls the statute of limitations when "it meets the particularity requirement of the fourth amendment to the United States constitution, as well as the reasonable certainty requirement under Connecticut law." The state argued that these requirements were met in the present case "by the combination of the DNA evidence with (1) a detailed and consistent physical description of the accused, (2) the description of the suspect's attire, (3) the fact that the affidavit state[d] that the suspect was wearing a dark colored sweatshirt and had touched the victim's cell phone [case], and (4) [the fact that] DNA evidence belonging to the suspect was found on each of [those] items of evidence." Finally, the state argued that the trial court should follow the majority of jurisdictions that have previously considered the issue and allowed the use of John Doe DNA arrest warrants.

An evidentiary hearing on the defendant's motion to dismiss was held before the trial court, after which the

court issued a memorandum of decision and denied the motion. Relying on the April, 2018 supplemental DNA report,[8] the court concluded that the John Doe arrest warrant satisfied both the particularity requirement of the fourth amendment and the reasonable certainty requirement under Connecticut law. Specifically, the court stated that the John Doe arrest warrant "identif[ied] the defendant with 'nearly irrefutable precision,' despite the initial use of the John Doe pseudonym," such that "there was essentially no possibility that the DNA profile of the perpetrator originated from another human being." In reaching its determination, the court specifically relied on the fact that "[t]he DNA report in the John Doe arrest warrant indicated that for both the discarded sweatshirt and [the] handgun, a mixture of four persons was detected. The [laboratory] opined that it was at least 100 billion times more likely that the DNA profile came from the defendant and three other unknown individuals, rather than from four unknown individuals. The DNA report also indicated that for the victim's cell phone [case] that was tested, a mixture of three persons was detected. The [laboratory] opined that it was at least 1.2 billion times more likely that the DNA profile came from the defendant and two other unknown individuals, instead of [from] three unknown individuals." On the basis of this information, and "[i]n accordance with the holdings from a majority of jurisdictions that have previously considered this issue, the

[8] There is some confusion as to whether the trial court relied on the April 13, 2018 supplemental DNA report or the April 16, 2018 supplemental DNA report. See footnote 7 of this opinion. The defendant contends that the trial court improperly relied on the April 16, 2018 supplemental DNA report, "which was not in evidence and was not relied on by the parties at the hearing." The state argues that the court appears to have relied on both reports. As we explain more fully hereinafter, however, it makes no difference which of the 2018 supplemental DNA reports the court relied on because it properly could rely on neither. See, e.g., *State* v. *Colon*, 230 Conn. 24, 34, 644 A.2d 877 (1994) ("in determining the adequacy of an affidavit in support of a . . . warrant, the information to establish probable cause must be found within the affidavit's four corners").

court [concluded] that the extraordinarily detailed DNA profile [was] sufficient to meet the particularity and reasonable certainty requirements under Connecticut law."[9] As discussed more fully hereinafter, however, the DNA report on which the trial court relied in denying the defendant's motion to dismiss was not, as that court indicated in its memorandum of decision, "the DNA report in the John Doe arrest warrant . . . ." The DNA report referenced in the arrest warrant application; see footnote 4 of this opinion; contained no statement as to the statistical rarity of the mixed partial DNA profiles listed therein, which is the probability that a random person chosen from the general population would have those profiles. The 2012 DNA profiles were also qualitatively different from the 2018 DNA profiles, which were

[9] The court also rejected the defendant's argument that the information must be dismissed because the police "knew the defendant's identity based [on] the anonymous tip from December 29, 2012, but failed to use reasonable diligence to investigate further." Specifically, at the hearing on the motion to dismiss, defense counsel argued that the police never sought to interview the defendant or his family members on the basis of the December tip, never followed up with the tipster, even though they had his cell phone number, and, apparently, made no effort to confirm the tip through normal investigative techniques, such as by ascertaining if the victim could identify the defendant in a photographic array. The trial court rejected this argument, concluding that any preaccusation delay on the part of the police was justified. Specifically, the court stated that the failure of the police to apprehend the defendant sooner was attributable to the misinformation they had received indicating that the defendant's DNA was in CODIS, not to a lack of due diligence on their part in pursuing an investigation. The defendant challenges this determination on appeal, arguing that the preaccusation delay violated his right to due process. See, e.g., *State* v. *Roger B.*, 297 Conn. 607, 614, 999 A.2d 752 (2010) (To establish due process violation on the basis of preaccusation delay, "the defendant must show both that actual substantial prejudice resulted from the delay and that the reasons for the delay were wholly unjustifiable, as [when] the state seeks to gain a tactical advantage over the defendant. . . . [P]roof of prejudice is generally a necessary but not sufficient element of a due process claim . . . . [Additionally] the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." (Emphasis omitted; internal quotation marks omitted.)). We do not address this claim in light of our determination that the John Doe arrest warrant failed to describe the defendant with the particularity required by the fourth amendment.

generated using more sophisticated DNA testing procedures.

On November 4, 2019, the defendant entered a plea of nolo contendere, conditioned on his right to appeal, on one count of robbery in the first degree in violation of General Statutes § 53a-134 (a) (2) and one count of assault in the first degree in violation of General Statutes § 53a-59 (a) (1). The trial court accepted the plea and thereafter sentenced the defendant to a total effective sentence of ten years of imprisonment.

On appeal, the defendant claims that the trial court improperly denied his motion to dismiss the information because an arrest warrant identifying a suspect by a general description and reference to several mixed partial DNA profiles, of which the defendant may or may not have been a contributor, violates the particularity requirement of the fourth amendment to the federal constitution and the reasonable certainty requirement under state law. Because the defendant's claim is unpreserved,[10] he seeks review pursuant to *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). The state responds that the record is inadequate for review of the defendant's claim, and, therefore, it fails under the first prong of *Golding*. In addition, the

[10] The defendant argues that his claim is preserved because "[t]he issue of whether the John Doe [arrest] warrant met the constitutional particularity and statutory reasonable certainty requirements was argued in the trial court and decided by [that] court" and, further, because "[t]he parties discussed . . . *State* v. *Belt*, [285 Kan. 949, 179 P.3d 443 (2008)], which rejected the John Doe warrant in that case because it had only two loci [that were] present in one in 500 people," and the trial court distinguished that case in its memorandum of decision. As previously indicated, however, the defendant's motion to dismiss was premised on three arguments, none of which challenged or even mentioned the quality of the DNA profiles in the arrest warrant application. It is axiomatic that, to preserve a claim at trial, the defendant must "alert the trial court to the specific deficiency now claimed on appeal"; *State* v. *Carter*, 198 Conn. 386, 396, 503 A.2d 576 (1986); which, in the present case, the defendant failed to do.

state argues that, even if the record is adequate for review, the defendant still cannot prevail because the DNA profiles, "coupled with the other identifying information in the [arrest] warrant, satisfied the fourth amendment's particularity requirement." We agree with the defendant.

In *Golding*, this court held that "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40; see also *In re Yasiel R.*, supra, 317 Conn. 780–81 (modifying third prong of *Golding* to exclude the term "clearly" and clarifying that *Golding* review is available for first impression questions). "The first two [prongs of *Golding*] involve a determination of whether the claim is reviewable [and] the second two . . . involve a determination of whether the defendant may prevail." (Internal quotation marks omitted.) *State* v. *Armadore*, 338 Conn. 407, 437, 258 A.3d 601 (2021).

In arguing that the record is inadequate for review, the state asserts that, because the defendant did not argue in the trial court that a John Doe arrest warrant that identifies a suspect through mixed partial DNA profiles violates the particularity requirement of the fourth amendment, the state was deprived of the opportunity to present evidence that might have established that the defendant's DNA profile would have been included in one of the 2012 mixed partial profiles had they been compared. The state's argument is unavailing because, in determining the validity of an arrest war-

rant, the only information that a reviewing court properly may consider is that which was presented to the judicial authority that issued the warrant, which must appear either on the face of the warrant or be incorporated by reference therein.[11] See, e.g., *Aguilar* v. *Texas*, 378 U.S. 108, 109 n.1, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964) ("[i]t is elementary that in passing on the validity of a warrant, the reviewing court may consider *only* information brought to the magistrate's attention" (emphasis in original)); *United States* v. *Jarvis*, 560 F.2d 494, 497 (2d Cir. 1977) ("[t]o comply with . . . the fourth amendment the name or a particularized description of the person to be arrested *must appear on the face of the 'John Doe' warrant*" (emphasis added)), cert. denied, 435 U.S. 934, 98 S. Ct. 1511, 55 L. Ed. 2d 532 (1978); id. ("[t]he warrant requirement exists in order to permit a neutral magistrate to make the decision whether to authorize arrest, rather than leaving this decision up to the prosecutor or officer"); *State* v. *Colon*, 230 Conn. 24, 34, 644 A.2d 877 (1994) ("in determining

[11] Although the defendant did not raise the issue in the trial court or on appeal to this court, we would be remiss not to note that the John Doe arrest warrant in this case contained no description of the suspect; nor did it incorporate by reference the descriptions set forth in the arrest warrant affidavit. It simply authorized the arrest of "Doe, John" for "[r]obbery 1" and "[a]ssault 1." See *State* v. *Browne*, 291 Conn. 720, 733–34, 970 A.2d 81 (2009) ("most [federal] [c]ourts of [a]ppeals have held that a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant" (internal quotation marks omitted)); id., 737 ("when the warrant application and affidavit are placed under seal to protect the identity and safety of a confidential informant, it is, in our view, well within constitutional limits to determine the particularity of the warrant in light of the supporting documentation *as long as it is incorporated explicitly by reference* [*in the warrant*]" (emphasis added)); *State* v. *Belt*, 285 Kan. 949, 961–62, 179 P.3d 443 (2008) (John Doe arrest warrants that failed to include or incorporate by reference suspect's unique DNA profile did not satisfy particularity requirement of fourth amendment because, in part, "there was no reason the [s]tate could not have particularly described the perpetrator's unique DNA profile in the warrants or their supporting affidavits").

the adequacy of an affidavit in support of a . . . warrant, the information to establish probable cause must be found within the affidavit's four corners").

In *State* v. *Browne*, 291 Conn. 720, 970 A.2d 81 (2009), this court explained that "[t]he protections afforded by the particularity [requirement of the fourth amendment] focus primarily on, and restrict the process of, *issuing* a warrant. . . . This focus makes sense in light of the chief purpose of the [requirement], which is to prevent general searches by requiring a neutral judicial officer to cabin the scope of the search to those areas and items for which there exists probable cause that a crime has been committed. . . . It does this in two steps. The police or other law enforcement officer who is seeking the warrant must submit to the judicial officer a precise description of what is sought to be seized, so that the judicial officer can determine whether a valid law enforcement purpose would be served by the seizure of all items fitting the description. The description is then written into (or attached to or otherwise incorporated in) the warrant in order to make sure that the law enforcement officer who executes the warrant stays within the bounds set by the issuer." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 729–30. Because the sufficiency of the description of the person to be seized is determined by the judicial officer at the time of the issuance of the warrant, the state's contention that the record is inadequate for review of the defendant's claim is without merit.[12] "To

[12] In arguing to the contrary, the state cites *State* v. *Brunetti*, 279 Conn. 39, 56, 901 A.2d 1 (2006), cert. denied, 549 U.S. 1212, 127 S. Ct. 1328, 167 L. Ed. 2d 85 (2007), in which this court held that the record was inadequate for review of the defendant's unpreserved claim that the search of his parents' home violated the fourth amendment because it was conducted without the consent of both parents. The defendant in *Brunetti* argued on appeal that the record was adequate for review because, in ruling on his motion to suppress, the trial court stated that it was "clear that at least . . . one of the parents . . . declined to [sign the] consent to . . . search [form]." (Internal quotation marks omitted.) Id. The defendant argued that "this statement perfected the record for review because it '[constituted] a

the extent that there are gaps in the record created by the unpreserved nature of [a] claim, they affect the defendant's burden of establishing the existence of a constitutional violation under the third prong of *Golding*, rather than the reviewability of the claim under the first prong." *State* v. *Gray*, 342 Conn. 657, 669–70, 271 A.3d 101 (2022).

In light of our determination that the record is adequate for review, and because the second prong of *Golding*—whether the unpreserved claim is of constitutional magnitude—is clearly satisfied; see *State* v. *Browne*, supra, 291 Conn. 729; we turn to *Golding*'s third prong, namely, whether the claimed constitutional violation in fact exists. We conclude that it does.

The following legal principles guide our analysis of this issue. Section 54-193 (b) provides in relevant part that "[n]o person may be prosecuted for any offense . . . for which the punishment is or may be imprisonment in excess of one year, except within five years next after the offense has been committed." We recently explained that "§ 54-193, like other criminal statutes of limitation, is remedial in nature. The purpose of a stat-

finding, supported by [the] evidence,' that the defendant's mother had declined to consent to the search." Id. We disagreed, explaining that "the act of declining to *sign* a consent to search form is not tantamount to a refusal to *consent* to the search"; (emphasis in original) id.; and, therefore, although it was clear from the record that the defendant's mother declined to sign the form, "we [did] not know, because the record [did] not reveal, whether [she] (1) declined to sign the form but orally consented to the search, (2) acquiesced in her husband's consent to the search, (3) affirmatively refused to consent to the search, or (4) took some other position regarding the search. All we know is that she did not sign the consent to search form. Consequently, any conclusion regarding the defendant's mother's position concerning the search . . . would be purely speculative." (Footnote omitted.) Id., 58. In the present case, by contrast, the record contains all of the facts necessary for our review of the defendant's claim regarding the sufficiency of the description of the suspect in the John Doe arrest warrant. As we explained, those facts are limited to those that are apparent on the face of the warrant or incorporated by reference therein.

ute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity. . . . Indeed, it is because of the remedial nature of criminal statutes of limitation[s] that they are to be liberally interpreted in favor of repose." (Internal quotation marks omitted.) *State* v. *A. B.*, 341 Conn. 47, 56, 266 A.3d 849 (2021).

"Thus, although the precise length of any statutory limitation period is necessarily somewhat arbitrary, such statutes nevertheless reflect the will of the legislature that, at least in the absence of special or compelling circumstances, the limitation period shall serve as a firm bar to prosecution. . . . It is also well established that statutes of limitations are not primarily concerned with demonstrable prejudice. . . . Instead, after the passage of the specified period of time, evidence of prejudice becomes less important than the virtues of predictability, repose, and societal stability. See, e.g., *United States* v. *Marion*, 404 U.S. 307, 322, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971) ([S]tatutes [of limitations] represent legislative assessments of relative interests of the [s]tate and the defendant in administering and receiving justice; they are made for the repose of society and the protection of those who may [during the limitation period] . . . have lost their means of [defense]. . . . These statutes provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be

prejudiced. . . .) . . . .'' (Citation omitted; internal quotation marks omitted.) *State* v. *A. B.*, supra, 341 Conn. 64.

