DEVONTE DALEY *v.* ZACHARY KASHMANIAN ET AL. (SC 20498)

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

Syllabus

Pursuant to statute (§ 52-557n (a) (2) (B)) and the common law of this state, respectively, municipalities and their employees enjoy qualified immunity from liability for their negligent acts or omissions in the performance of duties that require the exercise of judgment or discretion.

The plaintiff sought to recover damages from the defendants, the city of Hartford and one of its police officers, K, in connection with injuries the plaintiff sustained when a motorcycle on which he was riding was struck from behind by K's unmarked police vehicle. K's vehicle, known as a "soft car," lacked flashing or revolving lights and was indiscernible from an ordinary civilian vehicle. While driving his vehicle, K was instructed to surveil a group of motorcycles and quads riding through the city streets. K, who was traveling between forty and fifty miles per hour in a twenty-five mile per hour zone, crossed the street's center line and proceeded to travel north in the southbound lane, where the front of his vehicle struck the back tire of the plaintiff's motorcycle, causing the plaintiff to crash and sustain serious injuries. The plaintiff

alleged, inter alia, that K's negligence had caused his injuries and that the city was liable pursuant to § 52-557n (a) (1) (A) for the negligent acts of K and was required to indemnify K pursuant to the municipal indemnification statute (§ 7-465). Specifically, the plaintiff claimed that K had violated a ministerial duty imposed by the motor vehicle statutes ((Rev. to 2013) §§ 14-218a and 14-240) that govern speed on local roadways and following distances, respectively, and the statute ((Rev. to 2013) § 14-230) that requires vehicles to be driven on the right. The defendants asserted various special defenses, including governmental immunity pursuant to the common law and § 52-557n (a) (2) (B). After a trial, the jury returned a verdict for the plaintiff on his negligence claim, and the court then heard argument on the issue of governmental immunity, which had been reserved for the court's decision. The court ultimately set aside the verdict on the negligence count, concluding that governmental immunity was applicable to K's conduct because his surveillance while driving involved a discretionary, rather than a ministerial, police activity. Accordingly, the court also concluded that there was no cognizable claim against the city for indemnification under § 7-465, and it rendered judgment for the defendants. On appeal, the Appellate Court upheld the trial court's decision to set aside the verdict with respect to the negligence claim, concluding that it was barred by governmental immunity because K was engaged in discretionary conduct while surveilling the plaintiff. The Appellate Court also rejected the plaintiff's argument that K had a ministerial duty to comply with the motor vehicle statutes while operating his vehicle, insofar as the statute (§ 14-283) governing the operation of emergency vehicles allows the police to disregard motor vehicle statutes only when responding to an emergency call or during pursuits but not during surveillance operations. On the granting of certification, the plaintiff appealed to this court. *Held* that the Appellate Court incorrectly concluded that the defendants were entitled to governmental immunity pursuant to the common law and § 52-557n (a) (2) (B) in connection with the plaintiff's negligence claim, as the motor vehicle statutes setting forth the rules of the road imposed numerous ministerial duties that K violated in the operation of his vehicle, and, accordingly, this court reversed in part the Appellate Court's judgment and remanded the case with direction to reverse that part of the trial court's judgment setting aside the verdict and to remand the case to the trial court with direction to, inter alia, reinstate the jury's verdict and to render judgment for the plaintiff on the count of his complaint seeking indemnification from the city: because the statute was silent and was, therefore, ambiguous with respect to whether, or the extent to which, a municipal employee's manner of driving is considered a discretionary act for purposes of governmental immunity under § 52-557n (a) (2) (B), this court reviewed extratextual sources, particularly the statute's legislative history, which demonstrated the legislature's understanding that negligence in the operation of motor vehicles

was not intended to be shielded by governmental immunity, either before or after the passage of § 52-557n, and that understanding was implicitly confirmed by a nearly contemporaneous decision of this court holding that a municipality is liable for its employee's negligent operation of an emergency vehicle engaged in a high-speed police pursuit and rejecting a claim of blanket immunity under § 14-283; moreover, in the absence of any indication in the text or legislative history of § 52-557n that the legislature intended to alter or abolish the existing liability regime under the common law and related indemnification statutes, this court concluded that the legislature understood the operation of a motor vehicle in a nonemergency situation to be a ministerial act, and that conclusion was consistent with the fact that the operation of a motor vehicle is a highly regulated activity governed by a panoply of state motor vehicle statutes; furthermore, a review of the pertinent motor vehicle statutes, namely, §§ 14-218a, 14-230 and 14-240, established that those statutes impose ministerial duties on municipal employees who are operating a motor vehicle, outside of the limited shelter provided by § 14-283 for the operators of emergency vehicles in certain discrete circumstances, as the former statutes contain mandatory language that limits discretion in the performance of the mandatory act and does not call for the kind of open-ended good professional judgment that is the hallmark of discretionary act immunity; in the present case, although the decision to use the soft car to surveil the plaintiff was discretionary, once that decision was made, K had a ministerial duty and was legally bound to comply with the rules of the road, unless he was operating his vehicle as an emergency vehicle within the meaning of § 14-283, which the defendants conceded that he was not.

Argued December 15, 2021—officially released August 30, 2022

Procedural History

Action to, inter alia, recover damages for the alleged negligence and recklessness of the named defendant, and for other relief, brought in the Superior Court in the judicial district of Hartford and tried to the jury before *Scholl*, *J.*; thereafter, the court, *Scholl*, *J.*, which granted the named defendant's motion for a directed verdict on the recklessness claim, and the jury returned a verdict for the plaintiff on his negligence claim; subsequently, the court, *Scholl*, *J.*, set aside the verdict and rendered judgment for the defendants, from which the plaintiff appealed to the Appellate Court, *Keller*, *Bright* and *Harper*, *Js.*, which reversed in part the judgment of the trial court and remanded the case for a new trial

on the recklessness count, and the plaintiff, on the granting of certification, appealed to this court. *Reversed in part*; *judgment directed.*

Martin McQuillan, for the appellant (plaintiff).

William J. Melley III, for the appellee (named defendant).

Nathalie Feola-Guerrieri, senior assistant corporation counsel, for the appellee (defendant city of Hartford).

Sarah Steinfeld and *Erica Ryan Moskowitz* filed a brief for Moral Monday CT et al. as amici curiae.

Julianne Lombardo Klaassen and *James J. Healy* filed a brief for the Connecticut Trial Lawyers Association as amicus curiae.

Opinion

ROBINSON, C. J. The sole issue in this certified appeal is whether a police officer who was involved in a crash while using an automobile to perform surveillance during an investigation of possible criminal activity was engaged in a discretionary act for purposes of governmental immunity under the common law or General Statutes § 52-557n (a) (2) (B).[1] The plaintiff, Devonte Daley,

[1] General Statutes § 52-557n (a) provides: "(1) Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) *The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties*; (B) negligence in the performance of functions from which the political subdivision derives a special corporate profit or pecuniary benefit; and (C) acts of the political subdivision which constitute the creation or participation in the creation of a nuisance; provided, no cause of action shall be maintained for damages resulting from injury to any person or property by means of a defective road or bridge except pursuant to section 13a-149. (2) Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by: (A) Acts or omissions of any employee, officer or agent which constitute criminal conduct, fraud, actual malice or wilful misconduct; or (B) *negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law*." (Emphasis added.)

appeals, upon our grant of his petition for certification,[2] from the judgment of the Appellate Court reversing in part the judgment of the trial court, rendered in favor of the plaintiff after a jury trial, in this personal injury action against the defendants, Zachary Kashmanian, a police officer, and his employer, the city of Hartford (city). See *Daley* v. *Kashmanian*, 193 Conn. App. 171, 190, 219 A.3d 499 (2019). On appeal, the plaintiff contends that the Appellate Court incorrectly concluded that Kashmanian's actions during his surveillance of the plaintiff using a "soft car," which is an unmarked vehicle lacking police equipment, were discretionary acts for purposes of governmental immunity. We conclude that Kashmanian's operation of the soft car, including following the statutory rules of the road; see General Statutes § 14-212 et seq.; was a ministerial function and that the defendants, therefore, were not entitled to discretionary act immunity for Kashmanian's negligent operation of the soft car during the surveillance operation. Accordingly, we reverse in part the judgment of the Appellate Court.

The Appellate Court's opinion aptly sets forth the facts and procedural history in this case. "On June 1,

[2] We granted the plaintiff's petition for certification, limited to the following issue: "Did the Appellate Court correctly determine that . . . § 52-557n confers governmental immunity from liability for damages arising from personal injuries caused by a police officer's negligent operation of a motor vehicle when the negligent conduct occurs in the course of the officer's [on-duty] surveillance activities?" *Daley* v. *Kashmanian*, 335 Conn. 939, 237 A.3d 1 (2020).

Upon review of the briefs and record in this certified appeal, we observe that the immunity issues decided by the Appellate Court concern both an individual employee and his municipal employer. Accordingly, we rephrase the certified question to reflect that the discretionary act immunity at issue in this case has its doctrinal origins both at common law, for the employee, and under § 52-557n (a) (2) (B), for the municipality. See, e.g., *State* v. *Raynor*, 334 Conn. 264, 266 n.1, 221 A.3d 401 (2019) (this court may "rephrase" certified question that "does not properly frame the issues presented in the appeal because it inaccurately reflects the holding of the Appellate Court" (internal quotation marks omitted)); see also *Cole* v. *New Haven*, 337 Conn. 326, 336–37, 253 A.3d 476 (2020) (explaining doctrinal sources of discretionary act immunity).

2013, at approximately 12 a.m., the plaintiff was riding his yellow Suzuki motorcycle on Asylum Avenue in Hartford with a group of eight to ten other people who were riding 'dirt bikes' and 'quads.' The plaintiff's motorcycle was neither 'street legal' nor 'roadworthy' because it did not have headlights and was equipped with off-road tires: a black tire on the front and a yellow tire on the back. Also at that time, Kashmanian was operating an unmarked gray Acura TL, which the police characterize as a 'soft car.' A soft car is a vehicle that is not equipped with flashing or revolving lights, sirens, or police markings so that it is indiscernible from ordinary civilian cars.

"At or around that same time, a confidential informant provided an anonymous tip to the police that a man riding a yellow motorcycle with a yellow tire had a gun. Kashmanian was instructed by other officers to perform surveillance[3] [of] the group of motorcycles and quads, including the yellow motorcycle, which was operated by the plaintiff. When Kashmanian arrived at Asylum Avenue, he observed the yellow motorcycle and the group of motorcycles and quads, and proceeded to follow them westbound on Asylum Avenue. All of the motorcycles and quads then turned right and proceeded northbound on Sumner Street, which is a two lane road with a speed limit of twenty-five miles per hour. At the intersection of Asylum and Sumner, Kashmanian's vehicle 'sideswip[ed]' another motor vehicle . . . [that] had been proceeding in the same direction. Kashmanian paused for a brief second, but he was directed by the police on the radio to 'just keep going' and that they would 'take care of the accident; just keep going.'

[3] "Kashmanian testified that his understanding of surveillance is 'you're following someone at a distance, trying to keep an eye on them, where they're going; what their actions are. It could be in a car; it can be walking. It could be anywhere. It could be through a camera.' " *Daley* v. *Kashmanian*, supra, 193 Conn. App. 174 n.1.

"Kashmanian then proceeded north in the northbound lane of Sumner Street, to continue to surveil the plaintiff. Kashmanian was traveling between forty and fifty miles per hour, well over the twenty-five miles per hour speed limit. Kashmanian then crossed the center line to travel north in the southbound lane in an effort to avoid two quads in the group that fishtailed and sideswiped his vehicle. Although he could have returned to the northbound lane of traffic after passing the two quads, Kashmanian continued to travel north in the southbound lane, closing the distance between his car and the plaintiff's motorcycle until he struck the back tire of the plaintiff's motorcycle with the front left panel of his vehicle, which caused the plaintiff to crash his motorcycle into a parked car in the southbound lane of Sumner Street. The plaintiff was ejected from his motorcycle and landed approximately ninety-five feet down Sumner Street, causing him [to sustain serious] injuries. As evinced by the lack of skid marks on Sumner Street, Kashmanian neither suddenly slowed his vehicle nor applied his brakes before striking the plaintiff's motorcycle.

"On February 26, 2015, the plaintiff filed this personal injury action against the defendants. The plaintiff's operative fifth amended complaint contains two relevant counts.[4] In count one, the plaintiff asserted a com-

[4] "The complaint contains two additional counts . . . . In count three, the plaintiff alleged a statutory recklessness claim pursuant to General Statutes § 14-295 against Kashmanian in his individual capacity. The plaintiff withdrew this count at the conclusion of the presentation of evidence at trial. In count four, the plaintiff alleged an indemnification claim against the city pursuant to General Statutes § 7-465 (providing indemnification by municipalities of municipal officers, agents or employees who incur liability for negligent official conduct). Count four was not submitted to the jury because resolution of that claim was dependent on the court's analysis of the defendants' governmental immunity special defense. Specifically, in the absence of a common-law negligence claim against Kashmanian, there would be no basis for a statutory indemnification claim against the city pursuant to § 7-465. See *Wu* v. *Fairfield*, 204 Conn. 435, 438, 528 A.2d 364 (1987) ('in a suit under § 7-465, any municipal liability [that] may attach is predicated

mon-law negligence claim against Kashmanian in his official capacity and the city, alleging that Kashmanian negligently caused the plaintiff's injuries. In count two, the plaintiff asserted a common-law recklessness claim against Kashmanian, alleging that he recklessly, wilfully, and wantonly caused the plaintiff's injuries.

"In response, the defendants filed answers denying the essential allegations of the plaintiff's complaint and alleging two relevant special defenses. The defendants alleged that the plaintiff's injuries were caused by his own comparative negligence, and that the plaintiff's claims are barred by common-law and statutory governmental immunity, pursuant to . . . § 52-557n, because Kashmanian was engaged in discretionary acts.[5] Prior to the submission of the case to the jury, the parties stipulated that the issue of whether the defendants were entitled to governmental immunity would be decided by the court if the jury returned a verdict in favor of the plaintiff on his negligence claim.

"The case was tried to a jury over the course of five days. At the close of evidence, [counsel for] Kashmanian made an oral motion for a directed verdict as to count two, the common-law recklessness count. In particular, [he] argued that count two should not be submitted to the jury because there was no evidence that Kashmanian engaged in reckless conduct. After hearing the plaintiff's counterargument, the court orally granted Kashmanian's motion for a directed verdict as to count two. Accordingly, the jury was charged, and the case was submitted to the jury only as to count one, the

on prior findings of individual negligence on the part of the employee and the municipality's employment relationship with that individual')." *Daley* v. *Kashmanian*, supra, 193 Conn. App. 175 n.2.

[5] "The defendants pleaded governmental immunity as a special defense generally to all of the plaintiff's claims, yet Kashmanian [did] not argue that governmental immunity would apply to his alleged[ly] wilful, wanton, or reckless conduct." *Daley* v. *Kashmanian*, supra, 193 Conn. App. 176 n.4.

negligence count, and the defendants' comparative negligence special defense. On that same day, the jury returned a verdict for the plaintiff in the total amount of $416,214, reduced on the basis of the jury's finding that the plaintiff comparatively was 25 percent negligent, for a net award of $312,160.50." (Footnote omitted; footnotes in original.) *Daley* v. *Kashmanian*, supra, 193 Conn. App. 173–77.

Following the submission of memoranda of law and oral arguments on the reserved issue of governmental immunity, the trial court "set aside the jury's verdict in favor of the plaintiff on count one, the negligence claim. In particular, the [trial] court concluded that governmental immunity was applicable to Kashmanian's conduct because his driving surveillance involved discretionary police activity, which is protected under § 52-557n (a) (2) (B). Because of its determination on governmental immunity, the court also reasoned that no cognizable claim existed against the city for indemnification under [General Statutes] § 7-465.[6] See [footnote

[6] General Statutes § 7-465 provides in relevant part: "(a) Any town, city or borough, notwithstanding any inconsistent provision of law, general, special or local, shall pay on behalf of any employee of such municipality, except firemen covered under the provisions of section 7-308 . . . all sums which such employee becomes obligated to pay by reason of the liability imposed upon such employee by law for damages awarded for infringement of any person's civil rights or for physical damages to person or property, except as set forth in this section, if the employee, at the time of the occurrence, accident, physical injury or damages complained of, was acting in the performance of his duties and within the scope of his employment, and if such occurrence, accident, physical injury or damage was not the result of any wilful or wanton act of such employee in the discharge of such duty. . . . Such municipality may arrange for and maintain appropriate insurance or may elect to act as a self-insurer to maintain such protection. . . . Governmental immunity shall not be a defense in any action brought under this section. . . ."

Although the legislature has amended § 7-465 since the events underlying the present case; see, e.g., Public Acts 2013, No. 13-247, § 273; these amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

4] of this opinion. The court then rendered judgment in favor of the defendants on counts one and four of the plaintiff's complaint." (Footnote added.) *Daley* v. *Kashmanian*, supra, 193 Conn. App. 177–78.

The plaintiff appealed from the judgment of the trial court to the Appellate Court. After first agreeing with the plaintiff's claim that the trial court had improperly granted the defendants' motion for a directed verdict on count two of the complaint alleging recklessness; see id., 181–82; the Appellate Court then concluded that the trial court had properly granted the defendants' motion to set aside the verdict on the ground that the plaintiff's negligence claims were barred by governmental immunity. See id., 185–86. The Appellate Court reasoned that Kashmanian was engaged in discretionary conduct while surveilling the plaintiff, which is one of the "typical functions of a police officer." (Internal quotation marks omitted.) Id., 186. The court emphasized that "Kashmanian's surveillance, performed in the course of his employment as a police officer, necessarily required him to exercise his judgment, under the circumstances; for example, as to how fast to travel, the distance to maintain between his car and the [plaintiff's motorcycle], and whether to change lanes." Id., 187.

