STATE OF CONNECTICUT *v.* MUHAMMAD A. QAYYUM (SC 20552)

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

Syllabus

The defendant was convicted of the crimes of conspiracy to sell narcotics and possession of narcotics with intent to sell. Following an investigation into possible drug sales from an apartment occupied by P, the police executed a search warrant for the apartment, where they detained the defendant and P. The defendant admitted to the police that he had narcotics on his person. The police found $267 in small bills, heroin, and crack cocaine in the defendant's front pockets. The police also found, inter alia, heroin and crack cocaine on P's person. Inside of the apartment, the police found more crack cocaine in between the couch cushions where P had been sitting, as well as drug paraphernalia and a handwritten ledger documenting narcotics sales. On appeal to the Appellate Court, that court affirmed the trial court's judgment. Thereafter, the defendant, on the granting of certification, appealed to this court, claiming, inter alia, that the Appellate Court incorrectly concluded that the trial court had not abused its discretion in permitting F, a detective from another jurisdiction who had not been involved in the investigation of the defendant's drug sales, to testify regarding the defendant's intent to sell narcotics. *Held*:

1. This court declined to review the defendant's evidentiary claim regarding whether the trial court abused its discretion when it permitted F to offer expert testimony on the issue of whether the defendant had intended to sell narcotics, as that claim was not properly preserved; although defense counsel objected to the prosecutor's hypothetical question to F regarding the significance of a person in possession of the exact amount of drugs with which the police apprehended the defendant and whether those circumstances would indicate an intent to sell drugs, counsel did not object to the reformulated set of questions the prosecutor asked F, after the trial court sustained defense counsel's objection to

the hypothetical, about the general behavior of drug dealers; accordingly, because defense counsel failed to object to any of the prosecutor's questions that formed the basis for the defendant's claim on appeal, counsel had no occasion to articulate the basis for a challenge to those questions with sufficient clarity to put the trial court on notice of such a challenge, and the trial court, therefore, never ruled on it.

2. The defendant did not satisfy his burden of demonstrating that the trial court's admission of the testimony of a labor department representative, R, regarding the defendant's lack of reportable wages in the year of and the year before his arrest, even if improper, constituted harmful error: R's testimony, which the state adduced to demonstrate inferentially that the defendant's income derived from drug sales rather than reportable wages, was relatively unimportant to the state's otherwise strong case against the defendant in view of the physical evidence, including cash and drugs, that the police found on the defendant's person, P's testimony about an arrangement whereby the defendant would sell drugs out of his apartment in exchange for a discount, testimony from a police officer who had been observing P's apartment about the frequency with which people visited the apartment and left shortly after arriving, expert testimony suggesting that the defendant's frequent use of rental cars prior to his arrest fit the typical pattern of someone engaged in the sale of narcotics, and alerts by a police dog indicating that there was a residual odor of narcotics coming from the trunk and on the door of the defendant's rental car; moreover, although R's brief testimony was not cumulative of other evidence and did not conflict with any other evidence presented, R acknowledged that the defendant may have had unreported income from sources other than drug sales, and defense counsel had the opportunity to perform a thorough cross-examination of R; furthermore, the fact that R's testimony may have supported P's testimony that the defendant had sold narcotics in light of P's agreement with the state to receive a limited sentence in exchange for his testimony against the defendant did not render the admission of R's testimony harmful, as other evidence presented by the state served to bolster P's testimony, and it was well within the jury's province to find P's testimony credible notwithstanding his cooperation agreement with the state; in addition, the prosecutor referenced R's testimony only once and briefly, during his initial closing argument to the jury, and not at all during rebuttal argument; accordingly, when considered together with other evidence admitted at the defendant's trial, evidence of the defendant's lack of reportable wages in the year of and year prior to his arrest did not substantially affect the jury's verdict.

Argued April 28—officially released August 16, 2022

Procedural History

Two part substitute information charging the defendant, in the first part, with two counts of the crime of

possession of narcotics with intent to sell and with one count of the crime of conspiracy to sell narcotics, and, in the second part, with having previously been convicted of the crime of sale of narcotics, brought to the Superior Court in the judicial district of Litchfield, where the first part of the information was tried to the jury before *Danaher*, *J.*; verdict of guilty; thereafter, the defendant was presented to the court, *Danaher*, *J.*, on a plea of guilty to the second part of the information; judgment of guilty in accordance with the verdict and plea, from which the defendant appealed to the Appellate Court, *Bright*, *C. J.*, and *Suarez* and *Lavery*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Robert L. O'Brien, assigned counsel, with whom, on the brief, was *Christopher Y. Duby*, assigned counsel, for the appellant (defendant).

Linda Frances Rubertone, senior assistant state's attorney, with whom, on the brief, were *David R. Shannon*, state's attorney, and *Dawn Gallo*, former state's attorney, for the appellee (state).

Opinion

MULLINS, J. In this certified appeal, the defendant, Muhammad A. Qayyum, appeals from his conviction of one count of conspiracy to sell narcotics in violation of General Statutes § 53a-48 and General Statutes (Rev. to 2017) § 21a-277 (a),[1] and two counts of possession of narcotics with intent to sell in violation of § 21a-277 (a). On appeal, the defendant asserts that the Appellate Court improperly affirmed the judgment of the trial court because the trial court improperly admitted (1) expert testimony regarding the defendant's intent to

[1] Hereinafter, all references to § 21a-277 in this opinion are to the 2017 revision of the statute.

sell narcotics, and (2) evidence that the defendant had no reportable wages on record with the Connecticut Department of Labor (department) in 2016 and 2017. We reject both of these claims and, accordingly, affirm the judgment of the Appellate Court.

The opinion of the Appellate Court sets forth the following facts that the jury reasonably could have found. See *State* v. *Qayyum*, 201 Conn. App. 864, 866–67, 875, 242 A.3d 500 (2020). "On April 12, 2017, Torrington Police Officer Matthew Faulkner went to 356 Migeon Avenue in Torrington to execute a search warrant following his investigation regarding possible drug sales being conducted from unit 1 North, the apartment of Oscar Pugh. Officer Faulkner surveilled the residence for approximately one hour. During that time, two people separately arrived at Pugh's apartment but departed quickly. Officer Faulkner also saw the defendant arrive in a dark gray Infiniti sedan bearing Massachusetts license plates, which the defendant had rented from [the] Hertz [car rental company]. The defendant had rented cars from Hertz for sixty-three days during the period from January, 2017, until his arrest in April, 2017, [and the total cost of the rentals was] between $2500 and $2600. Officer Faulkner frequently had observed the defendant at Pugh's apartment over these preceding months.

"Additional police arrived approximately one hour after Officer Faulkner began his surveillance [on April 12, 2017]. The police executed the search warrant and detained the defendant and Pugh. The defendant eventually admitted that he had narcotics in his front pockets, and Officer Faulkner then proceeded to search them. Inside, he found $267 in small bills, seven wax folds of heroin, and two 'dubs' of crack cocaine.[2] The

[2] "Officer Faulkner testified at trial that a 'dub' is a piece of crack cocaine weighing 0.2 grams." *State* v. *Qayyum*, supra, 201 Conn. App. 866 n.1.

police did not find any drug paraphernalia on the defendant or in his rental car, but a canine officer alerted [to] the car's trunk and door.

"The police also searched Pugh. They found six wax folds of heroin and $2 in his pockets and a single dub of crack cocaine in his sock. They also found seventeen dubs of crack cocaine in between the couch cushions where Pugh was seated, along with various items of drug paraphernalia, such as crack pipes and cut straws. Additionally, they found a handwritten ledger documenting narcotics sales. Pugh admitted that the narcotics found on his person were his and that he was a heavy user, but he denied that the other narcotics in the apartment belonged to him." (Footnote in original.) Id., 866–67. Pugh explained that he had an arrangement with the defendant, in which he allowed the defendant to sell drugs in and from Pugh's apartment and, in exchange, Pugh received drugs at a discounted rate. "Other than the $2 found on Pugh's person, the police did not find any . . . money [in] the apartment." Id., 867.

"The defendant was [arrested and] charged by way of a substitute long form information with one count of conspiracy to sell narcotics in violation of §§ 53a-48 and 21a-277 (a) and two counts of possession of narcotics with intent to sell in violation of § 21a-277 (a). The defendant also was charged in a part B information with having twice been convicted of the sale of narcotics in violation of § 21a-277 (a). The defendant pleaded not guilty and elected to be tried by a jury." Id.

The jury found the defendant guilty of all three counts of the long form information. After the jury returned its verdict, the defendant pleaded guilty, under the part B information, to having twice been previously convicted for the sale of narcotics, thus increasing his maximum sentencing exposure under § 21a-277 (a). Thereafter,

"the [trial] court sentenced the defendant to a total effective term of twenty years of incarceration, execution suspended after twelve years, with five years of probation." Id. The Appellate Court affirmed the judgment of the trial court. Id., 881. This appeal followed.[3]

I

We first address the defendant's claim that the Appellate Court incorrectly concluded that the trial court had not abused its discretion by permitting expert testimony regarding the defendant's intent to sell narcotics. More specifically, the defendant claims that the testimony of Scott Flockhart, a detective with the New Milford Police Department, invaded the jury's province as fact finder because Flockhart was allowed to offer improper opinion testimony regarding whether the defendant intended to sell the drugs that were in his pocket at the time of his arrest. The state responds that the testimony was permissible because it addressed only "the general behavior of drug users and drug traffickers." Id., 879–80. The state relies on *State* v. *Nelson*, 17 Conn. App. 556, 555 A.2d 426 (1989), contending that, "[although] it is improper to solicit a particularized opinion as to the defendant's use and possession of items or drugs found . . . it is wholly appropriate to inquire into the custom and practice of narcotics traffickers generally." Id., 566. Because we conclude that this claim was not properly preserved, we decline to review it.

The following facts are relevant to the defendant's claim. During trial, the state presented the expert testimony of Flockhart, who testified that he had extensive

[3] We granted the defendant's petition for certification to appeal, limited to the following issues: (1) "Did the Appellate Court correctly conclude that the trial court had properly admitted evidence of the defendant's lack of income?" And (2) "[d]id the Appellate Court correctly conclude that the trial court had not abused its discretion in permitting expert testimony regarding the defendant's intent to sell narcotics?" *State* v. *Qayyum*, 336 Conn. 911, 244 A.3d 562 (2021).

experience, throughout his career, dealing with narcotics. Flockhart testified that people who traffic narcotics frequently use rental cars to avoid detection. He also testified that people who traffic narcotics often enlist intermediaries in an effort "to insulate themselves from the actual criminal activity." The prosecutor then asked Flockhart the following hypothetical question: "[I]f you came across a person with two $20 bags of crack [cocaine] and seven bags of heroin . . . would you be able to say whether that person possessed those drugs to use or possessed them with the intent to sell them?" Defense counsel objected to this question on the ground that it went to the ultimate issue. The trial court excused the jury to address this objection.

Outside the presence of the jury, defense counsel argued that the "hypothetical mirrors the facts of the case so closely that, essentially, the witness [was] being asked to give an opinion on the ultimate issue in this case." The trial court stated that the question, as phrased, "[came] too close to asking this expert as to whether he ha[d] an opinion as to whether someone who's exactly situated like [the] defendant was engaged in possession of narcotics with intent to sell." The court sustained the objection and cautioned the prosecutor to "[ask] the questions in a more general way . . . ."

Thereafter, with the jury present and in accordance with the trial court's ruling, the prosecutor asked Flockhart a series of questions regarding what factors an officer looks for when deciding to charge a person with possession of narcotics with the intent to sell.[4] Defense counsel did not object to any of those questions.

[4] The following is the relevant portion of the colloquy at trial between the prosecutor and Flockhart:

"[The Prosecutor]: What type of factors do you look for, what type of things do you consider [when deciding whether to charge a person with possession of narcotics with intent to sell] . . . .

"[Flockhart]: We look [at] how the drugs are packaged . . . [and] quantities. . . . [We] look for paraphernalia. If [somebody is] an addict, they're most likely gonna have some type of paraphernalia on them.

Following cross-examination, the prosecutor elicited additional testimony from Flockhart, in which he testified that he does not focus on a single factor when deciding whether to charge a person with possession of narcotics with intent to sell but, rather, looks at all the factors in the aggregate.

In addressing the defendant's claim that the trial court improperly admitted Flockhart's testimony, the Appellate Court pointed out that, at trial, defense counsel had objected only to the prosecutor's hypothetical question regarding the significance of a person holding the exact amount of drugs with which the police apprehended

"[The Prosecutor]: Okay. Well, in your experience, do addicts generally, are they . . . ever far from their paraphernalia?

"[Flockhart]: Usually not, no.

"[The Prosecutor]: In regards to how it's packaged, what are you looking for, specifically?

"[Flockhart]: Whether it's . . . broken down . . . [into] smaller quantities in smaller bags.

"[The Prosecutor]: Smaller quantities would mean what, in regards to that decision-making process?

"[Flockhart]: Would lead [toward] the possession with the intent to sell, because that's usually how it's broken up for street level distribution.

"[The Prosecutor]: What else would you look for?

"[Flockhart]: You would take a look at . . . [the person's] hygiene . . . track marks on their arms . . . [and] if they're gonna be getting dope sick.

* * *

"[The Prosecutor]: What about money, is that a consideration at all?

"[Flockhart]: Yes.

"[The Prosecutor]: Could you tell the jury how that would weigh in?

"[Flockhart]: Most addicts, when they go to buy . . . their drug of choice . . . usually [they] . . . go with an amount of money to buy a certain amount of that drug . . . if they have $100 on [them], they aren't gonna go and buy just $20 worth. . . .

"[The Prosecutor]: Yes or no—well, if you found a large amount of money on a person versus a negligible amount of money, how would that factor into your decision? . . .

"[Flockhart]: Most addicts aren't gonna have a large amount of money. . . .

"[The Prosecutor]: And what about the denominations of money, would that factor into your decision at all? . . .

"[Flockhart]: Yes."

the defendant and whether those circumstances would indicate an intent to sell drugs. See *State* v. *Qayyum*, supra, 201 Conn. App. 879 n.3. The Appellate Court noted that the trial court had sustained that objection and then instructed the prosecutor to ask his questions in a more general way. See id. Defense counsel did not object to the reformulated set of questions that the prosecutor asked Flockhart after the trial court sustained defense counsel's objection to the hypothetical. See id. As a result, the Appellate Court noted, the defendant's claim concerning Flockhart's testimony following defense counsel's objection was unpreserved. Id.

Notwithstanding that observation, the Appellate Court also addressed the merits of that unpreserved claim and concluded that the trial court did not abuse its discretion because Flockhart "never expressed his opinion on the ultimate issue before the jury, namely, whether the defendant intended to sell narcotics." Id., 880. Without reaching the merits, we agree with the Appellate Court that the defendant did not preserve this evidentiary claim[5] at trial.

"In order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . In objecting to evidence, counsel must properly articulate the basis of the objection so as to apprise the trial court of the precise nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling." (Internal quotation marks omitted.) *State* v. *Cabral*, 275 Conn. 514, 530–31, 881 A.2d 247, cert. denied, 546 U.S.

[5] The Appellate Court concluded, and the defendant concedes, that his claim regarding Flockhart's expert testimony is evidentiary in nature. *State* v. *Qayyum*, supra, 201 Conn. App. 879 n.3. "Although a defendant is entitled to review of unpreserved errors of constitutional magnitude under [*State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015)], the defendant makes no claim that the admission of the testimony that he challenges on appeal rises to the level of a constitutional violation." (Emphasis omitted.) *State* v. *Gonzalez*, 272 Conn. 515, 540, 864 A.2d 847 (2005).

1048, 126 S. Ct. 773, 163 L. Ed. 2d 600 (2005); accord *State* v. *Gonzalez*, 272 Conn. 515, 539, 864 A.2d 847 (2005). "These requirements are not simply formalities. They serve to alert the trial court to potential error while there is still time for the court to act. . . . Assigning error to a court's evidentiary rulings on the basis of objections never raised at trial unfairly subjects the court and the opposing party to trial by ambush." (Internal quotation marks omitted.) *State* v. *Cabral*, supra, 531; accord *State* v. *Gonzalez*, supra, 540.

Thus, "[a]ppellate review of evidentiary rulings is ordinarily limited to the specific legal issue raised by the objection of trial counsel." (Internal quotation marks omitted.) *State* v. *Duteau*, 68 Conn. App. 248, 256, 791 A.2d 591, cert. denied, 260 Conn. 939, 835 A.2d 58 (2002). "[T]he determination of whether a claim has been properly preserved will depend on a careful review of the record to ascertain whether the claim on appeal was articulated [before the trial court] with sufficient clarity to place the trial court on reasonable notice of that very same claim." *State* v. *Jorge P.*, 308 Conn. 740, 754, 66 A.3d 869 (2013).

In reviewing the defendant's claim, we note that, although defense counsel objected to the prosecutor's hypothetical question, defense counsel failed to object to any of the questions that form the basis of the defendant's claim on appeal.[6] It is well established that defense counsel's objection to one question on a specific ground does not necessarily equate to an objection

[6] During oral argument before this court, the defendant's appellate counsel was asked what question in particular crossed a line. The defendant's counsel responded that "it was questions that elicited the answers . . . regarding the charging decision that a police officer would come to . . . [but that he did not] know if there was a particular question that . . . crossed the line, so much as the entire line of questioning . . . ." But, again, there was no objection during trial to the line of questioning regarding charging decisions that is now the subject of this appeal.

to another related question later. See, e.g., *Dept. of Social Services* v. *Freeman*, 197 Conn. App. 281, 296, 232 A.3d 27 ("[a]n objection to a question on a specific ground is not an objection to a similar question later" (internal quotation marks omitted)), cert. denied, 335 Conn. 922, 233 A.3d 1090 (2020). Thus, the trial court was never presented with and never ruled on the claim regarding the prosecutor's questions to Flockhart about the general behavior of drug dealers that the defendant now raises on appeal. Consequently, defense counsel's failure to object to those questions necessarily means that he did not articulate his claim regarding those questions with sufficient clarity to put the trial court on notice. As a result, we conclude that the defendant failed to preserve this evidentiary claim, and, therefore, we do not review it.

II

The defendant next claims that the Appellate Court incorrectly concluded that the trial court had not abused its discretion when it allowed the state to present evidence of the defendant's lack of reportable wages in 2016 and 2017. Specifically, he argues that the evidence was not relevant to any material issue and that the prejudicial effect outweighed its probative value because it suggested that he had to earn a living selling drugs. In response, the state asserts that the trial court did not abuse its discretion in determining that the probative value of the evidence of the defendant's lack of reportable wages was not outweighed by its prejudicial effect. Furthermore, the state argues that, even if it was an error for the trial court to have admitted this evidence, the error was harmless. For the reasons that follow, we conclude that, even if we assume, without deciding, that the trial court abused its discretion in admitting evidence of the defendant's lack of reportable wages in 2016 and 2017, any error was harmless.[7]

[7] Because we resolve this appeal on the ground that any error in admitting evidence of the defendant's lack of reportable wages was harmless, we

The following additional facts are necessary to our consideration of this claim. After the first day of evidence, the prosecutor informed the trial court that he intended to call David Ricciuti, a programs and services coordinator in the department, to testify that the defendant had no reportable wages in 2016 and 2017. The prosecutor relied on *State* v. *Perry*, 58 Conn. App. 65, 751 A.2d 843, cert. denied, 254 Conn. 914, 759 A.2d 508 (2000), which held that "[f]inancial condition and employment status may be relevant to a defendant's motive to commit a crime and, thus, are admissible on purely nonconstitutional evidentiary grounds." Id., 69.

Defense counsel objected to the state's anticipated presentation of testimony from Ricciuti. Specifically, defense counsel objected that the evidence was irrelevant and unduly prejudicial because it might "play on certain biases that people hold, implicit biases as well." Before the trial court, defense counsel acknowledged that it was an evidentiary objection.[8] Defense counsel asserted that suggesting that someone is more likely to commit a crime because that person does not have a job "fits into a stereotype and . . . runs the risk of arousing the [jurors'] potential prejudices and implicit biases . . . ."

In response to defense counsel's argument that this evidence was more prejudicial than probative, the prosecutor argued that, when viewed in conjunction with other evidence, the probative value of the evidence

express no opinion on whether the Appellate Court correctly concluded that "the trial court acted within its discretion when it admitted Ricciuti's testimony concerning the defendant's lack of reportable wages" in 2016 and 2017. *State* v. *Qayyum*, supra, 201 Conn. App. 874.

[8] In his brief to this court, the defendant asserts that this claim is of constitutional significance because it shifts the burden to the defendant to rebut the evidence. We agree with the Appellate Court that the claim is not constitutional in nature; *State* v. *Qayyum*, supra, 201 Conn. App. 872 n.2; and, therefore, fails under the second prong of *State* v. *Golding*, 213 Conn. 233, 239, 567 A.2d 823 (1989).

outweighed any prejudicial effect. In particular, the prosecutor argued that, in light of the other evidence, such as the $267 found in the defendant's pockets with the narcotics at the time of his arrest and the thousands of dollars he spent on rental cars in the couple of months leading up to his arrest, Ricciuti's testimony that the defendant did not have reportable wages for that time period would permit the jury to infer that this money came from drug trafficking because there was no other explanation for the money. The trial court overruled defense counsel's objection, reasoning that Ricciuti's testimony was "not simply evidence . . . that the defendant does not have great resources. It's . . . evidence that he doesn't have a visible source of income . . . and yet he has funds to expend."

On direct examination, Ricciuti testified that the defendant did not report any wages to the department in either 2016 or 2017. Ricciuti acknowledged, however, that some people have "under the table jobs," for which the department would have no record. He also conceded, during cross-examination, that income from self-owned businesses, Social Security disability benefits, rental properties, inheritance and lottery winnings are not reportable wages.

During closing argument, defense counsel argued that the state did not present "testimony that [it had] checked to see if [the defendant] had other sources of income," such as unreported income from "Social Security disability [benefits], rental properties, inheritance, [or lottery winnings]." Defense counsel asked the jury to reject the assumption that "[the defendant] must be a drug dealer . . . [just] because the department . . . show[ed] that he doesn't have a job with reported income" and referenced numerous legitimate forms of income that would not need to be reported to the department.

During the prosecutor's initial closing argument, he mentioned Ricciuti's testimony once, stating that "[the defendant had] $267 . . . in his pocket, the defendant has spent around $2600 in the four month period leading up to this arrest in rental car fees, and no verifiable source—I'm sorry, no reportable wages with the . . . department . . . ." The prosecutor did not mention this evidence at all during his rebuttal closing argument.