''In *State* v. *Crawford*, 202 Conn. 443, 521 A.2d 1034 (1987), this court held that the issuance of an arrest warrant within the limitation period set forth in . . . § 54-193 (b) commences a prosecution for purposes of satisfying that statute of limitations, so long as the warrant is executed without unreasonable delay.'' *State* v. *A. B.*, supra, 341 Conn. 49. In the present case, it is undisputed that the John Doe arrest warrant was issued within the five year limitation period specified in § 54-193 (b). The issue we must decide is whether that warrant was void ab initio for failure to comply with the particularity requirement of the fourth amendment.[13] The particularity requirement of the fourth amendment, which provides that ''no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized''; U.S. Const., amend. IV; ''categorically prohibits the issuance of any warrant except one particularly describing the place to be searched and the persons or things to be seized. The manifest purpose of this . . . requirement was to prevent general searches. By limiting the authorization to search [and seize] to the specific areas and things for which there is probable cause to search, the require-

[13] ''Whether a warrant is sufficiently particular to pass constitutional scrutiny presents a question of law that we decide de novo.'' (Internal quotation marks omitted.) *State* v. *Buddhu*, 264 Conn. 449, 467, 825 A.2d 48 (2003), cert. denied, 541 U.S. 1030, 124 S. Ct. 2106, 158 L. Ed. 2d 712 (2004). For the same reason that he claims the John Doe arrest warrant lacked particularity under the fourth amendment, the defendant argues on appeal that the warrant also failed to comport with the reasonable certainty requirement under state law. See Practice Book § 36-3 (''[a] warrant shall be signed by the judicial authority and shall contain the name of the accused person, or if such name is unknown, any name or description by which the accused can be identified with reasonable certainty''). Because this unpreserved state law claim is not subject to *Golding* review, we decline to address it.

ment ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the [f]ramers intended to prohibit. Thus, the scope of a lawful search is defined by the object of the search and the places in which there is probable cause to believe that it may be found." (Footnote omitted; internal quotation marks omitted.) *Maryland* v. *Garrison*, 480 U.S. 79, 84, 107 S. Ct. 1013, 94 L. Ed. 2d 72 (1987). This requirement "makes general searches . . . impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." (Internal quotation marks omitted.) *Andresen* v. *Maryland*, 427 U.S. 463, 480, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976); see also *Payton* v. *New York*, 445 U.S. 573, 583, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980) ("[i]t is familiar history that indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the [f]ourth [a]mendment").

In applying this provision, courts universally have held that "an arrest warrant that correctly names the person to be arrested is . . . constitutionally sufficient and need not contain any additional identifying information." (Internal quotation marks omitted.) *Rivera* v. *Los Angeles*, 745 F.3d 384, 388 (9th Cir.), cert. denied, 574 U.S. 1061, 135 S. Ct. 870, 19 L. Ed. 2d 730 (2014), quoting *White* v. *Olig*, 56 F.3d 817, 819 (7th Cir. 1995); see also, e.g., *Wanger* v. *Bonner*, 621 F.2d 675, 682 (5th Cir. 1980) ("the inclusion of the name of the person to be arrested [in] the arrest warrant constitutes a sufficient description to satisfy the fourth amendment requirement that the person to be seized be described with particularity"). In *West* v. *Cabell*, 153 U.S. 78, 14 S. Ct. 752, 38 L. Ed. 643 (1894), the United States Supreme Court considered the particularity requirement as it related

to an arrest warrant that incorrectly named the arrestee. The plaintiff in error, Vandy M. West, challenged the legality of his arrest on a warrant issued for the arrest of "James West," a name that he had never gone by. Id., 85. Adhering to the common-law principle that "a warrant for the arrest of a person charged with [a] crime must truly name him, or describe him sufficiently to identify him"; id.; the court held that the warrant for the arrest of "James West," without further description, was constitutionally invalid for the arrest of a "Vandy M. West." Id., 85, 88.

Since *West*, numerous courts have addressed the fourth amendment particularity requirement as it relates to the validity of arrest warrants. "Generally, arrest warrants either describing the suspect only as 'John Doe' or inaccurately naming an individual without some other identifying description have been ruled insufficient under the naming requirement of the [f]ourth [a]mendment. See, e.g., *United States* v. *Doe*, 703 F.2d 745, 747–48 (3d Cir. 1983) (holding that an arrest warrant describing the suspect only as 'John Doe [also known as] Ed' was constitutionally insufficient and that an officer's personal knowledge of that suspect did not cure the insufficiency) . . . *People* v. *Montoya*, 255 Cal. App. 2d 137 [143, 63 Cal. Rptr. 73] (1967) (holding that 'John Doe' warrant, which described suspect as 'white male adult, [thirty to thirty-five years old, five feet ten inches, 175 pounds] dark hair, medium build' lacked adequate specificity) [cert. denied, 390 U.S. 1007, 88 S. Ct. 1255, 20 L. Ed. 2d 109 (1968)]. But see *United States* v. *Ferrone*, 438 F.2d 381, 389 [3d Cir.] ('[w]e hold that the physical description of [the defendant], coupled with the precise location at which he could be found, was sufficient and the John Doe warrant was, therefore, valid . . .') [cert. denied, 402 U.S. 1008, 91 S. Ct. 2188, 29 L. Ed. 2d 430 (1971)]; *Blocker* v. *Clark*, 126 Ga. 484 [487, 54 S.E. 1022] (1906) (noting that a 'John Doe'

warrant may be valid if it includes other identifying information such as occupation, personal appearance, or place of residence)." *State* v. *Burdick*, 395 S.W.3d 120, 126–27 (Tenn. 2012); see also *McIntyre* v. *State*, 142 App. Div. 2d 856, 858, 530 N.Y.S.2d 898 (1988) (arrest warrant identifying suspect as "JOHN DOE—White Male Slim Build—Approx. 17-18 years old" deemed facially defective).

"The advent of DNA analysis introduced a new layer of consideration, not only as to the particularity requirements of the [f]ourth [a]mendment, but also as to statutory provisions and procedural rules requiring that a suspect be described with 'reasonable certainty.' " *State* v. *Burdick*, supra, 395 S.W.3d 127. Although an issue of first impression for this court, courts that have considered the constitutionality of a John Doe arrest warrant that described the suspect by reference to his unique DNA profile overwhelmingly have held that it satisfies state and federal constitutional particularity requirements.[14] See *State* v. *Neese*, 239 Ariz. 84, 87–88, 366 P.3d 561 (App. 2016) (filing of "John Doe" indictment that identified defendant by his unique DNA profile satisfied particularity requirement and, therefore, commenced criminal prosecution within statute of limitations), review denied, Arizona Supreme Court, Docket No. CR-16-0067-PR (September 20, 2016); *People* v. *Robinson*, 47 Cal. 4th 1104, 1129, 1137, 1142–43, 224 P.3d 55, 104 Cal. Rptr. 3d 727 (arrest warrant incorporating by reference complaint describing suspect as " 'John Doe, unknown male' " with unique thirteen loci DNA profile adequately identified defendant under fourth amendment, thereby timely commencing prosecution),

[14] Those courts have done so because, "for purposes of identifying a particular person . . . a DNA profile is arguably the most discrete, exclusive means of personal identification possible. A genetic code describes a person with far greater precision than a physical description or a name." (Internal quotation marks omitted.) *State* v. *Dabney*, 264 Wis. 2d 843, 854, 663 N.W.2d 366 (App.), review denied, 266 Wis. 2d 63, 671 N.W.2d 850 (2003).

cert. denied, 562 U.S. 842, 131 S. Ct. 72, 178 L. Ed. 2d 49 (2010); *State* v. *Belt*, 285 Kan. 949, 960, 179 P.3d 443 (2008) ("a warrant identifying the person to be arrested for a sexual offense by description of the person's unique DNA profile, or incorporating by reference an affidavit containing such a unique profile, can satisfy constitutional and statutory particularity requirements"); *Commonwealth* v. *Dixon*, 458 Mass. 446, 452–54, 938 N.E.2d 878 (2010) (John Doe indictments incorporating suspect's unique DNA profile and additional physical description "unassailably fulfil[led] the constitutional requirement that an indictment provide 'words of description [that] have particular reference to the person whom the [c]ommonwealth seeks to convict' " and, therefore, sufficiently identified defendant and tolled statute of limitations); *State* v. *Carlson*, 845 N.W.2d 827, 829, 831–34 (Minn. App. 2014) (arrest warrant identifying defendant as "John Doe" and by unique fifteen loci DNA profile obtained from blood found at scene of burglary described defendant with particularity and reasonable certainty, and, thus, commenced prosecution within limitation period), review denied, Minnesota Supreme Court, Docket No. A13-0416 (June 17, 2014); *People* v. *Martinez*, 52 App. Div. 3d 68, 69–71, 855 N.Y.S.2d 522 ("John Doe" indictment for attempted rape and other charges sufficiently identified defendant and satisfied constitutional right to notice when indictment contained defendant's particularized DNA profile taken from semen sample), appeal denied, 11 N.Y.3d 791, 896 N.E.2d 103, 866 N.Y.S.2d 617 (2008); *State* v. *Danley*, 138 Ohio Misc. 2d 1, 4–6, 853 N.E.2d 1224 (Com. Pl. 2006) (arrest warrant for rape and aggravated robbery against "John Doe" that identified suspect by gender and unique DNA profile was sufficient to commence criminal action and to toll statute of limitations); *State* v. *Burdick*, supra, 395 S.W.3d 128 ("John Doe" arrest warrant that identified suspect in aggravated rape case

by his unique DNA profile satisfied particularity requirement of fourth amendment for purposes of commencing prosecution within statute of limitations); *State* v. *Younge*, 321 P.3d 1127, 1130–33 (Utah 2013) (information charging " 'John Doe unknown male' " with aggravated sexual assault and robbery and identifying assailant by unique DNA profile was valid and commenced underlying prosecution within statute of limitations); *State* v. *Dabney*, 264 Wis. 2d 843, 854, 663 N.W.2d 366 (App.) (arrest warrant for sexual assault identifying suspect as "John Doe" and setting forth unique DNA profile obtained from evidence recovered from victim was sufficiently particular and identified defendant with reasonable certainty), review denied, 266 Wis. 2d 63, 671 N.W.2d 850 (2003); annot., A. Weisman, "Validity of DNA Indictments," 29 A.L.R.7th 601, 604–28, § 3 (2018) (citing cases).

As the Massachusetts Supreme Judicial Court stated in *Commonwealth* v. *Dixon*, supra, 458 Mass. 446, "[when] a general John Doe indictment, bereft of any particularity, must fail as generally anonymous, the converse is true of a DNA indictment: it prevails as precisely eponymous. A properly generated DNA profile is a string of code that exclusively identifies a person's hereditary composition with near infallibility. See National Research Council (NRC), The Evaluation of Forensic DNA Evidence [(1996), p. 2] (technology for DNA profiling has progressed to the point where the reliability and validity of properly collected and analyzed DNA data should not be in doubt). Unlike [a] general John Doe indictment . . . an indictment of a person identified by a DNA profile accuses a singular and ascertained, but simply unnamed individual. Probably more than proper names or physical characteristics, DNA profiles unassailably fulfil the constitutional requirement that an indictment provide words of description [that] have particular reference to the person whom the [c]ommonwealth seeks

to convict. . . . A DNA profile is not merely a word of description . . . it is, metaphorically, an indelible bar code that labels an individual's identity with nearly irrefutable precision. See [id., pp. 2, 7, 9]." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Commonwealth* v. *Dixon*, supra, 453; see also *People* v. *Robinson*, supra, 47 Cal. 4th 1134 ("[f]or purposes of the [f]ourth [a]mendment, we conclude that the arrest warrant in question, which described the defendant by his [thirteen] loci DNA profile and included an explanation that the profile had a random match probability such that there was essentially no chance of its being duplicated in the human population except in the case of [a] genetically identical sibling, complied with the mandate of our federal [c]onstitution that the person seized be described with particularity").

We agree with the many courts that have held that "a warrant identifying the person to be arrested for [an] . . . offense by description of the person's unique DNA profile, or incorporating by reference an affidavit containing such a unique profile, can satisfy constitutional . . . particularity requirements." *State* v. *Belt*, supra, 285 Kan. 960; see id., 960–62 (arrest warrants identifying suspect in sexual assault cases as "John Doe" and listing only two DNA loci common to all humans lacked particularity for purposes of commencing prosecution within statute of limitations). In all of those cases, however, the DNA used to describe the suspect was from a single source sample collected directly from an individual's body or bodily fluids, which is "[the] type of DNA evidence that has been referred to as the gold standard." B. Stiffelman, "No Longer the Gold Standard: Probabilistic Genotyping Is Changing the Nature of DNA Evidence in Criminal Trials," 24 Berkeley J. Crim. L. 110, 114 (2019). "When one . . . speaks of [this type of evidence], what's described is a single source sample, usually from blood, semen, or saliva. A profile is deduced

from the sample, a profile is obtained from a suspect, and a comparison is made. The analyst then calculates how rare that profile is, based on databases estimating the frequency of the specific genetic markers in a given population. The analyst then testifies as to both the rarity of the profile and whether the two profiles match. The numbers are usually staggering, such that, if testing was done properly, and the population-based genetic modeling reliable, the matching suspect is almost undeniably the source of that DNA evidence sample." (Footnote omitted.) Id. "[T]his type of DNA evidence . . . is such powerful evidence, that not only has it been used to convict the guilty, it has led to hundreds of exonerations across the country." Id.

In the present case, however, the DNA evidence used to describe the suspect was not a single source sample known to have come from the perpetrator. Rather, it was "touch DNA," also known as "trace DNA," from multiple sources that might or might not have come from the perpetrator—something the police simply had no way of knowing when they applied for the John Doe arrest warrant.[15] Notably, the state has not identified a single case, and our research has failed to uncover one, in which mixed partial DNA profiles from touch DNA provided the description of a suspect in a John Doe arrest warrant. Touch DNA "is a term used to describe DNA that is left behind just by touching an object . . . . Notwithstanding its name, however, touch DNA does not necessarily indicate a person's direct contact with

[15] That the police had no way of knowing, when they sought the John Doe arrest warrant in this case, whether the perpetrator's DNA profile would match any of the DNA profiles listed in the arrest warrant application is demonstrated by the fact that the 2012 DNA report excluded the victim as a source of any of the touch DNA found on the tested items, including the DNA found on the victim's own cell phone case, which ultimately was determined to be a mixture of the DNA of three people. The victim also was excluded as a source of the DNA found on the front, driver's side door handle of her vehicle.

the object. Rather, according to [experts], abandoned skin cells, which make up touch DNA, can be left behind through primary transfer, secondary transfer, or aerosolization." (Internal quotation marks omitted.) *State* v. *Dawson*, 340 Conn. 136, 153, 263 A.3d 779 (2021). Even when a person touches an object, "DNA is not always detectable, meaning that it is possible to have someone touch an object but not leave behind detectable DNA because . . . some people leave more of their skin cells behind than others, i.e., some people are better 'shedders' of their DNA than others. There are also other factors that affect the amount of DNA left on an object, such as the length of contact, the roughness or smoothness of the surface, the type of contact, the existence or nonexistence of fluids, such as sweat, and degradation on the object." Id., 154.