In so concluding, the Appellate Court rejected the plaintiff's argument that "Kashmanian had a ministerial duty to comply with the motor vehicle statutes" while "operating a soft car with no lights or sirens" insofar as "the legislature has identified specific circumstances in [General Statutes] § 14-283[7] in which [the] police may

[7] General Statutes § 14-283 provides in relevant part: "(a) As used in this section, 'emergency vehicle' means . . . (3) any state or local police vehicle operated by a police officer or inspector of the Department of Motor Vehicles answering an emergency call or in the pursuit of fleeing law violators . . . .

"(b) (1) The operator of any emergency vehicle may (A) park or stand such vehicle, irrespective of the provisions of this chapter, (B) except as provided in subdivision (2) of this subsection, proceed past any red light, stop signal or stop sign, but only after slowing down or stopping to the extent necessary for the safe operation of such vehicle, (C) exceed the

disregard certain motor vehicle statutes," which means that, "absent those circumstances, police have a ministerial duty to obey all traffic laws." (Footnote added; internal quotation marks omitted.) Id. The Appellate Court reasoned that "[§] 14-283 addresses only two situations: responses to emergency calls and pursuit of fleeing law violators. It does not purport to set a standard of conduct for other police endeavors, including surveillance. Furthermore, the plaintiff's argument would make effective police surveillance impossible in many instances." (Footnote omitted.) Id., 187–88. Thus, the Appellate Court concluded that "the discretionary police activity of surveilling the plaintiff" afforded Kashmanian discretion that "extend[ed] to whether to violate the motor vehicle statutes."[8] Id., 189. Accordingly, the

posted speed limits or other speed limits imposed by or pursuant to section 14-218a 14-219, or section 7 of public act 21-28 as long as such operator does not endanger life or property by so doing, and (D) disregard statutes, ordinances or regulations governing direction of movement or turning in specific directions.

"(2) The operator of any emergency vehicle shall immediately bring such vehicle to a stop not less than ten feet from the front when approaching and not less than ten feet from the rear when overtaking or following any registered school bus on any highway or private road or in any parking area or on any school property when such school bus is displaying flashing red signal lights and such operator may then proceed as long as he or she does not endanger life or property by so doing.

"(c) The exemptions granted in this section shall apply only when an emergency vehicle is making use of an audible warning signal device, including but not limited to a siren, whistle or bell which meets the requirements of subsection (f) of section 14-80, and visible flashing or revolving lights which meet the requirements of sections 14-96p and 14-96q, and to any state or local police vehicle properly and lawfully making use of an audible warning signal device only.

"(d) The provisions of this section shall not relieve the operator of an emergency vehicle from the duty to drive with due regard for the safety of all persons and property. . . ."

Although § 14-283 has been amended by the legislature since the events underlying the present case; see, e.g., Public Acts 2014, No. 14-221, § 1; these amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[8] The Appellate Court, however, "decline[d] to hold that, *under all circumstances*, a municipal police officer operating a motor vehicle is engaged in

Appellate Court rendered judgment affirming the trial court's "judgment setting aside the jury's verdict on the negligence count" and reversing "the judgment directing a verdict in favor of Kashmanian on the common-law recklessness count," and remanded the case to the trial court "for a new trial as to [the recklessness] count." Id., 190. This certified appeal followed.[9] See footnote 2 of this opinion.

On appeal, the plaintiff, supported by the amici curiae, claims that the Appellate Court incorrectly concluded that the defendants were entitled to discretionary act immunity. Relying heavily on our recent decisions in *Cole* v. *New Haven*, 337 Conn. 326, 253 A.3d 476 (2020), and *Borelli* v. *Renaldi*, 336 Conn. 1, 243 A.3d 1064 (2020), the plaintiff argues that Kashmanian's "manner of driving" the soft car violated his ministerial duties as prescribed by the motor vehicle statutes, in particular General Statutes (Rev. to 2013) § 14-230,[10]

discretionary conduct, thereby immunizing the officer and municipality from damages arising from all violations of motor vehicle statutes. Although it may be true that some motor vehicle statutes implicitly require drivers to exercise some degree of judgment when operating a motor vehicle, some statutes do not. Furthermore, although some circumstances may permit an officer, in the exercise of discretion, to violate a motor vehicle statute, that is not always the case. Affording governmental immunity in *every* instance [in which] an officer violates a motor vehicle statute is far too expansive a rule. For example, a police officer who fails to stop at a stop sign because he is distracted by a personal phone call and, as a result, causes an accident can hardly be said to be engaging in discretionary conduct. In such a circumstance, the officer likely has a ministerial duty to obey the law and [to] stop at the stop sign. Ultimately, the determination of whether a police officer who violates a motor vehicle statute is engaged in ministerial or discretionary conduct must be made in view of the language of the statute at issue and the circumstances presented." (Emphasis in original.) *Daley* v. *Kashmanian*, supra, 193 Conn. App. 188–89.

[9] We note that Kashmanian filed a cross petition for certification to appeal from the judgment of the Appellate Court reversing the judgment of the trial court, which had directed a verdict in favor of Kashmanian on the common-law recklessness count. We denied Kashmanian's cross petition for certification. See *Daley* v. *Kashmanian*, 335 Conn. 940, 237 A.3d 1 (2020).

[10] General Statutes (Rev. to 2013) § 14-230 provides in relevant part: "(a) Upon all highways, each vehicle . . . shall be driven upon the right, except

which requires drivers to drive on the right side of the road, and without benefit of the exceptions provided by the emergency vehicle statute, § 14-283, which is limited to emergency responses and pursuits. Citing sister state cases and the "great weight of decisions in the Superior Court [concluding] that a police officer driving a motor vehicle is [engaged in a] ministerial activity," the plaintiff contends, inter alia, that adopting a "broader exception for police activities," such as that embraced by the Appellate Court in this case, "would render this carefully crafted [emergency vehicle] statute a nullity and usurp the General Assembly's authority to balance the important public values of effective policing and traffic safety."

In response, the defendants cite *Cole* v. *New Haven*, supra, 337 Conn. 326, *Ventura* v. *East Haven*, 330 Conn. 613, 199 A.3d 1 (2019), and *Edgerton* v. *Clinton*, 311 Conn. 217, 86 A.3d 437 (2014), among other cases, and contend that the Appellate Court correctly concluded that discretionary act immunity extends to surveillance, which they claim is a "typical on-duty law enforcement activ-it[y]" not amenable to judicial second-guessing. Kashmanian in particular relies on several federal court

(1) when overtaking and passing another vehicle proceeding in the same direction, (2) when overtaking and passing pedestrians, parked vehicles, animals or obstructions on the right side of the highway, (3) when the right side of a highway is closed to traffic while under construction or repair, (4) on a highway divided into three or more marked lanes for traffic, or (5) on a highway designated and signposted for one-way traffic.

"(b) Except as provided in subsection (c) of this section, any vehicle proceeding at less than the normal speed of traffic shall be driven in the right-hand lane available for traffic, or as close as practicable to the right-hand curb or edge of the highway, except when overtaking and passing another vehicle proceeding in the same direction or when preparing for a left turn at an intersection or into a private road or driveway.

* * *

"(d) Violation of any provision of this section shall be an infraction."

Hereinafter, unless otherwise indicated, all references to § 14-230 in this opinion are to the 2013 revision of the statute.

decisions for the proposition that surveillance is a discretionary activity, with the exigencies of law enforcement reasonably taking precedence at times over compliance with traffic laws. See *State Farm Mutual Automobile Ins. Co.* v. *United States*, Docket No. 16-CV-897 (JNE/BRT), 2017 U.S. Dist. LEXIS 62132 (D. Minn. April 6, 2017); *Priah* v. *United States*, 590 F. Supp. 2d 920 (N.D. Ohio 2008); *Flax* v. *United States*, 847 F. Supp. 1183 (D.N.J. 1994). The defendants argue that the motor vehicle statutes on which the plaintiff relies did not create a ministerial duty because they did not require Kashmanian to conduct surveillance in any particular manner and that the emergency vehicle statute, § 14-283, is inapplicable because it is limited to pursuits and emergency responses, rather than "typical patrol or surveillance activities," such as that presented in this case.[11] The defendants further contend that the motor vehicle statutes themselves impart a component of discretion insofar as they require "reasonable" conduct in controlling the motor vehicle, including its speed, and keeping a lookout, with even § 14-230 and General Statutes (Rev. to 2013) § 14-240,[12] the latter of which governs

[11] At oral argument before this court, whether Kashmanian was engaged in a "pursuit" of the plaintiff using the soft car was a significant topic of discussion. Consistent with arguments raised in his brief positing that Kashmanian operated the soft car in a manner that was "equivalent to pursuit," the plaintiff argued that Kashmanian would have violated numerous ministerial duties under the pursuit statute, General Statutes § 14-283a, and § 14-283 when he "drove at nearly double the posted speed limit, drove on the left side of the road without justification, and accelerated to close the gap between his automobile and the plaintiff's motorcycle, until he was following too closely for safety, with nearly fatal consequences." For their part, the defendants argued that Kashmanian's actions did not constitute a "pursuit" as a matter of law. Given our resolution of the plaintiff's ministerial act arguments as based on the statutory rules of the road, we need not consider the parties' pursuit related arguments.

[12] General Statutes (Rev. to 2013) § 14-240 provides in relevant part: "(a) No driver of a motor vehicle shall follow another vehicle more closely than is reasonable and prudent, having regard for the speed of such vehicles, the traffic upon and the condition of the highway and weather conditions.

"(b) No person shall drive a vehicle in such proximity to another vehicle as to obstruct or impede traffic.

following distances, providing for exceptions such as avoiding obstacles. We agree with the plaintiff, however, and conclude that the defendants were not entitled to governmental immunity because the motor vehicle statutes providing the rules of the road imposed numerous ministerial duties that Kashmanian violated in his operation of the soft car.

We begin with the standard of review. As the Appellate Court aptly stated, "[a]lthough generally a court's decision to set aside a jury verdict is subject to an abuse of discretion review . . . we afford plenary review to the present claim because, as the parties properly recognize, the ultimate determination as to whether the defendants are entitled to governmental immunity is a question of law." (Citation omitted.) *Daley* v. *Kashmanian*, supra, 193 Conn. App. 182; see, e.g., *Viking Construction, Inc.* v. *TMP Construction Group, LLC*, 338 Conn. 361, 368, 258 A.3d 80 (2021); *Ventura* v. *East Haven*, supra, 330 Conn. 634–37. Further, to the extent this appeal requires us to consider the meaning of § 52-557n itself, including whether the legislature contemplated that municipalities would be immune from liability for vehicular negligence pursuant to that statute, that inquiry presents a question of statutory interpretation governed by General Statutes § 1-2z. See, e.g., *Grady* v. *Somers*, 294 Conn. 324, 332–33, 984 A.2d 684 (2009); *Considine* v. *Waterbury*, 279 Conn. 830, 836–37, 905 A.2d 70 (2006).

"The following principles of governmental immunity are pertinent to our resolution of the plaintiff's claims.

* * *

"(d) Violation of any of the provisions of this section shall be an infraction, provided any person operating a commercial vehicle combination in violation of any such provision shall have committed a violation and shall be fined not less than one hundred dollars nor more than one hundred fifty dollars."

Hereinafter, unless otherwise indicated, all references to § 14-240 in this opinion are to the 2013 revision of the statute.

The [common-law] doctrines that determine the tort liability of municipal employees are well established. . . . Generally, a municipal employee is liable for the misperformance of ministerial acts, but has a qualified immunity in the performance of governmental acts. . . . Governmental acts are performed wholly for the direct benefit of the public and are supervisory or discretionary in nature. . . . The hallmark of a discretionary act is that it requires the exercise of judgment. . . . In contrast, [a ministerial act] refers to a duty [that] is to be performed in a prescribed manner without the exercise of judgment or discretion. . . .

"Municipal officials are immunized from liability for negligence arising out of their discretionary acts in part because of the danger that a more expansive exposure to liability would cramp the exercise of official discretion beyond the limits desirable in our society. . . . Discretionary act immunity reflects a value judgment that—despite injury to a member of the public—the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury. . . . In contrast, municipal officers are not immune from liability for negligence arising out of their ministerial acts, defined as acts to be performed in a prescribed manner without the exercise of judgment or discretion. . . . This is because society has no analogous interest in permitting municipal officers to exercise judgment in the performance of ministerial acts. . . .

"The tort liability of a municipality has been codified in § 52-557n. Section 52-557n (a) (1) provides that [e]xcept as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer

or agent thereof acting within the scope of his employment or official duties . . . . Section 52-557n (a) (2) (B) extends, however, the same discretionary act immunity that applies to municipal officials to the municipalities themselves by providing that they will not be liable for damages caused by negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law. . . .

"For purposes of determining whether a duty is discretionary or ministerial, this court has recognized that [t]here is a difference between laws that impose general duties on officials and those that mandate a particular response to specific conditions. . . . A ministerial act is one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment [or discretion] upon the propriety of the act being done. . . . In contrast, when an official has a general duty to perform a certain act, but there is no city charter provision, ordinance, regulation, rule, policy, or any other directive [requiring the government official to act in a] prescribed manner, the duty is deemed discretionary. . . .

"In accordance with these principles, our courts consistently have held that to demonstrate the existence of a ministerial duty on the part of a municipality and its agents, a plaintiff ordinarily must point to some statute, city charter provision, ordinance, regulation, rule, policy, or other directive that, by its clear language, compels a municipal employee to act in a prescribed manner, without the exercise of judgment or discretion. . . . Because the construction of any such provision, including a municipal rule or regulation, presents a question of law for the court . . . whether the provision creates a ministerial duty gives rise to a legal issue subject to plenary review on appeal. . . .

"Because this appeal concerns the actions of police officers and the [city] police department, we also observe that [i]t is firmly established that the operation of a police department is a governmental function, and that acts or omissions in connection therewith ordinarily do not give rise to liability on the part of the municipality. . . . Indeed, this court has long recognized that it is not in the public's interest to [allow] a jury of lay[persons] with the benefit of 20/20 hindsight to second-guess the exercise of a [police officer's] discretionary professional duty. Such discretion is no discretion at all. . . . Thus, as a general rule, [p]olice officers are protected by discretionary act immunity when they perform the typical functions of a police officer." (Internal quotation marks omitted.) *Cole* v. *New Haven*, supra, 337 Conn. 336–39; see, e.g., *Doe* v. *Madison*, 340 Conn. 1, 18–20, 31–32, 262 A.3d 752 (2021); *Borelli* v. *Renaldi*, supra, 336 Conn. 10–13; see also *Coley* v. *Hartford*, 312 Conn. 150, 164–65, 95 A.3d 480 (2014) (noting, with respect to officers' "alleged failure to adhere to specific police response procedures . . . the considerable discretion inherent in law enforcement's response to an infinite array of situations implicating public safety on a daily basis"); *Shore* v. *Stonington*, 187 Conn. 147, 153–57, 444 A.2d 1379 (1982) (whether to detain suspected drunk driver was discretionary act for police officer).

This appeal raises the question, which we left unanswered in our recent decisions in *Cole* v. *New Haven*, supra, 337 Conn. 347 n.18, and *Borelli* v. *Renaldi*, supra, 336 Conn. 4–5, of the extent to which the manner in which a police officer operates a motor vehicle while on duty is entitled to governmental immunity and, specifically, whether the motor vehicle statutes impose ministerial obligations on municipal employees such as police officers who drive during the course of their employment—particularly during circumstances that

are beyond the scope of the emergency vehicle statute, § 14-283.[13] In answering this question, we are mindful that § 52-557n, which the legislature enacted in 1986 as part of Tort Reform I; see Public Acts 1986, No. 86-338, § 13; is in large part a codification and harmonization of our case law governing the liability and immunity of municipalities. This renders critical to our analysis the legislature's understanding of the scope of municipal liability and immunity, both directly under the terms of § 52-557n and indirectly via the indemnification statutes, particularly § 7-465.[14] See *Grady* v. *Somers*, supra, 294 Conn. 348 (considering "the close relationship between § 52-557n (a) and the common-law doctrines governing municipal employees' immunity and liability for indemnification purposes under § 7-465 (a)" in concluding that "the identifiable person, imminent harm common-law exception to municipal employees' qualified immunity also applies in an action brought directly against municipalities pursuant to § 52-557n (a) (1) (A), regardless of whether an employee or officer of the municipality also is a named defendant"); *Violano* v. *Fernandez*, 280 Conn. 310, 326–28, 907 A.2d 1188 (2006) (relying on legislature's codification of discretionary act immunity in § 52-557n (a) (2) (B) in rejecting request to change definition of ministerial task to "follow the

[13] See footnote 22 of this opinion and accompanying text.

[14] "At common law, municipal officers were liable for their own torts, but the municipality, their municipal 'master,' was not vicariously liable for those torts. . . . Section 7-465 (a) effectively circumvented the general [common-law] immunity of municipalities from vicarious liability for their employees' acts by permitting injured plaintiffs to seek indemnification from a municipal employer for such acts under certain circumstances and after conformance with certain statutory requirements, but it did not bar a plaintiff from seeking redress from those employees." (Citations omitted.) *Sanzone* v. *Board of Police Commissioners*, 219 Conn. 179, 193, 592 A.2d 912 (1991); see, e.g., *Williams* v. *New Haven*, 243 Conn. 763, 767–68, 707 A.2d 1251 (1998) (discussing difference between action against municipality pursuant to § 52-557n, which "limit[s] governmental immunity in certain circumstances," and action against individual municipal employees or officials accompanied by statutory indemnification claim against municipality).

distinction used by other states under which governmental immunity would apply to acts that are related to policy decisions and, conversely, immunity would not apply to acts that implement policy").

Because the legislature intended § 52-557n to harmonize our state's law of municipal liability, we focus first on the statute. The text of § 52-557n (a) provides in relevant part that a municipality "shall be liable for damages to person or property caused by . . . [t]he negligent acts or omissions of such [municipality] or any employee, officer or agent thereof acting within the scope of his employment or official duties"; General Statutes § 52-557n (a) (1) (A); which presumably would include vehicular negligence, but then limits that liability by providing that the municipality "shall not be liable for damages to person or property caused by . . . *negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law*." (Emphasisadded.) General Statutes § 52-557n (a) (2) (B). The tension between these provisions is heightened by the statute's silence as to whether driving is a discretionary act for purposes of § 52-557n (a) (2) (B). Given the ambiguity that this particular silence creates, under § 1-2z, we turn to extratextual sources, in particular the legislative history of the statute.