The Appellate Court affirmed the judgment of the trial court. *State* v. *Qayyum*, supra, 201 Conn. App. 881. The Appellate Court concluded that the evidence was relevant because "[t]he fact that the defendant had access to money despite having no reportable wages, combined with the other evidence presented by the state, makes it more likely that he was engaged in drug trafficking to procure that money." Id., 873. Further, the Appellate Court determined that the evidence was not unduly prejudicial because it did not improperly arouse the emotions of the jurors. Id., 873–74. Finally, the Appellate Court concluded that, "although it was not an abuse of discretion to admit Ricciuti's testimony . . . such admission was not harmful." Id., 874. After reviewing the record in the present case, we agree with the Appellate Court that the admission of the evidence was not harmful.

When we review an evidentiary claim, our standard of review is clear. "Unless an evidentiary ruling involves a clear misconception of the law, the [t]rial court has broad discretion in ruling on the admissibility . . . of evidence. . . . The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling . . . ." (Internal quotation marks omitted.) *State* v. *St. John*, 282 Conn. 260, 270, 919 A.2d 452 (2007).

"[I]n order to establish reversible error on an evidentiary impropriety, the defendant must prove both an abuse of discretion and a harm that resulted from such abuse." *State* v. *Kirsch*, 263 Conn. 390, 412, 820 A.2d 236 (2003). "[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 [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." (Internal quotation marks omitted.) *State* v. *Fernando V.*, 331 Conn. 201, 215, 202 A.3d 350 (2019); see also, e.g., *State* v. *Favoccia*, 306 Conn. 770, 809, 51 A.3d 1002 (2012) ("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)).

We consider each of these factors. First, Ricciuti's testimony, when considered with other evidence, was a relatively unimportant aspect of the state's case. We agree with the Appellate Court's conclusion that the state's case against the defendant was quite strong. See *State* v. *Qayyum*, supra, 201 Conn. App. 875. The state introduced physical evidence that the police obtained from the defendant's person when they executed the search warrant. Specifically, the police recovered $267 in small bills, seven wax folds of heroin, and two dubs of crack cocaine from the defendant's person. Flockhart testified that an individual engaged in the sale of narcot-

ics will often break down narcotics into smaller packages and use intermediaries to make distribution easier.

In addition, the police recovered other narcotics hidden throughout Pugh's apartment and a narcotics ledger in the apartment, displaying numbers and dates. Consistent therewith, Pugh testified extensively about an arrangement he had with the defendant, whereby the defendant would sell drugs in and from Pugh's apartment and, in exchange, Pugh received drugs at a discounted rate. This, too, was consistent with the evidence the jury heard from Faulkner, an officer with the Torrington Police Department, who testified that, over several months, he had personally observed the defendant's frequent presence at Pugh's apartment. Faulkner also testified that he frequently witnessed people arrive at Pugh's apartment and leave quickly thereafter.

The state also presented expert evidence from Flockhart that it is "typical for someone engaged in [the sale of narcotics] to rent a car or have a vehicle registered in another person's name in order to . . . not be detected by law enforcement." The jury heard that this pattern fit the defendant's behavior. Indeed, the state presented testimony from a Hertz rental car representative, who testified that the defendant spent between $2500 and $2600 on rental cars over a four month span prior to his arrest. Additionally, at the time of the defendant's arrest, a canine officer, Remi, and his Torrington Police Department handler performed a sweep of the vehicle. Remi alerted twice and indicated that there was a residual odor of narcotics from the trunk and on the door of the defendant's rental car. Although the police discovered no drug paraphernalia on the defendant or in his rental car, Flockhart explained to the jury that those who are drug users usually have drug paraphernalia with them. This was consistent with Pugh's testimony that the defendant would frequently

transport drugs to Pugh's apartment but that he never saw the defendant use heroin or crack cocaine. The alerts by Remi and the lack of drug paraphernalia provided the jury with additional bases to conclude that the defendant was engaged in selling drugs. Therefore, even without Rucciuti's testimony, the state introduced sufficient physical evidence, witness testimony and expert testimony to allow the jury to conclude that the defendant intended to sell the narcotics found on his person. Accordingly, Ricciuti's testimony was of limited importance to the state's case.

Second, we consider whether the disputed evidence was cumulative of other evidence. The defendant only challenges Ricciuti's answer to the following question by the prosecutor: "[F]or 2016 and 2017, did [the defendant] have any reportable wages?" Although the disputed evidence was not cumulative of other evidence and did not conflict with any other evidence presented, it was brief, and Ricciuti testified that the defendant did not report any wages to the department in either 2016 or 2017. On direct examination, Ricciuti acknowledged that some people have "under the table" jobs, the wages for which are not reported to the state.

Third, we consider the extent of cross-examination that was allowed. Defense counsel was able to perform a thorough cross-examination of Ricciuti. In fact, on cross-examination, Ricciuti conceded that, just because there is no reported income, it does not mean that the defendant had no income. Ricciuti also admitted on cross-examination that someone could earn unreported income through self-owned businesses, Social Security disability benefits, rental properties, inheritance or lottery winnings. In the present case, defense counsel had ample opportunity to cross-examine Ricciuti, and counsel was not prevented from asking any questions on cross-examination.

On appeal, the defendant contends that Pugh's testimony was compromised because he had an agreement with the state to receive a limited sentence in exchange for his guilty plea and testimony at trial. He argues that, as a result, the admission of Ricciuti's testimony was not harmless because it supported Pugh's testimony that the defendant sold narcotics. We disagree.

At trial, the state disclosed Pugh's written agreement to provide truthful sworn testimony—under the penalty of perjury—and to plead guilty to the sale of narcotics. The agreement stated that Pugh would thereafter receive a limited sentence, at the discretion of a sentencing judge. The trial court also instructed the jury that, "[i]n weighing the testimony of an accomplice who has not yet been sentenced . . . keep in mind that he may, in his own mind, be looking for some favorable treatment in the sentence . . . [and] [t]herefore . . . look with particular care at the testimony of an accomplice and scrutinize it very carefully before you accept it."

First, Pugh's testimony was consistent with other evidence presented by the state, which bolstered its credibility. Indeed, the fact that the police found $267 in small bills, seven wax folds of heroin, two dubs of crack cocaine, and no drug paraphernalia on the defendant's person is consistent with Pugh's testimony that the defendant was engaged in the sale of narcotics. Furthermore, Pugh's testimony that he and the defendant had an arrangement whereby the defendant would sell drugs out of Pugh's apartment was also bolstered by Faulkner's testimony that he often saw the defendant at Pugh's apartment and that people would stop by the apartment, stay for a short amount of time and leave. Therefore, even without Ricciuti's testimony, other evidence presented by the state served to bolster Pugh's testimony.

Second, even though we acknowledge that the fact that Pugh had an agreement with the state may have

caused some jurors to question his credibility, assessing witness credibility is solely the function of the jury; see, e.g., *State* v. *Michael T.*, 194 Conn. App. 598, 621, 222 A.3d 105 (2019), cert. denied, 335 Conn. 982, 242 A.3d 104 (2020); and it was well within the jury's province to find Pugh's testimony credible even if he had a cooperation agreement with the state.

Third, although Ricciuti's testimony may have related to the ultimate issue in the case, it was not testimony directed at Pugh's credibility or even his testimony. Accordingly, even if Pugh's statement was slightly more likely to be true because of Ricciuti's testimony, the defendant still has not satisfied his burden of proving that the jury would have been substantially swayed by Ricciuti's testimony to reach a different verdict. This is especially so in the present case, in which other independent evidence also supported Pugh's testimony.

The defendant asserts that "[t]he state cannot argue that the lack of reported wages was both relevant and, somehow, did not contribute to the verdict." The defendant applies the wrong analysis. Under harmless error review of an evidentiary claim, evidence improperly admitted is not harmful merely because it is relevant or might possibly have contributed to the verdict. Instead, the defendant must prove that it substantially affected the jury's verdict. See, e.g., *State* v. *Fernando V.*, supra, 331 Conn. 215; *State* v. *Favoccia*, supra, 306 Conn. 809.

As we explained previously in this opinion, the state had a strong case against the defendant, and the evidence of no reportable wages in 2016 and 2017 was not central to the case. Indeed, the prosecutor mentioned that evidence only once, briefly, in his initial closing argument and not at all during his rebuttal argument. The state proved the defendant's intent to sell by a multitude of evidence, including physical evidence, wit-

ness testimony, and expert testimony. When considered together with other evidence, evidence of the defendant's lack of reportable wages for the limited period of 2016 to 2017 did not substantially affect the jury's verdict. Accordingly, we conclude that, even if we were to assume, without deciding, that the trial court improperly had admitted the evidence regarding the defendant's lack of reportable wages, the defendant did not satisfy his burden of demonstrating that it substantially swayed the jury's verdict. Therefore, we reject the defendant's claim.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

VOGUE *v.* ADMINISTRATOR, UNEMPLOYMENT COMPENSATION ACT
(SC 20570)

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

Syllabus

The plaintiff employer, V Co., appealed to the trial court from the decision of the Employment Security Board of Review, which upheld the decision of an appeals referee of the Employment Security Appeals Division that a tattoo artist, S, was V Co.'s employee and that V Co. was liable under the Unemployment Compensation Act (§ 31-222 et seq.) for contributions to the state's unemployment compensation fund based on S's wages. V Co. leased retail space in a shopping mall, where it sold body jewelry and provided body piercing and body art services. Since 2013, S provided tattoo services to the customers of V Co. from a back room on V Co.'s premises. In 2016, the defendant, the administrator of the Unemployment Compensation Act, audited V Co. and determined that S was V Co.'s employee rather than an independent contractor, as V Co. had claimed. The appeals referee sustained that decision classifying S as an employee, finding, inter alia, that S did not pay rent to use the back room, S performed tattoo services only during store hours, which were established by V Co., and V Co. advertised on its website and Facebook page that customers could receive tattoo services at its store. Thereafter, V Co. appealed to the board of review, which concluded that V Co. had

failed to satisfy any of the three prongs of the ABC test, as set forth in § 31-222 (a) (1) (B) (ii), which governs the determination of whether services performed by an individual constitute employment under the act. Specifically, the board of review determined that the tattoo services provided by S were performed within V Co.'s usual course of business, as required by part B of the ABC test, and noted that V Co. described itself on its website as a one-stop destination for piercing and tattoo services and that S was the only individual performing tattoo services for V Co. Thereafter, the trial court rendered judgment dismissing V Co.'s appeal from the decision of the board of review, concluding that V Co. had failed to prove that S was not an employee for purposes of the act. On appeal to the Appellate Court, that court found substantial evidence in the record to support the finding of the board of review that the provision of tattoo services was within V Co.'s usual course of business and concluded that the trial court had correctly determined that the board's application of the statute to the facts was neither unreasonable nor arbitrary. Accordingly, the Appellate Court affirmed the judgment of the trial court, and V Co., on the granting of certification, appealed to this court. *Held* that the Appellate Court correctly determined that the board of review had not acted unreasonably, arbitrarily, illegally, or in abuse of its discretion in finding that tattoo services were within V Co.'s usual course of business under part B of the ABC test, as there was substantial evidence in the record to support that finding: an activity is considered to be within an enterprise's usual course of business under part B of the ABC test when the enterprise performs the activity on a regular or continuous basis, without regard to the substantiality of the activity in relation to the enterprise's other business activities, and this court declined V Co.'s request to narrow the scope of the part B analysis by precluding consideration of the specific tasks performed by the worker for the putative employer; moreover, although advertisements are not by themselves dispositive of whether an activity is within an enterprise's usual course of business, the manner in which an enterprise holds itself out to the public, including through its advertising, may serve as substantial evidence of whether an activity is performed in the enterprise's usual course of business, and, in the present case, the record reflected that V Co. referred to itself on its website as a one-stop destination for piercing and tattoo services and used its store phone number as the number to contact for such services; furthermore, the board's finding that V Co. performed tattoo services on a regular or on a continuous basis was supported by additional evidence in the record, including evidence that tattoo services were provided only during V Co.'s store hours, V Co.'s owner previously had hired a tattoo artist and testified that he had included tattoo services as part of the business to increase revenue, and that all tattoo customers were required to execute a waiver with V Co. and would receive a receipt listing the name and contact information of V Co., rather than that of S.

Argued March 31—officially released August 16, 2022

Procedural History

Appeal from the decision of the Employment Security Board of Review affirming the decision of an appeals referee of the Employment Security Appeals Division that the plaintiff was liable for certain unpaid unemployment compensation contributions, brought to the Superior Court in the judicial district of New London; thereafter, the Employment Security Board of Review denied in part the plaintiff's motion to correct; subsequently, the plaintiff filed an amended appeal with the trial court; thereafter, the court, *S. Murphy*, *J.*, affirmed the Employment Security Board of Review's denial in part of the plaintiff's motion to correct, granted the defendant's motion to dismiss and rendered judgment dismissing the appeal, from which the plaintiff appealed to the Appellate Court, *Bright*, *C. J.*, and *Cradle* and *Suarez*, *Js.*, which affirmed the judgment of the trial court, and the plaintiff, on the granting of certification, appealed to this court. *Affirmed.*

Santa Mendoza, for the appellant (plaintiff).

Krista D. O'Brien, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Philip M. Schulz*, deputy associate attorney general, for the appellee (defendant).

Opinion

ROBINSON, C. J. This certified appeal requires us to consider whether the Board of Review of the Employment Security Appeals Division (board) correctly determined that tattoo services are part of the usual course of business of a body art and piercing business for purposes of part B of the statutory ABC test; see General Statutes § 31-222 (a) (1) (B) (ii) (II);[1] which is used to

[1] General Statutes § 31-222 (a) (1) (B) (ii) provides in relevant part: "Service performed by an individual shall be deemed to be employment subject to this chapter irrespective of whether the common law relationship of master and servant exists, unless and until it is shown to the satisfaction of the administrator that (I) such individual has been and will continue to be free from control and direction in connection with the performance of

determine whether an individual is an employee for purposes of the Unemployment Compensation Act (act), § 31-222 et seq. The plaintiff, Vogue,[2] which is a business that provides body piercing and body art services, appeals, upon our grant of its petition for certification,[3] from the judgment of the Appellate Court affirming the judgment of the trial court rendered in favor of the defendant, the Administrator of the Unemployment Compensation Act, that dismissed its appeal from the decision of the board. *Vogue* v. *Administrator, Unemployment Compensation Act*, 202 Conn. App. 291, 314, 245 A.3d 464 (2021). On appeal, the plaintiff claims that the Appellate Court improperly upheld the trial court's determination that the board had not acted unreasonably or arbitrarily in holding the plaintiff liable for

such service, both under his contract for the performance of service and in fact; and (II) such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and (III) such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed . . . ."

"This statutory provision is commonly referred to as the ABC test, with parts A, B and C corresponding to clauses I, II and III, respectively." (Internal quotation marks omitted.) *Southwest Appraisal Group, LLC* v. *Administrator, Unemployment Compensation Act*, 324 Conn. 822, 832, 155 A.3d 738 (2017).

[2] The record reflects that the plaintiff is a corporate entity known as Immortal Studios, LLC, doing business under the name Vogue. Although the plaintiff's appeal to the trial court was docketed only under the plaintiff's business name, it brought its administrative appeal to the trial court as Immortal Studios, LLC, doing business as Vogue, with subsequent appellate proceedings following suit. See *Vogue* v. *Administrator, Unemployment Compensation Act*, 202 Conn. App. 291, 293 n.1, 245 A.3d 464 (2021).

[3] We granted the plaintiff's petition for certification to appeal, limited to the following issue: "Did the Appellate Court properly affirm the trial court's judgment dismissing the plaintiff's appeal from the decision of the Board of Review of the Employment Security Appeals Division that the defendant had correctly determined that the plaintiff was liable for unpaid unemployment compensation contributions because an on-premises tattoo artist was an employee rather than an independent contractor under . . . § 31-222 (a) (1)?" *Vogue* v. *Administrator, Unemployment Compensation Act*, 336 Conn. 918, 245 A.3d 802 (2021).

unpaid unemployment compensation contributions on the basis of its conclusion that the offering of tattoo services was within the plaintiff's usual course of business. We disagree with the plaintiff and, accordingly, affirm the judgment of the Appellate Court.

The record reveals the following facts and procedural history, much of which is aptly set forth in the opinion of the Appellate Court.[4] "The plaintiff leases retail space in an indoor shopping mall in Waterford," where it "sells, among other things, body jewelry and body piercing services." Id., 294. In March, 2016, one of the defendant's field officers conducted an audit of the plaintiff's business and concluded that a tattoo artist, Mark Sapia, was an employee of the plaintiff rather than an independent contractor. Id. "Consequently, the defendant reclassified payments made to Sapia in 2014 and 2015 by the plaintiff as wages" and concluded that the plaintiff was liable for the payment of contributions under the act.[5] Id.

Subsequently, the plaintiff appealed from the defendant's decision to an appeals referee in its appeals division, who conducted an evidentiary hearing. Id. In a memorandum of decision issued in September, 2016, the appeals referee concluded that the defendant had correctly determined that Sapia was an employee of the plaintiff, on the basis of the following factual findings:

"(1) [Sapia] worked as a tattoo artist at [the plaintiff's store] from approximately 2013 through the time of the audit. Sapia himself personally performs the tattoo services for the customers at [the plaintiff's store]. The owner of [the plaintiff] classified Sapia as an indepen-

[4] The opinion of the Appellate Court sets forth an extensive recitation of the facts and procedural history of this case. See *Vogue* v. *Administrator, Unemployment Compensation Act*, supra, 202 Conn. App. 294–305. For the sake of brevity, we mention only the facts and procedural history relevant to the certified issue in this appeal.

[5] It is undisputed that Sapia has never filed a claim seeking unemployment insurance benefits under the act.

dent contractor when the company was [completing] a registration form with the [defendant].

"(2) Based on that information, the [defendant] conducted an audit of [the plaintiff's business for 2014 and 2015] and checked its payroll records and the status of individuals working for [the business]. [The plaintiff] had four employees . . . not including the owner or [Sapia].

"(3) When Sapia began working for [the plaintiff], the parties agreed that, when [Sapia] tattooed the customer, Sapia would get 50 percent of the sales price and the owner would get the other 50 percent. Sapia was allowed to use the credit card machine for [the plaintiff's store] when selling his tattoo services. Sapia did not have to pay to use that credit card machine. The owner would then give Sapia his percent[age] of the credit card sales once those transactions were approved by the credit card company. [The plaintiff's store] had a back room . . . where Sapia was to perform his tattoo work on the customers. The price of the tattoo was determined by Sapia.

"(4) The owner also had Sapia sign an agreement when they started working together, which indicated that Sapia was an independent contractor, outlined the payment arrangements, and allowed the owner to review or check the work performed by Sapia. That agreement also stated that [Sapia] was responsible for correcting any mistakes with the tattoos and that [the plaintiff] could deduct moneys from Sapia if a customer complaint was not resolved.

"(5) Although the agreement also required that Sapia carry his own business liability insurance, Sapia did not do so, which the owner knew.

"(6) The owner provided Sapia with a sterile environment at the [plaintiff's] store . . . for him to perform

his tattoo services for the general public. Sapia is registered with the state of Connecticut as a tattoo technician, and when he is placing the tattoos on the customers, he must do so in a sterile environment.

"(7) Sapia did provide his own ink and needles in order to place the tattoos on the customers he serviced at [the plaintiff's store]. Sapia also used his own laptop for his work.

"(8) [The plaintiff] keeps track of all of the tattoo sales made by Sapia when he is working in the store. When a customer paid for the tattoo in cash . . . Sapia would keep 50 percent of the sale for himself and turn over the other 50 percent to the owner. The owner did not pay any other moneys to Sapia in 2014 and 2015. Sapia . . . performed his tattoo services [only] during the store hours established by [the plaintiff] because the owner did not issue a store key to Sapia, who could not access the store on his own.

"(9) When Sapia sold a tattoo and applied the tattoo on the customer, the customer received a receipt, which listed the business name of the [plaintiff] company . . . as well as the phone number, address and website for [the plaintiff company] . . . . The [plaintiff's] owner also required that Sapia have the customers sign a waiver/release form, which was an agreement between [the plaintiff] and the customer, to release both [the plaintiff] and Sapia from various types of liability.

"(10) [The plaintiff] is in the business of providing piercings, selling jewelry for the piercing, and offering tattoo services. [The plaintiff] advertises through its website and its Facebook page that a customer can have piercings or tattoos done at its store and lists the hours that the tattoo artist is in the store.

"(11) [The plaintiff] provides a back room in the store where Sapia is able to perform his tattoo services for

the customers of [the plaintiff]. [The plaintiff] also provides a table, chairs, and cleaning supplies for that room.

"(12) Sapia does not have to submit an invoice to [the plaintiff] in order to be paid his 50 percent of the tattoo services that he provides to the customers at [the plaintiff's store]. Sapia does not pay any rent to [the plaintiff] to use the employer's sterile room to perform his services, and all advertisements are done by [the plaintiff], other than [Sapia's] mentioning his tattoo services on his social media sites, which also include the contact information at [the plaintiff's store].

"(13) The [plaintiff's] owner was not aware of any insurance or other paperwork to show that Sapia had established his own business or that he had his own company [that] offered tattoo services to the general public.

"(14) When the field auditor [for the defendant] conducted the audit, the only income reported by Sapia was the moneys that he received from [the plaintiff]." (Internal quotation marks omitted.) Id., 294–97.

In September, 2016, the plaintiff appealed to the board from the decision of the appeals referee upholding the defendant's classification of Sapia as an employee. Id., 297. "In a memorandum of decision dated January 19, 2017, the board [relied on the record of the proceedings before the appeals referee and] expressly adopted [her] findings of fact . . . without modification, with the exception of the tenth finding of fact, to which the board added the following finding: 'Sapia is the only tattoo artist performing tattoo services for the [plaintiff].' " Id., 297. The board then upheld the decision of the appeals referee, determining that the plaintiff had not proven that Sapia was an independent contractor by satisfying all three prongs of the ABC test set forth

in § 31-222 (a) (1) (B) (ii). See id., 298–99; see also footnote 1 of this opinion.

"With respect to part B of the test," which is at issue in this certified appeal, "the board concluded that Sapia's service was not performed outside of the plaintiff's usual course of . . . business or the place of its business.[6] The board stated . . . the [plaintiff] describes itself on its website as your one-stop destination for body jewelry, stainless steel jewelry, as well as piercing and tattoo services. The [plaintiff's] website also advertised that it provided tattoo services during all open store hours. [Although the board] recognize[s] that Sapia was the only tattoo artist performing these services on the employer's behalf, both the [plaintiff's] website and Facebook page describe the company as Vogue Tattoo and Piercings." (Footnote added; internal quotation marks omitted.) *Vogue* v. *Administrator, Unemployment Compensation Act*, supra, 202 Conn. App. 299. "Accordingly, the board determined that Sapia was employed by the plaintiff for purposes of the act and that the plaintiff was liable for any contributions related to his wages that were required by the act. The board [upheld] the decision of the appeals referee and dismissed the plaintiff's appeal." Id.