As a result, touch DNA "poses potential problems that are not present, or are less often present, with DNA obtained from evidence consisting of bodily fluids . . . ." 7 C. Fishman & A. McKenna, Jones on Evidence (7th Ed. 2019) § 60:9, p. 785. For example, "[t]ouch DNA will often be available in much smaller quantities than DNA extracted from blood, semen, or hair"; id.; and "the presence of touch DNA may often be far less probative of a defendant's guilt than DNA derived from bodily fluids." Id., p. 787. Indeed, "trace samples lack the clarity of the more straightforward DNA evidence that can lead to a clear match to a specific individual. An object is found at or near a crime scene. A technician swabs the object to test for that DNA. These trace samples are usually quite small, there is often more than one person's DNA, and the evidence is of a much poorer quality." B. Stiffelman, supra, 24 Berkeley J. Crim. L. 115. "When dealing with such small amounts of DNA, there is much greater ambiguity as to how the DNA ended up on the object. For example, the DNA could have been left by someone who touched the object, or

even by someone who touched the person who then touched the object. . . . In short, small amounts of DNA can be easily transferred and [travel]. Because of this, finding someone's DNA on an object is less significant to a determination of guilt or innocence of a suspect." (Footnote omitted.) Id., 115–16.

Complicating the matter further, as previously indicated, the DNA profiles in the present case were mixed partial DNA profiles. "A DNA profile is determined by looking at different locations on a genetic chain. The current standard, based on [Federal Bureau of Investigation] protocols, is to look at [twenty-two] specific locations on the genetic chain. A person has, at most, two distinct genetic markers (alleles) at any location—one from her mother and one from her father. A person will often have the same genetic marker from both [her] mother and [her] father, so a single location on an individual DNA profile can have either one or two alleles. If there are three alleles at a location, then the sample contains DNA from more than one person." Id., 114.

A mixed sample is "very common with forensic samples and . . . can occur for a variety of reasons . . . [including] if [the sample is from] an object that multiple people have touched, especially if [the object is] something that is found in a public place . . . ." (Internal quotation marks omitted.) *State* v. *Dawson*, supra, 340 Conn. 155. "[T]he conclusion that [a] sample [is] a mixed sample [is] based on the fact that there [are] alleles present at certain loci that [match] the evidentiary profile but [do] not match the defendant's known profile." Id., 156. When a mixed source DNA profile is produced, "examiners can draw three types of conclusions: inclusion, exclusion, and inconclusive. . . . [E]xaminers [also] generate a statistic—called a likelihood ratio—that helps give weight to [their] conclusions. A likelihood ratio is a mathematical comparison of two differ-

ent explanations for the DNA evidence that supports the strength of the inclusion." (Internal quotation marks omitted.) 7 C. Fishman & A. McKenna, Jones on Evidence (7th Ed. January, 2022 update) § 60:26, quoting *United States* v. *Caldwell*, 963 F.3d 1067, 1071–72 (11th Cir.), cert. denied, U.S. , 141 S. Ct. 836, 208 L. Ed. 2d 410 (2020). "The combined probability of inclusion is employed when there is a mixed DNA profile, which indicates the presence of genetic material from two or more contributors. . . . This method takes all of the observed data and considers all possible profiles that could produce that data. Then, it generates a statistic, which expresses the probability that a random person would have any of those generated profiles." (Citation omitted; internal quotation marks omitted.) *State* v. *Rodriguez*, 337 Conn. 175, 190–91, 252 A.3d 811 (2020), quoting B. Stiffelman, supra, 24 Berkeley J. Crim. L. 128. "A statistic is necessary to understand the significance of the inclusion as a potential contributor. . . . [W]ithout the probability assessment, the jury does not know what to make of the fact that the patterns match: the jury does not know whether the patterns are as common as pictures with two eyes, or as unique as the Mona Lisa." (Internal quotation marks omitted.) *People* v. *Pike*, 53 N.E.3d 147, 165 (Ill. App. 2016), appeal denied, 89 N.E.3d 761 (Ill. 2017).

We note, finally, that, "[w]hen some [locations on the genetic chain] yield full results and some do not, the incomplete pattern of alleles is sometimes referred to as a partial profile." 7 C. Fishman & A. McKenna, Jones on Evidence (7th Ed. 2019) § 60:25, p. 854. "When a comparison is made between the suspect's or complainant's DNA and a partial profile of crime-relevant DNA at . . . only a few cites, the odds of a random match can be much higher and the inference that the source of the known sample was also the source of the unknown

sample much weaker." (Internal quotation marks omitted.) Id., pp. 854–55.

In the present case, the arrest warrant affidavit did not alert the judicial authority to the fact that the DNA profiles did not include the perpetrator's unique DNA profile but, rather, were mixed partial profiles generated from the touch DNA of at least four different individuals, three of whom evidently had no involvement in the crimes at issue whatsoever. Nor did it apprise the judicial authority of the statistical probability that any person chosen at random from the general population would have those DNA profiles. See *State* v. *Rodriguez*, supra, 337 Conn. 190 ("a match means little without statistical evidence that will allow the fact finder to determine the strength of the match and, thus, the strength of the inferential fact that the defendant is the person whose DNA is present in the actual evidentiary sample"); National Research Council, DNA Technology in Forensic Science (1992) p. 74 ("[t]o say that two patterns match, without providing any scientifically valid estimate (or, at least, an upper bound) of the frequency with which such matches might occur by chance, is meaningless"). In light of the foregoing, we agree with the defendant that no judge reasonably could have concluded that the DNA profiles listed in the arrest warrant affidavit described the person responsible for the crimes, much less with the particularity required by the fourth amendment.

In arguing to the contrary, the state asserts that the DNA profiles "[were] not the only identifying information in the warrant. It also contained a physical description of the perpetrator, which included his height, race, general age, and attire." As previously indicated, although the arrest warrant application contained no description of the suspect; see footnote 15 of this opinion; the affidavit that accompanied the arrest warrant application stated that the victim had described the suspect as a black

male, approximately five feet eleven inches to six feet tall, between eighteen and thirty years old, with a medium build and a light beard, and that another witness had described the suspect as a light-skinned black male, approximately six feet tall, in his mid-twenties, with a slender build, and no or very little facial hair.[16] The state has failed to cite a single case in which such vague physical descriptions, which in Connecticut could potentially apply to thousands of individuals, was held to satisfy the particularity requirement of the fourth amendment; nor has our independent research uncovered any such case.

The state contends nonetheless that the particularity requirement is satisfied in this case in light of the trial court's finding that a subsequent comparison of the defendant's DNA with the DNA profiles generated in 2018 "revealed that there was essentially *no possibility* that the DNA profile of the perpetrator originated from another human being." (Emphasis in original; internal quotation marks omitted.) In furtherance of this argument, the state asserts that "[i]t is of no moment that [the] information [on which the trial court relied in making this finding] was derived from a subsequent, more sophisticated DNA testing procedure." To the contrary, it is of critical importance that the trial court relied on information from outside the four corners of the arrest warrant in determining whether the warrant satisfied the particularity requirement of the fourth amendment. See, e.g., *Aguilar* v. *Texas*, supra, 378 U.S. 109 n.1 ("[i]t is elementary that in passing on the validity of a warrant, the reviewing court may consider *only* information brought to the magistrate's attention") (emphasis in original); *United States* v. *Jarvis*, supra, 560 F.2d 497 ("[t]o comply with . . . the fourth amendment the

[16] The arrest warrant affidavit also provided a third description of the suspect given by another witness, which largely mirrored the victim's very general description of the suspect.

name or a particularized description of the person to be arrested *must appear on the face of the* '*John Doe*' *warrant*" (emphasis added)).

In arguing to the contrary, the state cites to language in *State* v. *Belt*, supra, 285 Kan. 949, which, as previously discussed, held that John Doe arrest warrants that failed to describe or incorporate by reference the suspect's unique DNA profile failed to satisfy the particularity requirement of the fourth amendment. Id., 962. In reaching its determination, the court in *Belt* stated that "[the omitted] genetic information was necessary to provide an evidentiary baseline for probable cause. The fact that it would need to be verified scientifically once [the] defendant was seized did not eliminate the need for this baseline to be drawn in the warrant in the first place." Id. The state fails to explain how this language—or any other statement in *Belt*—supports its contention that the trial court properly relied on the 2018 DNA reports in determining whether the *2012 DNA report*, which the Norwalk police relied on to establish probable cause for the John Doe arrest warrant, identified the suspect with the particularity required by the fourth amendment.

In light of the foregoing, we conclude that, to satisfy the particularity requirement of the fourth amendment, the affidavit accompanying a John Doe DNA arrest warrant application must contain information assuring the judicial authority issuing the warrant that the DNA profile identifies the person responsible for the crime on the basis of his or her unique DNA profile and should include information as to the statistical rarity of that DNA profile. See, e.g., *Commonwealth* v. *Dixon*, supra, 458 Mass. 453 ("[u]nlike [a] general John Doe indictment . . . an indictment of a person identified by a DNA profile accuses a singular and ascertained, but simply unnamed individual" (citations omitted)); see also M. Chin et al., Forensic DNA Evidence: Science

and the Law (2019) § 9.8, p. 9-11 ("[John] Doe arrest warrant premised on the suspect's DNA profile should include . . . [t]he actual DNA alleles possessed by the perpetrator . . . on a locus-by-locus basis . . . [and] [t]he rarity of the perpetrator's DNA profile should be expressed statistically on the face of the warrant, as well as in the warrant affidavit, to establish the particularity of the identification and [to] assure the magistrate that there will be no discretion on the part of law enforcement in the execution of the warrant"). Otherwise, the judicial authority cannot fulfill its gatekeeping role of preventing the harms that the particularity requirement was intended to prevent, namely, the issuance of general warrants and "the seizure of one thing under a warrant describing another." (Internal quotation marks omitted.) *Andresen* v. *Maryland*, supra, 427 U.S. 480.

Finally, we note that our decision today in no way diminishes the probative value of DNA in the determination of guilt or innocence. See, e.g., *State* v. *Rodriguez*, supra, 337 Conn. 203 (*Kahn*, *J.*, concurring) (recognizing "powerful tool" that DNA has become in determining "from blood, skin, sweat, semen, hair, or other DNA-containing cells . . . the likelihood that an individual is reasonably tied to a crime scene, victim, weapon, or other object"). Nor should it be read to imply that the 2012 mixed partial DNA profiles would not have been probative of the defendant's guilt if the case had gone to trial. It could be that those profiles were adequate for an expert to determine (1) that they included the defendant's DNA profile, and (2) the probability that a random person would also be included, thus allowing the state to argue that they tied the defendant to the crime. See, e.g., *People* v. *Pike*, supra, 53 N.E.3d 170 ("[n]ormally the probability of inclusion is admissible, even if that probability is rather high"); *People* v. *Smith*, 978 N.E.2d 324, 333, 337 (Ill. App. 2012) (holding that expert testimony that probability of inclusion for partial

profile from handgun was approximately one out of eleven, and, therefore, that defendant could not be excluded from 9 percent of population that could have contributed to DNA mixture was properly admitted and that weight of testimony was matter for jury to decide), appeal denied, 982 N.E.2d 774 (Ill. 2013). We have simply concluded that a John Doe arrest warrant that identifies a suspect on the basis of a general physical description that could apply to any number of people and mixed partial DNA profiles that are not positively known to include the suspect's profile, and that fails to state the statistical rarity of any of the profiles, does not satisfy the particularity requirement of the fourth amendment and, therefore, does not commence a prosecution for purposes of satisfying the applicable statute of limitations.[17]

[17] Like the Massachusetts Supreme Judicial Court, "[w]e are not unmindful of the arguments of the defendant and others that DNA indictments may vitiate some of the important public policy purposes that our statutes of limitations serve"; *Commonwealth* v. *Dixon*, supra, 458 Mass. 458; and create a risk that criminal trials, "in cases [in which] a DNA sample can be indicted as a placeholder, [are conducted] decades and decades after [the] commission of [an] offense [for which the legislature has imposed a five year statute of limitations]." Id. As that court stated, however, there are constitutional, statutory, and procedural safeguards to protect defendants against any such delays. Id., 458–59. For example, this court recently reaffirmed that "the issuance of an arrest warrant within the limitation period set forth in . . . § 54-193 (b) commences a prosecution for purposes of satisfying that statute of limitations, *so long as the warrant is executed without unreasonable delay*." (Emphasis added.) *State* v. *A. B.*, supra, 341 Conn. 49. Whether a delay is reasonable "is a question of fact that will depend on the circumstances of each case. If the facts indicate that an accused consciously eluded the authorities, or for other reasons was difficult to apprehend, these factors will be considered in determining what time is reasonable. If, on the other hand, the accused did not relocate or take evasive action to avoid apprehension, failure to execute an arrest warrant for even a short period of time might be unreasonable and fail to [satisfy] the statute of limitations." (Internal quotation marks omitted.) Id., 58. As the Massachusetts Supreme Judicial Court noted, "[i]t is in the first instance for the [l]egislature to determine whether [existing laws] . . . are inadequate to protect putative defendants indicted by their genetic identity, but unable to be identified by name before the expiration of [the applicable statute of limitations]. If so, they may revisit the statutory scheme that we conclude permits the practice." *Commonwealth* v. *Dixon*, supra, 459.

The judgment is reversed and the case is remanded with direction to render judgment dismissing the information.

In this opinion the other justices concurred.