The legislative history of the statute, although less than definitive in other contexts,[15] establishes the legislature's understanding of the effect of the Tort Reform

[15] This court has observed that the legislative history of § 52-557n is not always helpful in interpreting the statute given confusion among legislators in both houses about "the municipal liability section of the [Tort Reform I bill] as either altering [an individual's] existing right to bring an action against a municipality, or, at the very least, as having an unclear impact on [an individual's] right to sue a municipality." *Considine* v. *Waterbury*, supra, 279 Conn. 839; see *Sanzone* v. *Board of Police Commissioners*, 219 Conn. 179, 188, 592 A.2d 912 (1991) (describing "the legislative history of § 52-557n [as] worse than murky").

I bill enacted as § 52-557n on municipalities' liability for vehicular negligence. Most instructive are the remarks of Representative Robert G. Jaekle, the bill's sponsor, in response to "an unsuccessful amendment that would have deleted the portion of the bill enacted as § 52-557n . . . on the ground that it was too restrictive with respect to its limitations on claimants' rights," in which he answered "numerous questions about municipalities' potential liability under a variety of fact patterns, some hypothetical, and some actual cases." *Grady* v. *Somers*, supra, 294 Conn. 344. Several of Representative Jaekle's answers expressly contemplated vehicular negligence in the performance of governmental tasks as a basis for municipal liability. In one instance, Representative Jaekle responded to a question posed by Representative Gabriel J. Biafore, opining that the bill would have imposed no limitation on the liability of the city of Bridgeport when one of its snowplows struck a student who was present in the parking lot and schoolyard of a city school that was closed during a snowstorm. See 29 H.R. Proc., Pt. 16, 1986 Sess., pp. 5903–5904; see also id., pp. 5899–5901, remarks of Representative Jaekle (opining that municipality would not be immune for injuries caused by school bus crash involving "some negligence"). In another exchange with Representative Eugene A. Migliaro, Jr., concerning a hypothetical case of a fatal accident caused by a town employee who was intoxicated when he drove a town truck while on-duty, Representative Jaekle agreed with Representative Migliaro that the bill would permit both the employee and the town to be held liable, regardless of whether the employee's supervisor was aware of his intoxication. See id., pp. 5932–34. Representative Migliaro then stated that Representative Jaekle's explanation had "clarified" his understanding of the bill that, "as far as the employees are concerned, that the town, as long as they work for the town, the town can still

be held responsible for the actions of [its] employees." Id., pp. 5936–37. This legislative history suggests, therefore, that the legislature contemplated negligence in the operation of motor vehicles not to be subject to governmental immunity, both before and after the passage of § 52-557n.

Indeed, the legislature's understanding of the liability of individual police officers—and of the municipalities that employ them pursuant to § 7-465[16]—for the negligent operation of motor vehicles during law enforcement operations is implicitly confirmed by this court's nearly contemporaneous decision in *Tetro* v. *Stratford*, 189 Conn. 601, 611, 458 A.2d 5 (1983), which rejected a claim of "blanket immunity" under § 14-283 for damages arising from a crash caused by a high-speed police pursuit. This is particularly so given that we presume that the legislature is aware of the common law on a particular subject and, further, that it knows how to abrogate common-law rules, as it deems appropriate. See, e.g., *Pacific Ins. Co., Ltd.* v. *Champion Steel, LLC*, 323 Conn. 254, 265, 146 A.3d 975 (2016). In *Tetro*, the defendant

[16] The indemnification statutes, such as § 7-465, are themselves also indicative of the legislature's understanding of the liability of individual employees for vehicular negligence and its effect on municipalities at the time of the enactment of § 52-557n. These statutes were "enacted to protect municipal employees, including police officers, from the financial consequences of common-law tort liability for damages caused by their on-duty, negligent operation of motor vehicles; concerns about liability arising from negligent driving in large measure account for the enactment of our municipal indemnification statutes." *Borelli* v. *Renaldi*, supra, 336 Conn. 119 (*Ecker*, *J.*, dissenting); see id., 87–95 (*Ecker*, *J.*, dissenting) (explaining history of indemnification statutes, which were intended to protect municipal employees from personal risk while averting "the manifest unfairness that inevitably resulted when the cost of a municipal employee's negligence was imposed on the victim of that negligence rather than the municipality"). "Our case law is clear . . . that when the legislature chooses to act, it is presumed to know how to draft legislation consistent with its intent and to know of all other existing statutes and the effect that its action or nonaction will have [on] any one of them." (Internal quotation marks omitted.) *King* v. *Volvo Excavators AB*, 333 Conn. 283, 296, 215 A.3d 149 (2019).

town of Stratford was held liable pursuant to § 7-465 to indemnify two of its police officers for their negligence in conducting a high-speed pursuit on highly trafficked local roadways, which resulted in the pursued vehicle's crashing into the plaintiff's car. See *Tetro* v. *Stratford*, supra, 602–603 and n.1. Citing the due regard language of § 14-283 (d); see footnote 7 of this opinion; this court rejected the defendants' argument that there was "immunity conferred, as a matter of public policy, [on] emergency vehicles in pursuit of law violators." Id., 604–605; see id., 609. The court emphasized "that § 14-283 provides no special zone of limited liability once the defendants' negligence has been established." Id., 610; see id., 611 (stating in dictum that, "[a]s a general proposition, our common law and our statutes do not confer [on] police officers, whose conduct is negligent, blanket immunity from liability to an innocent bystander by virtue of their engagement in the pursuit of persons whom they believe to have engaged in criminal behavior"). As Justice Ecker observed in his dissenting opinion in *Borelli*, it is telling that "we have a unanimous precedent, decided shortly before the enactment of § 52-557n, holding that a municipality is liable for its employee's negligent operation of an emergency vehicle engaged in a police pursuit. . . . The legislature thereafter codified the then-existing common law governing municipal liability without so much as a whisper of any intention to impact, modify, or even address the law of vehicular negligence in general or the holding of *Tetro* in particular." (Citation omitted.) *Borelli* v. *Renaldi*, supra, 336 Conn. 138 (*Ecker*, *J.*, dissenting); see also id., 45–46 (*Robinson*, *C. J.*, concurring) (describing *Tetro* as having "limited" precedential value with respect to specific issue in *Borelli*, namely, whether decision to pursue vehicle for minor equipment violation was discretionary act, but agreeing with dissent that *Tetro* held that § 14-283 does not pro-

vide any immunity for operation of police vehicle during pursuit or emergency situation).

Although the legislative history of § 52-557n demonstrates the legislature's understanding that the negligent operation of motor vehicles is not shielded by governmental immunity, the legislative history provides no clarity as to the specific doctrinal basis for that understanding. In the absence of any indication in the text or legislative history of § 52-557n that the legislature intended to alter or abolish the existing liability regime under the common law and related indemnification statutes, which imposed liability on municipalities for damages caused by the negligent operation of motor vehicles driven by municipal employees, we conclude that the legislature understood the operation of a motor vehicle to be a ministerial act.[17] This is consistent with

[17] Even if we were to assume, for the sake of argument, that driving is in the nature of a discretionary act, or is an activity that lies outside the ministerial/discretionary dichotomy altogether, we would conclude that the well established law imposing municipal liability for vehicular negligence at the time § 52-557n was enacted—a body of law that was known to the legislature, as the legislative history previously recounted in this opinion reflects—illustrates that "the legislature did not contemplate § 52-557n as a bar against *all* civil actions arising from employees' discretionary acts, despite the discretionary act immunity afforded by § 52-557n (a) (2) (B)." (Emphasis added.) *Grady* v. *Somers*, supra, 294 Conn. 345. *Grady* and other decisions of this court recognize that the savings clauses in § 52-557n (a), which provide that the terms of the statute govern "[e]xcept as otherwise provided by law," preserve and incorporate common-law exceptions to municipal immunity. See *Grady* v. *Somers*, supra, 345–49. We note that, in *Borelli*, two separate opinions by members of this court embraced the proposition that driving a motor vehicle, including while engaged in emergency operation under § 14-283 (d), is not subject to discretionary act immunity under § 52-557n (a) (2) (B), given that statute's savings clauses. See *Borelli* v. *Renaldi*, supra, 336 Conn. 39–40 and n.4 (*Robinson*, *C. J.*, concurring); id., 144 (*Ecker*, *J.*, dissenting). We emphasize, however, that the extent to which governmental immunity extends to the operation of a municipal vehicle in emergency mode under § 14-283 remains an open question, particularly because this appeal does not concern operation pursuant to the privileges conferred by the emergency vehicle statute. See footnote 22 of this opinion and accompanying text.

the fact that the operation of a motor vehicle is a highly regulated activity governed by a panoply of state motor vehicle statutes establishing the rules of the road for all drivers as expressly provided. A review of this statutory scheme is instructive because it demonstrates that the terms of the relevant motor vehicle laws establish a ministerial duty insofar as they contain "mandatory statutory language" that "*itself* limits discretion in the performance of the mandatory act." (Emphasis in original.) *Northrup* v. *Witkowski*, 332 Conn. 158, 187, 210 A.3d 29 (2019). Accordingly we now turn specifically to the rules of the road that are at issue in this case, as pleaded in the operative complaint, which require vehicles to be driven to the right, govern following distances, and prohibit driving at an unreasonable rate of speed. See General Statutes (Rev. to 2013) §§ 14-218a, 14-230 and 14-240.

We begin with § 14-230, which uses definitive language in requiring vehicles to be driven to the right. It provides in relevant part: "Upon all highways, *each vehicle . . . shall be driven upon the right*, except (1) when overtaking and passing another vehicle proceeding in the same direction, (2) when overtaking and passing pedestrians, parked vehicles, animals or obstructions on the right side of the highway, (3) when the right side of a highway is closed to traffic while under construction or repair, (4) on a highway divided into three or more marked lanes for traffic, or (5) on a highway designated and signposted for one-way traffic."[18] (Emphasis added.) General Statutes (Rev. to 2013) § 14-230 (a). Thus, § 14-230 requires drivers to

[18] For other motor vehicle statutes that use definitive wording, see General Statutes § 14-219 (establishing infraction of speeding on highways by reference to speed limits), and General Statutes § 14-239 (a) (noting that "streets and highways" may be designated as one-way streets and that, "[u]pon any highway so designated a vehicle shall be driven only in the direction indicated").

drive their vehicles to the right, with no room for deviation beyond the five delineated exceptions.

In contrast to § 14-230, the two other motor vehicle statutes pleaded in the operative complaint employ *some* language of "reasonableness" that we have long held is the hallmark of a discretionary act; see, e.g., *Coley* v. *Hartford*, supra, 312 Conn. 165–66; to define the duty of the motor vehicle operator to proceed safely. Those statutes then narrow the judgment permitted in a way that provides objective guideposts for the driver's decision making—and the subsequent evaluation thereof.[19]

[19] Still other motor vehicle statutes use a mix of discretionary and definitive language across the operations governed by their subsections, such as General Statutes § 14-234, which governs passing in no-passing zones, and General Statutes §§ 14-241 and 14-242, which govern turning. Compare General Statutes § 14-234 (a) ("[w]hen [no passing] signs or markings are in place and clearly visible to an ordinarily observant person, each driver of a vehicle shall obey the directions thereof"), General Statutes § 14-241 (b) ("[a]t any intersection where traffic is permitted to move in both directions on each highway entering the intersection, an approach for a left turn shall be made in that portion of the right half of the highway nearest the center line thereof and by passing to the right of such center line where it enters the intersection, and after entering the intersection the left turn shall be made so as to leave the intersection to the right of the center line of the highway being entered"), General Statutes § 14-241 (e) ("when rotaries or roundabouts, signs or other devices are so placed, no driver shall turn a vehicle otherwise than as directed thereby"), General Statutes § 14-242 (b) ("[a] signal of intention to turn right or left shall be given continuously during not less than the last one hundred feet traveled by the vehicle before turning"), General Statutes § 14-242 (d) ("[n]o person shall turn a vehicle so as to proceed in the opposite direction upon any curve, or upon the approach to, or near the crest of, a grade, where such vehicle cannot be seen by the driver of any other vehicle approaching from either direction within five hundred feet, or at any location where signs prohibiting U-turns are posted by any traffic authority"), and General Statutes § 14-242 (e) ("[t]he driver of a vehicle intending to turn to the left within an intersection or into an alley, private road or driveway shall yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or within the area formed by the extension of the lateral lines of the private alley, road or driveway across the full width of the public highway with which it intersects, or so close to such intersection of public highways or to the area formed by the extension of the lateral lines of said private alley, road or driveway across the full width of the public highway as to constitute an immediate hazard"), with General Statutes § 14-234 (b) ("[t]he driver of a vehicle may overtake and pass, in a marked no-passing zone, pedestrians, parked or standing vehicles,

For example, § 14-218a, which governs speeds on local roadways such as Hartford's Sumner Street and Asylum Avenue, which are at issue in this case, provides in relevant part that "[n]o person shall operate a motor vehicle upon any public highway of the state, or road of any specially chartered municipal association . . . *at a rate of speed greater than is reasonable*, having regard to the width, traffic and use of highway, road or parking area, the intersection of streets and weather conditions," but then channels that discretion by providing that "[a]ny speed in excess of such limits, other than speeding as provided for in section 14-219, *shall be prima facie evidence that such speed is not reasonable*, but the fact that the speed of a vehicle is lower than such limits shall not relieve the operator from the

animals, bicycles, electric bicycles, mopeds, scooters, electric foot scooters, vehicles moving at a slow speed, as defined in section 14-220, or obstructions on the right side of the highway, as listed in subdivision (2) of subsection (a) of section 14-230, *provided such overtaking and passing may be conducted safely, with adequate sight distance and without interfering with oncoming traffic or endangering traffic*, as defined in section 14-297" (emphasis added)), General Statutes § 14-241 (a) ("[b]oth the approach for a right turn and a right turn shall be made *as close as practicable* to the right-hand curb or edge of the highway" (emphasis added)), General Statutes § 14-241 (c) ("[a]t any intersection where traffic is restricted to one direction on one or more of the highways, the driver of a vehicle intending to turn left shall approach the intersection in the extreme left-hand lane lawfully available to traffic moving in the direction of travel of such vehicle, and after entering the intersection the left turn shall be made so as to leave the intersection, *as nearly as practicable*, in the left-hand lane lawfully available to traffic moving in such direction upon the highway being entered" (emphasis added)), General Statutes § 14-242 (a) ("No person shall turn a vehicle at an intersection unless the vehicle is in a proper position on the highway as required by section 14-241, or turn a vehicle to enter a private road or driveway or otherwise turn a vehicle from a direct course or move right or left upon a highway *unless such movement can be made with reasonable safety*. No person shall so turn any vehicle without giving an appropriate signal in the manner provided in section 14-244." (Emphasis added.)), and General Statutes § 14-242 (f) ("[n]o person operating a vehicle who overtakes and passes a person riding a bicycle, an electric bicycle or an electric foot scooter and proceeding in the same direction shall make a right turn at any intersection or into any private road or driveway *unless the turn can be made with reasonable safety* and will not impede the travel of the person riding the bicycle, electric bicycle or electric foot scooter" (emphasis added)).

duty to decrease speed when a special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions." (Emphasis added.) General Statutes (Rev. to 2013) § 14-218a (a). Similarly, § 14-240 (a), which governs following distances, provides: "No driver of a motor vehicle shall follow another vehicle more closely *than is reasonable and prudent*, having regard for the speed of such vehicles, the traffic upon and the condition of the highway and weather conditions."[20] (Emphasis added.) General Statutes (Rev. to 2013) § 14-240 (a).

Other relevant aspects of the motor vehicle statutory scheme leave us hard-pressed to describe the obligations that the rules of the road impose as so open-ended in their execution as to constitute a discretionary act for purposes of governmental immunity. In particular,

[20] Our research reveals several other statutory rules of the road with similar language that appears superficially discretionary but channels or limits that discretion in a way that creates a ministerial duty. See General Statutes § 14-232 (a) ("(1) the driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left thereof *at a safe distance and shall not again drive to the right side of the highway until safely clear of the overtaken vehicle*; and (2) the driver of an overtaken vehicle shall give way to the right in favor of the overtaking vehicle and shall not increase the speed of his or her vehicle until completely passed by the overtaking vehicle" (emphasis added)); General Statutes § 14-232 (b) ("[n]o vehicle shall be driven to the left side of the center of the highway in overtaking and passing another vehicle proceeding in the same direction unless the left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be completely made *without interfering with the safe operation of any vehicle* approaching from the opposite direction or any vehicle overtaken" (emphasis added)); General Statutes § 14-233 ("The driver of a vehicle may overtake and pass upon the right of another vehicle *only when conditions permit such movement in safety* and under the following conditions: (1) When the vehicle overtaken is making or has signified the intention to make a left turn; (2) when lines of vehicles traveling in the same direction in adjoining traffic lanes have come to a stop or have reduced their speed; (3) upon a one-way street free from obstructions and of sufficient width for two or more lines of moving vehicles; (4) upon a limited access highway or parkway free from obstructions with three or more lanes provided for traffic in one direction. Such movement shall not be made by driving off the pavement or main-traveled portion of the highway except where lane designations, signs, signals or markings provide for such movement.").