"In February, 2017, the plaintiff appealed from the decision of the board to the trial court;" id.; see General Statutes § 31-249b; Practice Book § 22-1 et seq.; asserting that "several of the board's findings were not supported by the evidence and that the board had mis-

[6] Under part B of the ABC test, an enterprise bears the burden of showing that the services in question are "performed either outside the usual course of the business" or are "performed outside of all the places of business of the enterprise . . . ." General Statutes § 31-222 (a) (1) (B) (ii) (II); see *Vogue* v. *Administrator, Unemployment Compensation Act*, supra, 202 Conn. App. 304. It is undisputed that tattoo services are performed on the premises of the plaintiff's store. See *Vogue* v. *Administrator, Unemployment Compensation Act*, supra, 311. Thus, we need not address the latter inquiry of part B.

applied relevant legal principles to the facts of the case."[7] *Vogue* v. *Administrator*, *Unemployment Compensation Act*, supra, 202 Conn. App. 300. Thereafter, the defendant filed a motion for judgment in his favor and an accompanying memorandum of law, arguing "that the plaintiff had failed to prove that Sapia was not an employee for purposes of the act and that the board had correctly applied the law to the facts of the case," to which the plaintiff filed an objection. Id., 303. In April, 2019, after hearing argument on the defendant's motion for judgment and the plaintiff's objection thereto, the trial court rendered judgment for the defendant dismissing the administrative appeal.[8] Id.

The plaintiff then appealed from the trial court's judgment to the Appellate Court, asserting that the board incorrectly had interpreted and applied part B of the ABC test in determining that the provision of tattoo services was part of the plaintiff's usual course of business. See id., 305–306. The Appellate Court concluded that the board's construction of part B of the ABC test was neither previously subject to judicial scrutiny nor time-tested. See id., 308. Relying on this court's interpretation of part B in *Mattatuck Museum-Mattatuck Historical Society* v. *Administrator*, *Unemployment*

[7] In January, 2018, the plaintiff filed with the board a motion to correct fourteen of its findings, which it granted in part and denied in part. *Vogue* v. *Administrator*, *Unemployment Compensation Act*, supra, 202 Conn. App. 300. As the Appellate Court observed, the modified findings did not alter the board's conclusion that Sapia was an employee of the plaintiff. Id. In May, 2018, the plaintiff amended its administrative appeal to include claims related to the board's decision concerning that motion to correct, none of which relates to claims at issue in this certified appeal. Id., 303.

[8] Having rejected the plaintiff's argument that the board incorrectly determined that the plaintiff had failed to satisfy part B of the ABC test, the trial court deemed it unnecessary to consider parts A or C of the test. *Vogue* v. *Administrator*, *Unemployment Compensation Act*, supra, 202 Conn. App. 305. Similarly, the Appellate Court "focus[ed] on the board's analysis under part B because that portion of the board's analysis [was] dispositive of the plaintiff's claim on appeal." Id., 298.

Compensation Act, 238 Conn. 273, 679 A.2d 347 (1996) (*Mattatuck Museum*), the Appellate Court concluded that the board had correctly interpreted the term "usual course of business" under § 31-222 (a) (1) (B) (ii) (II). See *Vogue* v. *Administrator*, *Unemployment Compensation Act*, supra, 202 Conn. App. 309–11. Moreover, the Appellate Court noted that the board expressly cited to and relied on the interpretation of part B in *Mattatuck Museum*. See id., 311. Finding substantial evidence in the record to support the board's finding that the provision of tattoo services was within the plaintiff's usual course of business, the Appellate Court further concluded that the trial court had correctly determined that the board's application of the statute to the facts was neither unreasonable nor arbitrary. See id., 311–14. Accordingly, the Appellate Court affirmed the judgment of the trial court. Id., 314. This certified appeal followed. See footnote 3 of this opinion.

On appeal to this court, the plaintiff claims that the Appellate Court improperly upheld the board's determination that the provision of tattoo services is within the plaintiff's usual course of business. The plaintiff contends that the board's interpretation of the term "usual course of the business," as used in § 31-222 (a) (1) (B) (ii) (II), should not be accorded deference because it has not been subject to sufficient judicial or agency examination. Specifically, the plaintiff argues that the board based its decision on an overly broad interpretation of the statute and that, under this court's interpretation of the term in *Mattatuck Museum*, the plaintiff has satisfied part B of the ABC test because Sapia's activities were not performed by the plaintiff on a regular or continuous basis. The plaintiff also contends that *Mattatuck Museum* is inapplicable to the present case; it relies on former Chief Justice Rogers' dissenting opinion in *Standard Oil of Connecticut, Inc.* v. *Administrator*, *Unemployment Compensation Act*,

320 Conn. 611, 665, 134 A.3d 581 (2016), for the proposition that, because Sapia is the only tattoo artist performing tattoo services for the plaintiff, the business itself does not perform tattoo services on the requisite regular or continuous basis as a matter of law. Finally, the plaintiff suggests that, in applying the ABC test, this court has adopted a totality of the circumstances test. Thus, the plaintiff contends that the Appellate Court improperly upheld the board's determination that part B of the ABC test was not satisfied because that finding relied solely on the wording of the plaintiff's advertisements to determine that tattoo services were within the plaintiff's usual course of business.[9]

[9] The plaintiff also argues that the board's decision improperly relied on additional facts beyond those found by the appeals referee, which provide the basis for the decisions of the board, the trial court, and the Appellate Court. We disagree. The board is not required to limit its decision to facts contained in the record of the hearing before the appeals referee; it similarly may modify the appeals referee's findings of fact or conclusions of law pursuant to General Statutes § 31-249. See *Seward* v. *Administrator, Unemployment Compensation Act*, 191 Conn. App. 578, 584, 215 A.3d 202 (2019) ("appeals are heard on the record of the hearing before the referee although the board may take additional evidence or testimony if justice so requires" (internal quotation marks omitted)).

The plaintiff also contends that the decisions of the trial court and the Appellate Court point to facts not found by the appeals referee or the board, namely, that (1) " '[t]he record reflects that the plaintiff had hired a tattoo artist prior to hiring Sapia and . . . [had] interviewed several candidates . . . before Sapia began [working] at the plaintiff's store,' " and (2) " '[t]he plaintiff's website also advertises tattoo services during all open store hours.' " *Vogue* v. *Administrator, Unemployment Compensation Act*, supra, 202 Conn. App. 304–305. In reviewing the decisions of administrative agencies, courts "determine whether there is substantial evidence *in the administrative record* to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable." (Emphasis added; internal quotation marks omitted.) *Standard Oil of Connecticut, Inc.* v. *Administrator, Unemployment Compensation Act*, supra, 320 Conn. 622–23. We are unable to locate support in the record for the proposition that the plaintiff had previously interviewed several candidates before selecting Sapia as its resident tattoo artist. As we discuss subsequently in this opinion, however, sufficient other evidence in the record supports a finding that tattoo services are within the plaintiff's usual course of business. Moreover, the remaining disputed facts are supported by evidence in the record, namely, the transcript of testimony given at the hearing before the appeals referee and the field representative's report, which the appeals referee did

In response, the defendant contends that the board's interpretation of "usual course of business" should receive traditional deference because it has been time-tested and is reasonable, insofar as the board has, for decades, consistently applied this court's construction of that term in *Mattatuck Museum-Mattatuck Historical Society* v. *Administrator, Unemployment Compensation Act*, supra, 238 Conn. 273. Alternatively, the defendant contends that the Appellate Court correctly determined that the board's conclusions that led to its finding that tattoo services were within the plaintiff's "usual course of business" were neither unreasonable nor arbitrary. We agree with the defendant and conclude that the Appellate Court correctly determined that the board had not acted unreasonably, arbitrarily, illegally, or in abuse of its discretion in finding that tattoo services were within the plaintiff's usual course of business under part B of the ABC test.

By way of background, it is well settled that, " '[f]or purposes of the act, "employment" is defined in part by . . . § 31-222 (a) (1) (B) (ii), which provides in relevant part that "[s]ervice performed by an individual shall be deemed to be employment subject to this chapter irrespective of whether the common law relationship of master and servant exists, unless and until it is shown to the satisfaction of the administrator that (I) such individual has been and will continue to be free from control and direction in connection with the performance of such service, both under his contract for the performance of service and in fact; and (II) such service is performed either outside the usual course of the business for which the service is performed or is

not specifically decline to credit. Additionally, the Appellate Court acknowledged that the plaintiff's website directed customers to call the plaintiff's business for Sapia's availability. See *Vogue* v. *Administrator, Unemployment Compensation Act*, supra, 311 n.10. Accordingly, the trial court and the Appellate Court properly considered these facts in determining whether the board's conclusions were reasonable.

performed outside of all the places of business of the enterprise for which the service is performed; and (III) such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed . . . .'' This statutory provision is commonly referred to as the ''ABC test,'' with parts A, B and C corresponding to clauses I, II and III, respectively. . . . This statutory provision is in the conjunctive. Accordingly, unless the party claiming the exception to the rule that service is employment shows that all three prongs of the test have been met, an employment relationship will be found.' '' *Southwest Appraisal Group, LLC* v. *Administrator, Unemployment Compensation Act*, 324 Conn. 822, 832, 155 A.3d 738 (2017).

The purpose of the act is ''to ameliorate the tragic consequences of unemployment'' and ''to guard against involuntary unemployment within the limitations prescribed.'' (Internal quotation marks omitted.) *Furber* v. *Administrator, Unemployment Compensation Act*, 164 Conn. 446, 454, 324 A.2d 254 (1973). The legislature expressly mandated that the act shall be construed, interpreted, and administered in such a manner as to presume coverage, eligibility, and nondisqualification in doubtful cases. *Kirby of Norwich* v. *Administrator, Unemployment Compensation Act*, 328 Conn. 38, 48, 176 A.3d 1180 (2018); see General Statutes § 31-274 (c). Accordingly, exemptions to coverage under the act are strictly construed. *Kirby of Norwich* v. *Administrator, Unemployment Compensation Act*, supra, 48. Nevertheless, in applying the ABC test, we must be careful not to hamper ''those who undertake to do business together as independent contracting parties . . . on a legitimate basis.'' (Internal quotation marks omitted.) *Southwest Appraisal Group, LLC* v. *Administrator, Unemployment Compensation Act*, supra, 324 Conn. 834.

With respect to the standard of review, it is well established that "[r]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable." (Internal quotation marks omitted.) *Standard Oil of Connecticut, Inc.* v. *Administrator, Unemployment Compensation Act*, supra, 320 Conn. 622–23. Neither the trial court, the Appellate Court, nor this court "may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . [A]n agency's factual and discretionary determinations are to be accorded considerable weight by the courts." (Internal quotation marks omitted.) Id., 623.

Beyond the deference that we give to an administrative agency's factual determinations, our review of the board's construction of the ABC test, as set forth in § 31-222 (a) (1) (B) (ii), "presents a question of law [over which our review is plenary]. . . . Although [o]ur review of an agency's decision on questions of law is limited by the traditional deference that we have accorded to that agency's interpretation of the acts [that] it is charged with enforcing . . . [i]t is well settled . . . that we do not defer to the board's construction of a statute . . . when . . . the [provision] at issue previously ha[s] not been subjected to judicial scrutiny or when the board's interpretation has not been [time-tested]." (Citations omitted; internal quotation marks omitted.) *Kirby of Norwich* v. *Administrator, Unemployment Compensation Act*, supra, 328 Conn. 47. To the extent we do "accord great weight and deference to previous agency interpretations of a statute," we

do so only "when they are time-tested and reasonable." (Internal quotation marks omitted.) *Southwest Appraisal Group, LLC* v. *Administrator, Unemployment Compensation Act*, supra, 324 Conn. 833.

As a threshold matter, the parties appear to disagree about whether the Appellate Court correctly determined that the board's construction of the term "usual course of business" is not subject to judicial deference because it has *not* been time-tested or subject to judicial scrutiny, within the factual scenario presented by this case. See *Vogue* v. *Administrator, Unemployment Compensation Act*, supra, 202 Conn. App. 308 and n.9 (describing parties' arguments before Appellate Court with respect to judicial deference). In our view, the Appellate Court's treatment of this issue was somewhat unclear insofar as it appeared to extend plenary review to the board's interpretation of the ABC test; see id., 308–10; while applying a more deferential analysis as it assessed the reasonableness of the board's ultimate conclusion on the facts of this case. See id., 311–14. In our view, this case squarely presents a question of reasonableness, rather than one of statutory construction subject to plenary review. Resolution of which activities fall outside of a plaintiff's "usual course of business" under the ABC test required this court to construe that phrase in 1996, when it decided *Mattatuck Museum-Mattatuck Historical Society* v. *Administrator, Unemployment Compensation Act*, supra, 238 Conn. 278. In the present case, the board did not, however, provide its own "time-tested" construction of the phrase "usual course of business" that would implicate potential concerns about judicial deference. Rather, it applied this court's interpretation of that phrase in *Mattatuck Museum* to the facts of this case, as it has consistently and expressly done in its decisions since 1997.[10] Therefore, we review

[10] See *Provost* v. *CMIT Solutions of Hartford*, No. 9015-BR-19 (December 31, 2019) (Decisions of Employment Security Board of Review) (because claimant was performing service that appellant offered to clients, such

only the board's application of the usual course of business analysis to the facts of this case to determine whether it was unreasonable or arbitrary, insofar as it has not provided an interpretation of that phrase that differs from that articulated in *Mattatuck Museum* but has merely applied that precedent to the facts of this case. See, e.g., *Standard Oil of Connecticut, Inc.* v. *Administrator, Unemployment Compensation Act*, supra, 320 Conn. 622–23.

In *Mattatuck Museum-Mattatuck Historical Society* v. *Administrator, Unemployment Compensation Act*, supra, 238 Conn. 278–82, this court interpreted and defined the phrase "usual course of business," as used in the act's ABC test. In determining whether a particular activity is considered within an enterprise's "usual course of business" under part B of the ABC test, we consider whether "the enterprise performs the activity on a regular or continuous basis, without regard to the substantiality of the activity in relation to the enter-

services were not performed outside of appellant's usual course of business); *Torrison Stone & Garden, LLC*, v. *Administrator*, No. 9001-BR-15 (July 2, 2015) (Decisions of Employment Security Board of Review) (appellant offered masonry services on regular and continuous basis, held itself out to public as offering these services, and workers were masons); *King's Speech & Learning Center* v. *Administrator*, No. 9000-BR-15 (June 2, 2015) (Decisions of Employment Security Board of Review) (appellant held itself out to public on website as providing services in question, rather than simply connecting clients and therapists); *Administrator* v. *Hoffman Educational Group, LLC*, No. 9006-BR-12 (August 26, 2013) (Decisions of Employment Security Board of Review) (appellant satisfied part B because it did not hold itself out to public as tutoring service, and specific business activities did not include tutoring students, but it matched students with tutors); *Administrator* v. *JMF Speech & Language Services, Inc.*, No. 9005-BR-12 (January 24, 2013) (Decisions of Employment Security Board of Review) (appellant described itself as providing speech and language services to clients, provided these services on regular basis through therapists, and president provided same services); *Administrator* v. *Northern Connecticut Eye Associates*, No. 9013-BR-97 (September 22, 1997) (Decisions of Employment Security Board of Review) (doctor provided ophthalmologic services, which were specific business activities engaged in by enterprise in usual course of business).

prise's other business activities."[11] Id., 281. In doing so, this court examined the particular activities that the plaintiff, a museum, engaged in and concluded that the offering of art courses was within the plaintiff's "usual course of business" because the plaintiff had employed instructors to teach art courses for several years, held itself out to the public as offering art courses, and produced and distributed brochures announcing courses, class hours, location, registration fees, and instructors' names. See id., 279–82.

Neither party has asked this court to overrule or limit *Mattatuck Museum*. However, the plaintiff relies on former Chief Justice Rogers' dissenting opinion in *Standard Oil of Connecticut, Inc.* v. *Administrator, Unemployment Compensation Act*, supra, 320 Conn. 665, for the proposition that the usual course of business test requires some analysis as to whether the enterprise performs the activity regularly and continuously, without consideration of the specific tasks performed for the employer by the worker at issue in the case.[12] We

[11] Other jurisdictions have also followed *Mattatuck Museum* in defining the term "usual course of business" under their respective unemployment compensation statutes. See *Vazquez* v. *Jan-Pro Franchising International, Inc.*, 986 F.3d 1106, 1125 (9th Cir. 2021) (courts have framed prong B inquiry in several ways, including whether work of employee is continuously performed for hiring entity and which business hiring entity proclaims to be in, all of which should be considered); *Q.D.-A., Inc.* v. *Indiana Dept. of Workforce Development*, 114 N.E.3d 840, 847 (Ind. 2019) ("if a company regularly or continually performs an activity, no matter the scale, it is part of the company's usual course of business"); *Appeal of Niadni, Inc.*, 166 N.H. 256, 261, 93 A.3d 728 (2014) ("[w]e find the [Connecticut] Supreme [Court's] . . . approach [in *Mattatuck Museum*] most useful").

[12] The plaintiff also contends that the Appellate Court's opinion refers to tattooing as an "integral" part of the plaintiff's business. This court has not adopted the interpretation of part B that turns on whether the services provided by the worker were integral or necessary to the activities undertaken by the plaintiff. See, e.g., *Carpetland U.S.A., Inc.* v. *Illinois Dept. of Employment Security*, 201 Ill. 2d 351, 386, 776 N.E.2d 166 (2002) ("the key to [the usual course of business] inquiry is whether the services are necessary to the business of the employing unit or merely incidental"); *Sebago* v. *Boston Cab Dispatch, Inc.*, 471 Mass. 321, 333, 28 N.E.3d 1139 (2015) ("[a]nother factor is whether the service the individual is performing is

disagree with this argument. First, a part B standard that depends on the number of workers performing a task for an enterprise is inconsistent with both former Chief Justice Rogers' dissenting opinion in *Standard Oil of Connecticut, Inc.*, when considered in its complete context, and *Mattatuck Museum* itself, and would frustrate the fact sensitive nature of the usual course of business analysis. In *Mattatuck Museum*, the enterprise offered art courses to the public on a regular and continuous basis, employed instructors to teach art courses, produced and distributed brochures announcing art course information, listing the teacher at issue as "faculty," and discounted art courses to bolster its membership. See *Mattatuck Museum-Mattatuck Historical Society* v. *Administrator, Unemployment Compensation Act*, supra, 238 Conn. 282. Even if the museum in *Mattatuck Museum* utilized only one teacher for its art courses, the analysis in that case results in the same conclusion. Likewise, in her dissenting opinion in *Standard Oil of Connecticut, Inc.*, former Chief Justice Rogers specifically rejected an approach that would enable an enterprise to contract out the entirety of its workforce, while claiming that not one of the contract workers was an employee because no one on the payroll was performing the same tasks as the enterprise. See

necessary to the business of the employing unit or merely incidental" (internal quotation marks omitted)). The Appellate Court, however, correctly concluded that substantial evidence exists in the record for the board to have determined that the provision of tattoo services was within the plaintiff's usual course of business, as defined by *Mattatuck Museum*, which examines whether an enterprise performs an activity on a regular or continuous basis. See *Mattatuck Museum-Mattatuck Historical Society* v. *Administrator, Unemployment Compensation Act*, supra, 238 Conn. 281.

Further, the plaintiff suggests that, in applying the ABC test, this court has adopted a totality of the circumstances test. We disagree. The totality of the circumstances analysis governs only part C of the ABC test. See *Southwest Appraisal Group, LLC* v. *Administrator, Unemployment Compensation Act*, supra, 324 Conn. 837–38 ("part C must be considered in relation to the totality of the circumstances, with that inquiry guided by a multifactor test"). Part B has no such multifactor test.

Standard Oil of Connecticut, Inc. v. *Administrator, Unemployment Compensation Act*, supra, 669 n.6 (*Rogers, C. J.*, dissenting). Accordingly, we decline the plaintiff's request to narrow the scope of the *Mattatuck Museum* analysis away from the actual activities of the putative employer.

We therefore turn to whether the Appellate Court correctly concluded that the board had not acted unreasonably, arbitrarily, illegally, or in abuse of its discretion in applying its "usual course of business" analysis to the plaintiff's relationship with Sapia. The plaintiff contends that the Appellate Court improperly upheld the board's determination that part B of the ABC test was not satisfied because it relied solely on the wording of the plaintiff's website and social media advertisements in determining that tattoo services were within its usual course of business.

We agree with the plaintiff's argument that advertisements are not *by themselves* dispositive of whether an activity is within an enterprise's usual course of business.[13] Nevertheless, how an enterprise holds itself out to the public—which may be evidenced by its advertising—may be used as substantial evidence of whether an activity is performed in its usual course of business.[14]

[13] We also agree with the plaintiff's assertion that the court in *Mattatuck Museum* declined to take the broadly held position that, "if you do it, it is within your usual course of business." (Internal quotation marks omitted.) *Mattatuck Museum-Mattatuck Historical Society* v. *Administrator, Unemployment Compensation Act*, supra, 238 Conn. 279. As described previously in this opinion, the correct standard is whether the plaintiff regularly or continuously performs an activity. See id., 280.

[14] Similarly, other jurisdictions have relied on evidence of how an enterprise holds itself out to the public in its advertising in determining whether a particular activity is in its usual course of business. See *Jori Enterprises, LLC* v. *Director, Dept. of Workforce Services*, 474 S.W.3d 910, 914 (Ark. App. 2015) (enterprise "proudly offer[ed] one-on-one in-home tutoring," and, therefore, people could believe from advertisement that enterprise was tutoring service); *McPherson Timberlands, Inc.* v. *Unemployment Ins. Commission*, 714 A.2d 818, 822 (Me. 1998) (enterprise advertised interest in buying timber from other landowners and held itself out as harvester and

See *Standard Oil of Connecticut, Inc.* v. *Administrator, Unemployment Compensation Act*, supra, 320 Conn. 666, 669 (*Rogers, C. J.*, dissenting) (emphasizing that, under governing law, courts are directed to consider services that *enterprise itself* offers to the public and performs, which may include evidence of promotional materials); *Q.D.-A., Inc.* v. *Indiana Dept. of Workforce Development*, 114 N.E.3d 840, 847–48 (Ind. 2019) ("[A]dvertising can reflect services a company offers to its customers. But we cannot uncritically rely on that advertising to fully reflect the activities a company regularly or continually performs."). Moreover, when an enterprise is a new venture of an established business, whether it holds itself out to the public as performing the activity may indicate whether the activity is in its usual course of business. See *Mattatuck Museum-Mattatuck Historical Society* v. *Administrator, Unemployment Compensation Act*, supra, 238 Conn. 280 n.9. In the present case, the record reflects that the home page of the plaintiff's website stated, "Tattoo and Piercings" and "Welcome to Vogue, your one-stop destination for body jewelry, as well as piercing and tattoo services." (Internal quotation marks omitted.) The phone number listed for tattoo services was the plaintiff's store phone number.