AGW SONO PARTNERS, LLC *v.* DOWNTOWN SOHO, LLC, ET AL.
(SC 20625)

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

Syllabus

The plaintiff sought to recover damages from the defendants, D Co., and its managing member, E, in connection with D Co.'s breach of a commercial lease agreement for certain premises, which D Co. used to operate a restaurant and bar. D Co. had entered into a ten year lease agreement with T Co., the plaintiff's predecessor-in-interest. E subsequently executed a separate agreement with T Co., pursuant to which E personally guaranteed all of D Co.'s obligations under the lease agreement. The plaintiff later purchased the premises from T Co. and was assigned all of T Co.'s rights and obligations under the lease and guarantee agreements. The lease agreement contained provisions requiring D Co. to use the premises only for the operation of a restaurant and bar selling food and beverages and to bear the burden of complying with all applicable laws and regulations. It also required D Co. to pay the plaintiff monthly rent and a certain percentage of its gross annual sales. D Co. failed to make timely lease payments in January and February, 2020, but cured each of those defaults. D Co. then defaulted a third time in March, 2020. Around that time, the COVID-19 pandemic emerged, and the governor proclaimed civil preparedness and public health emergencies on March 10, 2020. The governor then issued a series of executive orders that closed restaurants and bars to in person business through May 20, 2020, restricted restaurants to outdoor dining and on premises alcohol consumption through June 16, 2020, and then allowed restaurants to resume indoor dining only at 50 percent capacity. D Co.'s restaurant was closed entirely between March 11 and May 27, 2020, and then opened for outdoor dining and subsequently for limited indoor dining. Whereas D Co.'s restaurant previously had a capacity of more than 140 patrons, upon reopening, indoor capacity was limited to approximately 25 persons, including staff. The restaurant was operating at a loss, and D Co. did not make any rental payments after February, 2020. D Co. vacated the premises in September, 2020, in response to a notice to

quit, and the plaintiff immediately began searching for a new tenant. S Co. signed a ten year lease for the premises on November 30, 2020, with occupancy commencing in January, 2021. S Co.'s monthly rental payment was less than what D Co. had been paying, and the plaintiff granted S Co. a concession of six months' free rent. The plaintiff alleged that D Co. had breached the lease agreement and had been unjustly enriched by virtue of its continued use of the premises for months after defaulting, and that E had breached his obligations under his agreement to guarantee D Co.'s obligations under the lease. In response, the defendants raised various special defenses, including the doctrines of impossibility of performance and frustration of purpose, owing to the adverse effects of the executive orders on the restaurant and hospitality industry. After a trial to the court, the trial court found for the plaintiff on all three counts and rejected the defendants' special defenses. The court concluded that the defendants had not proven, by a fair preponderance of the evidence, that the executive orders had rendered the operation of a restaurant impossible or frustrated the purpose of the lease agreement. The court reasoned that, although the pandemic was unforeseeable, the lease agreement allocated to D Co. the burden of complying with the executive orders, that the lease agreement did not require the operation of a profitable restaurant, and that none of the executive orders specifically made the operation of a restaurant impossible, especially in light of takeout and curbside options. With respect to damages, the court awarded the plaintiff, inter alia, damages for unpaid lease payments from March through December, 2020, around the time when S Co. signed its lease. Although the court credited evidence that the plaintiff had made efforts to mitigate its damages by securing S Co. as a new tenant, it found that the plaintiff had presented no evidence of its negotiations with S Co. to determine whether further negotiations could have resulted in a lease with terms similar to or the same as those in the defendants' lease. From the judgment rendered thereon, the defendants appealed and the plaintiff cross appealed. *Held*:

1. The defendants could not prevail on their claim that the trial court incorrectly had concluded that they failed to establish, by a preponderance of the evidence, the special defenses of impossibility and frustration of purpose:

   a. The trial court correctly determined that the various executive orders restricting the operation of D Co.'s restaurant did not render performance of the lease agreement impossible as a matter of law: only in the most exceptional circumstances will a contractual duty be discharged because additional financial burdens make performance less practical than initially contemplated, a party who makes an unqualified promise to perform necessarily assumes an obligation to perform, even if the occurrence of a foreseeable event makes performance impracticable, and the impossibility doctrine does not apply when the contract explicitly assigns a particular risk to one party; in the present case, the impossibility doctrine

did not excuse D Co. from its obligations to the plaintiff under the lease agreement because, even under the most restrictive executive orders closing restaurants entirely to indoor dining, use of the premises for the purpose of operating a restaurant was not rendered impossible insofar as restaurants were permitted to provide curbside or takeout service; moreover, the lease agreement did not prohibit D Co. from offering such curbside or takeout service, and, although the pandemic restrictions had serious economic consequences for the viability of the restaurant, they did not, by themselves, make performance under the lease agreement impossible or commercially impracticable but, instead, simply raised the cost of performance for D Co. in a manner that rendered performance highly burdensome but not factually impossible; furthermore, the language of the lease agreement suggested that events of the magnitude of the COVID-19 pandemic were not entirely unforeseeable, and the lease agreement, to the extent that it contemplated a crisis situation beyond the parties' control, excused only the plaintiff's obligations while squarely tasking D Co. with the obligation of complying with all governmental laws, orders and regulations.

b. The trial court correctly determined that the shutdown and restrictions compelled by the pandemic related executive orders did not frustrate the purpose of the lease agreement, which the defendants claimed was the operation of a "first-class" restaurant with indoor, on premises dining and bar service: establishing the frustration of purpose defense requires convincing proof of a changed situation so severe that it is not fairly regarded as being within the risks assumed under the contract, and, in light of the narrow construction afforded to the doctrine so as to preserve the certainty of contracts, this court could not conclude that the purpose of the parties' lease agreement was frustrated by the pandemic restrictions imposed by the executive orders, as even the most restrictive of the executive orders barring indoor dining entirely did not render the lease agreement valueless insofar as it did not preclude takeout or outdoor dining, which services D Co. ultimately provided.

2. The trial court improperly assigned the plaintiff, as the nonbreaching party, the burden of proving that it had mitigated its damages, and, accordingly, this court reversed the judgment with respect to the trial court's damages award and remanded the case for further proceedings as to damages: consistent with well established principles of damages law, as well as this court's precedent in the contexts of tort and contract law, this court concluded that, when a lessee has breached a lease agreement, the lessee bears the burden of proving that the lessor failed to undertake commercially reasonable efforts to mitigate its damages; in the present case, the trial court, in determining the damages to which the plaintiff was entitled, stopped the accrual of monthly rent damages in December, 2020, even though S Co. was not set to occupy the premises under its lease until January, 2021, and noted that the plaintiff had presented no evidence of its negotiations with S Co. and that it could

only speculate if further negotiations with S Co. would have resulted in a lease with the same or similar terms to those in the defendants' lease; moreover, by engaging in the foregoing speculation in connection with reducing the contract damages that it ultimately awarded to the plaintiff, the trial court effectively relieved the defendants of their burden of proving that the plaintiff's efforts were, in fact, commercially unreasonable under the circumstances; accordingly, a new hearing in damages was required.

Argued November 16, 2021—officially released May 10, 2022

Procedural History

Action to recover damages for, inter alia, breach of a lease agreement, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, Housing Session at Norwalk, and tried to the court, *Spader*, *J.*; judgment for the plaintiff, from which the defendants appealed and the plaintiff cross appealed. *Reversed in part*; *further proceedings*.

Philip Russell, with whom, on the brief, was *Catherine R. Keenan*, for the appellants-cross appellees (defendants).

Andrew B. Nevas, with whom, on the brief, was *Travis K. Waller*, for the appellee-cross appellant (plaintiff).

Opinion

ROBINSON, C. J. In the earliest months of the COVID-19 public health emergency, Governor Ned Lamont issued numerous executive orders that closed or severely restricted the operation of various businesses, including bars and restaurants, in order to stem the spread of the virus at that time. This appeal requires us to consider how those executive orders affected the enforceability of a commercial lease agreement for premises in South Norwalk that the defendants, Downtown Soho, LLC (Downtown Soho), and Edin Ahmetaj, leased from the plaintiff, AGW Sono Partners, LLC, for their fine dining restaurant. The defendants appeal, and the plaintiff cross

appeals,[1] from the judgment of the trial court awarding the plaintiff $200,308.76 in damages for the defendants' breach of that lease agreement. In their appeal, the defendants claim, inter alia, that the trial court incorrectly concluded that the common-law doctrines of impossibility and frustration of purpose did not relieve them of their obligations under the lease agreement, given the damaging economic effects of the various executive orders on their restaurant's business. In its cross appeal, the plaintiff claims that, in calculating the damages award, the trial court improperly allocated the burden of proof in determining whether the plaintiff had mitigated its damages when it leased the premises to a new tenant at a lesser rent than the defendants had paid. We conclude that the trial court correctly determined that the economic effects of the executive orders did not relieve the defendants of their obligations under the lease agreement but that a new damages hearing is required because the trial court improperly allocated the burden of proof as to mitigation in determining the damages award. Accordingly, we reverse in part the judgment of the trial court.

The record reveals the following facts, as found by the trial court, and procedural history. In December, 2018, TR Sono Partners, LLC (TR Sono), entered into a lease agreement with Downtown Soho, under which Downtown Soho would use and occupy premises located at 99 Washington Street in South Norwalk (premises) for a ten year period beginning on January 1, 2019. Section 4 (a) of the lease agreement provides in relevant part that the defendants "shall use the [p]remises for the operation of a restaurant and bar selling food, beverages, and related accessories, together with uses incidental thereto, and for no other purpose. . . ."[2] Under the terms of the

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

[2] Section 1 (o), in the definitions section of the lease agreement, provides similarly to § 4 (a), but differs slightly insofar as it states that the premises

lease agreement, Downtown Soho was obligated to pay both base monthly and percentage rent,[3] along with additional rent to cover its apportioned amounts of the plaintiff's insurance, common area expenses and real estate taxes, commencing on July 1, 2019, and concluding on December 31, 2028. On December 20, 2018, Ahmetaj, who is the managing member of Downtown Soho, executed a guarantee agreement pursuant to which he personally guaranteed all of Downtown Soho's obligations under the lease agreement. In December, 2019, the plaintiff purchased six commercial properties, including the premises, from TR Sono, which assigned all of its rights and obligations under the lease and guarantee agreements for those properties to the plaintiff.

The defendants operated a fine dining restaurant known as Blackstones Bistro (bistro) on the premises. Most of the bistro's business came during dinner service, when an average seating would generate a bill of $100 to $200 per patron, given bar service and dishes priced on average between $35 and $60 each. The upscale bar supported the restaurant side of the business and occupied approximately 40 percent of the premises' total rental space. Prior to the COVID-19 pandemic, the bar was busy and could accommodate sixty customers by providing more than twenty-eight seats at the bar plus standing room for crowds.

The defendants first defaulted on their payment obligations under the lease agreement in January, 2020, by

are "to be used as for the operation of a *first-class* restaurant and bar selling food, beverages, and related accessories, together with uses incidental thereto, and for no other purpose." (Emphasis added.)

[3] The lease agreement provides that the base monthly rent amounts would increase over the duration of the ten year term, starting at a rate of $9,333.33 per month for the period between July 1 and December 31, 2019, and increasing each year, and culminating at a rate of $12,177.88 per month for the final year, ending on December 31, 2028. In addition to the base monthly rent amounts, Downtown Soho also was obligated to pay the plaintiff, on an annual basis, 5 percent of the amount of its gross annual sales that exceeded $2.5 million.

making only half the required monthly rent payment; they cured that default in February, 2020, by making payment within two weeks of receiving a default notice from the plaintiff. The defendants then defaulted on their February, 2020 obligations, which they cured one week later. Subsequently, Ahmetaj met with Adam Greenbaum, the plaintiff's manager, to discuss the defaults; Ahmetaj informed Greenbaum that the defaults resulted from slower winter business and would cease when business improved during the warmer months, and that he was surprised that the plaintiff, unlike TR Sono, did not accept late payments given the seasonal nature of the restaurant business in the Norwalk area.

The defendants defaulted on the lease agreement a third time the next month, and the plaintiff sent them a default notice on March 11, 2020; the defendants did not cure that default. On March 10, 2020, Governor Lamont acted, pursuant to General Statutes §§ 19a-131a and 28-9, and issued a Declaration of Public Health and Civil Preparedness Emergencies (declaration) because of the COVID-19 outbreak[4] in the United States and in Connecticut, specifically.[5] Pursuant to the declaration, Governor Lamont then issued several executive orders that affected the operation of bars and restaurants. First, on March 16, 2020, Governor Lamont issued Executive Order No 7D,[6] which, inter alia, closed bars and

[4] "COVID-19 is a respiratory disease that spreads easily from person to person and may result in serious illness or death, and public health experts have indicated that persons infected with COVID-19 may not show symptoms, and transmission or shedding of the coronavirus that causes COVID-19 may be most virulent before a person shows any symptoms . . . ." (Internal quotation marks omitted.) *Fay* v. *Merrill*, 338 Conn. 1, 7, 256 A.3d 622 (2021).

[5] The declaration was subsequently renewed on September 1, 2020, and extended on February 9, 2021.

[6] Executive Order No. 7D, issued on March 16, 2020, provides in relevant part: "Limits on Restaurant, Bar and Private Club Operations. Effective at 8 p.m. on March 16, 2020 and through April 30, 2020, unless earlier modified, extended, or terminated by [the governor], any restaurant or eating establishment and any location licensed for [on premises] consumption of alcoholic liquor in the [s]tate . . . except for Class III and Class II Tribal Gaming enterprises, shall only serve food or [nonalcoholic] beverages for [off premises] consumption. . . ."

restaurants to in person business from that day through April 30, 2020; the subsequent Executive Order No. 7X[7] extended that ban through May 20, 2020. Executive Order No. 7PP,[8] issued on May 18, 2020, allowed restaurants to offer outdoor dining and on premises alcohol consumption beginning on May 20, 2020, and, on June 16, 2020, Executive Order No. 7ZZ[9] allowed restaurants

[7] Executive Order No. 7X, issued on April 10, 2020, provides in relevant part: "Extension of Closures, Distancing, and Safety Measures Through May 20, 2020. The orders to prevent transmission of COVID-19 through appropriate distancing and other safety measures listed below are extended through May 20, 2020:

"a. Executive Order No. 7D . . . imposing limits on restaurant, bar, and private club operations. . . ."

[8] Executive Order No. 7PP, issued on May 18, 2020, provides in relevant part: "1. Phase 1 Business Reopening. To provide for a comprehensive plan for safe resumption of limited social, recreational, athletic, and economic activity, pursuant to rules issued by the Department of Economic and Community Development for each of various business sectors (individually and collectively, the 'Sector Rules'), which Sector Rules shall constitute legally binding guidance, the following [e]xecutive [o]rders are repealed or amended effective at 12:01 a.m. on Wednesday, May 20, 2020, as provided herein:

"a. Reopening of Outdoor Dining. Executive Order No. 7D . . . is amended to provide that outdoor dining shall be permitted at any restaurant, eating establishment, private club, or any location licensed for [on premises] consumption of alcohol, in accordance with the provisions of Executive Order No. 7MM and the Sector Rules for Restaurants, as amended from time to time, and any [e]xecutive [o]rder governing the sale or service of alcoholic beverages. Alcoholic beverages shall not be served except in conjunction with the sale of food in accordance with the provisions of Executive Order No. 7MM. The remaining provisions of Executive Order No. 7D . . . which prohibits indoor dining and, which, as amended, prohibits the sale of alcohol by such permittees without the sale of food, are extended through June 20, 2020. The provisions of Executive Order No. 7N . . . establishing rules for restaurant takeout and delivery, shall remain in effect. . . ."