§ 14-283, the emergency vehicle statute, is indicative of the lack of discretion that the rest of the statutory scheme provides to operators of motor vehicles. Section 14-283 provides the operators of emergency vehicles relief in certain discrete circumstances—such as the response to an emergency or the police pursuit of a fleeing law violator—from what ordinarily would be negligence per se, namely, the operation of a motor vehicle in violation of rules of the road such as speed limits and traffic control devices.[21] See *Tetro* v. *Stratford*, supra, 189 Conn. 609. Subsection (d) of § 14-283 emphasizes, however, that the "emergency vehicle legislation provides only limited shelter from liability for negligence. The effect of the statute is merely to displace the conclusive presumption of negligence that ordinarily arises from the violation of traffic rules. The statute does not relieve operators of emergency vehicles from their general duty to exercise due care for the safety of others." Id. Although the extent to which governmental immunity is applicable to the operation of an emergency vehicle under the privileges accorded

[21] "Section 14-283 permits the operators of emergency vehicles to disregard certain traffic rules in light of the circumstances. The term 'emergency vehicle,' as used in § 14-283 (a), includes 'any state or local police vehicle operated by a police officer . . . in the pursuit of fleeing law violators . . . .' Section 14-283 (b) (1) provides in relevant part that an operator of an emergency vehicle may '(B) . . . proceed past any red light or stop signal or stop sign, but only after slowing down or stopping to the extent necessary for the safe operation of such vehicle, (C) exceed the posted speed limits or other speed limits imposed by or pursuant to section 14-218a or 14-219 as long as such operator does not endanger life or property by so doing, and (D) disregard statutes, ordinances or regulations governing direction of movement or turning in specific directions.' The ability to disregard traffic rules is not, however, unlimited. By its terms, § 14-283 applies to state and local police vehicles only when 'operated by a police officer or inspector of the Department of Motor Vehicles answering an emergency call or in the pursuit of fleeing law violators . . . .' General Statutes § 14-283 (a). Additionally, subsection (d) of § 14-283 provides: 'The provisions of this section *shall not* relieve the operator of an emergency vehicle from the duty to drive *with due regard for the safety of all persons and property*.' " (Emphasis in original.) *Borelli* v. *Renaldi*, supra, 336 Conn. 13.

by § 14-283 remains an open question in the wake of our decision in *Borelli* v. *Renaldi*, supra, 336 Conn. 1,[22]

[22] In our recent decision in *Borelli*, we concluded that the "due regard" requirement of § 14-283 (d) did not create a "ministerial, rather than [a] discretionary" duty for police officers "to weigh the safety of all persons and property and the seriousness of the offense *prior to initiating a pursuit* . . . ." (Emphasis added.) *Borelli* v. *Renaldi*, supra, 336 Conn. 14; see id., 16 ("the Uniform Statewide Pursuit Policy adopted pursuant to [General Statutes] § 14-283a contemplates that officers will exercise their judgment and discretion in giving due regard to the safety of all persons and property when determining whether to engage a pursuit"). We observed that the "phrase 'due regard' . . . rather than mandating a particular response to specific conditions, imposes a general duty on officers to exercise their judgment and discretion in a reasonable manner." Id., 14. We then stated that, "[b]ecause the requirement 'to drive with due regard for the safety of all persons and property' imposes a duty to exercise discretion, § 14-283 (d) falls squarely within the general rule of § 52-557n (a) (2) that municipalities 'shall not be liable for damages to person or property caused by . . . negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law.' Nothing in the language of § 14-283, which exclusively governs response to emergencies, supports the position that the legislature intended to impose anything other than a discretionary duty, or that it intended to delineate an exception to § 52-557n." Id., 15 n.6; see id., 23–24 (rejecting plaintiff's argument that, "because the statutory language mandates that police officers drive with due regard for safety, there is no discretion to drive without such regard," thus rendering that duty ministerial because "[t]he core distinction between the two types of duty lies not in whether the duty is mandatory, but in whether the performance of that duty will inherently require the municipal actor to exercise judgment").

Because *Borelli* was *not* a driving case, we emphasize that it does not stand for the proposition that emergency driving pursuant to § 14-283 is itself a discretionary activity for purposes of governmental immunity. See id., 4 ("although the plaintiff's complaint reasonably may be read to have raised the issue of whether governmental immunity shields officers with respect to the *manner* of driving while pursuing a fleeing motorist, *her argument on appeal focuses exclusively on whether governmental immunity applies to an officer's decision to engage in such a pursuit*" (emphasis altered)). We leave for another day whether emergency operation changes driving from a ministerial to a discretionary task.

We note, however, that several Superior Court decisions have concluded that *emergency* operation under the privilege conferred by § 14-283, and particularly the "due regard" standard of § 14-283 (d), is a discretionary act for purposes of governmental immunity. See, e.g., *Kajic* v. *Marquez*, Docket No. HHD-CV-16-6065320-S, 2017 WL 439963, *2, *7–8 (Conn. Super. August 16, 2017) (response to report of assault with firearm); *Parker* v. *Stadalink*, Superior Court, judicial district of Waterbury, Docket No. UWY-CV-13-6020769-S (May 4, 2016) (62 Conn. L. Rptr. 281, 284–86) (operation of police cruiser during high-speed pursuit); *Paternoster* v. *Paszkowski*, Docket No.

FBT-CV-14-6042098-S, 2015 WL 5809623, *6 (Conn. Super. September 1, 2015) (operation of police cruiser during high-speed pursuit). For a rejoinder to this line of Superior Court cases, see Judge Povodator's comprehensive decision in *Torres* v. *Norwalk*, Superior Court, judicial district of Stamford-Norwalk, Docket No. FST-CV-16-6029691-S (May 2, 2018) (66 Conn. L. Rptr. 548, 556–59), and the concurring and dissenting opinions in *Borelli*. See *Borelli* v. *Renaldi*, supra, 336 Conn. 39 (*Robinson*, *C. J.*, concurring); id., 114–15 (*Ecker*, *J.*, dissenting).

These Superior Court decisions and a broad reading of *Borelli* gave rise to a recent legislative response, albeit one that was vetoed by Governor Ned Lamont with an explanation that is instructive as we consider the governmental immunity issue before this court. See *Maturo* v. *State Employees Retirement Commission*, 326 Conn. 160, 184–85, 162 A.3d 706 (2017) (relying on veto message accompanying gubernatorial veto of amendment to municipal employee pension statute in determining employee's eligibility to collect disability pension while employed as mayor of municipality). Specifically, the legislature passed Senate Bill No. 204, 2022 Sess., as No. 22-22 of the 2022 Public Acts, "An Act Concerning Damages to Person or Property Caused by the Negligent Operation of a Motor Vehicle Owned by a Political Subdivision of the State." Senate Bill No. 204 would have amended § 52-557n (a) (2) by adding the following language: "Notwithstanding the provisions of subparagraph (B) of this subdivision, governmental immunity shall not be a defense in a civil action for damages to person or property caused by the negligent operation of a motor vehicle owned by a political subdivision of the state." Public Acts 2022, No. 22-22, § 1. On May 26, 2022, Governor Lamont vetoed Senate Bill No. 204, explaining his concern about the breadth of the bill, notwithstanding the legislature's apparent intention to create "parity" in liability for the negligent operation of motor vehicles as between municipalities and the state, for which sovereign immunity is waived by General Statutes § 52-556. Letter from Governor Ned Lamont to Denise W. Merrill, Secretary of the State (May 26, 2022) p. 2, available at https://portal.ct.gov/-/media/Office-of-the-Governor/Bill-notifications/2022/Bill-Notification-2022-13.pdf (last visited August 22, 2022). Governor Lamont expressed concern that it was "not evident whether in doing so, the legislature fully considered that unlike the state, municipalities face greater exposure by the simple fact that they have more emergency vehicles on the roads every day." Id. Relying on legislative testimony submitted by the Connecticut Conference of Municipalities, however, Governor Lamont emphasized: "Currently, public employees operating municipal vehicles *do not have the discretion to disregard motor vehicle laws*. They have a mandatory duty to abide by these laws and a municipality may be liable for an employee's negligent driving." (Emphasis added.) Id., p. 1; see id., p. 2 (Governor Lamont observed that Senate Bill No. 204 "eliminates completely the doctrine of governmental immunity for a municipality in the operation of a [town owned] vehicle. *This change could entail, for example, that a police officer's decision to pursue a fleeing law violator is not a discretionary act and therefore governmental immunity does not apply.* In that regard, I am concerned that the bill may inadvertently have gone too far." (Emphasis added.)); see also Written Testimony, Connecticut Conference of Municipalities (March 4, 2022) available at https://www.cga.ct.gov/2022/JUDdata/Tmy/2022SB-00204-R000304-

the motor vehicle statutory scheme establishes that—in the absence of the limited shelter of § 14-283—it imposes a ministerial duty on a government employee, including an on-duty police officer, who is operating a motor vehicle.[23]

The fact that the violation of these rules—beyond the emergency operation shelter of § 14-283—is punishable quasi-criminally as an infraction further suggests that the statutory rules of the road create a ministerial obligation. See *State* v. *Nesteriak*, 60 Conn. App. 647, 652–54, 760 A.2d 984 (2000) (concluding that § 14-283 (b) provides emergency vehicle operator with immunity

The%20Connecticut%20Conference%20of%20Municipalities%20-CCM-TMY.PDF (last visited August 22, 2022); Written Testimony, Connecticut Trial Lawyers Association (March 4, 2022) available at https://www.cga.ct.gov/2022/JUDdata/Tmy/2022SB-00204-R000304-The%20Connecticut%20Trial%20Lawyers%20Association-TMY.PDF (last visited August 22, 2022); Written Testimony, Attorney Thomas R. Gerarde on behalf of the Connecticut Conference of Municipalities (March 3, 2022) available at https://www.cga.ct.gov/2022/JUDdata/Tmy/2022SB-00204-R000304-Gerarde,%20Tom,%20Connecticut%20Conference%20of%20Municipalities-TMY.PDF (last visited August 22, 2022). Although the legislative proceedings concerning Senate Bill No. 204 are instructive with respect to the issue before us, which does *not* concern emergency vehicle operation under the aegis of § 14-283; see footnote 27 of this opinion and accompanying text; we nevertheless emphasize that the present case affords us no occasion to consider the extent to which governmental immunity extends to that unique context, and we decline to do so.

[23] Our research reveals that a recent decision from the Minnesota Court of Appeals has drawn a distinction between various provisions of the statutory rules of the road, observing that some create ministerial duties whereas other "less definite" provisions require the exercise of judgment, creating a discretionary duty. *Vanschaick* v. *Letourneau*, Docket No. A20-0705, 2021 WL 417024, *3 (Minn. App. February 8, 2021), review denied, Docket No. A20-0705, Minnesota Supreme Court (April 20, 2021); see id., *1–4 (assuming that state trooper was required to obey traffic laws in stopping speeding motorist but concluding that "less definite" statutes, such as those requiring turns to be made " 'safely,' " require exercise of judgment, creating discretionary duty). The Appellate Court's opinion in the present case contains a similar observation. See *Daley* v. *Kashmanian*, supra, 193 Conn. App. 188–89; see also footnote 8 of this opinion. We disagree with this approach as inconsistent with our legislature's intent to preserve liability for vehicular negligence under § 52-557n, as well as the effect of § 14-283 on the rules of the road provided by the motor vehicle statutory scheme.

from criminal prosecution for violation of traffic laws, including improper passing in violation of General Statutes § 14-232 and improper driving on left side of highway on curve in violation of General Statutes § 14-235, which is not overridden by "due care" requirement of subsection (d)); *State* v. *Plaskonka*, 22 Conn. App. 207, 209, 577 A.2d 729 ("the state had the burden of proving every element of the infractions beyond a reasonable doubt"), cert. denied, 216 Conn. 812, 580 A.2d 65 (1990); see also General Statutes § 51-164n (h) ("[i]n any trial for the alleged commission of an infraction, the practice, procedure, rules of evidence and burden of proof applicable in criminal proceedings shall apply"); *State* v. *Scribner*, 72 Conn. App. 736, 741–42, 805 A.2d 812 (2002) (emergency vehicle operator's privilege under § 14-283 does not provide immunity from negligent homicide with motor vehicle under General Statutes § 14-222a because that statute's terms indicate that "the legislature did not intend to put the limitation of liability offered under § 14-283 above the safety of the public"). These statutes, therefore, do not call for the kind of open-ended good professional judgment that is the hallmark of discretionary act immunity. Cf. *Coley* v. *Hartford*, supra, 312 Conn. 165–66 (police department response procedure requiring officer to remain at scene of domestic disturbance "for a reasonable time" period, as determined by "the reasonable judgment of the officer," created discretionary duty for purposes of § 52-557n (a) (2) (B) (internal quotation marks omitted)).

It is also significant that, although there is no appellate authority on point, our trial courts uniformly have held that the operation of an emergency vehicle—at least beyond the scope of § 14-283, the emergency vehicle statute—is a ministerial function for purposes of governmental immunity.[24] Prior to the enactment of

[24] For a discussion of the open debate concerning the application of governmental immunity to the operation of emergency vehicles under the privileges of § 14-283, see footnote 22 of this opinion.

§ 52-557n in 1986, "[n]o serious questions appeared to have been raised as to whether a police officer might be liable for negligence in the operation of a motor vehicle . . . [but, rather] the municipal employer would be responsible for indemnification of an officer found to have been civilly liable, under the provisions of . . . § 7-465 . . . ." *Torres* v. *Norwalk*, Superior Court, judicial district of Stamford-Norwalk, Docket No. FST-CV-16-6029691-S (May 2, 2018) (66 Conn. L. Rptr. 548, 550);[25] see *Borelli* v. *Renaldi*, supra, 336 Conn. 119 (*Ecker*, *J.*, dissenting) ("[h]istorically speaking, ordinary negligence principles so plainly apply to municipal employees who drive motor vehicles on public roadways that the rubric of municipal immunity typically is not invoked at all in this context"). These courts describe driving as an act that "occurs subconsciously much of the time" but that also "is constantly guided by a vast array of statutes and regulations that prescribe the conduct that is proper and improper while on the road. Following the rules of [the] road and exercising due care to the public is not optional for municipal employees engaged in routine driving." *Williams* v. *New London*, Superior Court, judicial district of New London, Docket No. CV-12-6012328-S (April 7, 2014) (58 Conn. L. Rptr. 86, 89–90); see id., 88 ("[R]outine driving cannot be considered a purely discretionary function. That is because, for example, municipal employees cannot claim that they have discretion to run stop signs, ignore pedestrians in the crosswalk, or exceed the speed limit while driving through city streets. These rules of the road are ministerial duties to which everyone must adhere, even police officers and firefighters when not

[25] We note that Judge Povodator's relatively recent decision in *Torres* v. *Norwalk*, supra, 66 Conn. L. Rptr. 548, is the most comprehensive Superior Court decision on this point, with its recent vintage reflecting the evolution of this court's discretionary act immunity jurisprudence after the enactment of § 52-557n.

responding to emergencies."); see also, e.g., *Torres* v. *Norwalk*, supra, 556 ("[v]iewed in isolation, the court must reject any suggestion that [nonemergency] operation of a motor vehicle, by a police officer, is a governmental function"); *Gagliardi* v. *Consiglio*, Superior Court, judicial district of New Haven, Docket No. CV-95-0380916 (September 16, 1997) (20 Conn. L. Rptr. 264, 266–67) (operation of school district truck in school parking lot was ministerial act); *Letowt* v. *Norwalk*, 41 Conn. Supp. 402, 406, 579 A.2d 601 (1989) ("[o]rdinary citizens drive their cars every day, not just police officers, and hence the operation of a motor vehicle would be deemed ministerial").

Significantly, these Superior Court decisions distinguish between the act of driving the motor vehicle, which is ministerial in nature, and the task that the employee sought to accomplish by driving the motor vehicle, which might well be discretionary, in concluding that governmental immunity does not bar claims of vehicular negligence. Most instructive is *MacMillen* v. *Branford*, Superior Court, judicial district of New Haven, Docket No. 374004 (March 30, 1998) (21 Conn. L. Rptr. 561), in which the court rejected a claim that a police officer who crashed his cruiser while in the course of investigating reported discharges of illegal fireworks was engaged in a discretionary act; the court drew a sharp distinction between the acts of driving and investigation. See id., 561–62; see also *Pelletier* v. *Petruck*, Superior Court, judicial district of Hartford, Docket No. CV-07-5009064-S (September 10, 2008) (46 Conn. L. Rptr. 288, 289) (denying motion for summary judgment in case arising from collision with snowplow because "the plaintiff does not allege that she was injured as a result of the construction or maintenance of the highways, but rather that her damages were the result of [the town employee's] alleged negligent operation of a motor vehicle"); *Letowt* v. *Norwalk*, supra, 41 Conn.

Supp. 406 (contrasting act of driving police car to accident scene from duties officer performed once there, such as measuring skid marks or caring for injured person).

The decisions of our sister states similarly support the conclusion that driving a motor vehicle in a nonemergency situation is a ministerial act for purposes of governmental immunity. See, e.g., *Loxley* v. *Coleman*, 720 So. 2d 907, 909 (Ala. 1998) (observing that "trying to avoid potholes while driving a motor vehicle is a ministerial, and not a discretionary, function" in concluding that supervisor was not entitled to governmental immunity for injuries caused when inmate fell from back of truck she was driving); *Wakarusa* v. *Holdeman*, 582 N.E.2d 802, 803–804 (Ind. 1991) (concluding that police officer involved in rear-end collision while on patrol looking for license plate violations was not engaged in "law enforcement" activities for purposes of governmental immunity statute, rendering "the controlling question" whether officer breached his duty to operate vehicle with reasonable care on public roadway); *Kyllo* v. *Panzer*, 535 N.W.2d 896, 903 (S.D. 1995) ("[i]t is inconceivable that driving a motor vehicle is anything other than a ministerial function"); *Hulick* v. *Houston*, Docket No. 14-20-00424-CV, 2022 WL 288096, *4–5 (Tex. App. February 1, 2022, pet. review filed) (officer driving cruiser during search for homeless person who allegedly caused disturbance was engaged in ministerial act and, therefore, was not entitled to governmental immunity for collision); *Heider* v. *Clemons*, 241 Va. 143, 145, 400 S.E.2d 190 (1991) ("[although] every person driving a car must make myriad decisions, in ordinary driving situations the duty of due care is a ministerial obligation"); *Morway* v. *Trombly*, 173 Vt. 266, 273, 789 A.2d 965 (2001) (operation of snowplow is ministerial act); see also 4 Restatement (Second), Torts § 895D, comment (h), p. 418 (1979) (noting that

"the driving of vehicles" is example of ministerial act "under ordinary circumstances" as one "done by officers and employees who are required to carry out the orders of others or to administer the law with little choice as to when, where, how or under what circumstances their acts are to be done"). Accordingly, the decisions of our sister states lend further support to the proposition that driving is a ministerial act for purposes of governmental immunity.[26]

We therefore conclude that, because the operation of a motor vehicle is a highly regulated activity that constitutes a ministerial function, Kashmanian's operation of the soft car was not itself a discretionary activity during the surveillance operation that led to the collision that injured the plaintiff. The decision of Kashmanian and his fellow officers to use the soft car to surveil the plaintiff was indeed a discretionary one. See, e.g., *Priah* v. *United States*, supra, 590 F. Supp. 2d 922–23, 928–29 (there was no liability under Federal Tort Claims

[26] Consistent with the decisions of some of our trial courts; see footnote 22 of this opinion; some of our sister states draw a distinction between emergency and nonemergency operation for purposes of governmental immunity under a ministerial/discretionary regime. See, e.g., *Davis* v. *Lambert-St. Louis International Airport*, 193 S.W.3d 760, 763–64 (Mo. 2006) (emergency response to call for assistance by fellow officer); *Woods* v. *Moody*, 933 S.W.2d 306, 308 (Tex. App. 1996) (observing that, "[u]nlike [high-speed] chases or traffic stops, operating a car in a [nonemergency] situation does not involve personal deliberation or the exercise of professional expertise, decision, or judgment," in holding that, "absent special circumstances that suggest the officer was performing a discretionary function, such as engaging in a [high-speed] chase . . . an officer driving a motor vehicle while on official, [nonemergency] business is performing a ministerial act"); *McBride* v. *Bennett*, 288 Va. 450, 457–58, 764 S.E.2d 44 (2014) (emergency response to domestic violence call). Because this case does not concern emergency operation, and particularly because the extent to which governmental immunity should extend to the emergency operation of municipal vehicles pursuant to § 14-283 has been the topic of recent legislative attention; see footnote 22 of this opinion; we need not and do not address the extent to which emergency operation and nonemergency operation are distinct for purposes of governmental immunity.