Additional evidence in the record beyond the online advertisements supports the board's finding that the plaintiff performed tattoo services on a regular or continuous basis. Tattoo services were provided at the

marketer of timber); *Athol Daily News* v. *Board of Review of Division of Employment & Training*, 439 Mass. 171, 179, 786 N.E.2d 365 (2003) (when enterprise defined "its business as 'publishing and distributing' a daily newspaper," carriers' services were performed within usual course of business); *Appeal of Niadni, Inc.*, 166 N.H. 256, 263, 93 A.3d 728 (2014) (record included several advertisements featuring workers' likeness and information); *Great Northern Construction, Inc.* v. *Dept. of Labor*, 204 Vt. 1, 12, 161 A.3d 1207 (2016) (factors relevant to part B determination include "how the purported employer defines its own business").

plaintiff's store only during its store hours. The plaintiff's owner previously had hired a tattoo artist. The plaintiff's owner testified that it was his decision to have tattoo work become part of the business, in addition to retail jewelry piercing and sales, to increase revenue. The field representative's report describes a required waiver form between the plaintiff and all tattoo customers. Indeed, after purchasing tattoo services, customers received a receipt with the plaintiff's name and contact information, rather than Sapia's. As the Appellate Court noted, the board and the trial court decisions reflected a review of the entire record. See *Vogue* v. *Administrator, Unemployment Compensation Act*, supra, 202 Conn. App. 313. Likewise, the board's consideration of how the plaintiff held itself out to the public is consistent with its application of *Mattatuck Museum* in other decisions.[15] See footnote 10 of this opinion.

For these reasons, it was not unreasonable or arbitrary for the board to conclude that the plaintiff regularly and continuously provided *both* body piercing and tattoo services for purposes of part B of the ABC test.

[15] The plaintiff raises additional facts in support of its contention that the ABC test is satisfied, such as Sapia's freedom to make his own hours during the plaintiff's open store hours, to keep his own appointment book, to set his own prices, to advertise his own clientele on his social media, and to store his intellectual property on his personal computer. However, these facts are not relevant to our part B analysis pursuant to *Mattatuck Museum*, which does not examine the activities of the worker at issue but, rather, focuses on the enterprise. See *Mattatuck Museum-Mattatuck Historical Society* v. *Administrator, Unemployment Compensation Act*, supra, 238 Conn. 279 (with respect to prong B, "we examine the particular activities engaged in by the [employer]"). Accordingly, because the ABC test is conjunctive, requiring the employer to prove each prong, we need not address the merits of parts A and C of the test analyzing the plaintiff's control over Sapia or Sapia's independently established business. See, e.g., *Southwest Appraisal Group, LLC* v. *Administrator, Unemployment Compensation Act*, supra, 324 Conn. 832 ("unless the party claiming the exception to the rule that service is employment shows that all three prongs of the test have been met, an employment relationship will be found" (internal quotation marks omitted)).

See *Standard Oil of Connecticut, Inc.* v. *Administrator, Unemployment Compensation Act*, supra, 320 Conn. 665 (*Rogers, C. J.*, dissenting) ("[a]n activity need not comprise the majority of an enterprise's business or its primary line of work in order to be within the enterprise's usual course of business, as long as it is performed with the requisite frequency"); *Q.D.-A., Inc.* v. *Indiana Dept. of Workforce Development*, supra, 114 N.E.3d 847 (adopting *Mattatuck Museum*'s definition and concluding that, "if a company regularly or continually performs activities showing it is engaged in various separate and independent kinds of businesses or occupations, it may have more than one course of business" (internal quotation marks omitted)). Because substantial evidence existed to support the board's determination that tattoo services were within the plaintiff's "usual course of business," the Appellate Court properly affirmed the judgment of the trial court dismissing the plaintiff's administrative appeal.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* RODERICK ROGERS (SC 20469)

McDonald, D'Auria, Mullins, Ecker and Alexander, Js.

Syllabus

Convicted of the crimes of murder, conspiracy to commit murder, and assault in the first degree, the defendant appealed. The defendant and his cousin, A, had been driving when they stopped to pick up the defendant's friend, J. They then drove to a housing complex, where the defendant and J exited the car and shot five individuals, one of whom died. The defendant and J returned to A's car and left the scene. Because A was on probation, he wore a global positioning system (GPS) device that tracked his movement. Thereafter, the defendant and J were arrested, and their cases were consolidated and tried jointly. Prior to trial, the defendant filed a motion in limine seeking either the preclusion of evidence of information pertaining to the location of his cell phone or

a hearing pursuant to *State* v. *Porter* (241 Conn. 57) to determine the scientific reliability of such evidence. The trial court did not rule on the defendant's motion, and he did not renew it at trial. The state never disclosed an expert witness, but, when jury selection began, the state provided the defendant with a list of witnesses, which included W, whom it identified only as a police officer. Seven days before evidence began, the state provided the defendant with W's resume and a copy of a slideshow presentation, prepared by W, that purportedly charted the location of the defendant's and J's cell phones, and A's GPS device around the time of the shooting. J filed a motion in limine to preclude W's testimony because of the state's untimely disclosure of W as an expert on cell site location data. The defendant's counsel did not file a similar motion, join J's motion, or raise any concerns regarding the untimely disclosure at the hearing on J's motion. The court denied J's motion, and, at trial, W's testimony and cell site location data showed that J, but not the defendant or A, had been near the crime scene at the time of the shooting. The defendant did not object to W's testimony or the cell site location data and did not request a *Porter* hearing at that time. While cross-examining W, the defendant's counsel emphasized that the data showed that the defendant had been with A in locations other than the crime scene, both before and after the shooting. After the defendant and J were convicted, the defendant appealed to the Appellate Court, claiming that the trial court improperly had admitted into evidence W's testimony regarding the cell site location information without first conducting a *Porter* hearing, as required by this court's decision in *State* v. *Edwards* (325 Conn. 97). The Appellate Court disagreed and affirmed the defendant's conviction. During the pendency of the defendant's appeal to this court from the Appellate Court's judgment, this court reversed J's conviction on the ground that the trial court had abused its discretion when it allowed W to testify without first granting J's request for a reasonable continuance to obtain his own cell site information expert. Thereafter, this court granted the defendant's petition for certification to appeal to this court, and the defendant claimed that, even though he admittedly failed to preserve any objection to the state's untimely disclosure of W, this court should exercise its supervisory authority over the administration of justice to grant him the same remedy as J because they were tried jointly and suffered the same harm. The defendant also claimed on appeal that this court should review the merits of his unpreserved claim that the trial court improperly had failed to conducted a *Porter* hearing in accordance with *Edwards*. *Held*:

1. This court declined the defendant's request to exercise its supervisory authority over the administration of justice to reverse his conviction, despite his failure to preserve any objection to the state's untimely disclosure of W as an expert witness, as the defendant and J were not similarly situated or similarly harmed by the state's untimely disclosure

of W: W's testimony regarding the cell site location data was less prejudicial to the defendant than it was to J insofar as it did not place the defendant near the crime scene at the time of the shooting, as it did with J; moreover, W's testimony demonstrated, and the defendant's counsel emphasized during cross-examination of W, that the defendant and A were together and not at the scene of the shooting both before and after it occurred, which suggested that defense counsel may have had strategic reasons for not objecting to W's testimony; furthermore, the state's case against the defendant was strong, as multiple witnesses identified him as the shooter, and a probation officer testified that he had witnessed A pick up the defendant from his home before the shooting and the defendant arrive back home after the shooting, whereas W's testimony was central to the state's case against J, who could not be identified as the shooter by any eyewitness; accordingly, because the defendant was not similarly situated to J, it was not anomalous to treat the defendant and J differently, and fairness and justice did not require the reversal of the defendant's conviction.

2. This court declined to review the defendant's unpreserved *Porter* claim: the trial court never ruled on the defendant's pretrial motion in limine requesting a *Porter* hearing, he did not renew that request at trial, and this court recently rejected the same arguments that the defendant raised in the present case and determined that the retroactivity of the nonconstitutional evidentiary rule announced in *Edwards*, namely, that a *Porter* hearing is required to assess the scientific reliability of expert testimony concerning cell phone location information, does not relieve a defendant of his obligation to preserve such a claim; moreover, contrary to the defendant's contention, the requirement of preservation did not frustrate judicial economy by forcing attorneys to raise any conceivable legal claim in the hope that the law would change in the future.

Argued May 2—officially released August 16, 2022

Procedural History

Substitute information charging the defendant with four counts of the crime of assault in the first degree, and with one count each of the crimes of murder, conspiracy to commit murder and criminal possession of a firearm, brought to the Superior Court in the judicial district of Fairfield, where the court, *Kavanewsky, J.*, granted the defendant's motion to sever the charge of criminal possession of a firearm and the state's motion to consolidate the case for trial with that of another defendant; thereafter, the cases were tried to the jury;

verdict of guilty; subsequently, the state entered a nolle prosequi as to the charge of criminal possession of a firearm, and the court, *Kavanewsky, J.*, rendered judgment in accordance with the verdict, from which the defendant appealed to this court; thereafter, the case was transferred to the Appellate Court, *Lavine, Alvord* and *Beach, Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

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

Nancy L. Chupak, senior assistant state's attorney, with whom, on the brief, were *Joseph T. Corradino*, state's attorney, and *C. Robert Satti, Jr.*, former supervisory assistant state's attorney, for the appellee (state).

Opinion

D'AURIA, J. In this certified appeal, we must determine whether the reversal of a codefendant's conviction necessitates the reversal of a defendant's conviction despite the defendant's failure to preserve the issue at trial when the defendant and codefendant were jointly tried and the codefendant properly preserved the issue. Specifically, the defendant, Roderick Rogers, appeals from the judgment of conviction, rendered after a jury trial, of one count of murder in violation of General Statutes § 53a-54a (a), one count of conspiracy to commit murder in violation of General Statutes §§ 53a-54a (a) and 53a-48, and four counts of first degree assault in violation of General Statutes § 53a-59 (a) (5). On appeal, he claims that, in light of this court's recent decision in *State* v. *Jackson*, 334 Conn. 793, 224 A.3d 886 (2020), in which his codefendant, Raashon Jackson, was granted a new trial premised on his properly preserved objection to the state's untimely disclosure of an expert witness, this court should exercise its supervi-

sory authority over the administration of justice to reverse his conviction, even though he did not join in Jackson's objection to the untimely disclosed expert, because they were tried jointly and suffered the same harm. Additionally, he requests that this court overrule our recent decision in *State* v. *Turner*, 334 Conn. 660, 686–87, 224 A.3d 129 (2020), and review the merits of his unpreserved *Porter*[1] claim under *State* v. *Edwards*, 325 Conn. 97, 156 A.3d 506 (2017). We affirm the judgment of conviction.

We begin by briefly summarizing the facts the jury reasonably could have found, as recited recently in Jackson's certified appeal from the Appellate Court's judgment. "On September 10, 2013, [the defendant] called his cousin, David Anderson, for a ride from [his] home in Bridgeport. Before Anderson arrived, a social worker, William Muniz, came to [the defendant's] house at 2:10 p.m. to discuss a job opportunity. [The defendant] informed Muniz that he had to leave but would be back in one hour. As Muniz was leaving, Anderson arrived. Because Anderson was on probation, he wore a global positioning system (GPS) device that tracked his movements.

"Anderson and [the defendant] left the house in Anderson's car, and [the defendant] directed Anderson to drive toward Palisade Avenue, on the east side of Bridgeport. On Palisade Avenue, [the defendant] saw [Jackson], a friend whom he called Red Dreads, and directed Anderson to stop the car. [Jackson] got into the backseat of Anderson's car. [The defendant] then directed Anderson to drive to the 'Terrace,' a reference to the Beardsley Terrace housing complex located in the north end of Bridgeport. After arriving at the housing complex, [the defendant] told Anderson to park on a

[1] See *State* v. *Porter*, 241 Conn. 57, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998).

side street off Reservoir Avenue. [The defendant] asked Anderson if he had an extra shirt, and Anderson told him to check the trunk. [The defendant] asked Anderson to wait because he and [Jackson] would be right back. [Jackson] and the defendant got out of the car, went to the open trunk, shut the trunk, and walked down a hill.

"At that time, a group of young men was gathered outside the housing complex. [Jackson] and the defendant approached the group, remarked, 'y'all just came through the Ave shooting Braz, you all f'ed up,' and either [Jackson] or the defendant began shooting at the group. One of the shooting victims, LaChristopher Pettway, sustained a fatal gunshot wound to his back. Four other victims, Tamar Hamilton, Leroy Shaw, Jauwane Edwards, and Aijahlon Tisdale, sustained nonfatal wounds.

"[Jackson] and the defendant then left the scene of the shootings and returned to Anderson's car. [The defendant] told Anderson to drive down Reservoir Avenue. Anderson then drove to the corner of Stratford Avenue and Hollister Avenue, where Anderson parked the car on the side of the street. [Jackson] got out of the car, and Anderson drove [the defendant] home. [The defendant] called Muniz at 2:46 p.m., and Muniz returned to [the defendant's] home by 3 p.m." *State* v. *Jackson*, supra, 334 Conn. 797–98.

On September 16, 2013, the defendant was arrested. Id., 798. That same day, he sent Jackson a text message stating that "[d]ey taken [me]." (Internal quotation marks omitted.) Id. Jackson was subsequently arrested. Id. Both men were charged with murder, conspiracy to commit murder, and four counts of assault in the first degree. Id., 798; see id., 799 n.2. The trial court granted the state's motion to consolidate for trial the defen-

dant's case with Jackson's case, and the two were tried jointly before a jury. See id., 798.

At trial, Anderson testified as a cooperating witness for the state. See id., 798. Over defense counsel's objection, the state also presented the testimony of an expert on cell site location information (CSLI), Sergeant Andrew Weaver of the Hartford Police Department, who testified to the location of Jackson's and the defendant's cell phones, and Anderson's GPS monitor. Id., 798–99.

The jury found both the defendant and Jackson guilty on all counts, and the court sentenced the defendant to a total effective term of forty-five years of incarceration. He then appealed, challenging certain of the trial court's evidentiary rulings. See *State* v. *Rogers*, 183 Conn. App. 669, 193 A.3d 612 (2018). Relevant to the present appeal, the defendant claimed that the trial court improperly had admitted into evidence maps depicting the location of his and Jackson's cell phones and related testimony without first conducting a *Porter* hearing, as required by our recent decision in *Edwards*. Id., 682. The Appellate Court rejected each of the defendant's evidentiary claims and affirmed the judgment of conviction. See id., 689–90. This court then granted the defendant's petition for certification to appeal.[2] Additional facts and procedural history will follow as required.

[2] We granted certification limited to the following issues: (1) "Does this court's decision in *State* v. *Jackson*, [supra, 334 Conn. 793], which directed that the conviction of the defendant in that case [Jackson] be reversed, require that this court also reverse the conviction of Jackson's codefendant in the present case?" (2) "Is the defendant's unpreserved claim regarding the state's late disclosed expert witness on cell site location information reviewable?" And (3) "[w]as the testimony of the state's late disclosed expert on cell site location information, as well as any evidence admitted in connection with that testimony, harmful to the defendant?" *State* v. *Rogers*, 335 Conn. 917A, 244 A.3d 146 (2020).

I

Recently, in *Jackson*, we reversed that defendant's conviction based on his properly preserved objection to the state's untimely disclosure of Weaver as an expert. Specifically, we held that the trial court had abused its discretion by failing to afford Jackson a reasonable continuance and that this error was harmful. See *State* v. *Jackson*, supra, 334 Conn. 809–10. Notwithstanding that he did not independently object, or join Jackson's objection, to the state's untimely disclosure of Weaver, the defendant requests that this court exercise its supervisory authority to either reverse his conviction or review his unpreserved claim that the untimely disclosure prejudiced him. Specifically, he argues that this is an exceptional circumstance because he and Jackson were tried jointly, and it would be unfair for Jackson's conviction, but not his conviction, to be reversed based on a failure of preservation when both he and Jackson were similarly harmed. He contends that the present case is similar to federal cases in which courts have reversed a defendant's conviction based on an unpreserved claim when the defendant was tried jointly with a codefendant, and the codefendant properly preserved and succeeded on the claim. Because we determine that Jackson and the defendant in the present case were not similarly situated and, thus, not similarly harmed by the state's late disclosure of Weaver, we decline to exercise our supervisory authority to either reverse the defendant's conviction or to review his unpreserved claim.

Approximately six months before trial started, the trial court ordered the state to disclose any experts to the defense. The state never specifically disclosed any witness as an expert. Rather, when jury selection began, the state provided the defendant with a list of 128 potential witnesses, including Weaver, whom it did not identify as an expert but as a member of the Hartford Police

Department. Id., 801. Seven days before evidence began, however, the state provided the defendant with Weaver's resume and a copy of a PowerPoint computer software presentation Weaver had prepared, which the state would argue charted the locations of cell phones associated with the defendant and Jackson, as well as the GPS unit worn by Anderson around the time of the shootings. Id. In response, the day before evidence began, Jackson's counsel moved in limine, seeking to preclude Weaver's testimony based on the state's untimely disclosure of Weaver as a CSLI expert. Id., 801–802. Counsel for the defendant did not file a similar motion or join Jackson's motion. The trial court held a hearing on Jackson's motion several days after evidence began but before Weaver testified before the jury. Id., 802. Counsel for Jackson argued that the state's late disclosure prejudiced Jackson and that the proper remedy was either a reasonable continuance of six weeks or suppression of the testimony. Id., 804. At no time during the hearing did counsel for the defendant object to the untimely disclosure, join Jackson's motion, or raise any concerns regarding the untimely disclosure before the trial court. The trial court ultimately denied Jackson's motion, including his request for a continuance, despite determining that the delay was avoidable. Id., 804–806.

At trial, Weaver testified before the jury "that the state's attorney's office had provided him with logs for Anderson's GPS monitor and call records for three phone numbers, and asked him to map the location of both Anderson's GPS monitor and of phone calls made and received for two of the phone numbers, which the state attributed to [Jackson] and the defendant. Using commercial mapping software, Weaver plotted these locations, which were depicted on the maps as a person figure in the center of 120 degree pie shaped coverage areas. The placement of the figure in the center did not

mean that was the exact location of the cell phone; rather, it meant that the phone was generally within the cell tower's coverage area.

"Weaver's PowerPoint presentation contained fifteen different snapshots of time. The maps and descriptions indicated Anderson's GPS location and whether the defendant's or [Jackson's] cell phone connected to a cell site with a 'generally expected coverage area' in which Anderson's GPS was located." Id., 807. Snapshot one depicted Anderson's GPS in the east end of Bridgeport prior to the shooting. Snapshots two and four depicted the defendant's phone as being in the same coverage area as Anderson's GPS in the east end of Bridgeport prior to the shooting but moving westward toward the crime scene. Neither the defendant's nor Jackson's cell phone is depicted in snapshots three, five, six, seven, or eight, which show Anderson's GPS moving closer to the crime scene. Snapshot nine, however, shows that Jackson's phone connected to a cell site whose coverage area included the location of Anderson's GPS and the location of the shootings near the time of the shooting. Snapshots ten through twelve also showed Jackson's phone as being in the same coverage area as Anderson's GPS immediately after the shooting, with the data showing that those two travelled eastward. Snapshot thirteen is the first snapshot to depict the cell phones of both the defendant and Jackson, as well as Anderson's GPS, with all three located in the east end of Bridgeport in the same coverage area approximately twenty-five minutes after the shooting. Weaver opined that these maps showed that the "phones moved together or met with [each other] before and/or after . . . the [victim's] murder. They either traveled to or traveled from [the crime scene together]. [The defendant's phone] moved toward the [victim's] murder with [Anderson's] GPS. And [Jackson's] phone . . . moved away and then . . . they actually made

phone calls all together . . . within this area of Stratford and Hollister [Avenues] after the homicide."

On cross-examination, counsel for the defendant asked Weaver if all of the snapshots depicting the location of the defendant's phone showed that he was in the east side of Bridgeport. Weaver answered, "yes." Additionally, defense counsel asked Weaver to confirm that none of the snapshots depicting the location of the crime scene showed the presence of the defendant's phone. Weaver again responded affirmatively.

In addition to the CSLI evidence, at trial, the state offered significant evidence regarding the defendant's role in the shooting. Specifically, the state offered the testimony of Muniz, who stated that he met with the defendant at his house at approximately 2:10 p.m., which was prior to the shooting, to discuss a job opportunity but that the defendant said that he had to leave and would be back in about one hour. Muniz testified that he saw a white car arrive and the defendant leave in that white car. He then testified that the defendant later called him at approximately 2:46 p.m., which was after the shooting occurred, to inform him that he was back home, and that he met the defendant at his home at approximately 3 p.m. Additionally, the state offered the testimony of Anderson, who stated that the defendant called him and asked for a ride; that he picked up the defendant at his house in a white Nissan Maxima; that the defendant directed him where to drive; that the defendant saw Jackson and that Jackson got into the car; that the defendant told him to park and then got out of the car with Jackson; that he stayed in the car until the defendant and Jackson returned; and that he then drove away. Most importantly, the state offered evidence from three victims of the shooting, Hamilton, Shaw, and Tisdale, all of whom identified the defendant as the shooter.

Although the defendant and Jackson were tried jointly, we granted Jackson's request for certification to appeal from the judgment of the Appellate Court approximately eighteen months before we granted certification to appeal in the present case.[3] On appeal before this court in *Jackson*, Jackson claimed, among other things, that, in light of the state's untimely disclosure of Weaver after jury selection began and only one week before evidence commenced, the trial court abused its discretion by either failing to preclude Weaver's testimony or failing to grant a reasonable continuance. *State* v. *Jackson*, supra, 334 Conn. 809–10. This court agreed with the trial court that the delayed disclosure was avoidable: "The state's failure to prepare for trial in a timely fashion is not a valid reason for a late disclosure of an expert witness to the defense." Id., 813. We concluded that the trial court had abused its discretion, however, in failing to afford Jackson a reasonable continuance to obtain his own expert, although not necessarily six weeks long, as Jackson had requested. See id., 816. Additionally, we determined that this error was harmful: "The state's case was based primarily on the testimony of Weaver and Anderson. There is no doubt that Weaver's expert testimony was central to the state's case because his testimony and PowerPoint presentation were the only objective evidence that placed [Jackson's] phone in the same area as [the defendant's] phone and Anderson's GPS around the time of the shootings. Although several eyewitnesses identified [the defendant] as a shooter, the identity of the second suspect was a central issue in the case, and the only objective evidence identifying [Jackson] as the second suspect was Weaver's expert testimony. There can be little doubt that jurors would have viewed

[3] This court delayed granting certification to appeal in the present case pending our resolution of the certified appeal in *Turner*, which raised a similar issue regarding the retroactive application of *Edwards* to an unpreserved *Porter* claim. See part II of this opinion.

as highly convincing Weaver's expert opinion; the testimony was presented in technical terms and used impressive visual displays to convey important information, and it came from a law enforcement officer unconnected to the department that investigated the crime. . . . No eyewitnesses identified [Jackson] as one of the perpetrators. Moreover, [Jackson's] DNA was never found in Anderson's car." (Citation omitted; footnote omitted.) Id., 818–19. As a result, we reversed the judgment of conviction and remanded the case for a new trial. See id., 822.