[9] Executive Order No. 7ZZ, issued June 16, 2020, provides in relevant part: "Resumption of Indoor Dining Pursuant to Sector Rules for Restaurants. Executive Order No. 7D . . . is amended to permit indoor dining pursuant to the . . . Sector Rules for Restaurants, as amended from time to time, which Sector Rules shall be legally binding and enforceable. The remaining provisions of Executive Order No. 7D . . . which prohibit the sale of alcohol by certain permittees without the sale of food, shall remain in effect and are extended through July 20, 2020. The provisions of Executive Order No. 7N . . . establishing rules for restaurant takeout and delivery, shall remain in effect."

to resume providing indoor dining at 50 percent capacity.[10]

The bistro was completely closed between March 11 and May 27, 2020. Downtown Soho had no income and could not pay rent during that period of time. Although the lease agreement did not prohibit takeout or delivery dining or restrict the restaurant's operation to dine in business only, Ahmetaj testified that it was not profitable when the bistro attempted to do so. After obtaining a permit from the city of Norwalk, Downtown Soho reopened the bistro for outdoor dining on May 28, 2020. Subsequently, during the summer of 2020, the bistro was open for indoor dining. As the trial court found, the nine foot social distancing requirements imposed at that time by the city of Norwalk[11] had a significant

[10] We note that, in March and April of 2020, Governor Lamont issued several other executive orders that also affected the restaurant industry. Executive Order No. 7F closed large shopping malls and places of public amusement but permitted restaurants and bars that are attached to shopping malls with separate external entrances to remain open for takeout service. Executive Order No. 7G modified Executive Order No. 7D by allowing restaurants, bars or alcoholic beverage manufacturers with active liquor permits to sell certain sealed containers of alcoholic beverages for off premises consumption. Executive Order No. 7N required restaurants and bars open for the sale of food for takeout to minimize the entrance of customers into their establishments and to use, to the extent possible, remote ordering or touchless payment systems to minimize contact. Executive Order No. 7T expanded options under Executive Order No. 7G for delivery of sealed alcoholic beverages to customers by existing permit holders.

Subsequently, in May, 2020, Governor Lamont issued Executive Order No. 7MM, which facilitated Executive Order No. 7PP; see footnote 8 of this opinion; insofar as it suspended and modified state and municipal laws, ordinances and regulations in order to allow for outdoor dining, alcoholic beverage service, and retail activities, and to expedite the associated state and local approval processes.

[11] Under the nine foot social distancing requirements, the bistro could provide only seven bar seats and eight indoor dining tables. The city of Norwalk did not allow the defendants to use floor space in the bar area, which constituted nearly 40 percent of the restaurant's square footage, for additional dining tables. The outdoor dining space of the restaurant could accommodate only six tables, with up to six patrons at each table, generally restricting capacity to twenty-two to twenty-five persons outside.

effect on the usage of the restaurant space because, "[p]repandemic, [more than] 140 patrons could enjoy the space, [whereas] after the pandemic, about a maximum of twenty-five individuals, including staff, could be inside. At best, operating the business meant operating at a loss." This was compounded by the fact that alcoholic beverage sales remained limited to those customers who had purchased food. See Executive Order No. 7PP; footnote 8 of this opinion.

The defendants did not make any rental payments after March, 2020. During the pandemic, Ahmetaj again spoke with Greenbaum and asked that the plaintiff forgive rent for the months of March, April, and May, 2020, with full payments to begin in June, 2020. The plaintiff declined that offer because the defendants had refused its request to make some partial payment as a show of good faith, particularly when they had been in default under the lease agreement even prior to the pandemic restrictions.[12] Subsequently, the plaintiff served a notice to quit, demanding that Downtown Soho vacate the premises on or before June 12, 2020; the plaintiff commenced a separate summary process action shortly thereafter. Downtown Soho vacated the premises by September 11, 2020.

[12] The relationship between the parties had grown acrimonious by this time. Ahmetaj testified that, at the time of trial, he owned two other bars, which were fully closed, and two other restaurants, which were able to operate at a break-even level given rent reduction accommodations provided by the landlords at those locations. Ahmetaj also testified that his conversations with Greenbaum led him to understand that the plaintiff wanted to replace the defendants with a new tenant prior to the pandemic. During those discussions, Ahmetaj informed Greenbaum that Downtown Soho would leave if the plaintiff paid the defendants $250,000 to vacate the premises. The plaintiff refused that demand.

Greenbaum testified that the plaintiff had, however, negotiated concessions with other tenants that were experiencing pandemic related financial difficulties by obtaining a partial payment up front, with portions of their monthly rents deferred to a later time. Greenbaum testified that most of the plaintiff's other tenants were able to continue to pay their monthly rents in full at that time.

The plaintiff immediately began marketing the space for new tenants. On November 30, 2020, the plaintiff entered into a ten year lease agreement for the premises with a new tenant, Sono Boil, Inc. (Sono Boil). Sono Boil planned to renovate the premises and to operate a full service restaurant there. The rent for Sono Boil's lease was $12,500 per month, including base rent and the additional rent for reimbursement of property taxes and common area expenses, which was less than the defendants had been paying. To entice Sono Boil to sign a lease, the plaintiff provided it with a concession of free rent for the first six months of the lease. The plaintiff did not offer a similar concession or lease terms to the defendants in order to allow them to stay.

The plaintiff brought this action against the defendants seeking money damages. In the first two counts of the three count complaint, the plaintiff alleged that Downtown Soho had breached the lease agreement and been unjustly enriched by occupying the premises without paying for that benefit. In the third count, the plaintiff alleged that Ahmetaj had breached his guarantee obligations. In response, the defendants raised various special defenses, including the doctrines of impossibility of performance and frustration of contract, relying on the purpose of the lease agreement, namely, " 'the operation of a first class restaurant and bar,' " and the adverse effects of the various executive orders on the restaurant and hospitality industry. The defendants also claimed that the executive orders rendered the lease agreement illegal as a matter of law.

After a one day trial to the court, at which Ahmetaj and Greenbaum testified, the trial court issued a memorandum of decision, finding that the plaintiff had established its claims of breach of the lease agreement, unjust enrichment, and breach of guarantee. Turning to the special defenses, the trial court concluded that the defendants had not proven, by a fair preponderance of

the evidence, that the executive orders rendered the operation of a restaurant impossible, impracticable or illegal, and had not frustrated the purpose of the lease agreement. Emphasizing that § 4 (d) of the lease agreement required the defendants to bear the risk of complying with applicable laws and regulations,[13] the trial court concluded that the "pandemic . . . was certainly an unforeseen event, but compliance with the governmental orders in response thereto was an expense allocated to the defendants in the lease [agreement]. The defendants claim that they were operating at a loss until the business ultimately closed. It is clear that [the bistro] would not immediately 'look' on the inside like it did prior to the pandemic, with a crowd enjoying [its] sorely missed cuisine, but the law, and the lease [agreement], did not require the defendant[s] to operate a *profitable* bar/restaurant, just a bar/restaurant. Certainly, fine dining as takeout is a difficult sell, but not illegal [or] impossible. . . . None of the executive orders specifically made the operation of a restaurant 'illegal' or 'impossible.' " (Emphasis in original.) The trial court further observed that the "purpose of the lease [agreement] was not frustrated [but, rather], the [defendants'] profitability for continuing that purpose was frustrated. It is a key distinction that causes this defense to fail."

The trial court then considered damages, observing that, "[i]n a commercial lease, the defendant is usually responsible for the full amount of the lease less the amounts the plaintiff was able to mitigate with the new lease." It then found that, "[a]lthough the defendant[s]

[13] Section 4 (d) of the lease agreement provides in relevant part that the defendants, at their "expense, shall comply with all laws, orders and regulations of [f]ederal, [s]tate and municipal authorities and with any direction of any public officer or officers, pursuant to [l]aw, which shall impose any violation, order or duty upon [l]andlord or [t]enant with respect to the use or occupancy thereof by [t]enant or [t]enant's [r]epresentatives, including, without limitation, the Americans with Disabilities Act . . . and any [e]nvironmental [l]aws . . . ."

vacated [the premises on] September 11, 2020, [they] did not provide any funds toward rent, use and occupancy or reimbursements since February, 2020. The new lease was signed in December, 2020, with the new tenant beginning occupancy in January, 2021. The lease is at a slightly lower monthly rent to reflect the new economic conditions." In calculating the damages, the trial court credited the plaintiff for mitigating its damages by "quick[ly] obtaining . . . a new tenant," Sono Boil, but it observed that "no evidence of the negotiations with [Sono Boil] was presented in detail by the plaintiff. The court can only speculate if further negotiations with [Sono Boil] could have resulted in a lease with the same terms the defendants' lease had. Certainly, the six month [rent] concession [given to Sono Boil] was similar to that enjoyed by the defendants . . . at the start of [their] lease [agreement] and is not unusual, but the court is going to terminate the accrual of damages [with the] December, 2020 rent. [Sono Boil] took possession on or about January 1, 2021. The court will allow the leasing [broker's] commission as an expense, as it would not have been incurred had the defendants fulfilled their obligations."[14] Accordingly, the trial court rendered judgment for the plaintiff and awarded it $200,308.76 in damages.[15] This appeal and cross appeal followed.

On appeal, the defendants claim that the trial court improperly interpreted and applied the special defenses

[14] The trial court rejected the defendants' fourth special defense, namely, that the plaintiff's damages had been offset by "multiple forms of relief from the federal government in the form of subsid[ies], tax relief and mortgage relief," which should be considered in calculating any damages owed to the plaintiff. The defendants do not challenge this conclusion on appeal, and we need not consider this special defense further.

[15] We note that the trial court's total damages award of $200,308.76 reflected the following components: (1) unpaid rent, use and occupancy for ten months, from March, 2020, through December, 2020, in the amount of $137,774.30; (2) utility bills of $2,013.88 and $3,005.20; (3) the leasing agent's commission on the new lease in the amount of $41,933; (4) reasonable attorney's fees in the amount of $14,775; and (5) costs in the amount of $807.38.

of impossibility and frustration of purpose.[16] In its cross appeal, the plaintiff claims that the trial court improperly declined to award it the full difference in value between the defendants' lease agreement and that of the new tenant, Sono Boil.

I

SPECIAL DEFENSE CLAIMS

Before turning to the defendants' specific claims with respect to the contract defenses of impossibility and frustration of purpose,[17] we set forth the applicable legal principles and standard of review. "The elements of a breach of contract claim are the formation of an agreement, performance by one party, breach of the agreement by the other party, and damages. . . . The interpretation of definitive contract language is a question of law over which our review is plenary. . . . By contrast, the trial court's factual findings as to whether and by whom a contract has been breached are subject

[16] We note that the defendants also claim that the trial court should have reduced the damages award proportionately because the various space and capacity restrictions that were in effect after the bistro reopened on May 28, 2020, meant that it did not have "exclusive occupancy" of the premises, rendering the trial court's finding of exclusive possession clearly erroneous. Insofar as this claim appears to pertain only to the unjust enrichment count of the complaint, we need not reach it given the independent basis for liability under the breach of contract count. See, e.g., *Russell* v. *Russell*, 91 Conn. App. 619, 638, 882 A.2d 98 ("unjust enrichment and breach of contract are mutually exclusive theories of recovery"), cert. denied, 276 Conn. 924, 888 A.2d 92, and cert. denied, 276 Conn. 925, 888 A.2d 92 (2005). To the extent it is at all relevant to the trial court's calculation of damages, we leave that to the new damages hearing to be held on remand. See part II of this opinion.

[17] Although the relevant headings in the defendants' brief state that the trial court improperly applied the doctrine of illegality in addition to the doctrines of impossibility and frustration of purpose, the defendants do not provide any factual or legal argument with respect to the doctrine of illegality. Accordingly, we agree with the plaintiff that any illegality claims are inadequately briefed and, therefore, abandoned for purposes of appeal. See, e.g., *Burton* v. *Dept. of Environmental Protection*, 337 Conn. 781, 805–806, 256 A.3d 655 (2021).

to the clearly erroneous standard of review and, if supported by evidence in the record, are not to be disturbed on appeal." (Citations omitted; internal quotation marks omitted.) *CCT Communications, Inc.* v. *Zone Telecom, Inc.*, 327 Conn. 114, 133, 172 A.3d 1228 (2017).

Moreover, a "party raising a special defense has the burden of proving the facts alleged therein." (Internal quotation marks omitted.) *U.S. Bank, National Assn.* v. *Moncho*, 203 Conn. App. 28, 46, 247 A.3d 161, cert. denied, 336 Conn. 935, 248 A.3d 708 (2021). "Legally sufficient special defenses alone do not meet the defendant's burden. The purpose of a special defense is to plead facts that are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action." (Internal quotation marks omitted.) Id.; see, e.g., *Wyatt Energy, Inc.* v. *Motiva Enterprises, LLC*, 308 Conn. 719, 736–37, 66 A.3d 848 (2013). On appeal, we engage in plenary review of the trial court's conclusions of law with respect to special defenses and review factual determinations for clear error. See id.

As one federal court has aptly noted with respect to COVID-19, "[t]hese times have not been easy for most people. And [although] some have had the good fortune to be able to continue to work during this unprecedented health crisis, others have not been as fortunate. . . . [B]usinesses that rely on the public such as theaters, restaurants, bars, hotels and the travel industry, as well as their landlords, have been hit particularly hard. And for the most part, the affected parties have tried to negotiate a resolution that is painful but practical to [e]nsure that 'on the other side' there will be something left. . . . But in the absence of [an] agreed [on] resolution, we are left with the resolutions that parties have bargained for in their contracts, or, [when] appropriate, the equitable remedies that [the] common law has fashioned." (Footnote omitted.) *In re Cinemex*

USA Real Estate Holdings, Inc., 627 B.R. 693, 701 (Bankr. S.D. Fla. 2021). With this in mind, we consider whether the impossibility or frustration of purpose doctrines afford the defendants relief from their contractual obligations to the plaintiff.

A

Impossibility Doctrine

We begin with the defendants' claim that the trial court incorrectly concluded that they failed to demonstrate entitlement to relief from the lease agreement under the impossibility doctrine. They argue that the trial court improperly drew a distinction between the operation of a restaurant and the operation of a profitable restaurant in rejecting this special defense, emphasizing that, under *Dills* v. *Enfield*, 210 Conn. 705, 557 A.2d 517 (1989), impossibility calls for proof only of commercial impracticability as a result of unforeseen events, in this case, the restaurant closures resulting from the governmental response to the COVID-19 pandemic. In support of this argument, the defendants rely on a New York case, *Bush* v. *ProTravel International, Inc.*, 192 Misc. 2d 743, 753–54, 746 N.Y.S.2d 790 (2002), in which the court determined that there was a genuine issue of material fact as to whether a customer was excused from the performance of a travel contract in the wake of a lockdown of New York City after the September 11 terrorist attacks on the World Trade Center.[18] The defendants posit that, under the circumstances

[18] We note that the defendants also rely on a recent decision from a New York trial court, *267 Development, LLC* v. *Brooklyn Babies & Toddlers, LLC*, New York Supreme Court, Kings County, Docket No. 510160/2020 (March 15, 2021), which they argue stands for the proposition that the doctrine of impossibility barred an action against a retail clothing store that was in default of its rental obligations during the pandemic lockdowns in New York, insofar as the risk of the government shutdown was unforeseeable. See *Hugo Boss Retail, Inc.* v. *A/R Retail, LLC*, Docket No. 655166/2020, 2021 WL 2006877, *12 n.9 (N.Y. Sup. May 19, 2021) (decision without published opinion, 71 Misc. 3d 1222, 145 N.Y.S.3d 329) (describing and distinguishing *267 Development, LLC*). The defendants did not include a

created by the executive orders, "[t]he unforeseeable effect of the [COVID-19] pandemic on [their] business and [the] subsequent lack of profitability [were] no fault of [theirs], and the lease could not have been performed by any other party. As a result, [they are] excused from breach of the [lease agreement] as [it] became impossible and impracticable for [them] to perform."