Act because federal agents were engaged in discretionary act in attempting to rescue kidnapped confidential informant via SWAT team raid, which led to death of informant when agents fired on vehicle in self-defense); *Flax* v. *United States*, supra, 847 F. Supp. 1190–91 (there was no liability under Federal Tort Claims Act because federal agents were engaged in discretionary act in deciding to engage in further surveillance of kidnapper in hopes of locating accomplice and victim, which was unsuccessful, rather than to apprehend kidnapper immediately after ransom pickup). But see *State Farm Mutual Automobile Ins. Co.* v. *United States*, supra, 2017 U.S. Dist. LEXIS 62132, *9 (vehicle surveillance without use of warning devices when proceeding against red light was expressly discretionary act under terms of Federal Bureau of Investigation's ground surveillance policy, which recognized that, "under certain conditions, the rules of the road give way to the exigencies of surveillance"); cf. *Borelli* v. *Renaldi*, supra, 336 Conn. 14–15 (decision to pursue is discretionary). Nevertheless, once the officers decided to operate a motor vehicle on public streets for the surveillance operation, they were legally bound to comply with the statutory rules of the road unless they were operating as an emergency vehicle within the meaning of § 14-283, which they concede was not the case under the present circumstances because § 14-283 is expressly limited to pursuits and emergency call responses, neither of which is a scenario presented in this case. Accordingly, Kashmanian's operation of the soft car was a ministerial act for purposes of his governmental immunity and that of the city pursuant to § 52-557n.

We disagree with the defendants' argument, echoed in the Appellate Court's opinion in this case; see *Daley* v. *Kashmanian*, supra, 193 Conn. App. 188–89; that a conclusion that our motor vehicle statutes create a ministerial duty frustrates public policy by cramping

police officers' discretion while undertaking their surveillance function, which is not covered by § 14-283. We recently rejected a similar argument in *Cole*, which concerned the highly regulated area of police pursuits, observing: "Although our case law repeatedly emphasizes the broad discretion generally afforded to police officers in the performance of their duties . . . the . . . arguments in the present case verge on ask[ing] too much in urging us to conclude that *all* police conduct in emergency situations is discretionary. We do not read our previous cases as establishing the broad proposition that *all* police conduct in emergencies is discretionary, even in the face of binding police department policies." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Cole* v. *New Haven*, supra, 337 Conn. 347. It is beyond our purview to extend an advantage to law enforcement by extending the limited relief from compliance with the traffic laws provided by § 14-283 to surveillance operations. As with pursuits, which are regulated comprehensively by General Statutes § 14-283a, the complex balancing of public safety against the exigencies of law enforcement is a public policy question for the legislature.[27] See, e.g.,

[27] As we previously noted, the legislature recently enacted Senate Bill No. 204, which Governor Ned Lamont subsequently vetoed, in an effort to clarify the scope of governmental immunity with respect to the negligent operation of motor vehicles. See footnote 22 of this opinion. Similarly, should the legislature determine that public policy favoring effective law enforcement requires an expansion of the scope of § 14-283 to exempt certain types of nonemergency motor vehicle operation from the ordinary rules of the road, it is well equipped to make those changes. Cf. Wis. Stat. Ann. § 346.03 (4) (a) and (b) (West 2019) (The Wisconsin emergency vehicle statute authorizes law enforcement officers to exceed the speed limit without "giving audible and visual signal" if "the officer is obtaining evidence of a speed violation" or "is responding to a call which the officer reasonably believes involves a felony in progress and the officer reasonably believes any of the following: 1. Knowledge of the officer's presence may endanger the safety of a victim or other person. 2. Knowledge of the officer's presence may cause the suspected violator to evade apprehension. 3. Knowledge of the officer's presence may cause the suspected violator to destroy evidence of a suspected felony or may otherwise result in the loss of evidence of a suspected

Mayer v. *Historic District Commission*, 325 Conn. 765, 780 and n.10, 160 A.3d 333 (2017); *Commissioner of Public Safety* v. *Freedom of Information Commission*, 312 Conn. 513, 549–50, 93 A.3d 1142 (2014).

The judgment of the Appellate Court is reversed insofar as that court upheld the trial court's motion to set aside the jury's verdict on count one of the operative complaint alleging negligence on the part of Kashmanian, and the case is remanded to the Appellate Court with direction to reverse that part of the trial court's judgment in favor of Kashmanian on count one and in favor of the city on count four of the operative complaint seeking indemnification from the city pursuant to § 7-465 for Kashmanian's negligence, to reinstate the jury's verdict, and to render judgment for the plaintiff on count four of the operative complaint; the judgment of the Appellate Court is affirmed in all other respects.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* TERRY FREEMAN (SC 20554)

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

Syllabus

Convicted, on a conditional plea of nolo contendere, of the crime of robbery in the first degree, the defendant appealed to the Appellate Court, claiming that his prosecution was time barred by the applicable five year statute of limitations ((Rev. to 2017) § 54-193 (b)) because, although the warrant for his arrest was issued two weeks before the expiration of

felony. 4. Knowledge of the officer's presence may cause the suspected violator to cease the commission of a suspected felony before the officer obtains sufficient evidence to establish grounds for arrest.").

* This case originally was scheduled to be argued before a panel of this court consisting of Chief Justice Robinson and Justices McDonald, D'Auria, Mullins, Kahn, Ecker and Keller. Although Justice Mullins was not present at oral argument, he has read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision.

the limitation period set forth in § 54-193 (b), it was executed one week after its expiration. The defendant had filed a motion to dismiss, which the trial court denied, finding that, because there was at least some evidence that the state had made efforts to execute the warrant before the expiration of the limitation period, the delay in the execution of the warrant was reasonable. At the hearing on that motion, the prosecutor relied on a stipulation of facts setting forth a relevant chronology of events. The stipulation provided that, while incarcerated on unrelated charges in early November, 2018, the defendant confessed to his involvement in the robbery, which occurred on November 29, 2013. On November 19, 2018, the police obtained a signed warrant for the defendant's arrest and requested that the Office of the State's Attorney prepare an application for a writ of habeas corpus to have the defendant transported from the correctional facility at which he was incarcerated to the trial court, where he could be served with the warrant. The Office of the State's Attorney prepared the application for a writ of habeas corpus on November 21, 2018, but it was not signed until November 27, 2018. Thereafter, on December 6, 2018, the defendant was transported to court, where he was served with the warrant. The prosecutor adduced no additional evidence at the hearing, aside from the arrest warrant and the writ of habeas corpus. When the trial court asked the prosecutor to explain the three week delay between the issuance and execution of the arrest warrant, he stated that the warrant was not picked up until two days after it was signed by the judge and that the Thanksgiving holiday took place during the period between when the application for the writ of habeas corpus was prepared and signed. He also explained that the procedure for transporting an inmate to court involves various factors, including staff availability, limits on how many inmates can be transported on a given day, and coordination among various state agencies, such that a one week delay between the signing of a writ of habeas corpus and the transport of an inmate was not unusual. On appeal to the Appellate Court from the denial of the defendant's motion to dismiss, that court affirmed, concluding that the trial court had correctly determined that there was sufficient evidence to establish that the delay in the service of the arrest warrant after the expiration of the statute of limitations was reasonable. On the granting of certification, the defendant appealed to this court. *Held* that the state failed to satisfy its burden of establishing that it acted with due diligence in its efforts to execute the arrest warrant within the limitation period without unreasonable delay, and, accordingly, the judgment of the Appellate Court was reversed and the case was remanded with direction to reverse the trial court's judgment and to order the trial court to grant the defendant's motion to dismiss: once a defendant demonstrates his nonelusiveness and his availability for arrest during the time period between the issuance and the execution of a warrant, the burden shifts to the state to present evidence of its due diligence and reasonable efforts in executing the

warrant, and this court clarified that, to satisfy that burden, the state must produce admissible evidence to explain the reasonableness of the delay and to demonstrate its due diligence, which does not include the unsworn factual representations of counsel, insofar as such assertions cannot be tested in the crucible of cross-examination; in the present case, the parties did not dispute that the defendant met his burden of demonstrating his availability for arrest during the statutory period and, therefore, that the burden shifted to the state to present evidence of its due diligence in executing the warrant; moreover, the stipulation on which the state relied was an unadorned chronology of events that, despite reflecting a three week delay between the issuance and execution of the arrest warrant, did not reveal the reasons for the various delays or explain how the efforts undertaken to execute the warrant reflected the state's due diligence, no evidence was presented at the hearing to establish the facts underlying the prosecutor's assertions that the delay was caused by a holiday and general logistical factors affecting the transportation of inmates, and the prosecutor could not explain why the state did not try to arrange for the transportation of the defendant before the expiration of the statute of limitations.

(*One justice concurring separately*; *three justices dissenting in one opinion*)

Argued February 17—officially released August 30, 2022

Procedural History

Information charging the defendant with the crimes of robbery in the first degree, conspiracy to commit robbery in the first degree, larceny in the fifth degree, and criminal possession of a firearm, brought to the Superior Court in the judicial district of Ansonia-Milford, where the court, *Brown*, *J.*, denied the defendant's motion to dismiss; thereafter, the defendant was presented to the court, *Brown*, *J.*, on a conditional plea of nolo contendere to the charge of robbery in the first degree; judgment of guilty in accordance with the plea; subsequently, the state entered a nolle prosequi as to the charges of conspiracy to commit robbery in the first degree and criminal possession of a firearm, and the court dismissed the charge of larceny in the fifth degree; thereafter, the defendant appealed to the Appellate Court, *Bright*, *C. J.*, and *Cradle* and *Alexander*, *Js.*, which affirmed the trial court's judgment, and the defen-

dant, on the granting of certification, appealed to this court. *Reversed*; *judgment directed.*

James E. Mortimer, assigned counsel, for the appellant (defendant).

Thadius L. Bochain, deputy assistant state's attorney, with whom, on the brief, were *Margaret E. Kelley*, state's attorney, *Matthew R. Kalthoff*, assistant state's attorney, and *Samantha L. Oden*, former deputy assistant state's attorney, for the appellee (state).

Opinion

ECKER, J. The defendant, Terry Freeman, appeals from the judgment of the Appellate Court affirming his conviction of robbery in the first degree in violation of General Statutes § 53a-134 (a) (3), following the entry of a conditional plea of nolo contendere. The sole issue on appeal is whether the prosecution of the defendant was time barred by the five year statute of limitations set forth in General Statutes (Rev. to 2017) § 54-193 (b)[1] on the ground that the state failed to establish that the warrant for the defendant's arrest was executed without unreasonable delay. See *State* v. *Swebilius*, 325 Conn. 793, 802, 159 A.3d 1099 (2017); *State* v. *Crawford*, 202 Conn. 443, 451, 521 A.2d 1034 (1987). We conclude that the state failed to produce sufficient evidence to establish that the arrest warrant was executed with due diligence, and, accordingly, we reverse the judgment of the Appellate Court.

[1] General Statutes (Rev. to 2017) § 54-193 (b) provides: "No person may be prosecuted for any offense, other than an offense set forth in subsection (a) of this section, for which the punishment is or may be imprisonment in excess of one year, except within five years next after the offense has been committed."

The statute was revised in 2019. See Public Acts 2019, No. 19-16, § 17. All references to the statute in this opinion are to the 2017 revision, unless otherwise noted.

The Appellate Court's opinion sets forth the following relevant facts, which we supplement with additional undisputed facts as necessary. "On November 5, 2018, Jeffrey Gabianelli, a detective with the West Haven Police Department, received a letter from the defendant containing information about an armed robbery that had occurred at the Wine Press Liquor Store in West Haven on November 29, 2013. The next day, Gabianelli visited the defendant at the Carl Robinson Correctional Institution in Enfield, where the defendant was incarcerated on unrelated charges. The defendant confessed to Gabianelli as to his involvement in the November 29, 2013 robbery. On November 9, 2018, Gabianelli prepared an arrest warrant. On November 15, 2018, a Superior Court judge signed the warrant. On November 19, 2018, John Laychak, a West Haven police officer, obtained the signed warrant and submitted a request that the Office of the State's Attorney prepare an application for a writ of habeas corpus to transport the defendant to the Superior Court in the judicial district of Ansonia-Milford for service of the arrest warrant. On November 21, 2018, the Office of the State's Attorney prepared the application for a writ of habeas corpus requesting that the defendant be transported to the court on December 6, 2018. On November 27, 2018, a prosecutor and a clerk of the court signed the writ of habeas corpus. On December 6, 2018, the defendant was transported to the Superior Court where he was served with the arrest warrant.

"Thereafter, the defendant filed a motion to dismiss, claiming that the prosecution was barred due to the lapse of the five year statute of limitations set forth in § 54-193 (b). The defendant argued that the statute of limitations had lapsed on November 29, 2018, five years after the robbery had occurred, and that the state had failed to proffer sufficient evidence to show that the delay in the execution of the arrest warrant until Decem-

ber 6, 2018, was reasonable." (Footnotes omitted.) *State* v. *Freeman*, 201 Conn. App. 555, 557–58, 242 A.3d 1059 (2020).

The trial court, *Brown*, *J.*, held an evidentiary hearing on the defendant's motion to dismiss. The prosecutor conceded that the defendant had met his burden of demonstrating that he "lived openly, was nonelusive, and was available for arrest throughout the relevant period of limitation" and, thus, that the burden shifted to the state to demonstrate that the warrant was executed without unreasonable delay. See *State* v. *Swebilius*, supra, 325 Conn. 807 ("[o]nce the defendant has presented evidence of his availability for arrest, it is reasonable and proper that the burden should then shift to the state to explain why, notwithstanding the defendant's availability during the statutory period, the delay in his arrest was reasonable"). To fulfill that burden, the state relied on a written stipulation of facts agreed on by the parties, which set forth the relevant chronology of events described previously in this opinion. The state adduced no additional evidence, aside from the arrest warrant application issued on November 15, 2018, and the writ of habeas corpus dated November 21, 2018.

The trial court asked the prosecutor to explain the delay between the issuance of the arrest warrant on November 15, and its execution on December 6. The prosecutor explained that the court liaison officer did not pick up the signed warrant until Monday, November 19, and that he had no "information as to why [the warrant] wasn't picked up on [that] Friday [i.e., November 16]," but "the court liaison officer would . . . pick up the warrant [only] during the business day, so that would account, at least in part, for that four day gap . . . ." The prosecutor did not offer an explanation for the two day gap between November 19, and November 21, the date on which the state prepared the application for the writ of habeas corpus. Regarding the six day

gap between November 21, and November 27, the date on which the writ of habeas corpus was signed, the prosecutor explained that Thursday, November 22, was the Thanksgiving holiday and that Friday, November 23, was "a relatively light day . . . ." As for the nine day gap between November 27, and December 6, the date on which the defendant was transported and the warrant was executed, the prosecutor explained that the transport was arranged "as a matter of course" in light of the various "factors that play in effectuating the transport of an inmate to [the] court," such as the availability of staff, the maximum number of inmates that may be transported on a given day, and the necessary coordination among the relevant state agencies. The prosecutor "could offer no explanation as to why the defendant was not transported to court for service of the warrant on or before November 29, 2018, except to say that a one week delay between the signing of a habeas writ and the transport of a defendant was not unusual."

The trial court denied the defendant's motion to dismiss, finding "that the state, in fact, made at least some effort to execute the warrant on or before November 29, 2018. The state acted reasonably and diligently to follow up on the defendant's letter, to obtain his confession, and to prepare an arrest warrant for court review and action. Once the warrant was issued, the state acted reasonably and made at least some effort to have the defendant brought to court for execution of the warrant." Although the statute of limitations expired seven days before the warrant was executed, the trial court found "at least some evidence explaining why the delay was reasonable. The writ had to be prepared and approved before the defendant could be ordered transported to court." Significantly, the court noted that "[t]he state should have been more mindful that, as of November 15, 2018, [the state] . . . had [only] fourteen more days

to get the warrant executed to be within the five year limitation period" but determined that, because the state made some "efforts to meet the November 29, 2018 [expiration] date," the delay in the execution of the warrant was reasonable.

The defendant thereafter entered a conditional plea of nolo contendere to the charge of robbery in the first degree. The trial court sentenced the defendant to one year of imprisonment, consecutive to his current sentence.