On appeal before this court, the defendant now claims that, in the interest of justice, we should exercise our supervisory authority to afford him the same remedy as Jackson, despite his undisputed failure to preserve any objection to the state's untimely disclosure of Weaver as an expert witness. "[W]e will reverse a conviction under our supervisory powers only in the rare case [in which] fairness and justice demand it. . . . [The issue at hand must be] of [the] utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole." (Internal quotation marks omitted.) *State* v. *Turner*, supra, 334 Conn. 687. In determining whether to exercise our supervisory powers to review an unpreserved claim, we consider the following factors: the record must be adequate for review; all parties must have had an opportunity to be heard on the issue; and review must not create unfair prejudice to any party.[4]

[4] The defendant also argues that exceptional circumstances justify the exercise of our supervisory authority because this court created new law in *Jackson* by providing additional guidance to trial courts regarding the need for a continuance when experts are involved. We disagree. In *Jackson*, we did not alter in any way the applicable legal principles or create any new standard but, rather, applied settled legal principles to the facts at issue.

The defendant further argues that *Jackson* constituted a change in the law as to this case, and, thus, our holding in *Jackson* that the trial court abused its discretion in not granting a reasonable continuance and that this error was harmful equally applies to the present case. This argument ignores the fact that Jackson and the defendant were not similarly harmed by this error.

See, e.g., *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 155–56, 84 A.3d 840 (2014).

This court has not previously decided whether, under our supervisory authority, a defendant is entitled to the benefit of a codefendant's preservation of an objection when tried jointly. On two prior occasions, however, this court has held that, under certain circumstances, a defendant's unpreserved claim may be treated as preserved if his codefendant, who was tried jointly with him, preserved the same claim. Specifically, we have held that "the failure by [a defendant] fully to challenge the [ruling of the trial court] at trial would not be dispositive [of whether the defendant may raise the claim], [if] his codefendant [who was tried jointly] adequately alerted the trial court to the possibility of error in a timely fashion." (Internal quotation marks omitted.) *State* v. *Dahlgren*, 200 Conn. 586, 599–600 n.9, 512 A.2d 906 (1986), quoting *State* v. *Pelletier*, 196 Conn. 32, 34, 490 A.2d 515 (1985). Since *Dahlgren*, however, this court has clarified that *Pelletier* and its progeny "[do] not stand for the proposition that whenever a codefendant makes a trial motion in which the defendant did not join, the silent defendant may raise the denial of the motion in his appeal. . . . When a defendant does not join a codefendant's motion for tactical or other reasons, the defendant cannot later complain of the procedure on appeal." (Citation omitted; internal quotation marks omitted.) *State* v. *Gould*, 241 Conn. 1, 9 n.3, 695 A.2d 1022 (1997). We have held that a defendant is not entitled to the benefits of a codefendant's properly preserved objection if it would "not be anomalous to treat the review of each of the defendants' claims . . . differently." Id.; see also *State* v. *Walton*, 227 Conn. 32, 55 n.20, 630 A.2d 990 (1993) (same).

The defendant in the present case does not specifically rely on this case law but, rather, makes a similar

argument in support of this court's exercising its supervisory authority to either reverse his conviction or treat his claim as preserved, contending that it would be anomalous and unjust to treat similarly situated defendants differently. We decline, however, to either reverse the defendant's conviction or to treat his claim as preserved under either our supervisory authority or pursuant to *Pelletier* and its progeny because we see no anomaly in treating the defendant in the present case differently than Jackson when they are not similarly situated in that they could not have suffered the same prejudice from the same error. Specifically, unlike with Jackson, the CSLI data never placed the defendant near the crime scene at the time of the shooting. Rather, the evidence at issue showed that the defendant was with Anderson in the east end of Bridgeport both before and after the shooting, which defense counsel emphasized on cross-examination. Not only does this point show that this evidence was less prejudicial to the defendant than to Jackson, it also suggests that defense counsel may have had strategic reasons for not objecting to this evidence, further militating against review and reversal. Additionally, unlike with Jackson, the state's case against the defendant was very strong, with multiple eyewitnesses identifying him as the shooter. Moreover, there was testimony from Muniz, which established that Anderson had picked up the defendant prior to the shooting and that the defendant then arrived back home after the shooting. As a result, the defendant and Jackson were not similarly situated or similarly harmed by the state's untimely disclosure of Weaver as an expert, and we cannot conclude that fairness and justice require reversal of the defendant's conviction. Therefore, we decline to exercise our supervisory authority.[5]

[5] The defendant alternatively requests that this court exercise its supervisory authority to adopt a presumption that, unless explicitly stated on the record otherwise, an objection by one defendant will be presumed to be joined by all defendants when they are tried jointly. As discussed, however, this court already has recognized a rule that this court may treat as preserved

Our conclusion is consistent with holdings of courts in other jurisdictions, which, likewise, have held under their supervisory authority or as a matter of plain error that a defendant's conviction must be reversed, or his unpreserved claim treated as preserved, only if his codefendant, with whom he was tried jointly, properly preserved the claim and the defendant was similarly situated and equally harmed. See, e.g., *Lawyer* v. *State*, 28 So. 3d 220, 220 (Fla. App. 2010) (holding that court would review defendant's unpreserved claim and reverse his conviction when codefendant, who was tried jointly with defendant, properly preserved and succeeded on same claim, and both defendants were similarly situated in that their defenses were "closely intertwined"); *People* v. *Robinson*, 13 N.Y.2d 296, 302, 196 N.E.2d 261, 246 N.Y.S.2d 623 (1963) (holding that, "in the interests of justice," court would review defendant's unpreserved claim and reverse his conviction when codefendant, who was tried jointly with defendant, properly preserved and succeeded on same claim and error was equally harmful to both defendants); *State* v. *Montwheeler*, 277 Or. App. 426, 439, 371 P.3d 1232 (2016) (holding that when, during joint trial, codefendant properly preserved claim, "the ends of justice militate[d] in favor of correcting the [defendant's unpreserved] error" because both "defendants presented a unified theory of defense [and, thus] the trial court's error harmed both defendants"); *Rivera* v. *People*, 64 V.I. 540, 587 (2016) ("disparate treatment of identically situated [codefendants] constitute[d] 'manifest injus-

an unpreserved claim that a codefendant, who was tried jointly with the defendant, properly preserved if the defendant is similarly situated and equally harmed. The fact that the defendant does not satisfy this rule does not justify this court's exercising its supervisory authority to create a presumption more beneficial to the defendant. Moreover, fairness and justice principles do not require that we adopt the defendant's proposed rule and overrule our prior case law when the preexisting rule creates no injustice, as the defendant is not similarly situated to Jackson.

tice,' " even if issue was raised by one defendant but waived by another, overriding any interest associated with complying with preservation requirements); *Williams* v. *People*, 59 V.I. 1024, 1032 n.3 (2013) ("when one [codefendant] receives reversal on appeal by raising an issue that a second [codefendant] neglected to brief, the interests of justice require providing the second [codefendant] with the same remedy" unless error affects defendants differently); see also *United States* v. *Cardales-Luna*, 632 F.3d 731, 733 (1st Cir.) (when defendant failed to preserve claim raised by codefendants whose convictions were upheld, " 'accepted principles of stare decisis militate[d] strongly in favor of resolving identical points in the same way for identically situated defendants' "), cert. denied, 565 U.S. 1034, 132 S. Ct. 573, 181 L. Ed. 2d 421 (2011); *United States* v. *Babwah*, 972 F.2d 30, 35 (2d Cir. 1992) (reversing defendant's conviction based on unpreserved claim when codefendant properly preserved claim and defendants were tried jointly and equally harmed, as manifest injustice would occur if conviction was not reversed); *United States* v. *Olano*, 934 F.2d 1425, 1439 (9th Cir. 1991) (it would be "manifestly unjust" to deem waived claim of inherently prejudicial procedural error when codefendant's conviction was reversed but both defendants "suffered the same prejudice from the same fundamental error in the same trial"), rev'd on other grounds, 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993); *United States* v. *Rivera Pedin*, 861 F.2d 1522, 1526–27 n.9 (11th Cir. 1988) ("it [is] anomalous to reverse some convictions and not others when all defendants suffer from the same error"); *United States* v. *Gray*, 626 F.2d 494, 497 (5th Cir. 1980) ("[b]elieving it anomalous to reverse some convictions and not others when all defendants suffer from the same error, we consider the arguments to be adopted"), cert. denied sub nom *Fennell* v. *United States*, 449 U.S. 1038, 101

S. Ct. 616, 66 L. Ed. 2d 500 (1980), and cert. denied sub nom. *Wright* v. *United States*, 449 U.S. 1038, 101 S. Ct. 616, 66 L. Ed. 2d 500 (1980), and cert. denied, 449 U.S. 1091, 101 S. Ct. 887, 66 L. Ed. 2d 820 (1981), and cert. denied sub nom. *Barker* v. *United States*, 450 U.S. 919, 101 S. Ct. 1367, 67 L. Ed. 2d 346 (1981); *United States* v. *Anderson*, 584 F.2d 849, 853 (6th Cir. 1978) ("under the unique circumstances of this case [in which the codefendant preserved his claim and the defendant was equally harmed] it would be a manifest injustice to allow [the defendant's] conviction to stand while ordering a new trial for [his codefendant]"). But see *United States* v. *Massara*, 174 Fed. Appx. 703, 707 n.3 (3d Cir. 2006) ("[The defendant] asserts [that] he filed [his] motion [to challenge, for the first time, the jury instruction at trial that was the basis for the reversal of his codefendant's conviction] directly after learning [that] his [codefendant] . . . obtained reversal of her conviction on this ground. But [the codefendant], unlike [the defendant], raised the jury instruction issue on direct appeal.").

Because the defendant in the present case is not similarly situated to Jackson, it is not "anomalous" to treat him differently than Jackson, and, thus, fairness and justice do not require that we exercise our supervisory authority to reverse the defendant's conviction or treat his claim as preserved.

II

The defendant next requests that we overrule our recent decision in *State* v. *Turner*, supra, 334 Conn. 671–72, in which we held that, although the new rule announced in *State* v. *Edwards*, supra, 325 Conn. 97, applied retroactively, this retroactivity did not excuse a defendant's failure to preserve his *Porter* claim. The defendant argues that we should revisit our prior decision because our holding in *Turner* "belies logic,

eschews the important policy considerations that underlie the general rule of retroactivity, and renders illusory any benefit defendants may have gained from retroactive application of newly announced rules." He asserts that, in reaching our holding in *Turner*, this court did not consider the purpose of the general rule regarding retroactivity—to ensure a law's integrity and consistent application. The defendant contends that the retroactive effect of the new rule announced in *Edwards* should excuse any preservation issues, and, thus, we should review his *Porter* claim despite his failure to raise it at trial. We decline to overrule our holding in *Turner* and, thus, decline to review the defendant's unpreserved *Porter* claim.

As discussed in part I of this opinion, the defendant did not object to Weaver's testimony or the corresponding slideshow depicting the location of his phone, Jackson's phone, and Anderson's GPS. Although the defendant filed a motion in limine before trial regarding any CSLI, requesting either the preclusion of this evidence or a *Porter* hearing,[6] the trial court did not rule on this motion. The defendant did not renew his request at trial.

[6] "In *Porter*, we followed the United States Supreme Court's decision in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and held that testimony based on scientific evidence should be subjected to a flexible test to determine the reliability of methods used to reach a particular conclusion. . . . A *Porter* analysis involves a two part inquiry that assesses the reliability and relevance of the witness' methods. . . . First, the party offering the expert testimony must show that the expert's methods for reaching his conclusion are reliable. . . . Second, the proposed scientific testimony must be demonstrably relevant to the facts of the particular case in which it is offered, and not simply be valid in the abstract. . . . Put another way, the proponent of scientific evidence must establish that the specific scientific testimony at issue is, in fact, derived from and based [on] . . . [scientifically reliable] methodology." (Internal quotation marks omitted.) *State* v. *Turner*, supra, 334 Conn. 669; see also Conn. Code Evid. § 7-2, commentary (discussing requirements and scope of *Porter*).

After the defendant's trial, but while his appeal before the Appellate Court was pending, this court released *State* v. *Edwards*, supra, 325 Conn. 97. In *Edwards*, we held for the first time that expert testimony regarding cell phone data is the type of scientific evidence *Porter* contemplated, and, thus, a *Porter* hearing was required to ensure that this testimony was based on reliable scientific methodology. See id., 129–33. Specifically, in *Edwards*, "the state offered the testimony of Detective Christopher Morris of the Wethersfield Police Department regarding cell phone data and maps he generated therefrom. . . . The defendant objected to the admission of the maps and requested a *Porter* hearing, which the trial court denied. . . . On appeal in *Edwards*, the defendant argued to this court that the trial court improperly had failed to qualify Morris as an expert and denied his request for a *Porter* hearing. We agreed. . . . Specifically, we concluded that Morris should have been qualified as an expert witness before the court allowed him to testify regarding cell phone data because of his superior knowledge on this subject. . . . Additionally, we determined that expert testimony regarding cell phone data is the type of scientific evidence contemplated by *Porter*, and, thus, a *Porter* hearing was required to ensure that his testimony was based on reliable scientific methodology. . . . Nevertheless, we applied an evidentiary harmless error analysis, concluding that these errors had not harmed the defendant." (Citations omitted; footnote omitted.) *State* v. *Turner*, supra, 334 Conn. 671–72.

In light of our decision in *Edwards*, on direct appeal to the Appellate Court, the defendant in the present case raised a *Porter* claim for the first time, arguing both that it was preserved,[7] and, alternatively, that the rule of retroactivity overcame his failure to preserve

[7] On appeal to this court, the defendant does not dispute that his *Porter* claim is unpreserved.

this claim. *State* v. *Rogers*, supra, 183 Conn. App. 686 and n.16. The Appellate Court held that the defendant's *Porter* claim was not preserved and that, although the rule in *Edwards* was retroactive, retroactivity did not cure this lack of preservation. See id., 686, 686–87 n.16.

The defendant then sought certification to appeal to this court on the issue of whether his unpreserved *Porter* claim was reviewable in light of the retroactivity of the new nonconstitutional rule in *Edwards*. While the defendant's appeal was pending before this court, however, we decided this very issue in *State* v. *Turner*, supra, 334 Conn. 671–72. Specifically, the defendant in *Turner* did not preserve his *Porter* claim at trial, either by objecting to the admission of the CSLI testimony or the cell tower coverage maps, or by requesting a *Porter* hearing. Id. After the defendant's criminal trial in *Turner*, but while his appeal was pending before the Appellate Court, we released our decision in *Edwards*. As a result, on appeal before this court, the defendant in *Turner* argued that the rule in *Edwards* applied retroactively, and, as such, he was not required to preserve his *Porter* claim at trial to receive the benefit of the new rule. We held that, although the rule in *Edwards* was retroactive; see id., 677; "[r]etroactivity of new, nonconstitutional evidentiary rules does not relieve a defendant of his obligation to preserve the claim." Id., 679. In so holding, we relied on the following principles: (1) that the trial court need not hold a *Porter* hearing unless one is specifically requested; (2) we previously have held that, although new, nonconstitutional evidentiary rules are retroactive, the defendant still was required to preserve his claim at trial to be entitled to review; (3) fairness principles did not require application of the new rule in *Edwards* to all defendants; and (4), absent a timely objection, the record was inadequate to determine the defendant's *Porter* claim; see 678–80; because "we have no way of knowing whether

the state would have presented additional evidence to support [the expert's] methodology and to show that the cell tower coverage maps were derived from this methodology if the defendant had requested a *Porter* hearing." Id., 681–82. Accordingly, in *Turner*, we declined to review the defendant's *Porter* claim.

"Our determination of whether we should overrule a prior decision is guided by the doctrine of stare decisis, which counsels that a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it." (Internal quotation marks omitted.) *State* v. *Bischoff*, 337 Conn. 739, 762, 258 A.3d 14 (2021). "[W]e have always required a departure from precedent to be supported by some special justification. . . . Such justifications include the advent of subsequent changes or development in the law that undermine[s] a decision's rationale . . . the need to bring [a decision] into agreement with experience and with facts newly ascertained . . . and a showing that a particular precedent has become a detriment to coherence and consistency in the law . . . ." (Citation omitted; internal quotation marks omitted.) *Sepega* v. *DeLaura*, 326 Conn. 788, 798–99 n.5, 167 A.3d 916 (2017).

Contrary to the defendant's contentions, we considered in *Turner* the same arguments that he raises in the present case. Specifically, we noted that this court consistently has held that "[r]etroactivity of new, nonconstitutional evidentiary rules does not relieve a defendant of his obligation to preserve the claim." *State* v. *Turner*, supra, 334 Conn. 679. We explained that it did not undermine fairness principles to treat the defendant in *Edwards* differently than the defendant in *Turner* because they were not similarly situated—one preserved the claim while the other did not. See id., 677, 680. This distinction was important because the defendant's failure to request a *Porter* hearing in *Turner* affected the adequacy of the record before this court.

See id., 680. Moreover, our holding was consistent with the purpose of the retroactivity rule, which grants " '[c]omplete retroactive effect' " only to a new constitutional rule or a new judicial interpretation of a criminal statute. Id., 677 n.6.

Nevertheless, the defendant contends that our holding in *Turner* frustrates judicial economy by forcing attorneys to raise any conceivable legal claim in the hope that the law changes in the future. We disagree. Little more than two years have passed since our decision in *Turner*, and we are unaware of any detrimental effect caused by our holding. Moreover, our decision in *Turner* is of relatively recent vintage, and we are unaware of, and the defendant has not cited, changes or developments in the law that undermine our decision's rationale. See, e.g., *State* v. *Ward*, 341 Conn. 142, 151 n.4, 266 A.3d 807 (2021) (declining to overrule precedent of relatively recent vintage without showing that precedent creates unworkable scheme). As explained, this court has long held that it is not inconsistent for a new nonconstitutional rule to apply retroactively but to still require preservation of the claim at issue. Accordingly, we decline to overrule our holding in *Turner* and, thus, decline to review the defendant's unpreserved *Porter* claim.

The judgment is affirmed.

In this opinion the other justices concurred.

DANIEL DIAZ *v.* COMMISSIONER OF CORRECTION (SC 20536)

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

Syllabus

Pursuant to statute (§ 54-1f (b)), a police officer "shall arrest, without previous complaint and warrant, any person who the officer has reasonable grounds to believe has committed or is committing a felony."

The petitioner, who had been convicted of various drug and weapons charges, sought a writ of habeas corpus, claiming, inter alia, that his trial counsel, C, had rendered ineffective assistance. The petitioner specifically alleged that C had a conflict of interest insofar as he was employed as an active duty New Haven police officer while simultaneously representing the petitioner in criminal proceedings in the judicial district of New Britain. Before C began representing criminal defendants, he sought the advice of corporation counsel for the city of New Haven, who concluded that C's representation of criminal defendants was not inappropriate, so long as it occurred outside of the New Haven judicial district. In his habeas petition, the petitioner alleged, inter alia, that C failed to disclose his employment as a police officer to him and that, as a result of this conflict of interest, C failed to adequately cross-examine the New Britain police officers who arrested the petitioner and searched his apartment. The habeas court denied the petition, concluding, inter alia, that there was no evidence that C's representation of the petitioner was directly adverse to another client or limited by C's responsibilities to the New Haven Police Department. Specifically, the court implicitly agreed with and credited C's view that his obligations as a police officer under § 54-1f (b) did not give rise to a conflict of interest when he represented criminal defendants in locales other than New Haven. Thereafter, the petitioner filed a petition for certification to appeal, which the habeas court denied, and the petitioner appealed to the Appellate Court, which dismissed the petitioner's appeal. On the granting of certification, the petitioner appealed to this court. *Held*:

1. This court declined the respondent's invitation to revisit the question of which standard applies to ineffective assistance of counsel claims based on personal conflicts of interest that do not involve the concurrent representation of multiple clients: because the petitioner could not prevail under the standard currently followed by this court, as articulated in *Cuyler* v. *Sullivan* (446 U.S. 335), which requires a petitioner to establish, inter alia, that an actual conflict of interest adversely affected defense counsel's performance, it was not necessary for this court to consider whether it should instead follow the majority of federal courts of appeals that have concluded that the more stringent standard set forth in *Strickland* v. *Washington* (466 U.S. 668), which requires a petitioner to establish that there is a reasonable probability that, but for the attorney's deficient performance, the result of the proceeding would have been different, applies in habeas cases involving purely personal conflicts of interest.
2. The petitioner could not prevail on his claim that it is a per se conflict of interest for an individual to simultaneously serve as a Connecticut police officer and to represent a criminal defendant, even if the alleged crimes were committed, investigated, and prosecuted outside of the city or town in which the officer serves: although the use of the phrase "shall arrest" in § 54-1f (b) suggested, as the petitioner argued, that

police officers have a mandatory and nondiscretionary duty to arrest all suspected felons under all circumstances, regardless of when or where the suspected crime was committed, the petitioner's interpretation was not the only plausible reading of the statutory language; moreover, adopting the petitioner's interpretation of § 54-1f (b) would lead to absurd and unworkable results insofar as treating the statute as mandatory would deprive police officers of the necessary discretion as to whether and when to arrest a suspected felon and would require them to make arrests, even when the suspected crime was committed long ago, outside of the statute of limitations, or outside of the officer's jurisdiction; accordingly, this court concluded that, although § 54-1f (b) gives patrolling officers the authority to arrest suspected felons they encounter, it does not require off duty officers, such as C, to arrest their clients whenever they suspect that those clients may have committed other crimes, even outside of the officer's jurisdiction; nevertheless, because the petitioner raised a colorable question of statutory interpretation that previously had not been directly addressed by the appellate courts of this state, this court concluded that the habeas court had abused its discretion in denying the petition for certification to appeal, and, accordingly, the Appellate Court improperly dismissed the petitioner's appeal from that denial.