In response, the plaintiff argues that the trial court correctly determined that impossibility depends both on whether the contract can be performed only " 'at an excessive and unreasonable cost' " *and* whether on the terms of the contract reflect consideration of the risk at issue. Citing several recent decisions from New York's federal and state courts considering the effect of the COVID-19 pandemic on the enforceability of commercial leases under the impossibility doctrine; see, e.g., *Gap, Inc.* v. *Ponte Gadea New York, LLC*, 524 F. Supp. 3d 224, 237–38 (S.D.N.Y. 2021); the plaintiff emphasizes that § 4 (d) of the lease agreement requires the tenant to bear the cost of legal and regulatory compliance with respect to the use of the premises. We agree with the plaintiff and conclude that the executive orders did not render performance of the lease agreement impossible as a matter of law.

"The doctrine of 'impossibility' has come to include 'physical impossibility,' 'frustration of purpose' and 'impracticability' because of contingencies rendering performance more costly." *Dills* v. *Enfield*, supra, 210

copy of the unreported decision in *267 Development, LLC*, in their appendix, which renders it difficult for us to consider this out-of-state trial court case that has been published or reported only on a limited basis. See Practice Book § 67-8 (b) (2) (applicable to appeals filed before October 1, 2021) ("[w]here an opinion is cited that is not officially published, the text of the opinion shall be included in part two of the appendix"). As described by the defendants and by the New York court in *Hugo Boss Retail, Inc.*, *267 Development, LLC*, appears distinguishable from the present case because it contemplated a complete shutdown of the subject business, as compared to the somewhat more limited restrictions at issue in the present case.

Conn. 717 n.16. It "represents an exception to the accepted maxim of pacta sunt servanda [agreements must be kept], in recognition of the fact that certain conditions cannot be met because of unforeseen occurrences. . . . A party claiming that a supervening event or contingency has prevented, and thus excused, a promised performance must demonstrate that: (1) the event made the performance impracticable; (2) the nonoccurrence of the event was a basic assumption on which the contract was made; (3) the impracticability resulted without the fault of the party seeking to be excused; and (4) the party has not assumed a greater obligation than the law imposes." (Citation omitted.) Id., 717, citing 2 Restatement (Second), Contracts § 261, p. 313 (1981), and E. Farnsworth, Contracts (1982) § 9.6, p. 678.

As we observed in *Dills*, "only in the most exceptional circumstances have courts concluded that a duty is discharged because additional financial burdens make performance less practical than initially contemplated. See, e.g., *Neal-Cooper Grain Co.* v. *Texas Gulf Sulphur Co.*, 508 F.2d 283, 294 (7th Cir. 1974) (party [is] not allowed 'to escape a bad bargain merely because it is burdensome'); *American Trading & Production* [*Corp.*] v. *Shell International Marine, Ltd.*, 453 F.2d 939, 942 (2d Cir. 1972) (closing of Suez Canal requiring charterer to sail nearly twice as many miles at . . . cost of nearly one-third more than . . . contract price does not excuse performance); *United States* v. *Wegematic* [*Corp.*], 360 F.2d 674, 676–77 (2d Cir. 1966) (duty of manufacturer to produce revolutionary computer system [was] not excused because of 'engineering difficulties' requiring two years and $1.5 million to correct); *Peerless Casualty Co.* v. *Weymouth Gardens*, 215 F.2d 362, 364 (1st Cir. 1954) (increased costs caused by . . . unexpected outbreak of war [do] not [end] obligation of contract); [*In re*] *Westinghouse Electric* [*Corp.*], 517 F. [Supp.] 440, 452–53 (E.D. Va. 1981) (duty to remove spent fuel [was]

not excused merely because reprocessing of . . . fuel became unprofitable) . . . ." *Dills* v. *Enfield*, supra, 210 Conn. 717–18.

"Furthermore, the event [on] which the obligor relies to excuse his performance cannot be an event that the parties foresaw at the time of the contract." Id., 718. "Thus, the central inquiry is whether the nonoccurrence of the alleged impracticable condition was a basic assumption on which the contract was made." (Internal quotation marks omitted.) Id., 719, citing 2 Restatement (Second), supra, §§ 261 and 271, pp. 313, 354. "If an event is foreseeable, a party who makes an unqualified promise to perform necessarily assumes an obligation to perform, even if the occurrence of the event makes performance impracticable." (Internal quotation marks omitted.) *Dills* v. *Enfield*, supra, 210 Conn. 720.

Our description of *Dills* is apt for this case, as well, with respect to impossibility or impracticability. "This case, like virtually every case involving discharge from an obligation to perform, concerns the issue of which party bears the loss resulting from an event that renders performance by one party uneconomical. . . . Determining whether the [nonoccurrence] of a particular event was . . . a basic assumption involves a judgment as to which party assumed the risk of its occurrence . . . . In making such determinations, a court will look at all circumstances, including the terms of the contract. . . . [Because] impossibility and related doctrines are devices for shifting risk in accordance with the parties' presumed intentions, which are to minimize the costs of contract performance, one of which is the disutility created by risk, they have no place when the contract explicitly assigns a particular risk to one party or the other."[19] (Cita-

[19] For a prominent historical example of the doctrine of impossibility, see the California Supreme Court's decision in *Lloyd* v. *Murphy*, 25 Cal. 2d 48, 56, 153 P.2d 47 (1944), which held that restrictions on the production of new vehicles during World War II as a result of mobilizing industry to support national defense did not trigger the doctrine of impossibility so as to relieve

tions omitted; internal quotation marks omitted.) Id.; see *O'Hara* v. *State*, 218 Conn. 628, 636–38, 590 A.2d 948 (1991) (impossibility doctrine did not excuse duty to convey real property, despite nonoccurrence of roadway relocation project that was condition to conveyance, because contract anticipated that situation by requiring partial conveyance if condition did not occur); *Dills* v. *Enfield*, supra, 210 Conn. 709–11, 719–20 (impossibility doctrine did not excuse real estate developer from his obligation to submit acceptable construction plans to town's economic development agency for construction of industrial park, which would have allowed him to recover $100,000 deposit that developer had made to town pending financing, even though it would cost $250,000 to produce plans and developer had been unable to obtain project financing, because situation reflected bargained for provision in contract and was not unforeseeable given developer's previous financial difficulties); *West Haven Sound Development Corp.* v. *West Haven*, 201 Conn. 305, 307–308, 313–15, 514 A.2d 734 (1986) (impossibility doctrine did not relieve city of contractual obligations to real estate developer when popular referendum to turn certain land into park, which result had force of ordinance, resulted in cancellation of economic development project); *Hess* v. *Dumouchel Paper Co.*, 154 Conn. 343, 351–52, 225 A.2d 797 (1966) (planned condemnation of land for highway construction did not excuse tenant's performance of lease for warehouse until "the time of the actual taking" because "the imminence of condemnation did not operate to cancel the written lease" under impossibility doctrine).

Applying these principles, we conclude that the doctrine of impossibility or impracticability did not excuse

the tenant, an automobile dealer, of its obligations, even though the automobile sales business was rendered "less profitable and more difficult to continue" during that time.

the defendants from their obligations to the plaintiff under the lease agreement. First, and most significant, as the trial court found, even under the most restrictive executive orders, use of the premises for restaurant purposes was not rendered factually impossible insofar as restaurants were permitted to provide curbside or takeout service, and the lease agreement did not prohibit curbside or takeout service. See, e.g., *Gap, Inc.* v. *Ponte Gadea New York, LLC*, supra, 524 F. Supp. 3d 237–38 (even though retailer's "performance may be burdensome, even to the extent of insolvency or bankruptcy," governmental prohibitions on physical retail business did not render performance of retail store lease impossible as matter of law given availability of curbside pickup of merchandise and force majeure clause of "limited application"); *In re Cinemex USA Real Estate Holdings, Inc.*, supra, 627 B.R. 700–701 (doctrine of impracticability did not excuse movie theater's rental obligation after reopening was allowed at 50 percent capacity, despite reduced revenues resulting from lack of new movie releases and reduced customer demand, and increased costs resulting from providing appropriate safety equipment and social distancing); *558 Seventh Ave. Corp.* v. *Times Square Photo, Inc.*, 194 App. Div. 3d 561, 561–62, 149 N.Y.S.3d 55 (concluding that doctrines of impossibility and frustration of purpose did not excuse obligation of electronics store to pay rent because, although it "was shuttered for a period as a result of [pandemic related] executive orders," which resulted in "reduced revenues," it "eventually reopened for curbside service and . . . [the tenant was] able to gain access to the premises during the period of nonpayment"), appeal dismissed, 37 N.Y.3d 1040, 176 N.E.3d 301, 154 N.Y.S.3d 564 (2021). But cf. *Doherty* v. *Monroe Eckstein Brewing Co.*, 198 App. Div. 708, 710–12, 191 N.Y.S. 59 (1921) (constitutional prohibition of sale of liquor rendered void for illegality

lease that was for exclusive purpose of "saloon business," namely, place for sale of intoxicating beverages); *1877 Webster Ave., Inc.* v. *Tremont Center, LLC*, 72 Misc. 3d 284, 292, 148 N.Y.S.3d 332 (2021) (fact that "the exclusive purpose of the lease was to operate a first-class nightclub" created "a legally cognizable theory" that government shutdown of nonessential businesses rendered it "objectively impossible" for tenant "to conduct business as originally contemplated by the parties' lease"). Although the COVID-19 restrictions had undoubtedly serious economic consequences for the viability of the bistro—in particular, the initial closure for indoor dining, followed by the loss of bar business and a reopening for indoor dining only with a drastic reduction in capacity—they did not, by themselves, make performance under the lease agreement impossible or commercially impracticable as a matter of law.[20] Instead, they simply raised the cost of performance for the defendants in a manner that rendered it perhaps highly burdensome, but not factually impossible—akin

[20] We disagree with the defendants' reliance on *Bush* v. *ProTravel International, Inc.*, supra, 192 Misc. 2d 743, because that case presented issues of physical impossibility that make the case distinguishable from the present case. In *Bush*, a New York trial court held that the impossibility doctrine excused a customer's compliance with a September 14, 2001 cancellation deadline in a travel company's contract for a safari vacation, given the state of emergency in New York City in the days following the September 11 terrorist attacks. See id., 753–54. Observing that, "on the days at the focal point of the argument . . . September 12, 13 and 14, 2001, New York City was in [a] state of virtual lockdown with travel either forbidden altogether or severely restricted"; id., 750; and that telephone communications were disabled into lower Manhattan where the travel company's office was located; id., 746; the court followed "wartime precedents [that] developed the law of temporary impossibility"; id., 752; in denying the travel company's motion for summary judgment on the ground that the traveler had established a genuine issue of material fact that compliance with the September 14 cancellation deadline for the return of her deposit was factually impossible. Id., 754. We disagree with the defendants' reliance on *Bush* because that case concerned physical impossibility created in the wake of the September 11 attacks in the neighborhood of the travel agent's office, as opposed to the commercial impracticability and lack of profitability at issue in the present case.

to the outbreak of war, or the closure of the Suez Canal, which had been held not to discharge contractual duties under the doctrine of impossibility. See *Dills* v. *Enfield*, supra, 210 Conn. 717–18 (citing cases).

Second, the language of the lease agreement suggests that events of the magnitude of the COVID-19 pandemic were not entirely unforeseeable. The lease agreement lacks a force majeure clause that would govern the parties' mutual obligations in the event of a crisis situation beyond their control,[21] and, to the extent that the lease agreement provides for any forgiveness of obligation in a crisis situation (thus suggesting that they are foreseeable), it excuses only the *plaintiff's* obligations—under § 25 of the lease agreement governing "unavoidable delay" occasioned by a variety of circumstances, including fire or "governmental [preemption] in connection with a national emergency . . . ."[22]

[21] "[T]he basic purpose of force majeure clauses . . . is in general to relieve a party from its contractual duties when its performance has been prevented by a force beyond its control or when the purpose of the contract has been frustrated." *Phillips Puerto Rico Core, Inc.* v. *Tradax Petroleum Ltd.*, 782 F.2d 314, 319 (2d Cir. 1985); see *Harriscom Svenska, AB* v. *Harris Corp.*, 3 F.3d 576, 580 (2d Cir. 1993) ("[l]ike commercial impracticability, a force majeure clause in a contract excuses nonperformance when circumstances beyond the control of the parties prevent performance"). Although force majeure events "[h]istorically . . . connoted events that rendered a party's performance impossible because of an unforeseeable event beyond the parties' control," with "[s]uch events . . . often described as acts of God" or resulting from "natural disasters such as earthquakes and floods, [force majeure] has since come to encompass many man-made and [man caused] events such as strikes, market shifts, terrorist attack[s], computer hacking, and governmental acts, among many others. In other words, force majeure provides a flexible concept that permits the parties to formulate an agreement to address their unique course of dealings and industry idiosyncrasies, allowing contractual force majeure clauses to have a much wider application than the doctrine would under its historical roots." (Footnotes omitted; internal quotation marks omitted.) J. Robinson et al., "Use the Force? Understanding Force Majeure Clauses," 44 Am. J. Trial Advoc. 1, 2–3 (2020).

[22] Section 25 of the lease agreement provides: "[The plaintiff] shall not be in default hereunder if it is unable to fulfill or is delayed in fulfilling any of its obligations hereunder, including, without limitation, any obligations to

Finally, § 4 (d) of the lease agreement squarely tasks the defendants with the obligation of complying with all governmental "laws, orders and regulations . . . ." See footnote 13 of this opinion. Accordingly, we conclude that the trial court correctly determined that the defendants did not establish the special defense of impossibility by a preponderance of the evidence.

B

Frustration of Purpose

We now turn to the defendants' claim under the frustration of purpose doctrine. The defendants argue that the COVID-19 pandemic and required shutdown pursuant to the executive orders, which was an unforeseen event beyond the control of either party, frustrated the purpose of the lease agreement, as stated by § 1 (o), namely, "the operation of a first-class restaurant and bar selling food, beverages and related accessories, together with uses incidental thereto, and for no other purpose."[23] Relying on the prohibition era decision in

supply any service hereunder, or any obligation to make repairs or replacements hereunder, if it is prevented from fulfilling or is delayed in fulfilling such obligations by reason of fire or other casualty, strikes or labor troubles, governmental [preemption] in connection with a national emergency, shortage of supplies or materials, or by reason of any rule, order or regulation of any governmental authority, or by reason of the condition of supply and demand affected by war or other emergency, or any other cause beyond its reasonable control (collectively, 'Unavoidable Delay'). *Such inability or delay by* [*the plaintiff*] *in fulfilling any of its obligations hereunder shall not affect, impair or excuse* [*the defendants*] *from the performance of any of the terms, covenants, conditions, limitations, provisions or agreements hereunder on its part to be performed, nor result in any abatement of* [*r*]ent *payable hereunder*." (Emphasis added.)