The defendant appealed from the trial court's judgment to the Appellate Court, claiming that the trial court had improperly denied his motion to dismiss because (1) it misinterpreted and misapplied the legal standard set forth in *State* v. *Crawford*, supra, 202 Conn. 443, and *State* v. *Swebilius*, supra, 325 Conn. 793, and (2) there was insufficient evidence to establish that the delay in the service of the arrest warrant after the expiration of the statute of limitations was reasonable. See *State* v. *Freeman*, supra, 201 Conn. App. 559. The Appellate Court rejected the defendant's first claim, explaining that *Swebilius* neither "qualif[ies] the efforts the state must show to satisfy its burden nor explain[s] the degree of effort necessary." Id., 563. Instead, "the state must prove that any delay in serving the warrant beyond the statute of limitations was reasonable. What efforts the state made to accomplish service and the reasons why service was not accomplished before the statute of limitations expired are necessary parts of the court's reasonableness analysis." Id., 564. The Appellate Court concluded that "the [trial] court applied the correct legal test as set forth by [this court] in *Swebilius* and by [the Appellate Court] in [other cases]." Id., 566.

Regarding the sufficiency of the evidence produced by the state, the Appellate Court determined that the state had fulfilled its burden of demonstrating that it

made reasonable efforts to obtain and execute the arrest warrant, reasoning that, "[f]ollowing the defendant's confession to [the detective], the state made continuous efforts to obtain a warrant and to facilitate the appropriate transportation of the defendant to the Superior Court for the execution of that warrant; efforts that were all made before the statute of limitations expired." Id. Although the defendant was not transported and served with the warrant until seven days after the expiration of the statute of limitations, the Appellate Court opined that "the nine day delay from the signing of the habeas writ to the transportation of the defendant was not unusual, as a matter of course, given the logistical, practical and safety precautions that must be taken whenever an incarcerated individual is transported from a correctional facility to a courthouse." Id., 567–68. The court further explained that it was "within the purview of the trial court to use its knowledge of the inner workings of the courts and the process by which incarcerated persons are transported to a court in its determination of the reasonableness of the state's efforts." Id., 568. Accordingly, the Appellate Court affirmed the judgment of conviction. Id.

On appeal to this court,[2] the defendant claims that the Appellate Court improperly upheld the trial court's denial of his motion to dismiss on the basis of its conclusion that the state executed the arrest warrant without unreasonable delay. The defendant contends that "[t]here was no evidence of any effort by the state to attempt to execute the warrant before the statute of limitations expired or any evidence offered to explain why the state's failure to do so was reasonable under these

[2] We granted the defendant's petition for certification to appeal, limited to the following issue: "Did the Appellate Court correctly conclude that the trial court properly denied the defendant's motion to dismiss on the basis of its determination that the state had executed the arrest warrant without unreasonable delay?" *State* v. *Freeman*, 336 Conn. 907, 243 A.3d 1180 (2021).

circumstances." The state responds that the Appellate Court correctly concluded that the trial court's denial of the defendant's motion to dismiss was proper because the state fulfilled its burden of proving that the warrant was executed without unreasonable delay. We agree with the defendant.

The standard of review on a motion to dismiss is well established. "Because a motion to dismiss effectively challenges the jurisdiction of the court, asserting that the state, as a matter of law and fact, cannot state a proper cause of action against the defendant, our review of the [trial] court's legal conclusions and resulting denial of the defendant's motion to dismiss is de novo." (Internal quotation marks omitted.) *State* v. *A. B.*, 341 Conn. 47, 55, 266 A.3d 849 (2021). Whether a warrant was executed within a reasonable period of time under § 54-193 (b) ordinarily "is a question of fact that will depend on the circumstance of each case." *State* v. *Crawford*, supra, 202 Conn. 451. In the present case, however, the facts are undisputed, and the sole question is whether the stipulated facts are sufficient to demonstrate that the state fulfilled its burden of proving that it executed the warrant with due diligence. Under these circumstances, we review the trial court's reasonableness conclusion de novo. See *Jones* v. *State*, 328 Conn. 84, 101, 177 A.3d 534 (2018) (observing that, "when the facts are undisputed, determining the legal import of those facts presents a question of law subject to de novo review"); *One Country, LLC* v. *Johnson*, 314 Conn. 288, 300, 101 A.3d 933 (2014) ("when the facts are undisputed," application of legal standard is "a question of law over which we exercise plenary review"); *Connecticut Light & Power Co.* v. *Dept. of Public Utility Control*, 219 Conn. 51, 62, 591 A.2d 1231 (1991) (same); see also *Nelson* v. *State Farm Mutual Automobile Ins. Co.*, 419 F.3d 1117, 1119 (10th Cir. 2005) ("[w]hether a court properly applied a statute of limitations and the date a

statute of limitations accrues under undisputed facts are questions of law we review de novo"); *Spitsyn* v. *Moore*, 345 F.3d 796, 799 (9th Cir. 2003) ("[i]f the facts underlying a claim for equitable tolling are undisputed, the question of whether the statute of limitations should be equitably tolled is . . . reviewed de novo").

We begin our analysis with the relevant case law. In *State* v. *Crawford*, supra, 202 Conn. 443, this court held that the issuance of an arrest warrant within the limitation period set forth in General Statutes (Rev. to 1983) § 54-193 (b) commences a prosecution for purposes of satisfying the statute of limitations, so long as the warrant is executed without unreasonable delay. See id., 450–51. In *Crawford*, the state had issued a warrant for the arrest of the defendant, Ronald L. Crawford, approximately two months after the commission of the charged offenses, but the warrant was executed more than one year after the statute of limitations lapsed. Id., 445. Crawford filed a motion to dismiss the charges against him, arguing that, because he was not prosecuted within the one year limitation period, the prosecution was time barred. Id. We explained that, "[w]hen an arrest warrant has been issued, and the prosecutorial official has promptly delivered it to a proper officer for service, he has done all he can under our existing law to initiate prosecution and to set in motion the machinery that will provide notice to the accused of the charges against him. When the prosecutorial authority has done everything possible within the period of limitation to evidence and effectuate an intent to prosecute, the statute of limitations is [satisfied]."[3] (Footnote omitted.)

[3] *Crawford* uses the word "toll" rather than "satisfy," but we have since clarified that a distinction exists between "tolling" and "satisfying" the statute of limitations and that the latter term is the more accurate one in the present context. See *State* v. *A. B.*, supra, 341 Conn. 57 n.6 (noting that we previously have "used the term 'tolled,' and other forms of the verb 'toll,' rather than 'satisfied,' to describe the state's meeting its obligation under § 54-193 (b) to have 'prosecuted' a crime within the relevant limitation period" and concluding that " 'satisfie[d]' is the appropriate term to describe the state's meeting such obligation under [the statute]").

Id., 450. "We recognize[d], however, that some limit as to when an arrest warrant must be executed after its issuance is necessary in order to prevent the disadvantages to an accused attending stale prosecutions, a primary purpose of statutes of limitation[s]." Id. We therefore concluded that, "in order to [satisfy] the statute of limitations, an arrest warrant, when issued within the time limitations . . . must be executed without unreasonable delay." Id., 450–51.

We declined to "adopt a per se approach as to what period of time to execute an arrest warrant is reasonable." Id., 451. Instead, we clarified that "[a] reasonable period of time is a question of fact that will depend on the circumstances of each case. If the facts indicate that an accused consciously eluded the authorities, or for other reasons was difficult to apprehend, these factors will be considered in determining what time is reasonable. If, on the other hand, the accused did not relocate or take evasive action to avoid apprehension, *failure to execute an arrest warrant for even a short period of time might be unreasonable and fail to* [*satisfy*] *the statute of limitations*." (Emphasis added.) Id.

In *State* v. *Swebilius*, supra, 325 Conn. 793, we considered whether a brief delay in the execution of an arrest warrant could be per se reasonable. The defendant, Jon Swebilius, was arrested thirty-two days after the issuance of the warrant for his arrest and thirteen days after the expiration of the applicable five year statute of limitations. Id., 796. Swebilius "moved to dismiss the charge on the ground that the prosecution was barred by the statute of limitations because . . . the delay in the execution of the warrant was unreasonable." Id. We concluded that the Appellate Court had "incorrectly determined that some delays in the execution of an arrest warrant may be so brief as to be reasonable as a matter of law for the purpose of [satisfying] the applicable statute of limitations." Id., 801.

We explained that, "once the defendant has demonstrated his availability for arrest, he has done all that is required to carry his burden; the burden then shifts to the state to demonstrate that any period of delay in executing the warrant was not unreasonable." Id., 804; see *State* v. *Woodtke*, 130 Conn. App. 734, 740, 25 A.3d 699 (2011). The "burden shifting scheme" required by *Swebilius* "encourages diligence by law enforcement officials in providing timely notice of charges to defendants." *State* v. *Swebilius*, supra, 325 Conn. 808. We "decline[d] to specify the precise actions that [law enforcement officials] must undertake to serve a warrant with due diligence, or the precise time line within which they must act," but held that "such officials must present some credible and persuasive factual basis for inaction when they fail to observe the statute of limitations. This requirement is consistent with the principle that, when a judicial doctrine, for all practical purposes, extends the statute [of limitations] beyond its stated term, that doctrine should be applied in only limited circumstances . . . ." (Internal quotation marks omitted.) Id., 808–809. We emphasized that such a rule "is not intended to impose an undue burden on the state"; id., 814; but to effectuate "the purposes of statutes of limitations," namely, "prevent[ing] the unexpected enforcement of stale and fraudulent claims" and "aid[ing] in the search for truth that may be impaired by the loss of evidence" due to the passage of time. (Internal quotation marks omitted.) Id., 812.

The burden imposed on the state is not onerous, but neither is it trivial. Although the dissent accurately observes that *Swebilius* (on a single occasion) referred to the requirement that the state "make *some effort* to serve the arrest warrant before the relevant statute of limitations expires"; (emphasis added) id., 814; *Swebilius* otherwise uniformly characterized the state's burden as requiring "*reasonable* efforts"; (emphasis added)

id., 815; or evidence of "due diligence . . . ." Id., 808; accord id., 804 n.8, 812. The dissent is correct that these standards are all "functionally equivalent"—but they are equivalent only if "some effort" is understood to require reasonable and diligent efforts. The dissent goes too far, and would empty *Swebilius* of its significance, by suggesting that a single reference in *Swebilius* to "some effort," in contrast to its more than one dozen references to "reasonable efforts" and "due diligence," means that the state satisfies its burden by making anything less than reasonable and diligent efforts. Indeed, that burden is no burden at all because it allows the state to satisfy the statute of limitations by ignoring it entirely, and simply to proceed with business while exhibiting no regard for, or even awareness of, the statutory deadline. That meaning is the opposite of what *Swebilius* intended when it stated that "a rule making some delays reasonable without any showing of *due diligence* is inconsistent with the purposes of the statutes of limitations." (Emphasis added.) *State* v. *Swebilius*, supra, 325 Conn. 812. We reaffirm that, once a defendant's availability for arrest is established, the state must demonstrate that it made diligent efforts to execute an arrest warrant within the limitation period or "offer some *evidence* explaining why its failure to do so was reasonable under the circumstances."[4] (Emphasis added.) Id., 814; see *State* v. *Ali*, 233 Conn. 403, 416, 660 A.2d 337 (1995) ("the issuance of an arrest

[4] The dissent states that "[t]he court in *Swebilius* required the state to provide an explanation only when it failed to make 'some' . . . effort . . . ." We disagree. As we explained in *Swebilius*, "[o]nce the defendant has presented evidence of his availability for arrest, it is reasonable and proper that the burden should then shift to the state *to explain why, notwithstanding the defendant's availability during the statutory period, the delay in his arrest was reasonable.* Doing so allocates burdens efficiently by requiring each party to bring forth evidence uniquely within its knowledge." (Emphasis added.) *State* v. *Swebilius*, supra, 325 Conn. 807. To read *Swebilius* as the dissent suggests is inconsistent with the plain language and clear import of our holding in that case.

warrant is sufficient 'prosecution' to satisfy the statute of limitations only if the warrant is executed with *due diligence*" (emphasis added)); *State* v. *Crawford*, supra, 202 Conn. 452 (same).

In the present case, the parties do not dispute that the defendant fulfilled his burden of demonstrating his availability for arrest during the statutory period and, therefore, that the burden shifted to the state "to present evidence of its due diligence in executing the warrant." *State* v. *Swebilius*, supra, 325 Conn. 803. We emphasize that the requirement of "evidence" to satisfy the state's burden under *Swebilius* must not be overlooked. "Evidence" in this context means what it normally means, namely, the formal presentation in a judicial proceeding of testimony, documents, or exhibits " 'to prove or disprove the existence of an alleged fact . . . .' " *Voris* v. *Middlesex Mutual Assurance Co.*, 297 Conn. 589, 602, 999 A.2d 741 (2010), quoting Black's Law Dictionary (9th Ed. 2009) p. 635. "Fairly stated, evidence legally is the means by which alleged matters of fact are properly submitted to the trier of fact for the purpose of proving a fact in issue. On the other hand, 'proof' is the result or the effect of such 'evidence.' Moreover, [counsel's] representations [are] not 'testimony,' which, in turn, when given under oath or stipulated to, is a species of 'evidence.' " *Cologne* v. *Westfarms Associates*, 197 Conn. 141, 153–54, 496 A.2d 476 (1985); see *Federal National Mortgage Assn.* v. *Buhl*, 186 Conn. App. 743, 751, 201 A.3d 485 (2018) ("[u]nsworn 'representations of counsel are not, legally speaking, evidence' [on] which courts can rely"), cert. denied, 331 Conn. 906, 202 A.3d 1022 (2019); *Constantine* v. *Schneider*, 49 Conn. App. 378, 395, 715 A.2d 772 (1998) (same).

To fulfill its burden of proof regarding the delay in the execution of the warrant, the state was required to produce admissible *evidence* to explain the delay. This

proposition is not contested by the state. The unsworn factual representations of counsel, which cannot be tested in the crucible of cross-examination, are not evidence on which the state may rely to fulfill its burden of production and persuasion. Cf. *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, 255 n.9, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) (party bearing evidentiary burden of proof "cannot meet its burden merely through . . . argument of counsel"); *Pretzantzin* v. *Holder*, 736 F.3d 641, 651 (2d Cir. 2013) (government failed to fulfill burden of production because "the arguments of counsel are not evidence . . . and the [g]overnment failed to make any evidentiary proffer" (citation omitted)). This important precept derives from the recognition that "[s]tatements as to facts that have not been proven [or subject to cross-examination] amount to unsworn [and unchecked] testimony . . . ." (Internal quotation marks omitted.) *State* v. *Singh*, 259 Conn. 693, 717, 793 A.2d 226 (2002). Allowing assertions of counsel to serve as evidence, moreover, erases the elemental and crucial distinction between advocate and witness in our adversary system. See Rules of Professional Conduct 3.7 (prohibiting lawyer from testifying as witness except in certain circumstances not at issue in present case).

The question, then, is whether the stipulation of facts, arrest warrant application, and writ of habeas corpus constituted sufficient evidence to establish that the state acted with due diligence in executing the warrant such that the delay in the execution was not unreasonable. Although we have not defined the term "due diligence" in this context, we previously have observed that "[d]ue diligence does not require omniscience. Due diligence means doing everything reasonable, not everything possible." (Internal quotation marks omitted.) *Skakel* v. *State*, 295 Conn. 447, 507, 991 A.2d 414 (2010); see *In re Samantha C.*, 268 Conn. 614, 632, 847 A.2d 883 (2004)

(in context of termination of parental rights, reasonable efforts to reunify family means "doing everything reasonable, not everything possible" (internal quotation marks omitted)). Due diligence does not require a party to do everything possible to attain its objective, but, at the same time, it requires something more than nonchalance. The state exercises due diligence, in short, if it undertakes efforts to execute a warrant "by persevering application . . . [made] in good earnest." (Internal quotation marks omitted.) *Skakel* v. *State*, supra, 507, quoting *Kubeck* v. *Foremost Foods Co.*, 190 Conn. 667, 672, 461 A.2d 1380 (1983).

We conclude that the evidence adduced by the state was insufficient to meet its burden of demonstrating that it exercised due diligence in its efforts to execute the warrant within the limitation period without unreasonable delay. The record reflects that the warrant was issued on November 15, 2018, but was not executed until three weeks later, on December 6, 2018, seven days after the expiration of the five year statute of limitations on November 29, 2018. The three week delay requires explanation in the form of *evidence* to establish that the delay was not unreasonable. Although the state prepared a writ of habeas corpus requesting the transportation of the defendant on November 21, 2018, eight days before the expiration of the limitation period, the writ was not signed by the prosecutor and the clerk of the court until six days later, on November 27, 2018. Additionally, the defendant was not transported to court, and the warrant was not executed, until December 6, 2018, nine days after the habeas writ was signed and seven days after the expiration of the limitation period. The stipulated facts do not reveal the reasons for these delays. Nor do they explain how the efforts undertaken to execute the warrant reflect due diligence by the state.

At the hearing on the defendant's motion to dismiss, the lack of evidence regarding these critical issues was

highlighted by the fact that the trial court found it necessary to ask the prosecutor to explain the reason for the delay in the execution of the warrant. The prosecutor cited state holidays, weekends, a "light" work day, and his own assessment of general logistical factors affecting the transportation of inmates, such as "certain limitations on the staff of [the] court with respect to how many inmates will be housed downstairs on any particular day" and "the involvement of other agencies, notably, the judicial marshals . . . ." According to the prosecutor, as "a matter of course and a matter of courtesy," the state does not "[make] a habit of requesting transport a day later, [or] two days later," but prefers to give "a little bit of lead time for the relevant agencies . . . to plan the transport . . . ." The prosecutor was unable to explain why, in this particular case, the state did not try to arrange for the transportation of the defendant before the expiration of the statute of limitations on November 29, 2018, but maintained that, in general, a delay of two to three weeks is "consistent with [his] office's practice . . . ." No evidence was presented to establish the facts underlying these assertions.