3. There was no merit to the petitioner's claim that C's undisclosed status as a police officer became an actual conflict of interest during the petitioner's criminal trial insofar as it led C to hold back when cross-examining other police officers; the habeas court thoroughly analyzed the petitioner's claims of inadequate cross-examination and found them to be without merit, the Appellate Court reviewed the petitioner's challenges to the findings and conclusions of the habeas court and found them to be meritless, and this court saw no reason to second-guess the habeas court's determination that there was no constitutionally relevant actual conflict of interest because the petitioner was unable to establish prejudice under *Sullivan* by showing that C had failed to pursue some plausible, alternative defense strategy or tactic that was inherently in conflict with or not undertaken due to C's other loyalties; nevertheless, this court emphasized that, although the petitioner did not demonstrate an actual conflict of interest, it did not condone C's failure to disclose to the petitioner that he was also employed as a police officer or C's decision to mislead the Office of the Chief Public Defender by vaguely listing his employment with New Haven as a "municipal employee," rather than as a police officer, on his application for a special public defender contract, which were unbecoming of an officer of the court.

(*Two justices concurring in one opinion*)

Argued December 17, 2021—officially released August 16, 2022

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district

of Tolland and transferred to the judicial district of Fairfield, where the case was tried to the court, *Devlin*, *J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Alvord* and *Keller*, *Js.*, which dismissed the appeal, and the petitioner, on the granting of certification, appealed to this court. *Improper form of judgment*; *reversed*; *judgment directed.*

Robert L. O'Brien, assigned counsel, with whom, on the brief, was *Christopher Y. Duby*, assigned counsel, for the appellant (petitioner).

Mitchell S. Brody, senior assistant state's attorney, with whom, on the brief, were *Brian W. Preleski*, former state's attorney, and *Angela R. Macchiarulo*, senior assistant state's attorney, for the appellee (respondent).

Opinion

MULLINS, J. The petitioner, Daniel Diaz, appeals from the judgment of the Appellate Court dismissing his appeal from the judgment of the habeas court. The primary issue on appeal is whether the habeas court abused its discretion by denying his petition for certification to appeal with respect to the claim that his defense counsel at his second criminal trial rendered ineffective assistance of counsel by laboring under a conflict of interest, namely, simultaneously working as defense counsel and as an active duty police officer in a different city. Although counsel's failure to disclose the potential conflict to the petitioner is deeply troubling, and although we conclude that the legal issues raised are fairly debatable among jurists of reason, such that certification to appeal should have been granted, we ultimately agree with the respondent, the Commissioner of Correction, that the petitioner failed to prove his claim that his counsel labored under an actual conflict of interest.

I

The opinion of the Appellate Court sets forth the following relevant facts and procedural history. See *Diaz* v. *Commissioner of Correction*, 200 Conn. App. 524, 526–29, 545–47, 240 A.3d 795 (2020). "In early 2001, the [petitioner] was under investigation by the New Britain [P]olice [D]epartment for illegal drug related activities. On March 13, 2001, New Britain police officers arrested Kevin Lockery, who was known by the police as a drug user, for a narcotics offense. In an effort to gain lenient treatment, Lockery identified the [petitioner] as a drug dealer and provided the police with information about the [petitioner]. At the direction of the police, Lockery called the [petitioner] on a [cell phone] and arranged to purchase five bags of heroin at a specific location in New Britain. Shortly after the [petitioner] received Lockery's call, the [petitioner] left his residence and drove to that location. Lockery did not meet the [petitioner] as arranged, and, after several minutes, the [petitioner] began to drive away.

"Police officers stopped the [petitioner's] automobile. A search of the [petitioner] yielded twenty-five packets of heroin, $1025 and a [cell] phone that displayed among received calls the telephone number from which Lockery had called the [petitioner] to arrange the drug purchase. A subsequent search of the [petitioner's] residence, pursuant to a warrant, yielded 168 packets of heroin, [16] grams of marijuana, a [12] gauge shotgun, several shotgun shells and numerous other items typically used in the sale and distribution of illegal drugs. . . .

"In his first criminal trial in 2002, the petitioner was found guilty by a jury of having committed multiple charged offenses, but the judgment of conviction was reversed by [this court] because the petitioner had received an inadequate canvass from the trial court regarding his decision to waive counsel and [to] repre-

sent himself. See *State* v. *Diaz*, 274 Conn. 818, 828, 878 A.2d 1078 (2005). In his second criminal trial in 2006, the petitioner was found guilty by a jury of [one count of] possession of narcotics with intent to sell by a person who is not drug-dependent in violation of General Statutes [Rev. to 2001] § 21a-278 (b), two counts of possession of narcotics in violation of General Statutes [Rev. to 2001] § 21a-279 (a), and [one count of] criminal possession of a firearm in violation of General Statutes [Rev. to 2001] § 53a-217 (a) (1). [The Appellate Court] affirmed the judgments of conviction on appeal. See *State* v. *Diaz*, [109 Conn. App. 519, 559, 952 A.2d 124, cert. denied, 289 Conn. 930, 958 A.2d 161 (2008)]." (Citation omitted; internal quotation marks omitted.) *Diaz* v. *Commissioner of Correction*, supra, 200 Conn. App. 526–27.

"[In] . . . 2015, the petitioner . . . filed an amended petition for a writ of habeas corpus, which is the operative petition in this appeal. The petition contained five counts, only [one] of which [is] relevant to this appeal." Id., 528. "In the third count, the petitioner alleged that Frank Canace, his defense counsel in the second criminal trial, had a conflict of interest as a result of his employment as a New Haven police officer while representing the petitioner as a special public defender." Id.

The petitioner alleged that "Canace served as a special public defender representing indigent criminal defendants in . . . the judicial district of New Britain. While representing the petitioner, Canace was employed as a police officer for the city of New Haven. The petitioner was not aware that Canace was employed as a New Haven police officer, and Canace did not inform him of that fact." Id., 545.

"Before Canace began representing criminal defendants in approximately 1996 or 1997, Canace [had] made

known to the New Haven Police Department his desire to do so. To determine whether it was appropriate for Canace to be employed as a New Haven police officer while simultaneously representing criminal defendants, corporation counsel for the city of New Haven solicited opinions on the matter from the American Bar Association, the Statewide Grievance Committee, and the New Haven state's attorney's office. Corporation counsel concluded that Canace could represent criminal defendants in Connecticut courts, with the exception of those located in the judicial district of New Haven." Id., 545–46.

"In 2006, Preston Tisdale, an attorney employed as the director of the special public defender program at the Division of Public Defender Services, was informed that Canace was employed as a New Haven police officer while also representing criminal defendants as a special public defender. Tisdale consulted with the Office of the Chief Public Defender and, ultimately, decided that Canace would have to resign as a special public defender. Tisdale provided two reasons for his decision: (1) Canace exhibited a lack of candor in his application for a special public defender contract by vaguely describing his position for the city of New Haven as a municipal employee, and (2) other clients of Canace might raise ineffective assistance of counsel claims against him.

"In his petition, the petitioner alleged that Canace had a conflict of interest as a result of his employment as a police officer while representing the petitioner. The petitioner further alleged that Canace's conflict of interest presented itself when he failed (1) to move to dismiss the petitioner's criminal charges on double jeopardy grounds, (2) to identify false statements by police officers in the search warrant affidavit, and (3) to adequately cross-examine police officers regarding their prior inconsistent statements and the different

logos on the packaging of the drugs seized from the petitioner and those on Lockery's person during his arrest. The petitioner also alleged particular instances in which Canace provided deficient performance at [the petitioner's] second criminal trial." (Internal quotation marks omitted.) Id., 546–47.

A trial on the habeas petition was held in 2017. Id., 529. The habeas court denied each of the petitioner's claims. Id. With respect to the claim that Canace labored under an actual conflict of interest, the court found no evidence that "Canace's representation of the petitioner was directly adverse to another client" or that it was "limited by his responsibilities to the New Haven Police Department." Among other things, the habeas court implicitly agreed with and credited Canace's view that his obligations as a police officer under General Statutes § 54-1f (b)[1] did not give rise to a conflict of interest when he represented criminal defendants in other locales. Ultimately, the habeas court determined that Canace's representation of the petitioner was not limited by his responsibilities to the New Haven Police Department.

Thereafter, the petitioner filed a petition for certification to appeal from the denial of his petition for a writ of habeas corpus, which the habeas court denied. See *Diaz* v. *Commissioner of Correction*, supra, 200 Conn. App. 529. The petitioner then appealed to the Appellate Court, and that court dismissed the appeal, finding no merit to the petitioner's claims. See id., 554. This certified appeal followed.[2] Additional facts will be set forth as necessary.

[1] The text of the statute is set forth in part II B 1 of this opinion.

Moreover, although § 54-1f (b) was the subject of technical amendments in 2011; see Public Acts 2011, No. 11-51, § 134; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[2] We granted certification to appeal, limited to the following question: "Did the Appellate Court properly reject the petitioner's claim that the habeas court had abused its discretion by denying his petition for certification to appeal with respect to the claim that defense counsel at his second criminal

II

A

The following legal principles govern our resolution of the petitioner's appeal. "We begin by setting forth the applicable standard of review. The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . The application of [the pertinent legal standard to] the habeas court's factual findings . . . however, presents a mixed question of law and fact, which is subject to plenary review. . . .

"Faced with the habeas court's denial of certification to appeal, a petitioner's first burden is to demonstrate that the habeas court's ruling constituted an abuse of discretion. . . . A petitioner may establish an abuse of discretion by demonstrating that the issues are debatable among jurists of reason . . . [the] court could resolve the issues [in a different manner] . . . or . . . the questions are adequate to deserve encouragement to proceed further. . . . The required determination may be made on the basis of the record before the habeas court and the applicable legal principles. . . . If the petitioner succeeds in surmounting that hurdle, the petitioner must then demonstrate that the judgment of the habeas court should be reversed on its merits. . . . In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of

trial rendered ineffective assistance by failing to disclose his role as an active police officer in the state of Connecticut?" *Diaz* v. *Commissioner of Correction*, 335 Conn. 971, 971–72, 241 A.3d 129 (2020). The respondent contends, and we agree, that the issue is more properly characterized as whether defense counsel rendered ineffective assistance due to an actual conflict of interest arising from his simultaneous role as an active police officer in the state of Connecticut. See, e.g., *Gomez* v. *Commissioner of Correction*, 336 Conn. 168, 174–75 n.3, 243 A.3d 1163 (2020) (this court may restate certified question).

the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous." (Citation omitted; internal quotation marks omitted.) *Moore* v. *Commissioner of Correction*, 338 Conn. 330, 338–39, 258 A.3d 40 (2021); see also *Simms* v. *Warden*, 230 Conn. 608, 612, 615–16, 646 A.2d 126 (1994). Certification to appeal should be granted when, for example, the appeal presents colorable issues of first impression in Connecticut appellate courts. See, e.g., *Anderson* v. *Commissioner of Correction*, 204 Conn. App. 712, 716–17, 254 A.3d 1011, cert. denied, 338 Conn. 914, 259 A.3d 1179 (2021).

"It is axiomatic that the [sixth amendment] right to counsel is the right to the effective assistance of counsel. . . . As an adjunct to this right, a criminal defendant is entitled to be represented by an attorney free from conflicts of interest." (Citations omitted; internal quotation marks omitted.) *Phillips* v. *Warden*, 220 Conn. 112, 132, 595 A.2d 1356 (1991). "We have described an attorney's conflict of interest as that which impedes his paramount duty of loyalty to his client." *State* v. *Crespo*, 246 Conn. 665, 689, 718 A.2d 925 (1998), cert. denied, 525 U.S. 1125, 119 S. Ct. 911, 142 L. Ed. 2d 909 (1999).

"[Although] the right to [conflict free] representation typically is implicated in cases involving representation of criminal codefendants by a single attorney . . . it is equally applicable in other cases [in which] a conflict of interest may impair an attorney's ability to represent his [or her] client effectively." (Citations omitted; internal quotation marks omitted.) *Phillips* v. *Warden*, supra, 220 Conn. 134–35. An attorney may confront a potential ethical conflict, for example, when representation of a client "somehow implicates counsel's personal or financial interests . . . ." (Citations omitted.) *Mickens* v. *Taylor*, 535 U.S. 162, 174–75, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002); see, e.g., *State* v. *Crespo*, supra, 246 Conn. 689–90 ("an attorney [also] may be considered

to be laboring under an impaired duty of loyalty, and thereby be subject to conflicting interests, because of interests or factors personal to him that are inconsistent, diverse or otherwise discordant with [the interests] of his client" (internal quotation marks omitted)).

Under the sixth amendment to the United States constitution, as construed by the federal courts, whether a criminal conviction may be reversed on the basis of an attorney's conflicted loyalties depends on both the nature of the conflict alleged and whether that conflict was brought to the timely attention of the trial court. Courts apply three different standards to such claims, each of which arguably applies to the petitioner's claims in the present case.

First, under extremely limited circumstances, a conflict of interest can, in essence, be a form of structural error; see, e.g., *Weaver* v. *Massachusetts*, U.S. , 137 S. Ct. 1899, 1907–1908, 198 L. Ed. 2d 420 (2017) (discussing structural error doctrine); for which automatic reversal of a conviction is warranted, without regard to prejudice. To date, the United States Supreme Court has identified only one such scenario: automatic reversal is required when an attorney simultaneously represents multiple criminal codefendants, whose interests may be expected to be mutually adverse, and defense counsel timely represents to the trial court that joint, concurrent representation will create a potential conflict of interest, but the court neither releases counsel from the obligation nor determines that there is no conflict. In that circumstance, an attorney's divided loyalties may be presumed, and there is a per se violation of the sixth amendment right to counsel. See, e.g., *Mickens* v. *Taylor*, supra, 535 U.S. 168, citing *Holloway* v. *Arkansas*, 435 U.S. 475, 488, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978).

The United States Supreme Court has not identified any conflicts, other than multiple representation sce-

narios in which a trial court knowingly and improperly permits joint representation, that would amount to per se violations of the sixth amendment and thus require automatic reversal of a conviction. Although the Supreme Court has not extended *Holloway* v. *Arkansas*, supra, 435 U.S. 488, to other types of conflicts of interest, the lower federal courts have recognized certain other situations in which automatic reversal is warranted. For example, the United States Court of Appeals for the Second Circuit has deemed it to be a per se violation of the sixth amendment when defense counsel is not authorized to practice law or when defense counsel is implicated in the very crime for which his or her client is on trial. See, e.g., *United States* v. *Kaid*, 502 F.3d 43, 46 (2d Cir. 2007) (citing cases). Although, in the present case, the petitioner's position is not entirely clear, we understand one of his arguments to be that we should further extend the reasoning of *Holloway*—and find a per se violation of the sixth amendment—to situations in which an attorney is employed as a Connecticut police officer while representing a criminal defendant. He argues that counsel in such cases is inherently conflicted by virtue of a Connecticut police officer's mandatory obligation to arrest suspected felons pursuant to § 54-1f (b). He contends that this statutory obligation creates an actual conflict, tantamount to structural error, for which automatic reversal is required. We address this claim in part II B 1 of this opinion.

Second, for certain alleged conflicts of interest, the federal courts apply the standard that the United States Supreme Court articulated in *Cuyler* v. *Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980).[3] The *Sullivan* standard is often framed as a two part test:

[3] The paradigmatic *Sullivan* case is a multiple representation case in which the alleged conflict was not disclosed to the trial court, such that the court neither knew nor reasonably should have known that a conflict of interest existed. See *Cuyler* v. *Sullivan*, supra, 446 U.S. 343, 345.

"[I]n order to establish a violation of the sixth amendment" right to counsel based on defense counsel's actual, undisclosed conflict of interest, a petitioner "must establish (1) that counsel actively represented conflicting interests and (2) that [the] actual conflict of interest adversely affected his [counsel's] performance." (Internal quotation marks omitted.) *Phillips* v. *Warden*, supra, 220 Conn. 133; see also *Cuyler* v. *Sullivan*, supra, 348, 350. Although framed as a two part test, however, in practice, "[t]hese components are considered in a single, integrated inquiry." *Eisemann* v. *Herbert*, 401 F.3d 102, 107 (2d Cir. 2005). That is to say, "the *Sullivan* standard is not properly read as requiring inquiry into actual conflict as something separate and apart from adverse effect. An actual conflict, for [s]ixth [a]mendment purposes, is a conflict of interest that adversely affects counsel's performance." (Internal quotation marks omitted.) *Mickens* v. *Taylor*, supra, 535 U.S. 172 n.5; see also, e.g., *Russell* v. *Armstrong*, Docket No. Civ. A. 300CV1116SRU, 2006 WL 287203, *4 (D. Conn. February 2, 2006) ("[t]he actual conflict and adverse effect analyses are not distinct" (internal quotation marks omitted)).

Third, any alleged attorney conflicts of interest that are not subject to automatic reversal and that are not governed by the *Sullivan* standard are, like most other ineffective assistance of counsel claims, presumptively governed by *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The primary difference between *Sullivan* and *Strickland* is the lower burden that the petitioner must shoulder to establish a violation under *Sullivan*. See, e.g., *Mickens* v. *Taylor*, supra, 535 U.S. 174, 176; see also, e.g., *Rodriguez* v. *Commissioner of Correction*, 312 Conn. 345, 352, 92 A.3d 944 (2014).

Under *Strickland*, a petitioner must demonstrate that there is a reasonable probability that, but for the attor-

ney's deficient performance, the result of the proceeding would have been different. *Strickland* v. *Washington*, supra, 466 U.S. 694. By contrast, to demonstrate the adverse effect of a conflicted representation under *Sullivan*, the petitioner need only establish that "a conflict of interest actually affected the adequacy of [the] representation . . . ." *Cuyler* v. *Sullivan*, supra, 446 U.S. 349–50. This court has said that, "[t]o prove a lapse of representation [under *Sullivan*], a [petitioner] must demonstrate that some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." (Internal quotation marks omitted.) *State* v. *Davis*, 338 Conn. 458, 478 n.13, 258 A.3d 633 (2021). In such cases, prejudice is presumed.[4]

[4] As we discussed, to prevail under *Sullivan*, a petitioner must establish that an *actual* conflict of interest adversely affected counsel's performance. See *Cuyler* v. *Sullivan*, supra, 446 U.S. 348, 350. We note that there is some confusion among the cases as to whether a merely *potential* or theoretical conflict of interest—one in which the interests of the defendant could place the attorney under inconsistent duties at some time in the future—is subject to review under *Strickland* or, rather, whether potential conflicts are not a cognizable basis for an ineffective assistance of counsel claim. The Appellate Court, following the lead of the United States Court of Appeals for the Second Circuit, has followed the former approach. See, e.g., *Santiago* v. *Commissioner of Correction*, 87 Conn. App. 568, 583–84 n.14, 867 A.2d 70 (citing *United States* v. *Williams*, 372 F.3d 96, 102–103 (2d Cir. 2004), for proposition that, to violate sixth amendment, merely potential conflicts of interest must result in *Strickland* prejudice), cert. denied, 273 Conn. 930, 873 A.2d 997 (2005); see also, e.g., *Lopez* v. *United States*, 792 Fed. Appx. 32, 36 (2d Cir. 2019) ("If a defendant can show only a potential conflict, he must show both that it had an adverse effect [on] his attorney's representation and that the conflict resulted in prejudice. . . . This amounts to the showing required by the ordinary ineffective assistance of counsel test from *Strickland*." (Citation omitted.)). Although we question the viability of this approach, in light of the facts that (1) the United States Supreme Court stated in *Cuyler* v. *Sullivan*, supra, 350, that "the possibility of conflict is insufficient to impugn a criminal conviction," (2) the other federal courts of appeals generally have not followed the Second Circuit in treating merely potential conflicts of interest as cognizable claims under *Strickland*, and we are not aware of any court that has reversed a conviction on the basis of a purely potential conflict of interest, and (3) it is difficult to envision

See, e.g., *Rodriguez* v. *Commissioner of Correction*, supra, 312 Conn. 352–53.

The first question we must resolve is whether *Sullivan* or *Strickland* governs the petitioner's claim that Canace was encumbered by an actual conflict of interest that rendered his representation of the petitioner ineffective by, among other things, causing him to hold back when cross-examining police witnesses. See part II B 2 of this opinion. The respondent notes that there is a division among the lower federal courts as to how to apply the United States Supreme Court's conflict of interest cases with regard to personal conflicts of the type at issue in the present case. Prior to *Mickens*, many, if not most, federal courts that addressed the issue had assumed that such conflicts are governed by *Sullivan*. See, e.g., *Mickens* v. *Taylor*, supra, 535 U.S. 174–75 (citing cases). Consistent with that approach, in *Phillips*, this court applied the *Sullivan* standard to an attorney's personal conflicts of interest vis-à-vis a single client. See *Phillips* v. *Warden*, supra, 220 Conn. 133, 136, 144. In *Mickens*, however, the United States Supreme Court questioned the propriety of the lower courts' "expansive application" of *Sullivan* to cases of attorney ethical conflicts, noting that the rationales for departing from the *Strickland* standard do not necessarily apply outside of the multiple concurrent representation context, such as when an attorney's personal interests are at issue. *Mickens* v. *Taylor*, supra, 174–75. The court left open the question of whether *Sullivan* should be extended to personal conflict of interest cases. See id., 176.

Following *Mickens*, the majority of federal courts of appeals have taken the position that, in order to prevail

how a merely potential conflict of interest could ever result in *Strickland* prejudice (likely altering the result of the proceeding) without first having become an actual conflict, we need not resolve the issue in the present appeal because the petitioner has not alleged that he suffered *Strickland* prejudice as the result of a potential conflict of interest.

on a claim of ineffective assistance of counsel that is based on an alleged personal conflict of interest, the petitioner or defendant must establish *Strickland* prejudice. See, e.g., *McRae* v. *United States*, 734 Fed. Appx. 978, 983 (6th Cir. 2018) (purporting to join United States Courts of Appeals for First, Second, Fifth, Sixth, Eighth, Tenth and Eleventh Circuits in requiring showing of *Strickland* prejudice), cert. denied, U.S. , 139 S. Ct. 1599, 203 L. Ed. 2d 757 (2019). Those courts reasoned that the United States Supreme Court has cautioned against overbroad application of *Sullivan* and that it is often possible to identify specific harms arising from the conflicted representation in such cases. See, e.g., id., 984; see also, e.g., id., 983 (citing cases). Other federal courts of appeals have continued to apply the *Sullivan* presumed prejudice standard in personal conflict of interest cases, reasoning that, just as in cases of multiple representation, "it is difficult to measure the precise effect on the defense when representation is corrupted by conflicting interests." (Internal quotation marks omitted.) *Rubin* v. *Gee*, 292 F.3d 396, 402 (4th Cir.), cert. denied, 537 U.S. 1048, 123 S. Ct. 637, 154 L. Ed. 2d 523 (2002); see, e.g., *Reynolds* v. *Hepp*, 902 F.3d 699, 708 (7th Cir. 2018) ("[s]ince before *Mickens*, we have at least assumed that *Sullivan* extends to financial conflicts of interests"), cert. denied, U.S. , 140 S. Ct. 160, 205 L. Ed. 2d 51 (2019); *United States* v. *Walter-Eze*, 869 F.3d 891, 900 (9th Cir. 2017) (assuming, without deciding, that *Sullivan* applies to cases of pecuniary conflict), cert. denied, U.S. , 139 S. Ct. 1196, 203 L. Ed. 2d 226 (2019); *Rubin* v. *Gee*, supra, 401–402 (applying *Sullivan*).