[23] As they emphasized at oral argument before this court, the defendants also claim that the lease has the specific purpose of allowing the operation of a " 'first-class restaurant,' " which they describe as a "high-end," indoor, fine dining business with a "premium rent to obtain [the] benefit of exposure to large numbers of consumers in a highly trafficked retail and commercial location." They contend that the lease agreement's language is ambiguous with respect to whether the *use of the premises was specifically and contractually limited to that kind of restaurant*, which would support their argument that the "purpose of the lease [was never] to operate anything

Doherty v. *Monroe Eckstein Brewing Co.*, supra, 198 App. Div. 708, and a recent Massachusetts decision, *UMNV 205-207 Newbury, LLC* v. *Caffé Nero Americas, Inc.*, Docket No. 2084CV01493-BLS2, 2021 WL 956069 (Mass. Super. February 8, 2021), among other cases, the defendants contend that the purpose of the lease agreement was frustrated and "rendered valueless" given that the executive orders in effect until June 16, 2020, eliminated the indoor, "on premises dining with bar service" that had constituted their "business trade," despite the lack of limitations to that effect in the provisions of the lease agreement. In response, the plaintiff argues that the case law cited by the defendants is distinguishable and that the trial court correctly determined that the executive orders did not frustrate the purpose of the lease agreement because a legal use for the premises remained available to the defendants under its terms, namely, the service of food and beverages for off premises consumption. We agree with the plaintiff and conclude that the trial court correctly determined that the executive orders did not frustrate the purpose of the lease agreement.

other than a first-class restaurant, which precludes a majority takeout dining experience, and there was no prior established takeout business." The defendants further argue that the executive orders frustrated this specific, limited purpose. In response, the plaintiff contends that we should not review this claim regarding the effect of the "first-class restaurant" language because it was not raised before the trial court.

We agree with the plaintiff and conclude that this issue with respect to the inconsistency in the lease agreement is not preserved. Although the defendants' posttrial brief discussed the nature of its fine dining business, including entree prices and associated bar revenues, it did not claim that the language of the lease agreement limited the use of the premises to a particular kind of restaurant business. Indeed, counsel for the defendants acknowledged at oral argument before this court that this issue was not specifically litigated before the trial court, with no evidence introduced as to the drafting of the lease agreement. Accordingly, we decline to consider this claim further because it was not presented to the trial court and, therefore, is unpreserved for appellate review. See, e.g., *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 157–60, 84 A.3d 840 (2014); *Graham* v. *Commissioner of Transportation*, 206 Conn. App. 497, 505–506, 260 A.3d 1275 (2021).

"The doctrine of frustration of purpose . . . excuses a promisor in certain situations [in which] the objectives of the contract have been utterly defeated by circumstances arising after the formation of the agreement. . . . Excuse is allowed under this rule even though there is no impediment to actual performance. . . . A party claiming that a supervening event or contingency has frustrated, and thus excused, a promised performance must demonstrate that: (1) the event substantially frustrated his principal purpose; (2) the nonoccurrence of the supervening event was a basic assumption on which the contract was made; (3) the frustration resulted without the fault of the party seeking to be excused; and (4) the party has not assumed a greater obligation than the law imposes."[24] (Citation omitted; internal quotation marks omitted.) *Howard-Arnold, Inc.* v. *T.N.T. Realty, Inc.*, 315 Conn. 596, 605, 109 A.3d 473 (2015); see *Hess* v. *Dumouchel Paper Co.*, supra, 154 Conn. 350–51. "[T]he establishment of the defense requires convincing proof of a changed situation so severe that it is not fairly regarded as being within the risks assumed under the contract. . . . The doctrine

[24] Our Appellate Court has observed that the "doctrine of frustration of purpose was first recognized in the [turn of the century] English case of *Krell* v. *Henry*, 2 K.B. 740 (C.A. 1903). In that case, a spectator entered into a contract to rent an apartment for the purpose of viewing the procession for the coronation of King Edward VII. When the coronation was postponed and the procession cancelled, the spectator refused to pay for the rental, breaching the contract. . . . When the apartment owner sued, the court excused the breach, holding that the 'coronation procession was the foundation of this contract' . . . and that 'the object of the contract was frustrated by the non-happening of the coronation and its procession on the days proclaimed.' . . . The court implicitly determined that, had the parties contemplated the possibility of the coronation being cancelled, they would have included a provision allowing the spectator to terminate the contract under those circumstances. Thus, the doctrine of frustration of purpose, as it originated and has since been applied by Connecticut courts, acts to provide an excuse for nonperformance by a party whose purposes were thwarted by events the parties did not contemplate and could not foresee." (Citations omitted.) *DDS Wireless International, Inc.* v. *Nutmeg Leasing, Inc.*, 145 Conn. App. 520, 525–26, 75 A.3d 86 (2013).

of frustration of purpose is given a narrow construction so as to preserve the certainty of contracts . . . .'' (Citation omitted; internal quotation marks omitted.) *Godfrey* v. *Commissioner of Correction*, 202 Conn. App. 684, 693, 246 A.3d 1032, cert. denied, 336 Conn. 931, 248 A.3d 2 (2021), quoting 17A Am. Jur. 2d 618, Contracts § 640 (2016), and 17A Am. Jur. 2d, supra, § 641, p. 619; see *O'Hara* v. *State*, supra, 218 Conn. 638 (circumstances giving rise to frustration of purpose must be unforeseeable at time of contract); see also *Howard-Arnold, Inc.* v. *T.N.T. Realty, Inc.*, supra, 605–606 (doctrine did not apply when purpose of lease was to lease property, and tenant continued to occupy property, despite lack of environmental remediation in connection with option to purchase); *O'Hara* v. *State*, supra, 638–39 (doctrine did not apply with respect to purchase of land because ''the agreement explicitly acknowledged the possibility that the plans for relocation could be altered,'' meaning that ''the parties foresaw that the state might acquire a greater portion of the eastern property than originally proposed''); *Hess* v. *Dumouchel Paper Co.*, supra, 351 (The purpose of the lease agreement was not frustrated by ''the impending condemnation'' of the leased warehouse for the construction of a highway because the ''purpose of the agreement, from the defendant's point of view, was to provide storage space for its inventory,'' which ''survived the announcement of the highway construction plans, as evidenced by the defendant's purchase of its own warehouse. At the time of the actual taking, of course, the objective of the contract would have become frustrated, and performance by the plaintiff rendered impossible . . . .''); *DDS Wireless International, Inc.*, v. *Nutmeg Leasing, Inc.*, 145 Conn. App. 520, 527, 75 A.3d 86 (2013) (doctrine did not excuse taxi company from its obligations under service contract for mobile dispatch system because termination clause in contract indicated that ''the parties plainly did con-

template a situation in which the [taxi company] would not be satisfied with the dispatch system or the service provided").

Given the narrowness of the frustration of purpose doctrine, we conclude that the purpose of the lease agreement was not frustrated by the pandemic restrictions imposed by the executive orders, even those that barred indoor dining entirely. The language of the lease agreement was not limited to a certain type of dining and—in contrast to the more restrictive language contained in the sister state cases on which the defendants rely—did not preclude the takeout and subsequent outdoor dining that the defendants sought to provide. Put differently, the lease terms did not by themselves render the lease agreement valueless in light of the executive orders. See *Gap, Inc.* v. *Ponte Gadea New York, LLC*, supra, 524 F. Supp. 3d 235 (pandemic restrictions did not frustrate purpose of retail store lease, despite adverse economic consequences and dramatic reduction of foot traffic in area of store, given availability of curbside pickup and reopening for shopping with restrictions, because lease did not make "any guarantee regarding foot traffic or the nature or demographic characteristics of the area of the . . . store premises"); *In re Cinemex USA Real Estate Holdings, Inc.*, supra, 627 B.R. 699–700 (doctrine of frustration of purpose did not excuse movie theater's rental obligation after reopening was allowed at 50 percent capacity, despite reduced revenues and increased operation costs).

The lack of use restrictions in the lease agreement at issue in this appeal, in juxtaposition with executive orders that did not completely shut down the restaurant industry, renders distinguishable the Massachusetts decision, *UMNV 205-207 Newbury, LLC* v. *Caffé Nero Americas, Inc.*, supra, 2021 WL 956069, on which the defendants rely. In that case, a state trial court concluded that the purpose of a restaurant lease had been

frustrated for the period of time between closure in March, 2020, and partial reopening in June, 2020, for outdoor dining and takeout, and subsequently limited indoor dining, given that the "main object or purpose of [the] contract" was limited by its specific language allowing the tenant to "use the *leased premises . . . to operate* [*only*] *a café with a sit-down restaurant menu 'and for no other purpose.*' "[25] (Emphasis added.) Id., *5; see id. ("[Because] the [l]ease limited the permissible use of the leased space to a single purpose, it cannot be disputed that [the defendant's] continued ability to operate a café [on] the leased premises, and the absence of government orders barring all restaurants from serving customers inside, was a basic assumption underlying the [l]ease. And there is no evidence that the risk of a global viral pandemic coming to Massachusetts and leading to a government order shutting down the entire restaurant industry was something the parties contemplated when they entered into the [l]ease."); cf. *Doherty* v. *Monroe Eckstein Brewing Co.*, supra, 198 App. Div. 711 (distinguishing lease making "[a] saloon business . . . the only business for which the tenant was authorized to use the premises" from other leases referring to "the character of the saloon business if conducted"). Accordingly, we conclude that the trial court correctly determined that the

[25] We note that the Massachusetts court further concluded that the lease's force majeure clause did not bar the application of the doctrine of frustration of purpose because that clause excepted financial inability to pay from causes deemed to be beyond a party's control, and "addresse[d] the risk that performance may become impossible, but [did] *not* address the distinct risk that the performance could still be possible even while the main purpose of the [l]ease is frustrated by events not in the parties' control." (Emphasis in original.) *UMNV 205-207 Newbury, LLC* v. *Caffé Nero Americas, Inc.*, supra, 2021 WL 956069, *6; see id., *7 (observing that separate provisions of lease address "a classic cause of frustration of purpose," namely, destruction or damage of leased premises, by limiting rent abatement/termination rights only to extent that landlord was made whole by insurance, and gave landlord 120 days to repair premises).

defendants did not prove the special defense of frustration of purpose.[26]

[26] Finally, we note that our conclusions in this appeal are consistent with the decisions of numerous federal and state courts that have held that the severe economic difficulties in the operation of restaurants, retail businesses, and other public accommodations that resulted from governmental actions intended to stem the spread of the COVID-19 pandemic have not excused them from the performance of their commercial lease agreements on grounds of impossibility, impracticability, or frustration of purpose. See *Gap, Inc.* v. *Ponte Gadea New York, LLC*, supra, 524 F. Supp. 3d 234–35, 237–38 (retail store); *In re NTS W. USA Corp.*, Docket No. 20-CV-6692 (CS), 2021 WL 4120676, *1, *5–7 (S.D.N.Y. September 9, 2021) (retail store); *In re Cinemex USA Real Estate Holdings, Inc.*, supra, 627 B.R. 695, 700–701 (movie theater); *STORE SPE LA Fitness* v. *Fitness International, LLC*, Docket No. SACV 20-953 JVS (ADSx), 2021 WL 3285036, *9–10 (C.D. Cal. June 30, 2021) (fitness center); *Gap, Inc.* v. *170 Broadway Retail Owner, LLC*, 195 App. Div. 3d 575, 576–78, 151 N.Y.S.3d 37 (2021) (retail store); *558 Seventh Ave. Corp.* v. *Times Square Photo, Inc.*, supra, 194 App. Div. 3d 561–62 (retail electronics store); *A/R Retail, LLC* v. *Hugo Boss Retail, Inc.*, 72 Misc. 3d 627, 648–50, 149 N.Y.S.3d 808 (2021) (retail store); *Greater New York Automobile Dealers Assn., Inc.* v. *City Spec, LLC*, Docket No. LT-053560-20/QU, 2020 WL 8173082, *7–10 (N.Y. Civ. December 29, 2020) (decision without published opinion, 70 Misc. 3d 1209, 136 N.Y.S.3d 695) (commercial office space); see also *CAI Rail, Inc.* v. *Badger Mining Corp.*, Docket No. 20 Civ. 4644 (JPC), 2021 WL 705880, *7–10 (S.D.N.Y. February 22, 2021) (decline in petroleum industry resulting from suppression of demand because of COVID-19 restrictions did not relieve lessee of railroad cars from obligation under lease, which lacked force majeure clause, pursuant to doctrines of impossibility or frustration of purpose under New York law); cf. *1600 Walnut Corp.* v. *Cole Haan Co. Store*, 530 F. Supp. 3d 555, 558–59 (E.D. Pa. 2021) (governor's shutdown orders were force majeure event that, under terms of lease, did not excuse retail tenant from obligation to pay rent, thus rendering doctrines of impossibility and frustration of purpose unavailable to relieve tenant of requirement to adhere to terms of lease).

To the extent that our independent research has found authority that excused—at least in part—tenants from their rental obligations during COVID-19, that authority rests on distinguishable lease language, namely, force majeure clauses that governed this particular situation. See *In re Cinemex USA Real Estate Holdings, Inc.*, supra, 627 B.R 699 (force majeure clause excusing performance for duration of certain events, including governmental action, excused movie theater from rent obligation during period of total shutdown due to COVID-19); *In re Hitz Restaurant Group*, 616 B.R. 374, 377–80 (Bankr. N.D. Ill. 2020) (concluding that force majeure clause excusing both parties from lease obligations that are " 'prevented or delayed, retarded or hindered by . . . laws, governmental action or . . . orders of government" proportionately reduced, but did not eliminate, restaurant tenant's rent obligations during COVID-19 shutdowns given that curbside and takeout service remained available); *1877 Webster Ave., Inc.* v. *Tremont*

II

DAMAGES

We now turn to the plaintiff's cross appeal, in which it claims that the trial court improperly failed to award it the full difference in value between the defendants' lease agreement and the new lease that the plaintiff entered into with Sono Boil, the replacement tenant. The plaintiff argues that the trial court's award of damages, which held the defendants responsible only for rent accrued until December, 2020, and was $246,778.50 less than it sought, was inconsistent with the general standard for damages for breach of a lease contract, under which the breaching tenant is responsible for the payment of the full amount of the contract less the amounts that the landlord was able to mitigate with the new lease, thus placing the landlord in the position that it would be had the lease been performed. See, e.g., *Danpar Associates* v. *Somersville Mills Sales Room, Inc.*, 182 Conn. 444, 446, 438 A.2d 708 (1980); *Rokalor, Inc.* v. *Connecticut Eating Enterprises, Inc.*, 18 Conn. App. 384, 388–90, 558 A.2d 265 (1989). To this end, the plaintiff argues, inter alia, that the trial court improperly charged it with the burden of presenting evidence relating to its negotiations with Sono Boil to show an inability to mitigate its damages by obtaining the same lease or better terms than it had with the defendants, because the defendants, as the breaching party, bear the burden of proof as to failure of mitigation under cases such as *Vanliner Ins. Co.* v. *Fay*, 98 Conn. App. 125, 145, 907 A.2d 1220 (2006).