As we previously discussed, representations of counsel are not evidence. For this reason, we reject the suggestion in the concurring opinion that it may be permissible for a party to rely on the representations of counsel to satisfy their respective burdens under *Swebilius*. In *Swebilius*, we made it very clear that the representations of counsel, factual or otherwise, are insufficient. If a statute of limitations defense has been raised, the parties are under an obligation to adduce *evidence* regarding (1) the defendant's availability for arrest during the limitation period, and, if applicable, (2) the state's due diligence in executing the warrant. See *State* v. *Swebilius*, supra, 325 Conn. 803 ("once a defendant presents *evidence* of his availability for arrest

during the limitation period, the burden shifts to the state to present evidence of its due diligence" (emphasis added)). We again emphasized the evidentiary nature of the requirement when we noted the near unanimous case law supporting the burden shift: "We note that the cases since *Crawford* that have considered the distribution of burdens in relation to § 54-193 (b) have been nearly uniform in placing the burden on the state *to present evidence* of due diligence." (Emphasis added.) Id., 804 n.8. Indeed, we noted that, "in cases involving relatively brief delays, *evidence* of [the state's] legitimate need to prioritize competing public safety responsibilities may well be sufficient to demonstrate compliance with the dictates of *Crawford*." (Emphasis added.) Id., 814. We even pointed out that the state's evidentiary burden was not onerous and could be satisfied by compiling publicly available governmental statistics. See id., 814–15 n.17. In sum, we are unaware of any case, in Connecticut or elsewhere, that permits a party to satisfy its burden of proof relating to a statute of limitations by relying on the representations of counsel.

Accordingly, the explanations offered by the prosecutor in response to the trial court's search for answers, while no doubt made in good faith, are insufficient to satisfy the state's burden under *Swebilius* to "present some credible and persuasive factual basis for . . . [the state's] fail[ure] to observe the statute of limitations."[5] Id., 808. Although the prosecutor presented the

[5] As this court recently explained in *A. B.*, "[w]e have long held that the primary purpose of statutes of limitations is to encourag[e] law enforcement officials promptly to investigate suspected criminal activity . . . so as to ensure that a defendant receives notice, within a prescribed time, of the acts with which he is charged . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *A. B.*, supra, 341 Conn. 68–69. "Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity." (Internal quotation marks omitted.) Id., 56; see *State* v.

trial court with a stipulated chronology of events, he failed to provide *any* admissible evidence to explain the reasons for the delay in the execution of the warrant.[6] As a result of that evidentiary deficiency, the state failed to fulfill its burden of proving that the warrant was executed with due diligence, and the trial court improperly denied the defendant's motion to dismiss.

The dissent would dilute the requirements of *Swebilius*—and, in the process, the statute of limitations—to

Crawford, supra, 202 Conn. 450. Although the delay in the execution of the warrant in the present case was relatively brief, we previously have explained that even a brief delay beyond the expiration of the limitation period cannot be deemed "reasonable as a matter of law, solely on the basis of the length of the delay and irrespective of other facts." *State* v. *Swebilius*, supra, 325 Conn. 799 n.5.

[6] We reject the Appellate Court's determination that "it [was] within the purview of the trial court to use its knowledge of the inner workings of the courts and the process by which incarcerated persons are transported to a court in its determination of the reasonableness of the state's efforts." *State* v. *Freeman*, supra, 201 Conn. App. 568. There is no indication in the trial court's decision that it relied on its *own* knowledge of the inner workings of the courts and the process by which incarcerated persons are transported, rather than the prosecutor's factual representations. Stated another way, there is no indication that the state was excused from fulfilling its burden of proof because the trial court took judicial notice of these facts. See, e.g., *Jacobs* v. *Healey Ford-Subaru, Inc.*, 231 Conn. 707, 730 n.24, 652 A.2d 496 (1995) ("The doctrine of judicial notice excuses the party having the burden of establishing a fact from introducing formal proof of the fact. Judicial notice takes the place of proof." (Internal quotation marks omitted.)). Regardless, the inner workings of the courts and the process by which incarcerated persons are transported are "matters susceptible of explanation or contradiction," and, therefore, the defendant was "entitled to receive notice and have an opportunity to be heard" before the trial court took judicial notice of these facts on its own initiative. Conn. Code Evid. § 2-2 (b); see *Moore* v. *Moore*, 173 Conn. 120, 122, 376 A.2d 1085 (1977) (recognizing distinction "between matters susceptible of explanation or contradiction, of which notice should not be taken without giving the affected party an opportunity to be heard . . . and matters of established fact, the accuracy of which cannot be questioned, such as court files, which may be judicially noticed without affording a hearing" (citations omitted)). It is undisputed that, to the extent the trial court took judicial notice of these facts, it failed to provide the defendant with the requisite notice and opportunity to be heard.

require nothing more than "business as usual" without regard to the statutory deadline, and without regard to when the defendant was actually served with process. The dissent opines that the state satisfied its burden of demonstrating that its efforts to execute the arrest warrant were reasonable because, "before the statute of limitations expired, the state had undertaken all of the necessary preparatory steps for execution of the warrant . . . ." This observation begs the critical question under *Crawford* and *Swebilius*. That question is whether the "preparatory" steps taken by the state, if any, *were sufficient under the applicable legal standard* when the warrant was executed on a nonelusive defendant *after* the expiration of the limitation period. Under those circumstances, our precedent is very clear that the statute of limitations is satisfied only if the warrant is "executed with due diligence" such that there is not "unreasonable delay" between issuance and execution of the warrant. *State* v. *Crawford*, supra, 202 Conn. 451.[7] This burden, once again, obligates the state to demonstrate the reasonableness of the delay between issuance and execution of the warrant by presenting evidence that it sought to meet its obligations by making efforts demonstrating diligence, that is, something more than nonchalance, throughout that time period. For the reasons previously explained, we conclude that the state failed to fulfill this burden.[8]

[7] The dissent acknowledges that the inquiry focuses on the time period between issuance and execution of the warrant, which, in the present case, was from November 15 to December 6, 2018.

[8] The dissent misinterprets our holding in two respects when it states that we (1) determine that the state's delay in executing the warrant was unreasonable, and (2) effectively require that "the state . . . do everything possible to serve the warrant within the limitation period." Footnote 3 of the dissenting opinion. We intend to say nothing of the kind. Rather, we hold that the state failed to produce *evidence* that it undertook efforts to meet its obligation to execute the warrant without unreasonable delay. In undertaking those efforts, the state was not required to do everything possible to timely execute the warrant, but it was required by our law to make efforts indicating that it was acting in earnest to meet the statutory deadline. See *State* v. *Swebilius*, supra, 325 Conn. 814 (recognizing that "[t]he policies

Finally, we address the appropriate remedy. The state argues that, pursuant to *State* v. *Swebilius*, supra, 325 Conn. 815, the proper remedy is to reverse the judgment of the Appellate Court and to remand the case to the trial court so that the state is " 'afforded the opportunity to demonstrate that it made reasonable efforts to execute the warrant before the expiration of the statute of limitations or to explain why its failure to do so was reasonable under the circumstances.' " We disagree. In *Swebilius*, the proper remedy was to remand the case for further factual development because the trial court applied an incorrect legal standard when it determined that some delays in the execution of a warrant are sufficiently short that they may be deemed reasonable as a matter of law. The trial court's application of the wrong legal standard, combined with our articulation of the burden shifting framework for the first time in *Swebilius*, necessitated a remand so that the trial court could "evaluate the facts in light of [the] correct legal standard." *McDermott* v. *State*, 316 Conn. 601, 611, 113 A.3d 419 (2015). In contrast, in the present case, the trial court applied the correct legal standard, and "any

underlying statutes of limitations are best served when . . . the state has a strong incentive to ensure that a defendant is provided timely notice of charges"). In both regards, these are important distinctions. Finally, to the extent that the dissent suggests that the delay in the present case was somehow presumptively reasonable "[i]n light of the need for coordination among various agencies to temporarily transfer custody of the defendant from prison to the court," we reject the notion that we can presume anything of the kind without supporting evidence. It took the state from November 15 to December 6 to execute the warrant in this case. The record is devoid of evidence about the period of time that is, in fact, reasonably necessary to execute an arrest warrant on a defendant in custody under the circumstances as they existed. In the absence of such evidence, we are unwilling to speculate on that issue. Moreover, we consistently have declined to "adopt a per se approach as to what period of time to execute an arrest warrant is reasonable." *State* v. *Crawford*, supra, 202 Conn. 451; see *State* v. *Swebilius*, supra, 809 (rejecting state's claim that "some delays in the execution of an arrest warrant . . . are so brief as to require no justification on the part of the state").

insufficiency in proof was [not] caused by [a] subsequent change in the law" but, rather, by the state's "failure to muster evidence." (Internal quotation marks omitted.) Id. The state was well aware of its evidentiary burden under our precedent but nonetheless elected to offer no evidence other than an unadorned chronology of events. Under these circumstances, we can perceive no reason to provide the state with a second opportunity to meet that burden.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the trial court's judgment and to remand the case with direction to grant the defendant's motion to dismiss.

In this opinion McDONALD and D'AURIA, Js., concurred.

ROBINSON, C. J., concurring in the judgment. I concur in this court's judgment reversing the judgment of the Appellate Court, which affirmed the conviction of the defendant, Terry Freeman, of robbery in the first degree in violation of General Statutes § 53a-134 (a) (3), following the entry of a conditional plea of nolo contendere. See *State* v. *Freeman*, 201 Conn. App. 555, 568, 242 A.3d 1059 (2020). I agree with the court's ultimate conclusion that the prosecution of the defendant was time barred by the five year statute of limitations set forth in General Statutes (Rev. to 2017) § 54-193 (b)[1] on the ground that the state failed to establish that the

[1] General Statutes (Rev. to 2017) § 54-193 (b) provides: "No person may be prosecuted for any offense, other than an offense set forth in subsection (a) of this section, for which the punishment is or may be imprisonment in excess of one year, except within five years next after the offense has been committed."

The statute was revised in 2019. See Public Acts 2019, No. 19-16, § 17. All references to the statute in this opinion are to the 2017 revision, unless otherwise noted.

warrant for the defendant's arrest was executed without unreasonable delay. I write separately because I respectfully disagree with those portions of the opinion announcing the judgment of the court[2] holding that the "evidence" of the "reasonable efforts to execute the arrest warrant" after the running of the statute of limitations that are required by this court's decisions in *State* v. *Swebilius*, 325 Conn. 793, 159 A.3d 1099 (2017), and *State* v. *Crawford*, 202 Conn. 443, 521 A.2d 1034 (1987), cannot be established by the factual representations of counsel. To the contrary, I conclude that the prosecutor's personal involvement in and familiarity with arranging the process by which the defendant would be transported to court from the Carl Robinson Correctional Institution for service of the warrant rendered the prosecutor's unchallenged factual representations an appropriate vehicle by which the state could establish "evidence" of its efforts to serve the warrant after the lapse of the statute of limitations. Because I nevertheless conclude that the facts established by those representations did not satisfy the state's obligation to make reasonable efforts to serve the arrest warrant following the lapse of the statute of limitations, I concur in the judgment of the court.

I note my agreement with the majority opinion's recitation of the facts, procedural history, and governing legal principles as set forth by, inter alia, *State* v. *Swebilius*, supra, 325 Conn. 793, and *State* v. *Crawford*, supra, 202 Conn. 443. Specifically, I agree that, "[w]hen an arrest warrant has been issued, and the prosecutorial official has promptly delivered it to a proper officer for service, he has done all he can under our existing law to initiate prosecution and to set in motion the machinery that will provide notice to the accused of the charges against him. When the prosecutorial authority has done

[2] Hereinafter, in the interest of simplicity, I refer to the opinion announcing the judgment of the court as the majority opinion.

everything possible within the period of limitation to evidence and effectuate an intent to prosecute, the statute of limitations is [satisfied]." (Footnote omitted.) *State* v. *Crawford*, supra, 450; see *State* v. *A. B.*, 341 Conn. 47, 57 n.6, 266 A.3d 849 (2021) (explaining that " 'satisfie[d]' is the appropriate term to describe the state's meeting such obligation under" criminal statute of limitations). There must, "however, [be] some limit as to when an arrest warrant must be executed after its issuance . . . in order to prevent the disadvantages to an accused attending stale prosecutions, a primary purpose of statutes of limitation[s]." *State* v. *Crawford*, supra, 450. "[I]n order to [satisfy] the statute of limitations, an arrest warrant, when issued within the time limitations . . . must be executed without unreasonable delay." Id., 450–51.

In *Crawford*, this court declined to "adopt a per se approach as to what period of time to execute an arrest warrant is reasonable." Id., 451. Instead, the court clarified that "[a] reasonable period of time is a question of fact that will depend on the circumstances of each case. If the facts indicate that an accused consciously eluded the authorities, or for other reasons was difficult to apprehend, these factors will be considered in determining what time is reasonable. If, on the other hand, the accused did not relocate or take evasive action to avoid apprehension, failure to execute an arrest warrant for even a short period of time might be unreasonable and fail to [satisfy] the statute of limitations." Id.

In *State* v. *Swebilius*, supra, 325 Conn. 793, we recently held that even a very brief delay in the execution of an arrest warrant following the lapse of the statute of limitations cannot "be reasonable as a matter of law . . . ." Id., 801; see id., 809–10. We then clarified the parties' respective obligations with respect to the proof of a statute of limitations defense, observing that, "once the defendant has demonstrated his availability

for arrest, he has done all that is required to carry his burden [of proving the statute of limitations defense]; the burden then shifts to the state to demonstrate that any period of delay in executing the warrant was not unreasonable." Id., 804; see id., 803 (discussing Appellate Court case law shifting burden "to the state to present evidence of its due diligence in executing the warrant"). Requiring "the state to explain why, notwithstanding the defendant's availability during the statutory period, the delay in his arrest was reasonable . . . allocates burdens efficiently by requiring each party to bring forth evidence uniquely within its knowledge." Id., 807; see id., 808 ("the state is in a far better position to determine what efforts were undertaken to ensure the defendant's prompt arrest").

We emphasized in *Swebilius* that "[t]his burden shifting scheme also encourages diligence by law enforcement officials in providing timely notice of charges to defendants. Although we decline[d] to specify the precise actions that they must undertake to serve a warrant with due diligence, or the precise timeline within which they must act, such officials must present some credible and persuasive factual basis for inaction when they fail to observe the statute of limitations. This requirement is consistent with the principle that, when a judicial doctrine, for all practical purposes, extends the statute [of limitations] beyond its stated term, that doctrine should be applied in only limited circumstances . . . . Accordingly, once a defendant has demonstrated his availability and nonelusiveness during the statutory period, the state must then demonstrate the reasonableness of any delay between the issuance and the service of an arrest warrant, at least when service occurs after the expiration of the limitation period." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 808–809.

I agree with the majority opinion that, despite our reference in *Swebilius* requiring "that the state make *some effort* to serve the arrest warrant before the relevant statute of limitations expires . . . that opinion otherwise uniformly characterized the state's burden as requiring *reasonable* efforts . . . or evidence of due diligence . . . ." (Citations omitted; emphasis in original; internal quotation marks omitted.) Thus, "reasonableness" and "due diligence" remain the touchstone in determining whether the state has demonstrated a "credible and persuasive factual basis" for its failure to serve the arrest warrant within the limitation period, and the reasonableness of the additional time needed beyond the expiration of that period. *State* v. *Swebilius*, supra, 325 Conn. 808. As *Swebilius* itself emphasized, this standard does not "impose an undue burden on the state. [The court in *Swebilius*] concluded merely that, if the defendant can demonstrate his availability during the statutory period, the state must make some effort to serve the arrest warrant before the relevant statute of limitations expires, or to offer some evidence explaining why its failure to do so was reasonable under the circumstances. Indeed, in cases involving relatively brief delays, evidence of a legitimate need to prioritize competing public safety responsibilities may well be sufficient to demonstrate compliance with the dictates of *Crawford*." Id., 814.

I part company from the conclusion in the majority opinion that a prosecutor's representations of fact to the court may not be used to satisfy the state's obligation under *Swebilius* to use "evidence" to prove the reasonableness of its efforts to serve the warrant, or the failure of those efforts. See id., 814–15. First, the majority's reading of the word "evidence" is inconsistent with its ordinary meaning, which is simply "something that furnishes proof" or "something legally submitted to a tribunal to ascertain the truth of a matter

. . . .” Merriam-Webster’s Collegiate Dictionary (10th Ed. 1993) p. 402; see also American Heritage College Dictionary (4th Ed. 2007) p. 484 (defining “evidence” as “[a] thing or things helpful in forming a conclusion or judgment” or “[t]he documentary or oral statements and the material objects admissible as testimony in a court of law”). The majority’s restrictive reading of the word even goes beyond the more technical definition of the word set forth in Black’s Law Dictionary, which defines “evidence” expansively as “[s]omething (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact”; Black’s Law Dictionary (11th Ed. 2019) p. 697; Black’s specifically draws a distinction between evidence generally and “admissible evidence.” See id., pp. 697–98. Put differently, the majority opinion’s reading of *Swebilius* adds the word “admissible” where it does not exist.

Second, the majority opinion’s restrictive reading of the word “evidence” is in direct conflict with the well established “practice that a trial court may rely [on] certain representations made to it by attorneys, who are officers of the court and bound to make truthful statements of fact or law to the court.” (Internal quotation marks omitted.) *State* v. *Chambers*, 296 Conn. 397, 419, 994 A.2d 1248 (2010); see Rules of Professional Conduct 3.3 (a) (1) (duty of candor to tribunal). Particularly given the prosecutor’s role as “a high public officer” and “a minister of justice”; (internal quotation marks omitted) *State* v. *Courtney G.*, 339 Conn. 328, 341, 350 n.9, 260 A.3d 1152 (2021); accord Rules of Professional Conduct 3.8, commentary; I would not preclude our trial courts from relying on the statements of a prosecutor about events in which he or she played a personal role,[3] particularly when those factual repre-

[3] The majority opinion accurately quotes this court’s decision in *Cologne* v. *Westfarms Associates*, 197 Conn. 141, 153–54, 496 A.2d 476 (1985), as providing: “Fairly stated, evidence legally is the means by which alleged

sentations are, as the dissent correctly observes in the present case, entirely uncontested. See *State* v. *Chambers*, supra, 421–22; see also, e.g., *State* v. *Nguyen*, 253 Conn. 639, 658–60, 756 A.2d 833 (2000) (trial court was not required to conduct evidentiary hearing prior to barring witness' testimony as sanction for violation of sequestration order given "effectively uncontested" representations by prosecutor and defense counsel, and defendant's failure to request evidentiary hearing). Put differently, had the defendant desired to challenge the factual underpinnings of the prosecutor's explanation of the delays, he could have done so.