This court has followed the latter approach, continuing to broadly apply *Sullivan*, even in the wake of *Mickens*. See, e.g., *State* v. *Davis*, supra, 338 Conn. 477–78. The respondent invites us to revisit the question in the present case, emphasizing the need for some reliable

benchmark by which to assess the impacts of an alleged conflict of interest. Because the petitioner cannot prevail even under the more petitioner-friendly *Sullivan* standard; see part II B 2 of this opinion; however, we decline to revisit at this time the question of whether *Strickland* prejudice must be demonstrated in habeas cases involving purely personal conflicts of interest.

B

With these principles in mind, we now consider the merits of the petitioner's habeas petition to determine whether the test we adopted in *Simms* v. *Warden*, supra, 230 Conn. 612, 615–16, is satisfied. We understand the petitioner to be making two claims with respect to Canace's alleged conflict of interest. First, the petitioner contends that, as a matter of law, a Connecticut police officer cannot serve as defense counsel—at least, not without an adequate waiver—because the duties entailed by those two roles are necessarily in conflict. For this claim, the petitioner seeks to have us extend *Holloway*, on the rationale that his claim involves an inherent conflict and, thus, structural error. Second, the petitioner contends that, in this particular case, Canace's obligations as a police officer undermined his ability to effectively represent the petitioner, giving rise to an actual conflict of interest under *Sullivan*.[5] We consider each claim in turn.

1

The petitioner first argues that for an individual to simultaneously serve as a Connecticut police officer and to represent a criminal defendant creates a per se conflict of interest, even if the alleged crimes were committed, investigated, and prosecuted outside of the

[5] It was not entirely clear from the petitioner's briefing and his arguments before this court whether these are distinct theories of conflict of interest or, rather, whether the former represents the alleged conflict and the latter the adverse effect. In either event, we find his claims unpersuasive.

city or town in which the officer serves. Although we have not previously had cause to consider the issue, we agree with those courts that have concluded that for a police officer to serve as defense counsel in a different jurisdiction does not create a categorical conflict of interest. See, e.g., *Paradis* v. *Arave*, 130 F.3d 385, 391 (9th Cir. 1997); *State* v. *Gonzales*, 483 So. 2d 1236, 1236–37 (La. App. 1986). But see, e.g., *People* v. *Gelbman*, 150 Misc. 2d 466, 468, 568 N.Y.S.2d 867 (Justice Ct. 1991) (rule of professional conduct barred representation). This case law is consistent with the guidance that Canace received from the Statewide Grievance Committee and New Haven corporation counsel, namely, that his representation of criminal defendants was permissible, provided it occurred outside of the judicial district of New Haven and was properly disclosed. Indeed, a properly notified criminal defendant may well benefit from a police officer's experience and insider knowledge of police work. See, e.g., *State* v. *Gonzales*, supra, 1237 (arguable that "the complained of conflict of interest worked to the appellant's benefit [because] counsel's knowledge of police procedures was an asset in developing the defense strategy").

Although the petitioner does not necessarily disagree that a police officer might provide conflict free representation in some other state, he contends that for an individual to simultaneously serve as a *Connecticut* police officer and to represent a criminal defendant creates an inherent conflict of interest because all of this state's police officers are bound by § 54-1f (b). That provision provides that "[m]embers of the Division of State Police within the Department of Emergency Services and Public Protection or of any local police department or any chief inspector or inspector in the Division of Criminal Justice shall arrest, without previous complaint and warrant, any person who the officer has reasonable grounds to believe has committed or is committing

a felony."[6] General Statutes § 54-1f (b). The petitioner asserts that § 54-1f (b) obligated Canace to arrest him if Canace had reasonable grounds to suspect that he had committed or was attempting to commit a crime.[7] The petitioner further asserts that this obligation directly conflicted with Canace's duty of loyalty to his client, the petitioner, and aligned Canace's interests with those of the New Britain police officers who testified for the state at the petitioner's second criminal trial.

We acknowledge that the petitioner's argument, although perhaps counterintuitive, finds support in the plain language of the statute. The use of the phrase "shall arrest" might suggest that police officers have a mandatory, nondiscretionary duty to arrest suspected felons. Furthermore, that broadly worded mandate could be read to imply that officers must arrest all suspected felons under all circumstances, regardless of when or where the suspected crime was committed. We conclude, however, that the petitioner's interpretation is not the only plausible reading of the statutory language and that adopting his interpretation would "yield absurd or unworkable results . . . ." General Statutes § 1-2z.

[6] For purposes of brevity, we refer to such individuals as "suspected felons" in this opinion.

[7] Although the petitioner's brief suggests that Canace might have been obligated to arrest the petitioner for the crimes with which he already had been charged, during oral argument before this court, counsel for the petitioner conceded that Canace would have been under no obligation to rearrest the petitioner for those crimes. He contended, however, that there is nevertheless an inherent conflict of interest because, in the course of representation, Canace might have come to suspect that the petitioner had committed other crimes, or that the petitioner intended to offer perjured testimony. He posits that, under § 54-1f (b), Canace would be required to immediately arrest his client if he had any reasonable grounds for such suspicions. Because this presents an inherent conflict, he contends, the representation was a form of structural error for which *Holloway* should be extended to mandate reversal. Given that we conclude that there was no inherent conflict in Canace's duties under Connecticut law, we need not decide whether *Holloway* should be extended to this situation.

It is well established "that the use of the word shall, though significant, does not invariably create a mandatory duty." (Internal quotation marks omitted.) *Electrical Contractors, Inc.* v. *Ins. Co. of the State of Pennsylvania*, 314 Conn. 749, 757, 104 A.3d 713 (2014). "The mere fact that a statute uses the word shall in prescribing the function of a government entity or officer should not be assumed to render the function necessarily obligatory in the sense of removing the discretionary nature of the function . . . ." (Internal quotation marks omitted.) *Mills* v. *Solution, LLC*, 138 Conn. App. 40, 51, 50 A.3d 381, cert. denied, 307 Conn. 928, 55 A.3d 570 (2012). We thus conclude that the statutory language is ambiguous, and, therefore, we "look to other relevant considerations, beyond the legislature's use of the term 'shall,' to ascertain the meaning of the statute." *Electrical Contractors, Inc.* v. *Ins. Co. of the State of Pennsylvania*, supra, 758.

"It is axiomatic that [w]e must interpret the statute so that it does not lead to absurd or unworkable results." (Internal quotation marks omitted.) *Wilkins* v. *Connecticut Childbirth & Women's Center*, 314 Conn. 709, 723, 104 A.3d 671 (2014). In the present case, the petitioner's reading of § 54-1f is unworkable on many levels and would lead to absurd results.

To start, treating the statute as mandatory would deprive police officers of the necessary discretion as to whether and when to arrest a suspected felon. See, e.g., *Castle Rock* v. *Gonzales*, 545 U.S. 748, 761, 125 S. Ct. 2796, 162 L. Ed. 2d 658 (2005) (recognizing "[t]he deep-rooted nature of [law enforcement] discretion, even in the presence of seemingly mandatory legislative commands"); *Smart* v. *Corbitt*, 126 Conn. App. 788, 800, 14 A.3d 368 (discussing importance of police discretion in carrying out routine duties), cert. denied, 301 Conn. 907, 19 A.3d 177 (2011). Undercover work, for example, would become impossible, as an officer would be required

to shed his or her cover upon encountering the first suspected felon. Additionally, the petitioner's reading of § 54-1f (b) would require police officers to make arrests even when the suspected crime was committed long ago, outside the statute of limitations, or outside of the officer's jurisdiction. Thus, although the petitioner's reading of the statute has surface appeal, it ultimately leads to absurd results and is unworkable.[8]

[8] Because the use of the word "shall" in the statutory language is ambiguous; see, e.g., *Electrical Contractors, Inc.* v. *Ins. Co. of the State of Pennsylvania*, supra, 314 Conn. 757; and also because a strict facial reading leads to absurd, unworkable results, we may consider the legislative history of the statute. See General Statutes § 1-2z. The legislative history of § 54-1f (b) supports our conclusion that the word "shall" is used in its discretionary, rather than mandatory, sense. The original version of the statute, which gave constables the power to make warrantless arrests, was clearly discretionary rather than mandatory. See Code of Laws, Constables (1650), reprinted in 1 Col. Rec. 509, 522 (J. Trumbull ed., 1850).

In *State* v. *Carroll*, 131 Conn. 224, 38 A.2d 798 (1944), this court interpreted a predecessor to the current version of the statute, which provided in relevant part that "police officers . . . *shall* arrest, without previous complaint and warrant, any person for any offense in their jurisdiction, when the offender shall be taken or apprehended in the act or on the speedy information of others . . . ." (Emphasis added; internal quotation marks omitted.) Id., 227, quoting General Statutes (1930 Rev.) § 239. Despite the statute's use of the word "shall," this court, in discussing the law, repeatedly characterized it in discretionary terms. See, e.g., *State* v. *Carroll*, supra, 228 ("at common law a peace officer *could* arrest without a warrant" (emphasis added; internal quotation marks omitted)); id. (legislature intended to limit common-law *right* of arrest); id., 230 (statute means that peace officer "*may* make such an arrest" (emphasis added)); id., 231 (police officer "may act" on information he has reasonable grounds to accept as accurate); id. (statute "restricts the *right* of a police officer to arrest" (emphasis added)).

In 1945, when the legislature amended the statute and adopted language substantially similar to that of the current version, the legislators who sponsored the amendment, as well as the representatives of the law enforcement community who championed it, almost universally described the amended statute as providing police officers with the right or authority to make warrantless arrests, rather than the duty or obligation to arrest any suspected felon. See, e.g., 1 S. Proc., 1945 Sess., p. 243, remarks of Senator Albert L. Coles ("Here a police officer would be *permitted* to arrest a known criminal when he sees him on the street. He *could* apprehend him . . . . [N]ow . . . you give him no *authority*." (Emphasis added.)); id., remarks of Senator Leon RisCassi ("The law today and . . . for decades has been that in [b]reach of [p]eace cases you *can arrest* if you see the crime committed or if someone tells you that it has been committed. Of course you *can* always arrest on

Our conclusion is consistent with *Castle Rock* v. *Gonzales*, supra, 545 U.S. 748, in which the United States Supreme Court indicated, in dictum, that a Colorado statute using language similar to that of § 54-1f (b) would not deprive a peace officer of discretion, despite the use of the phrase "shall apprehend" in the Colorado statute. (Internal quotation marks omitted.) Id., 761. The court explained that "[a] well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes." Id., 760. "In each and every state there are long-standing statutes that, by their terms, seem to preclude nonenforcement by the police. . . . However, for a number of reasons, including their legislative history, insufficient resources, and sheer physical impossibility, it has been recognized that such statutes cannot be interpreted literally. . . . [T]hey clearly do not mean that a police officer may not lawfully decline to . . . make an arrest." (Internal quotation marks omitted.) Id.

For these reasons, we are not persuaded by the petitioner's theory that § 54-1f (b), which gives patrolling officers the authority to arrest suspected felons whom they happen across, *requires* off duty officers, such as Canace, to arrest their clients whenever they suspect that those clients may have committed other crimes, even outside of their jurisdictions.[9] Accordingly, and

evidence. This gives you the *right* to arrest on a crime committed or to be committed." (Emphasis added.)); 1 H.R. Proc., Pt. 3, 1945 Sess., p. 860, remarks of Representative Luke H. Stapleton ("[t]his bill would include . . . members of some other organized police force . . . to *permit* them to make arrests without warrants" (emphasis added)); Conn. Joint Standing Committee Hearings, Judiciary, Pt. 2, 1945 Sess., p. 402, remarks of Police Chief Donnelly, Bridgeport Police Department (arguing that, under proposed bill, police officer "would have something definite or tangible to go by when he is out there in the street and to make that *decision*" (emphasis added)); id., p. 480, remarks of John Gleason, chief of police of the Greenwich Police Department ("a policeman has to make [speedy decisions] . . . so I think he should lay within his rights in making an arrest withou[t] [a] warrant").

[9] We recognize that even the fact that the statute seemingly affords a police officer acting as a defense counsel the *discretion* to arrest a suspected felon outside of the officer's jurisdiction could create ethical problems in

particularly in light of the United States Supreme Court's hesitance to recognize new categories of per se conflicts of interest beyond the one recognized in *Holloway*, we find that there is no inherent conflict of interest when a police officer who is also a licensed attorney represents a criminal defendant in a different Connecticut jurisdiction. Nevertheless, because the petitioner raised a colorable question of statutory interpretation that had not previously been directly addressed by this state's appellate courts, we conclude that the habeas court abused its discretion in denying certification to appeal.

2

We now turn our attention to the petitioner's alternative argument that Canace's undisclosed status as a law enforcement officer became an actual conflict of interest during the petitioner's second criminal trial insofar as it led Canace to decline to pursue plausible alternative defense strategies or tactics. Before the habeas court, the petitioner pointed to various ways in which Canace's dual role allegedly manifested an actual conflict of interest and compromised the effectiveness of his representation of the petitioner. Before this court, however, the petitioner limits his argument to several ways in which the purported conflict of interest allegedly led Canace to hold back when cross-examining other police officers, most notably Jerry Chrostowski of the New Britain Police Department.[10] The petitioner

the representation of a criminal defendant. See *State* v. *Kuskowski*, 200 Conn. 82, 85–86, 510 A.2d 172 (1986) (§ 54-1f (b) permits extrajurisdictional arrest by officer who witnesses and has probable cause to believe that crime is being committed). We decline to address this issue, however, because the petitioner has not raised the issue, let alone demonstrated how the mere authority to arrest affected Canace's representation, as would be necessary to establish an actual conflict of interest.

[10] The petitioner contends, for example, that Canace failed to adequately cross-examine Chrostowski as to inconsistencies in his and other witnesses' testimony regarding (1) the circumstances under which narcotics were found in the petitioner's apartment, (2) the police officers' prior familiarity with the petitioner, and (3) whether Lockery had purchased drugs from the petitioner.

contends that, because the state's case in the second criminal trial was built around the testimony of the New Britain police officers who arrested him and searched his apartment, the officers' credibility was paramount, and, therefore, Canace's hesitancy to question the officers was highly prejudicial.

The habeas court thoroughly analyzed the petitioner's claims of inadequate cross-examination and found them to be without merit for several reasons. First, the court credited Canace's testimony that he did not abandon any defense strategies for fear of challenging the credibility of fellow police officers. Second, the habeas court determined that Canace made reasonable strategic decisions as to which lines of inquiry to pursue, using his knowledge of police work to identify instances of poor police investigation. Third, the habeas court recounted all of the ways in which Canace attempted, with varying degrees of success, to challenge the credibility and undermine the testimony of the New Britain police officers. For example, the habeas court found that Canace "pursued a strategy [of attempting to demonstrate] that the police had set up the petitioner . . . ."

The Appellate Court reviewed, at some length, the petitioner's challenges to the findings and conclusions of the habeas court and found them to be meritless. See *Diaz* v. *Commissioner of Correction*, supra, 200 Conn. App. 551–53. Nothing in the petitioner's brief, his argument before this court, or our independent review of the record leads us to reject the conclusions of those courts that Canace's duties as a police officer did not materially impact his representation of the petitioner, and no useful purpose would be served by repeating their analyses here. In short, we see no reason to second-guess the determination of the habeas court that there was no constitutionally relevant actual conflict of interest because the petitioner was unable to establish *Sullivan* prejudice, namely, that Canace failed to pursue

some plausible, alternative defense strategy or tactic that was inherently in conflict with or not undertaken due to his other loyalties.

III

Finally, we emphasize that our conclusion that the petitioner has not demonstrated that Canace's performance suffered from an actual conflict of interest should not be taken to mean that we condone Canace's conduct in the present case. We do not.

Regardless of whether he violated rule 1.7 of the Rules of Professional Conduct,[11] which governs attorney conflicts of interest, it seems likely that Canace violated rule 1.4 of the Rules of Professional Conduct, which requires an attorney to "promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required . . . ."[12] Rules of Professional Conduct 1.4 (a) (1). Attor-

[11] Rule 1.7 of the Rules of Professional Conduct provides in relevant part: "(a) . . . a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

"(1) the representation of one client will be directly adverse to another client; or

"(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer. . . ."

As we discussed; see part II A of this opinion; the petitioner carries a higher burden in establishing a sixth amendment violation on the basis of an alleged conflict of interest than would be necessary to establish that an attorney ran afoul of the Rules of Professional Conduct. Specifically, in order to establish a violation of his constitutional right, the petitioner must establish that an actual conflict of interest adversely impacted the representation; see, e.g., *Cuyler* v. *Sullivan*, supra, 446 U.S. 348, 350; *Phillips* v. *Warden*, supra, 220 Conn. 133; and not merely that there was a significant risk of a material limitation. See Rules of Professional Conduct 1.7 (a) (2).

[12] The ethics opinion that Canace obtained prior to engaging as a defense counsel expressly required him to disclose his status as a police officer to potential clients because that information was material to the representation and because he might later be required to withdraw if it turned out that his own police department was involved in investigating or prosecuting the petitioner.

ney conduct may breach ethical standards, however, without violating the sixth amendment right to counsel. See, e.g., *Mickens* v. *Taylor*, supra, 535 U.S. 176; see also, e.g., *United States* v. *Walter-Eze*, supra, 869 F.3d 906 ("the presumed prejudice rule was not intended to enforce the Canons of Legal Ethics" (internal quotation marks omitted)). Indeed, although there undoubtedly is some overlap, the constitutional right to effective assistance of counsel and the rules that govern attorney ethical conduct serve fundamentally different purposes. See, e.g., *Beets* v. *Scott*, 65 F.3d 1258, 1272 (5th Cir. 1995) ("the purpose of the [s]ixth [a]mendment is not primarily to police attorneys' ethical standards and create a constitutional code of professional conduct . . . [but, rather] its purpose is to [ensure] a fair trial based on competent representation"), cert. denied sub nom. *Beets* v. *Johnson*, 517 U.S. 1157, 116 S. Ct. 1547, 134 L. Ed. 2d 650 (1996).

It is true that Canace had satisfied himself, and the New Haven corporation counsel, that his work as a criminal defense attorney outside of the judicial district of New Haven did not create a per se conflict of interest. But that in no way justified his decision either to mislead the Office of the Chief Public Defender regarding the nature of his work for the city of New Haven—by listing his employment with the city as a "municipal employee," which covers any occupation with the city, rather than as a police officer—or to fail to disclose to his client, the petitioner, that he was simultaneously employed as a police officer. Although those actions may not have risen to the level of an actual conflict of interest for purposes of the sixth amendment, they certainly were unbecoming of an officer of the court.

The form of the judgment of the Appellate Court is improper, the judgment of the Appellate Court is reversed, and the case is remanded to that court with

direction to affirm the judgment of the habeas court denying the petition for a writ of habeas corpus.

In this opinion the other justices concurred.

ROBINSON, C. J., with whom ECKER, J., joins, concurring in the judgment. I join the majority's opinion insofar as it upholds the trial court's denial of the habeas corpus petition brought by the petitioner, Daniel Diaz, but reverses and remands the case to the Appellate Court for a corrected judgment.[1] See *Diaz* v. *Commissioner of Correction*, 200 Conn. App. 524, 554, 240 A.3d 795 (2020). I ultimately agree with the majority's conclusion that the petitioner failed to prove a violation of his right to the effective assistance of counsel under the sixth and fourteenth amendments to the United States constitution at his second criminal trial for the sale of narcotics on the ground that his criminal defense attorney, Frank Canace, labored under an actual conflict of interest given his concurrent employment as a New Haven police officer.[2] I write separately to high-

[1] Specifically, I agree with the majority's determination that the form of the Appellate Court's judgment, which dismissed the appeal rather than affirmed the judgment of the habeas court, was improper, thus requiring reversal and a remand for a corrected judgment.

[2] I agree with the majority's statement of the law with respect to conflicts of interest, namely, that, under *Cuyler* v. *Sullivan*, 446 U.S. 335, 348, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980), a defendant is required to prove "(1) that [defense] counsel actively represented conflicting interests and (2) that an actual conflict of interest adversely affected his [counsel's] performance. . . . As we previously have explained, an attorney may be subject to conflicting interests when interests or factors personal to him [or her] . . . are inconsistent, diverse or otherwise discordant with [the interests] of his [or her] client . . . . To prove adverse effect, a defendant must demonstrate that some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *State* v. *Davis*, 338 Conn. 458, 477–78, 258 A.3d 633 (2021); see id., 477–78 n.13 ("Prejudice may be presumed in some sixth amendment contexts, such as the actual or constructive denial of assistance of counsel altogether or various forms of state interference with counsel's assistance. . . . In the context . . . of counsel allegedly burdened by a conflict of interest . . . there is no presumption of prejudice per se. Prejudice is pre-

light my concerns about the propriety of an active duty municipal police officer moonlighting as a criminal defense attorney, even in judicial districts located outside the municipality that officer serves. In my view, case law and ethics opinions endorsing this practice—including the one on which Canace relied in this case—are inconsistent with contemporary understandings of policing culture insofar as the attorney is left standing

sumed only if the defendant demonstrates that counsel actively represented conflicting interests and that . . . conflict of interest adversely affected [counsel's] performance." (Internal quotation marks omitted.)); see also part II A of the majority opinion.

As we stated more than thirty years ago in a seminal conflicts decision by this court, "[a]t the core of the sixth amendment guarantee of effective assistance of counsel is loyalty, perhaps the most basic of counsel's duties. . . . Loyalty of a lawyer to his client's cause is the sine qua non of the [s]ixth [a]mendment's guarantee that an accused is entitled to effective assistance of counsel. . . . That guarantee affords a defendant the right to counsel's undivided loyalty." (Citations omitted; internal quotation marks omitted.) *Phillips* v. *Warden*, 220 Conn. 112, 136–37, 595 A.2d 1356 (1991), citing *Strickland* v. *Washington*, 466 U.S. 668, 692, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and *Cuyler* v. *Sullivan*, supra, 446 U.S. 356 (Marshall, J., concurring in part and dissenting in part). "This requirement of loyalty carries with it the correlative duty of exercising independent professional judgment on the client's behalf, and both those duties are also reflected in the relevant disciplinary guidelines." *Phillips* v. *Warden*, supra, 137. "[A] lawyer shall not represent a client if . . . there is a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer." Rules of Professional Conduct 1.7 (a) (2). The commentary to rule 1.7 reinforces these ethical precepts. The commentary provides in relevant part that "[l]oyalty and independent judgment are essential elements in the lawyer's relationship to a client," that such loyalty is impaired "if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests," and that "[t]he lawyer's own interests must not be permitted to have an adverse effect on representation of a client." Rules of Professional Conduct 1.7, commentary; see *Phillips* v. *Warden*, supra, 138 (quoting pre-2007 revision of rule 1.7 and commentary thereto).