In response, the defendants contend that the trial court did not abuse its discretion in determining the

Center, LLC, supra, 72 Misc. 3d 292 (fact that "the exclusive purpose of the lease was to operate a first-class nightclub" presented "legally cognizable theory" of impossibility that government shutdown of nonessential businesses rendered it "objectively impossible" for tenant "to conduct business as originally contemplated by the parties' lease").

damages awarded. Relying on *Southhaven Associates, LLC* v. *McMerlin, LLC*, 159 Conn. App. 1, 122 A.3d 670 (2015), and *Rokalor, Inc.* v. *Connecticut Eating Enterprises, Inc.*, supra, 18 Conn. App. 384, among other cases, the defendants argue that the trial court retained the discretion not to award the full value of the lease agreement as a basis for damages, given the plaintiff's failure to introduce evidence as to negotiations with prospective tenants, changes in economic conditions or fair market value of the premises. Finally, the defendants contend that the plaintiff failed to move for an articulation that would have indicated that the trial court applied an erroneous legal standard in awarding damages. We agree with the plaintiff and conclude that a new damages hearing is required because the trial court improperly assigned it the burden of proving the mitigation of damages.[27]

Certain well established principles, discussed in this court's decision in *Danpar Associates* v. *Somersville Mills Sales Room, Inc.*, supra, 182 Conn. 446–47, govern the plaintiff's claims in its cross appeal. "[W]hen the lessee breaches a lease for commercial property, the lessor has two options: (1) to terminate the tenancy; or (2) to refuse to accept the surrender. . . . [When] the landlord elects to continue the tenancy, he may sue

[27] As a corollary to its burden of proof claim, the plaintiff contends that the trial court's damages award is clearly erroneous insofar as the trial court concluded that the plaintiff failed to prove its entitlement to damages via the presentation of evidence relating to those negotiations with Sono Boil. The plaintiff, however, asks us to remand the case to the trial court with direction to award it $447,087.26, which reflects the full remaining value of the payments due under the lease agreement. On the other side of that coin, the defendants argue in their appeal that the trial court improperly failed to consider relevant facts regarding the breakdown in negotiations between the parties in determining whether the plaintiff had mitigated its damages. Because a remand for a new hearing is required given that the trial court applied the improper legal standard in calculating the damages, we need not reach these claims with respect to the calculation of damages as a factual matter.

to recover the rent due under the terms of the lease. Under this course of action, the landlord is under no duty to mitigate damages. . . . When the landlord elects to terminate the tenancy, however, the action is one for breach of contract . . . and, when the tenancy is terminated, the landlord is obliged to mitigate his damages. . . . The general rule for the measure of damages in contract is that the award should place the injured party in the same position as he would have been in had the contract been performed." (Internal quotation marks omitted.) *Southhaven Associates, LLC* v. *McMerlin, LLC*, supra, 159 Conn. App. 10–11; see, e.g., *Brennan Associates* v. *OBGYN Specialty Group, P.C.*, 127 Conn. App. 746, 754–55, 15 A.3d 1094, cert. denied, 301 Conn. 917, 21 A.3d 463 (2011). If a landlord "institute[s] an action for breach of lease . . . the remaining rental payments due under the lease *could* be used as part of the calculation of the damages that the [landlord] sustained." (Emphasis added.) *Southhaven Associates, LLC* v. *McMerlin, LLC*, supra, 11; see, e.g., *Brennan Associates* v. *OBGYN Specialty Group, P.C.*, supra, 755; *Rokalor, Inc.* v. *Connecticut Eating Enterprises, Inc.*, supra, 18 Conn. App. 389–90. "The duty to mitigate damages [does] not require the plaintiff [landlord] to sacrifice any substantial right of its own . . . or to exalt the interests of the tenant above its own. . . . It [is] required to make reasonable efforts to minimize damages. What constitutes a reasonable effort under the circumstances of a particular case is a question of fact for the trier." (Internal quotation marks omitted.) *Southhaven Associates, LLC* v. *McMerlin, LLC*, supra, 5–6; see, e.g., *Brennan Associates* v. *OBGYN Specialty Group, P.C.*, supra, 754–55.

Ordinarily, we review the trial court's assessment of damages, including the reasonableness of any mitigation efforts, as a question of fact under the clearly erroneous standard of review. See, e.g., *Pan Handle Realty*,

LLC v. *Olins*, 140 Conn. App. 556, 569–70, 59 A.3d 842 (2013); *Rokalor, Inc.* v. *Connecticut Eating Enterprises, Inc.*, supra, 18 Conn. App. 390. A claim that the trial court applied an improper legal standard or burden of proof in its damages determination, however, presents a question of law over which we exercise plenary review. See, e.g., *In re Zakai F.*, 336 Conn. 272, 289–90, 255 A.3d 767 (2020); *Smith* v. *Muellner*, 283 Conn. 510, 536, 932 A.2d 382 (2007); *Papallo* v. *Lefebvre*, 172 Conn. App. 746, 755, 161 A.3d 603 (2017).

We begin with the plaintiff's claim that the trial court improperly required it, as the nonbreaching party, to bear the burden of proving that it had mitigated its damages.[28] There is no case directly on point from this court in the landlord-tenant context,[29] with the leading

[28] The defendants correctly state that, when a trial court's memorandum of decision is ambiguous as to the burden of proof applied, it is the responsibility of the appellant—in this case, the plaintiff—to move pursuant to Practice Book § 61-10 for an articulation on that point. See, e.g., *Smith* v. *Muellner*, supra, 283 Conn. 537. In the present case, we conclude that the trial court's memorandum of decision is unambiguous insofar as it can be read only to assign the burden of proving the reasonableness of mitigation to the plaintiff, by expressly questioning its failure to introduce evidence of its negotiations with Sono Boil in stopping the accrual of damages in December, 2020. Accordingly, we disagree with the defendants' argument that the record is not adequate for review of this issue.

[29] Our sister states are split with respect to which party bears the burden of proving mitigation of the lessor's damages in the wake of a breach of a commercial lease in view of the " 'modern trend' " of treating real property leases as contractual in nature, rather than as assignments of property rights. *Frenchtown Square Partnership* v. *Lemstone, Inc.*, 99 Ohio St. 3d 254, 257, 791 N.E.2d 417 (2003); see, e.g., *Reid* v. *Mutual of Omaha Ins. Co.*, 776 P.2d 896, 905 (Utah 1989) (describing "the traditional rule" not requiring mitigation as "anachronistic"). Some follow traditional contract and tort law principles in holding that it is the breaching party's obligation to prove a violation of the duty to mitigate damages, such as by affirmative defense. See, e.g., *Frenchtown Square Partnership* v. *Lemstone, Inc.*, supra, 259; *Austin Hill Country Realty, Inc.* v. *Palisades Plaza, Inc.*, 948 S.W.2d 293, 299–300 (Tex. 1997). Others allocate to the landlord the burden of proving that it satisfied its "affirmative obligation" of mitigating damages for breach of a lease by making "commercially reasonable" efforts to obtain a new tenant because that requirement ensures that "serious efforts are made to redeploy the rental property in a productive fashion by those who are best

decision, *Danpar Associates*, being silent with respect to the allocation of the burden of proof as to mitigation. Consistent, however, with the black letter principles of damages law that led this court in *Danpar Associates* to require landlords to mitigate their damages in the wake of a breach of a lease,[30] our Appellate Court held in *Pan Handle Realty, LLC* v. *Olins*, supra, 140 Conn. App. 569–70, that the tenant, as the party breaching a residential lease, is required to prove that the landlord failed to make efforts to mitigate its damages. For that position, the Appellate Court cited to its decision in *Dunleavey* v. *Paris Ceramics USA, Inc.*, 97 Conn. App. 579, 582–83, 905 A.2d 703 (2006), which is a contract case involving the sale of defective limestone for a landscape project. See *Pan Handle Realty, LLC* v. *Olins*, supra, 569–70; see also id., 570–71 (trial court's conclusion that landlord made reasonable efforts to mitigate damages was not clearly erroneous because landlord had to spend $80,000 to restage property with furnishings and advertise property at higher rent than

able to accomplish that end and who are also best able to prove that required mitigation efforts have been carried out." *Reid* v. *Mutual of Omaha Ins. Co.*, supra, 906–907; see also annot., C. Vaeth, Landlord's Duty, on Tenant's Failure To Occupy, or Abandonment of, Premises, To Mitigate Damages by Accepting or Procuring Another Tenant, 75 A.L.R.5th 1, 129–48, § 14 (2000 and Supp. 2020) (discussing split of authority).

[30] In *Danpar Associates*, this court cited a commercial contract case, *Willametz* v. *Goldfeld*, 171 Conn. 622, 627, 370 A.2d 1089 (1976), an eminent domain condemnation damages case, *Connecticut Light & Power Co.* v. *Costello*, 161 Conn. 430, 442, 288 A.2d 415 (1971), and a motor vehicle negligence case, *Brown* v. *Middle Atlantic Transportation Co.*, 131 Conn. 197, 199, 38 A.2d 677 (1944), for the proposition that a landlord who brings an action for damages from the breach of a lease "is entitled to recover those damages [that] would naturally flow from a total breach of the lease" but was obligated to make "reasonable efforts" to "minimize the damages occasioned by the defaulting tenant's breach of contract." *Danpar Associates* v. *Somersville Mills Sales Room, Inc.*, supra, 182 Conn. 446; see id., 446–47 (trial court properly considered landlord's refusal to accept assignment of lease to new tenant that "would have placed it in statu[s] quo ante" in determining whether landlord made reasonable efforts to minimize damages from breach of lease of premises in shopping center).

tenant had been willing to pay to recoup losses, and, "although the [landlord] was unsuccessful in its efforts to secure a replacement lessee, there is no evidence to suggest that the [landlord] was not responsive to prospective replacement lessees").

The allocation of the burden of proving the failure to mitigate to the breaching tenant in *Pan Handle Realty, LLC*, is consistent with a long line of case law, in both contract and torts contexts, that holds that the failure to mitigate damages is for the breaching party to prove. See *Preston* v. *Keith*, 217 Conn. 12, 21–22, 584 A.2d 439 (1991) (defendant bears burden of production and persuasion with respect to mitigation of damages in negligence case); *Newington* v. *General Sanitation Service Co.*, 196 Conn. 81, 86, 491 A.2d 363 (1985) (sanitation company bore burden of proving that "the [defendant] town failed to use reasonable care to reduce its damages" for company's breach of refuse disposal contract); *Krawitz* v. *Ganzke*, 114 Conn. 662, 665, 159 A. 897 (1932) (The court held that an employee who was discharged in violation of an employment contract "was prima facie entitled to recover the amount of his salary for the balance of the year, and was not bound to offer evidence that he had sought other employment. The burden was [on] the defendant to prove that the plaintiff could by proper diligence have found other employment, if such was claimed to be the fact."); see also *Ann Howard's Apricots Restaurant, Inc.* v. *Commission on Human Rights & Opportunities*, 237 Conn. 209, 228–29, 676 A.2d 844 (1996) (relying on "established rules" as to proof of damages in contract and tort cases, and holding that, with respect to award for damages for discriminatory employment practices pursuant to General Statutes § 46a-86 (c) and (d), employer bears burden of proving that employee "failed to make reasonable efforts to mitigate the amount of damages by seeking other employment").

As we have observed in the tort context, the "rationale for this rule is well established. A defendant claiming that the plaintiff has failed to mitigate damages seeks to be benefited by a particular matter of fact, and he should, therefore, prove the matter alleged by him. The rule requires him to prove an affirmative fact, whereas the opposite rule would call [on] the plaintiff to prove a negative, and therefore the proof should come from the defendant. He is the wrongdoer, and presumptions between him and the person wronged should be made in favor of the latter. For this reason, therefore, the onus must in all such cases be [on] the defendant." (Internal quotation marks omitted.) *Preston* v. *Keith*, supra, 217 Conn. 22. We note that this process need not be onerous because, in addition to presenting witnesses or documentary evidence to establish the point, the defendant could well establish failure of mitigation through cross-examination of the plaintiff and its witnesses. See id., 22–23. Accordingly, we conclude that, when a tenant has breached a lease agreement, that tenant bears the burden of proving that the landlord failed to undertake commercially reasonable efforts to mitigate its damages.[31]

Thus, we conclude that the trial court improperly cast the burden of proof onto the plaintiff when, in

[31] Although not squarely addressing the issue of the burden of proof, we note that the Appellate Court's decision in *Rokalor, Inc.* v. *Connecticut Eating Enterprises, Inc.*, supra, 18 Conn. App. 384, may be read to suggest that it is the landlord who bears the burden of proving reasonable efforts, insofar as it refers to failures of proof on the part of the landlord in that case. See id., 390–91 (observing that landlord "did not hire a real estate broker until almost four months after the defendant's default . . . provided no explanation for this delay" and "did not introduce any evidence by the broker to establish what efforts were made by him to lease the premises" in concluding that trial court did not abuse discretion in "finding that the [landlord] failed to make reasonable efforts to mitigate its damages"). To the extent that the Appellate Court's decision in *Rokalor, Inc.*, may be read to require the nonbreaching landlord to bear the burden of proving that it did not fail to mitigate its damages, we conclude that it is not an accurate statement of the law.

stopping accrual of monthly rent damages in December, 2020, the trial court credited evidence that the plaintiff had made efforts to mitigate its damages by securing Sono Boil as its new tenant for the premises but stated that "no evidence of the negotiations with [Sono Boil] was presented in detail *by the plaintiff*. The court can only speculate if further negotiations with [Sono Boil] could have resulted in a lease with the same terms the defendants' lease had." (Emphasis added.) By engaging in this speculation in connection with reducing the contract damages that it ultimately awarded to the plaintiff, the trial court effectively relieved the defendants of their burden of proving that the plaintiff's efforts were, in fact, commercially unreasonable under the circumstances. Accordingly, a new damages hearing is required. See, e.g., *South Windsor* v. *Lanata*, 341 Conn. 31, 46–47, 266 A.3d 875 (2021).

Consistent with other courts; see, e.g., *In re Cinemex USA Real Estate Holdings, Inc.*, supra, 627 B.R. 701; we observe in conclusion that the COVID-19 public health emergency has had devastating economic effects in many industries, particularly those that rely on the public, such as the restaurant and hospitality industry. This case, which is a contract dispute between private parties, demonstrates the difficulty of using existing legal doctrines to shield parties from the economic damage caused by the pandemic, insofar as the zero sum nature of litigation renders it a process that is particularly ill-suited to resolving these difficult questions of public and economic policy in an equitable manner that will leave something remaining on the "other side" as we attempt to identify a "new normal" while entering the third year of this pandemic. We therefore are left to rely on the political branches of our federal and state governments to identify and implement economic relief in an equitable manner, so as to will enable all of our state's businesses and citizens to thrive in the wake of COVID-19.

The judgment is reversed only with respect to the award of damages and the case is remanded for further proceedings as to damages; the judgment is affirmed in all other respects.

In this opinion the other justices concurred.