I similarly agree with the majority's conclusion that General Statutes § 54-1f (b)—which empowers a police officer to make warrantless arrests of persons whom "the officer has reasonable grounds to believe has committed or is committing a felony"—is discretionary rather than mandatory in nature and, therefore, did not create an inherent conflict of interest that is structural in nature, thus requiring per se invalidation of the petitioner's conviction as a result of his representation by Canace. See part II B 1 of the majority opinion.

with one foot on either side of the "thin blue line" that is perceived to prevail between their loyalties to both their criminal defense client and their brother and sister officers. Nevertheless, I concur in the judgment of the majority because there is nothing in the record to indicate that the cultural nature of this conflict was raised or that it affected Canace's representation of the petitioner.

In my view, much of the fairly limited case law and ethics opinions that consider the potential conflicts arising from an active duty police officer concurrently serving as a criminal defense attorney unduly focus on jurisdictional, rather than cultural and psychological, boundaries in considering whether a conflict exists. One notable federal case, cited by both the majority and the Appellate Court, is *Paradis* v. *Arave*, 130 F.3d 385 (9th Cir. 1997), in which the habeas petitioner, Donald M. Paradis, challenged his state murder conviction on several grounds, including that "his trial counsel . . . suffered from a conflict of interest while acting as his appointed defense counsel during the criminal trial," insofar as the attorney was employed as a Coeur d'Alene city park police officer at the time of trial. Id., 391; see part II B 1 of the majority opinion; *Diaz* v. *Commissioner of Correction*, supra, 200 Conn. App. 550. Applying *Cuyler* v. *Sullivan*, 446 U.S. 335, 348, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980); see footnote 2 of this opinion; the United States Court of Appeals for the Ninth Circuit rejected Paradis' argument that the attorney's employment as a city park police officer created a conflict of interest that rose to the level of a sixth amendment violation, emphasizing that there was "no showing that [the attorney] *actively represented* conflicting interests. Because the city police of Coeur d'Alene, let alone its park police, were not involved in the investigation of [the] murder, no conflict of interest flow[ed] eo ipso from [the attorney's] additional employ-

ment. Potentially divided allegiances do not constitute active representation of conflicting interests."[3] (Empha-

[3] I note that one case from the United States Court of Appeals for the Second Circuit, *United States* v. *Rogers*, 209 F.3d 139 (2d Cir. 2000), considered the extent to which a criminal defense attorney's service as a city police commissioner created a conflict of interest for sixth amendment purposes. In *Rogers*, the defendant's trial attorney "was simultaneously serving as one of six New Haven police commissioners whose role it [was] (i) to approve the police budget, (ii) to consult with the police chief about the department, (iii) to work with the police chief to make departmental rules and regulations, and to make and evaluate departmental policy, and (iv) to appoint, promote and remove police officers." Id., 141. After he was convicted but before he was sentenced, the defendant himself alerted the District Court to his attorney's status as a police commissioner after learning about it through a newspaper article. He argued that, under *Cuyler* v. *Sullivan*, supra, 446 U.S. 335, his attorney's "position on the board of police commissioners was an actual conflict of interest that had an adverse effect on the lawyer's performance" because it led him to be hesitant to file a suppression motion or to call police witnesses, and further resulted in [his] making an "inadequate summation . . . and repeatedly advis[ing] [him] to plea[d] guilty and cooperate with the government. [The defendant] also argued that [counsel] violated his ethical obligation to advise him, and the court, of any possible conflict." *United States* v. *Rogers*, supra, 142. The District Court found that there ultimately was no adverse effect on the attorney's performance, even if his position as a police commissioner was indeed an actual conflict, and reiterated that conclusion at sentencing, stating that the court had been aware of the attorney's police commissioner role for several years and that the attorney had provided professionally competent representation at trial, and crediting the attorney's statement that, as a commissioner, his responsibilities were "administrative and oversight," with no law enforcement responsibilities or participation. Id., 143. The Second Circuit, however, reversed the defendant's conviction under the automatic reversal rule of its decision in *United States* v. *Levy*, 25 F.3d 146, 153 (2d Cir. 1994), concluding that the District Court had failed to conduct the inquiry required by its awareness *before* trial of the possibility of a conflict created by the attorney's role as a police commissioner. See *United States* v. *Rogers*, supra, 143–44. Although the Second Circuit determined that the District Court's failure to inquire relieved it from having to decide whether the attorney's role as a police commissioner amounted to an actual conflict, the Second Circuit observed that, "[i]n light of the apparent issues and anticipated witnesses, the [District] [C]ourt's awareness that [the attorney] was a police commissioner presented a [nonfrivolous] conflict issue of a kind that created a duty of inquiry on the part of the [D]istrict [C]ourt." Id., 144. The court also observed that the attorney's posttrial explanations about the purely administrative role of the police commissioners "fail[ed] to dispel the possibility of conflict" because, as a police commissioner, the attorney "had responsibility for police policy, police personnel, the police budget and [nonspecific] oversight. It is certainly possible that such responsibilities [could] produce an institutional loyalty. That effect [was] not necessarily

sis in original.) *Paradis* v. *Arave*, supra, 391; see *State* v. *Gonzales*, 483 So. 2d 1236, 1236–37 (La. App. 1986) (The court rejected the defendant's claim "that [his] court-appointed defense attorney was also a reserve police officer" whose "divided loyalties" created an actual conflict that adversely affected his performance under *Sullivan* because the "record . . . show[ed] a vigorous and competent representation by the defense counsel. Indeed it is [arguable] that the complained of conflict of interest worked to the [defendant's] benefit [because] counsel's knowledge of police procedures was an asset in developing the defense strategy."); cf. *Herring* v. *Secretary, Dept. of Corrections*, 397 F.3d 1338, 1355–58 (11th Cir.) (defense counsel's status as "special deputy sheriff" did not create impermissible conflict of interest because that status was granted as common professional courtesy to allow counsel to carry concealed firearm and counsel had no law enforcement certification, responsibilities or experience, rendering status "honorary" in nature, which counsel resigned when law changed to permit issuance of concealed carry permits), cert. denied sub nom. *Herring* v. *Crosby*, 546 U.S. 928, 126 S. Ct. 171, 163 L. Ed. 2d 277 (2005).

In *People* v. *Gelbman*, 150 Misc. 2d 466, 568 N.Y.S.2d 867 (Justice Ct. 1991), a municipal trial court granted a motion to disqualify a criminal defense attorney who was also a town police officer from representing a

detrimental to criminal defense. Institutional loyalty could [compel] a commissioner (variously) to root out abuses, or to avoid unfair attacks on the police, or to dampen suspicions that would be stirred in a lawyer who has no relationship with the police. If [the attorney] had a divided loyalty, it is hard to say which way it cut, but it [was] enough to observe . . . that divided loyalties are rarely divided down the middle." Id., 145–46. Thus, the court held that "a possible conflict existed, prompting a duty of inquiry," and automatic reversal was required because "the [D]istrict [C]ourt failed to perform this duty . . . ." Id., 146; see id. ("[the court] therefore adopts and applies a firm preference for prophylactic inquiry, in which any conflict is identified and either eliminated or knowingly and voluntarily waived [pretrial], over an avoidably delayed and less certain inquiry after the fact").

defendant in a criminal proceeding in that municipality's court. See id., 467, 469. The court relied on an ethics opinion stating that an attorney may not practice criminal law in the municipal courts "because it would be inappropriate for the [p]olice [o]fficer personally to represent criminal defendants" as, "no matter how earnest and complete a defense a lawyer provides, there is an obvious danger that a convicted defendant will believe that his defense was inadequate because of the lawyer's bias as a [p]olice [o]fficer. Conversely, the public might lose faith in the criminal justice system if it believes that the lawyer was employed in the hope that the lawyer's position as a [police officer] . . . might enable the lawyer to obtain a more lenient treatment for the defendant. A police officer is widely viewed as a representative of the [p]eople. [The court] believe[s] that the representation of a criminal defendant by a police officer could lessen public confidence in the integrity of the criminal justice system." (Internal quotation marks omitted.) Id., 467–68. In *State* v. *White*, 114 S.W.3d 469 (Tenn. 2003), the court upheld the disqualification of a criminal defense attorney, who had been sworn in as an assistant county district attorney and who also served as a part-time prosecutor in municipal court, because the attorney's "dual roles as assistant district attorney general and defense counsel in the same county were inherently antagonistic and thus, created an actual conflict of interest." Id., 478. The court relied on the fact that the attorney's relationships with fellow prosecutors and police officers could be jeopardized insofar as "[z]ealous representation of criminal defendants very often will require . . . vigorous cross-examination of the testimony of such law enforcement personnel, and in many instances will require challenging the very laws the prosecutor is charged to enforce. Even if cross-examination of such personnel would not involve the disclosure of confidences and secrets of the

state or municipality, the desire to maintain a harmonious working relationship with these law enforcement officers could adversely affect the inquiring attorney's zeal in conducting such cross-examination." (Internal quotation marks omitted.) Id. "The [d]isciplinary [r]ules preventing conflicts of interests were specifically designed to free the lawyer's judgment from such compromising interests and loyalties." (Internal quotation marks omitted.) Id.

Looking to ethics opinions,[4] I note that, in *In re Inquiry to Advisory Committee on Professional Ethics Index No. 58-91 (B)*, 130 N.J. 431, 432–34, 616 A.2d 1290 (1992), the New Jersey Supreme Court considered whether a police officer actively employed by the township of Cherry Hill, and his second employer, a law firm located in that municipality, could represent clients in criminal matters arising therein. The court considered rule 1.7 (c) (2) of the New Jersey Rules of Professional Conduct, under which "[a]ttorneys are disqualified from representing clients not only in cases of actual conflict, but also when representation begets an appearance of impropriety. Thus, multiple representation is impermissible 'in those situations in which an ordinary knowledgeable citizen acquainted with the facts would conclude

[4] As the majority observes in part III of its opinion, it is well settled that "analogous" rules of professional ethics for attorneys "may be informative but are not determinative with respect to whether there is an actual conflict for [s]ixth [a]mendment purposes." *Perillo* v. *Johnson*, 205 F.3d 775, 798 (5th Cir. 2000); see, e.g., *United States* v. *Gallegos*, 39 F.3d 276, 279 (10th Cir. 1994); *United States* v. *Nissen*, 555 F. Supp. 3d 1174, 1190 (D.N.M. 2021); see also *Mickens* v. *Taylor*, 535 U.S. 162, 176, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002) ("[t]he purpose of [the exception in *Sullivan*] from the ordinary requirements of *Strickland* . . . is not to enforce the Canons of Legal Ethics, but to apply needed prophylaxis in situations [in which] *Strickland* itself is evidently inadequate to [ensure] vindication of the defendant's [s]ixth [a]mendment right to counsel"); *Nix* v. *Whiteside*, 475 U.S. 157, 165, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986) ("breach of an ethical standard does not necessarily make out a denial of the [s]ixth [a]mendment guarantee of assistance of counsel").

that the multiple representation poses substantial risk of disservice to either the public interest or the interest of one of the clients.' " Id., 433. Recognizing the risk that a currently employed police officer could obtain "sensitive information about private parties," the court noted that its "overriding concern . . . for maintaining public confidence in the integrity of the legal profession" led it to conclude that, as long as the police officer attorney "remain[ed] a member of the Cherry Hill law enforcement team . . . no firm with which he is associated may represent private clients in Cherry Hill Municipal Court or in criminal matters arising in Cherry Hill." (Citation omitted; internal quotation marks omitted.) Id., 434. The court observed that the "appearance of impropriety has special relevance for attorneys invested with the public trust, such as a government attorney or . . . an attorney who is a full-time police officer. . . . A municipal police officer, like a municipal attorney, is charged with major responsibilities in the effectuation of the criminal justice system at the local level—the apprehension and prosecution of violators of municipal ordinances as well as state criminal and quasi-criminal laws." (Citations omitted; internal quotation marks omitted.) Id., 435; see id., 433–34 (rejecting argument for application of exception for screening associates who are former government attorneys, given that attorney "seeks to hold two jobs, not leave government service to enter private practice").

In my view, where these authorities fall short in resolving the question of whether an active duty police officer is conflicted from service as a criminal defense attorney is their failure to consider the effect of what more contemporaneous scholarship has described as the culture of American policing—and the extent to which an active duty police officer seeking to represent a criminal defense client may consciously or unconsciously subscribe to, or be influenced by, that culture.

Specifically, their sterile focus on jurisdictional boundaries appears to fail to account for the phenomenon, described in compelling detail in Professor Barbara E. Armacost's lead article in The George Washington Law Review, of "the 'brotherhood in blue' and the 'thin blue line' " that have come to characterize the "organizational cohesiveness" and "service culture" of American policing. B. Armacost, "Organizational Culture and Police Misconduct," 72 Geo. Wash. L. Rev. 453, 453–54 (2004). Professor Armacost summarizes "[t]he organizational theory literature [that] provides a theoretical framework for what police scholars have long recognized: police officers are enmeshed in a distinctive organizational culture that powerfully influences their judgment and conduct. Cops are much more likely to frame their decisions in terms of [role based] obligations and expectations than according to a simple analysis of the costs and benefits of their actions." Id., 509. "As a number of scholars have framed it, police officers have a distinctive 'working personality'—e.g., a set of 'distinctive cognitive and behavioral responses'—that derives from certain characteristics of the police milieu. The foundation for this so-called working personality is the street cop or the cop on the beat, which serves as the common background or training ground for virtually all police officers from patrolmen to police chief. . . . As police officers on the beat are exposed to certain common variables of police work, they develop distinctive patterns of coping with these variables, which in turn come to define a distinct occupational culture of policing." (Footnotes omitted.) Id., 512–13. Citing the work of Professor Jerome Skolnick,[5] Professor Armacost observes that "the police officer's role contains two variables that are the primary determinants of the working personality of police officers: dan-

[5] See B. Armacost, supra, 72 Geo. Wash. L. Rev. 494 n.240, 513 nn.365–74, citing J. Skolnick, Justice Without Trial: Law Enforcement in Democratic Society (2d Ed. 1975) pp. 42–57.

ger and authority. The danger entailed in police work—and the sense among police officers that they hold the thin blue line between order and disorder—makes police officers 'especially attentive' to any indication that violence or law breaking might be imminent." (Footnote omitted.) Id., 513. Further, the "other variable of police work, which reinforces this sense of isolation, is the element of authority. Police are empowered to intervene in a myriad of ways in the lives of ordinary citizens, from giving traffic citations, to maintaining order at public events, to enforcing public morality through enforcing laws pertaining to gambling, prostitution, and drunkenness. Police authority in these areas creates a *we/they* mentality, not only between the police and the criminal element, but also between the law enforcers and the general public." (Emphasis in original; footnote omitted.) Id.; see id., 513–14 ("when the policeman dons his uniform, he enters a distinct subculture governed by norms and values designed to manage the strain created by an outsider role in the community" (internal quotation marks omitted)). Ultimately, it is taken as an " '[article] of faith' in police culture" that "police officers consider themselves to be the 'thin blue line' between societal order and disorder. Like the rest of us, they see the negative effects of crime but, unlike the rest of us, they have the authority and power to do something about it." (Footnote omitted.) Id., 516–17. Professor Armacost also observes that the "call to do a potentially dangerous job involving conflicting demands and uncooperative or ungrateful citizens results in a sense of *us versus them* that develops between cops and the outside world. The bond resulting from this siege mentality—the so called 'brotherhood in blue'—creates a 'fierce and unquestioning loyalty to all cops, everywhere.' Along with the bond of solidarity is the sense that no one outside the ranks will really

understand the realities of policing."[6] (Emphasis in original; footnotes omitted.) Id., 517.

Professor Seth W. Stoughton describes this culture as that of the warrior officer inherent in modern policing, which substantially derives from the militarization of police work as supported by federal initiatives that have equipped local police forces with "military-grade equipment and training" to support their roles as soldiers in the "wars on crime, drugs, and terror . . . ." S. Stoughton, "Principled Policing: Warrior Cops and Guardian Officers," 51 Wake Forest L. Rev. 611, 647 (2016); see id. ("[t]he metaphor was clear: police officers were soldiers, and their day-to-day job involved fighting on the front lines"). Officers who adopt the "[w]arrior" mindset view themselves as "the embodiment of the [t]hin [b]lue [l]ine, rather than the society that it protects . . . ." Id., 654. Professor Stoughton observes that, "[t]o those within the [w]arrior circle, only fellow [w]arriors have the right to censure each other; but in reality even other officers—or former officers—are discouraged from doing so." (Footnote omitted.) Id., 664. Discussing, for example, review of use of force decisions, Stoughton notes: "Not only is second-guessing believed to be inap-

[6] Professor Armacost further observed: "Cops are never told to be silent or to keep the agency's secrets. They never see an order upholding the code of silence that guides their working lives. There is no need to be explicit. The reactions, body language, whispered asides, and other rites of initiation convey what is expected. The code of silence serves to reinforce police bonds of solidarity, both of which make it difficult to investigate, with any accuracy, incidents that may involve mistakes or misbehavior." (Footnote omitted; internal quotation marks omitted.) B. Armacost, supra, 72 Geo. Wash. L. Rev. 517–18. With respect to the implementation of reforms targeted at corruption or excessive force, she observes that the "conflict in the police bureaucracy between a set of broader values and goals articulated in formal policies and the informal norms of [street level] police culture highlights the tension between means and ends, which is 'at the heart of police work.' " Id., 518; see id., 519 ("Institutional actors watch how other officers do things, and then they conform their own conduct to what they perceive as the norm. Even if police agencies have much the same formal rules, what differs is what agencies actually tolerate, because that is how cops learn what the agency really accepts.").

propriate, it is also viewed as an obstacle to effective policing. Questioning and criticism, in this worldview, are proximate to treason; calling an officer's capabilities or honor into doubt shakes that officer's resolve by making an [already difficult] duty even less attractive. This allegedly endangers officers and weakens the [t]hin [b]lue [l]ine between order and chaos."[7] Id., 665; see

[7] Ample additional scholarly literature supports the "thin blue line" aspect of police culture documented by the work of Professors Armacost and Stoughton. See, e.g., R. Cohen, "The Force and the Resistance: Why Changing the Police Force Is Neither Inevitable, nor Impossible," 20 U. Pa. J.L. & Soc. Change 105, 113–14 (2017) (advocating law enforcement culture change from adversarial "warrior" mindset, which is product of line of duty dangers, to "guardian" mindset by embracing procedural justice and activities to cultivate public trust); V. Johnson, "Bias in Blue: Instructing Jurors To Consider the Testimony of Police Officer Witnesses with Caution," 44 Pepp. L. Rev. 245, 292 (2017) (describing " 'us against them' mentality" among some police officers arising from "the view that the police are under assault by the community they are meant to serve," which renders "officers . . . prone to group polarization," with "tunnel vision" and "confirmation bias[es]" that are potentially exacerbated by other unconscious racial biases); J. Manly, Note, "Policing the Police Under 42 U.S.C. § 1983: Rethinking *Monell* to Impose Municipal Liability on the Basis of Respondeat Superior," 107 Cornell L. Rev. 567, 571 (2022) ("The police subculture plays a crucial role in police agencies, providing a way for officers to deal with social isolation from their communities while simultaneously promoting a bond of solidarity among the ranks. But while such a subculture may help officers cope with the unique stressors of policing, the detrimental impact that such a subculture has on society as a whole outweighs any benefit that may be derived from its existence. The police subculture—characterized by secrecy, mutual support, and officer unity—effectively creates a code of silence, known colloquially as the 'blue wall.' This code of silence, while acting to further reinforce solidarity among the ranks, results in 'an informal norm of police culture that prohibits reporting misconduct committed by other police officers.' Officers who violate this informal norm by reporting their colleagues' misconduct risk suffering serious personal and professional repercussions." (Footnotes omitted.)); S. Ricciardi, Note, "Police Misconduct in Connecticut," 47 Conn. L. Rev. Online 37, 44–45 (2015) ("The '[b]lue [w]all of [s]ilence,' also known as the '[c]ode of [s]ilence' or the '[b]lue [c]urtain,' is one of the most persistent obstacles in excessive force litigation. The idea of a code of silence is not completely unimaginable. Police officers are faced with life and death situations more frequently than the public likely realizes, and a certain level of trust is expected out of necessity. However, the brotherhood mentality that has formed over time has become a barrier to transparency. 'The code of silence, adhered to by any officer who intends to remain on the job, provides a virtually impenetrable layer of protection for [violence prone] officers.' " (Footnotes omitted.)).

id., 666–67 (Professor Stoughton suggests that warrior culture "principles and value systems of policing" be replaced by "[g]uardian policing," which "seeks to instill officers with values that encourage public engagement, foster trust, and build lasting community partnerships. The result is safer and more effective law enforcement.").

I believe that aspects of the thin blue line culture of policing—particularly in a small state and in an age characterized by the instant sharing of information—may render it ethically and practically untenable for an active duty police officer to serve simultaneously as a criminal defense attorney, as it appears that the officer's loyalties will always be perceived to be in tension—even for those officers who make a conscious effort not to participate in that culture. At the very least, the apparent prevalence of the thin blue line renders disclosure, informed consent, and appropriate pretrial vetting paramount in cases in which a police officer attorney, who believes that he has eschewed participation in thin blue line culture, undertakes the representation of a criminal defense client. See, e.g., *State* v. *Davis*, 338 Conn. 458, 470–71, 258 A.3d 633 (2021). Ultimately, however, nothing in the record in this case, save for an oblique reference to the "goodwill" of Canace's fellow police officers in a section of a 1992 informal ethics opinion concerning the propriety of his representing clients in civil actions against individual members of the New Haven police department, touches on police culture. See Connecticut Bar Association Committee on Professional Ethics, Informal Opinion No. 92-04 (January 27, 1992). Because these cultural claims were not specifically raised before the habeas court, they cannot serve as a basis for overturning the petitioner's conviction, absent establishment of a record to the contrary.

Accordingly, I concur in the judgment reversing the Appellate Court's judgment dismissing the petitioner's

appeal and remanding the case to that court with direction to affirm the judgment of the habeas court.