Having said that, the explanation offered by the prosecutor in this case does not convince me that the state's failure to serve the arrest warrant before the expiration of the statute of limitations on November 29, 2018, and the delay in service to December 6, 2018, were in fact reasonable, even though there were two state holidays during that period and interagency coordination was required to transport the defendant from the correctional facility to court.[4] I acknowledge the prosecutor's

matters of fact are properly submitted to the trier of fact for the purpose of proving a fact in issue. On the other hand, 'proof' is the result or the effect of such 'evidence.' Moreover, [counsel's] representations [are] not 'testimony,' which, in turn, when given under oath or stipulated to, is a species of 'evidence.' " In my view, *Cologne* is distinguishable, notwithstanding its conclusion that the representations of the plaintiffs' attorney were a factually insufficient basis on which to hold the defendants in indirect civil contempt of court, because those representations did not concern events that the attorney herself had witnessed. See *Cologne* v. *Westfarms Associates*, supra, 153, 156. Indeed, this court's decision in *Cologne* contemplates permitting courts to rely on attorneys' factual representations concerning events in which they are personally involved—noting specifically that "the record is barren of any indication that the plaintiffs' counsel herself had directly observed the conduct of the defendant that was purported to constitute contempt." Id., 153.

[4] In addition to noting that the Thanksgiving holiday and weekend days fell in the period between the issuance of the warrant and the date on which the defendant was transferred to court to allow for execution of the warrant, the prosecutor explained: "So, it was reasonable because there are a number of factors that play in effectuating the transport of an inmate to this court

explanation that he would not ordinarily request immediate transportation, as a "courtesy" to the various agencies involved, such as the Department of Correction and the judicial marshals, and his office's ordinary timing and practices with respect to the transportation of inmates to court. Nevertheless, I remain unconvinced that the state made the requisite reasonable efforts to serve the warrant in a timely fashion, insofar as there is no indication that the state attempted to expedite the process to have the defendant transported sooner, despite knowing of the impending expiration of the statute of limitations. Although it may well be that expediting the transportation of the defendant would in fact have been unreasonable, given its ripple effect on other judicial or law enforcement matters; cf. *State* v. *Swebi-*

here in Milford. It is not as simple as having the West Haven Police Department take a ride up to Carl Robinson [Correctional Institution] and serve the warrant because . . . if that warrant is served, [the defendant] would have to be transported here to court the next day for his arraignment before the court. So, it's not as logistically simple as just taking a ride up there and serving the warrant.

"As Your Honor is aware, there are certain limitations on the staff of this court with respect to how many inmates will be housed downstairs on any particular day. I know that our office and our administrative staff, in making requests for writs of habeas corpus, are mindful of dates . . . [that are] already at capacity as far as prisoner transport. It also requires the involvement of other agencies, notably the judicial marshals, to transport inmates from . . . correctional facilities and—and, frankly, I think [as] a matter of course and a matter of courtesy, we . . . haven't made a habit of requesting transport a day later, two days later or a week later. I think typically it's a date that kind of works with the calendar that has been set out as far as how many inmates are being transported to court on a given day, and then giving a little bit of lead time for the relevant agencies to . . . plan the transport of the inmate to court. . . .

"[A]s to whether it was reasonable that it was done on December 6, roughly two weeks after, maybe three weeks after the warrant had been signed, and about two weeks after the habeas was requested, you know, I think that's consistent with our office's practice and consistent with—with our course of action, which is to [be] mindful that there are other people involved in the system who have to act when we issue a writ of habeas corpus, and giving the two week lead time is reasonable to allow all of those various factors, the time to make preparations."

lius, supra, 325 Conn. 814; the current state of the record in this case leaves me entirely unable to arrive at that conclusion as a matter of law because the prosecutor's representations do not establish that expediting the transportation of the defendant to court would have resulted in anything more than potential inconvenience to the state actors involved. Because the state failed to carry its burden of proving the reasonableness of its failure to serve the arrest warrant on or before the date on which the statute of limitations expired, on November 29, 2018, I agree with the conclusion in the majority opinion that the robbery charge is time barred and should be dismissed on remand.

I join in the judgment of the court to reverse the judgment of the Appellate Court.

KELLER, J., with whom MULLINS and KAHN, Js., join, dissenting. I respectfully disagree with the majority's[1] conclusion that the Appellate Court erred in holding that the trial court correctly determined that the state had executed the arrest warrant for the defendant, Terry Freeman, without unreasonable delay and, therefore, properly denied the defendant's motion to dismiss the criminal charges against him in connection with a 2013 armed robbery. In determining that the delay was unreasonable, the majority effectively concludes that the state must not only obtain the arrest warrant but also execute the warrant before the statute of limitations has expired or offer evidence as to why it was not possible to have done so. Such a standard clearly exceeds what is required under our case law.[2]

[1] In the interest of simplicity, I refer to the opinion announcing the judgment as the majority opinion.

[2] I agree with the majority that de novo review is appropriate because we are considering stipulated facts on a cold record. See *Jones* v. *State*, 328 Conn. 84, 101, 177 A.3d 534 (2018) ("Ordinarily, when the facts are undisputed, determining the legal import of those facts presents a question of law subject to de novo review. . . . This is so even in the context of fact laden disputes ordinarily subject to a trial court's discretion." (Citations omitted.)).

Twenty-three days before the statute of limitations expired on charges relating to the 2013 armed robbery, the defendant provided a police detective with a confession to his participation in that cold case. The detective timely prepared an arrest warrant, and, by the time the judge signed the warrant, the statute of limitations was due to expire in fourteen days. The following activities ensued in those fourteen days: a police officer obtained the signed warrant and submitted a request for an application for a writ of habeas corpus to transport the defendant to court for service of the warrant, the Office of the State's Attorney prepared the application for the writ, and the writ was signed by that office and by the clerk of the court. Thus, before the statute of limitations expired, the state had undertaken all of the necessary preparatory steps for execution of the warrant under the unusual circumstances of the case.

The majority concludes that these efforts were inadequate on their face to comply with the dictates of *State* v. *Swebilius*, 325 Conn. 793, 159 A.3d 1099 (2017); consequently, the state was required to provide evidence to explain why it failed to do more. In particular, the majority deems fatal the state's failure to provide evidence to explain why the defendant could not have been transported to the court for service of the warrant before the statute of limitations expired. The standard applied by the majority misapprehends the burden that this court imposed on the state in *Swebilius*.

To understand this court's intention in that case, it is important to focus on the specific context in which this issue came before the court. It had long been established that, in Connecticut, "the issuance of an arrest warrant is sufficient 'prosecution' to satisfy the statute of limitations only if the warrant is executed with due diligence." *State* v. *Ali*, 233 Conn. 403, 416, 660 A.2d 337 (1995). The court in *Swebilius* addressed the question of whether the state can be deemed to have acted

with due diligence, as a matter of law, when *no* effort was made to execute the warrant during the limitation period, if the warrant was executed within a sufficiently brief period after the limitation period expired. *State* v. *Swebilius*, supra, 325 Conn. 798–800. In *Swebilius*, the arrest warrant was executed thirteen days after the limitation period expired when the defendant voluntarily surrendered to the police after learning that the warrant had been issued. Id., 797. This court rejected the notion that any brief period of delay could be presumed reasonable as a matter of law. Id., 801.

Before articulating the state's burden, this court noted its "agree[ment] with the drafters of . . . the Model Penal Code that [i]t is undesirable . . . to toll the statute of limitations in instances [in which] the warrant is issued but *no* effort is made to arrest a defendant whose whereabouts are known."[3] (Emphasis added; footnote omitted; internal quotation marks omitted.) Id., 814. To strike the proper balance of a rule that would discourage such inaction without imposing an "undue burden" on the state; id., 814; this court articulated the following standard: "[I]f the defendant can demonstrate his availability during the statutory period, the state must make *some* effort to serve the arrest warrant before the relevant statute of limitations expires, or to offer some evidence explaining why its failure to do so was reasonable under the circumstances." (Emphasis added.) Id. "Some" effort, then, was in contraposition to "no" effort. See id., 808 ("such officials must present some credible and persuasive

[3] Much of the court's analysis in *Swebilius* rested on *State* v. *Crawford*, 202 Conn. 443, 521 A.2d 1034 (1987), a case in which there similarly was no evidence that the state had made *any* effort to execute the arrest warrant before the limitation period expired. See *State* v. *Swebilius*, supra, 325 Conn. 801–802 (noting that, in *Crawford*, "this court was asked to determine whether the mere issuance of an arrest warrant within the limitation period was sufficient to commence a prosecution for purposes of [General Statutes] § 54-193, thereby tolling the limitation period").

factual basis for *inaction* when they fail to observe the statute of limitations" (emphasis added)). The court emphasized the modest nature of the burden in other ways. It noted that, "in cases involving relatively brief delays, evidence of a legitimate need to prioritize competing public safety responsibilities may well be sufficient to demonstrate [that the warrant was executed without unreasonable delay]." Id., 814; see also id., 814 n.17. This example further signaled that the state was not required to go to extraordinary lengths or to upend other important obligations to demonstrate due diligence.

Instead of considering whether the state made "some effort" to execute the warrant, a burden that the state plainly satisfied, the majority seizes on the court's subsequent reference in *Swebilius* to "reasonable efforts . . . ." Id., 815. It then ascribes a meaning to that term that effectively equates to "best efforts" (i.e., "*every* reasonable effort"), which far exceeds "some effort." Insofar as the majority concludes that the state was required to explain why it could not have executed the warrant within the limitation period, it appears to require the state to present additional evidence to explain why it did not do everything *possible* to accomplish that end, a far cry from "some effort."[4] As the Kansas Court of Appeals explained in a case favorably cited by this court in *State* v. *Swebilius*, supra, 811 n.13, "[w]hen determining the reasonableness of a delay in the execution of an arrest warrant, it is key to look at what the [s]tate did do, *not what it did not do*." (Emphasis added.) *State* v. *Divers*, Docket No. 106,312, 2012

[4] The majority denies that it is effectively requiring the state to do everything possible to serve the warrant within the limitation period. Although the majority's determination that the state is required to provide evidence to explain why it did not execute the warrant within the limitation period leaves the door open for some explanation short of impossibility to suffice, the state cannot have confidence that any effort short of everything that is possible will be deemed "reasonable" under the majority's view.

WL 4794603, *3 (Kan. App. October 5, 2012) (decision without published opinion, 286 P.3d 239), review denied, Kansas Supreme Court, Docket No. 11-106312-A (June 14, 2013); see *State* v. *Long*, 276 Kan. 297, 300, 75 P.3d 1217 (2003) ("the reasonableness of the delay in executing the warrant cannot be measured by what the [s]tate could have or should have done"); see also *In re Samantha C.*, 268 Conn. 614, 632, 847 A.2d 883 (2004) (stating, in context of case involving constitutional rights, that "[r]easonable efforts means doing everything reasonable, not everything possible" (internal quotation marks omitted)).

Only four sentences stand between the court's references in *Swebilius* to "some effort" and "reasonable efforts . . . ." *State* v. *Swebilius*, supra, 325 Conn. 814–15. This proximity clearly indicates that the court viewed these standards to be functionally equivalent.[5] Those terms can easily be reconciled if "reasonable" was simply intended to make clear that "some" effort is not satisfied by any effort no matter how inconsequential or ineffective to accomplish the intended goal. See id., 811 n.13 (favorably citing approach in *State* v. *Gauthier*, Superior Court, judicial district of New Haven, Docket No. N23N-MV-11-0074499-S (September 11, 2012), in which delay of "forty-nine days after statute of limitations expired was not unreasonable because officers 'maintained diligent attention to [the] case' and attempted to serve warrant as soon as officer was aware it had been signed," despite one month lapse between efforts to see whether warrant had been signed). To the extent that the majority implies that the standard as I have interpreted it would be satisfied by efforts amounting to "nonchalance" or less, it is clearly mistaken.

[5] The court in *Swebilius* used "some effort" when articulating the general standard; *State* v. *Swebilius*, supra, 325 Conn. 814; and "reasonable efforts" when referring to the state's burden on remand. Id., 815.

Another problem with the majority's analysis is that it appears to require the state to provide an explanation whenever it fails to execute the warrant within the limitation period. For example, it would not be good enough for the state to establish that it attempted to execute the warrant where the defendant was believed to reside; it would be required to explain why service could not be effectuated at that time and why further efforts could not have been made to successfully execute the warrant within the limitation period. The court in *Swebilius* only required the state to provide an explanation when it failed to make "some" (i.e., "reasonable") effort within the limitation period. *State* v. *Swebilius*, supra, 325 Conn. 814.

When assessed against that standard, it is clear that the state made reasonable efforts to execute the warrant before the statute of limitations expired. As I previously noted, the state undertook all of the necessary preparatory steps for execution of the warrant before the limitation period expired.

The only question that remains is whether execution of the warrant seven days after the statute of limitations expired (five days if one does not count weekend days, when the court was not open) was "without unreasonable delay."[6] *State* v. *Crawford*, 202 Conn. 443, 451, 521 A.2d 1034 (1987). The majority overlooks the signifi-

[6] Whether the delay is unreasonable is assessed in relation to the period between the issuance of the arrest warrant and its execution. See *State* v. *Swebilius*, supra, 325 Conn. 809 ("the state must . . . demonstrate the reasonableness of any delay between the issuance and the service of an arrest warrant") Thus, for example, if the state had made some effort to serve the warrant long before the statute of limitations expired and then did nothing else of consequence before that period expired, we would consider the entire period between issuance and execution, including that period of inaction, in assessing whether the delay in execution was unreasonable. In the present case, I focus on the delay following the expiration of the statute of limitations because I conclude that the state made sufficient efforts to execute the warrant during the limitation period.

cance of the fact that the present case is atypical. In the usual case, "[w]hen an arrest warrant has been issued, and the prosecutorial official has promptly delivered it to a proper officer for service, he has done all he can under our existing law to initiate prosecution and to set in motion the machinery that will provide notice to the accused of the charges against him." Id., 450. In the present case, the defendant was in the custody and control of the Commissioner of Correction when the arrest warrant was issued. The defendant was a convicted felon with four years of his sentence remaining. Even without taking the prosecutor's explanation into account,[7] the evidence submitted reflects

[7] In addition to noting that the Thanksgiving holiday and weekend days fell in the period between the issuance of the warrant and the date on which the defendant was transferred to the court to allow for execution of the warrant, the prosecutor explained: "So, it was reasonable because there are a number of factors that play in effectuating the transport of an inmate to this court here in Milford. It is not as simple as having the West Haven Police Department take a ride up to Carl Robinson [Correctional Institution] and serve the warrant because, of course, then, if that warrant is served, [the defendant] would have to be transported here to court the next day for his arraignment before the court. So, it's not as logistically simple as just taking a ride up there and serving the warrant.

"As Your Honor is aware, there are certain limitations on the staff of this court with respect to how many inmates will be housed downstairs on any particular day. I know that our office and our administrative staff in making requests for writs of habeas corpus are mindful of dates in which . . . [we are] already at capacity as far as prisoner transport. It also requires the involvement of other agencies, notably the judicial marshals, to transport inmates from . . . correctional facilities . . . and, frankly, I think [as] a matter of course and a matter of courtesy, we . . . haven't made a habit of requesting transport a day later, two days later or a week later. I think typically it's a date that kind of works with the calendar that has been set out as far as how many inmates are being transported to court on a given day, and then giving a little bit of lead time for the relevant agencies to . . . plan the transport of the inmate to court. . . .

"[A]s to whether it was reasonable that it was done on December 6, roughly two weeks after, maybe three weeks after the warrant had been signed, and about two weeks after the habeas [writ] was requested, you know, I think that's consistent with our office's practice and consistent . . . with our course of action, which is to [be] mindful that there are other people involved in the system who have to act when we issue a writ of habeas corpus, and giving the two week lead time is reasonable to allow all of those various factors the time to make preparations."

that the procedures undertaken to execute the warrant required the cooperation of the Department of Correction, judicial marshals, and a court liaison officer for the New Haven Police Department. In light of the need for coordination among various agencies to temporarily transfer custody of the defendant from prison to the court and to execute the warrant in a manner consistent with procedures to maintain control over the defendant and to protect public safety, I would conclude that execution of the warrant five (or seven) days after the limitation period expired under such circumstances was without unreasonable delay.[8]

I note that this contextual explanation of the myriad specific considerations that were factors in the present case is a far cry from the type of generic excuse that this court deemed inadequate in *Swebilius*. See *State* v. *Swebilius*, supra, 325 Conn. 814–15 n.17 (noting that properly contextualized statistics demonstrating competing demands on police department could provide evidence of reasonableness of delay, whereas "[t]he mere fact that a police department is a very busy urban police department is not enough for it to avoid its obligation to serve the warrants in a timely manner" (internal quotation marks omitted)). Contrary to the majority, I see nothing inherently unreasonable about a prosecutor's adhering to procedures put into place to accommodate coordination among the various agencies involved in the transportation of an inmate, such that further explanation is required under the present circumstances.

[8] In light of my conclusion that the state's efforts within the limitation period were reasonable, I need not consider the majority's determination that "admissible evidence" was required to explain the purported inadequacy of those efforts and, thus, that the trial court could not consider the prosecutor's representations to the trial court, which were made in response to the court's direct questions. This court has permitted trial courts to rely on such representations with respect to matters of similar import when there is no objection to the veracity or accuracy of the statements, no request for an evidentiary hearing on the matter, and no statute or court rule requiring such an evidentiary hearing. See, e.g., *Maio* v. *New Haven*, 326 Conn. 708, 729, 167 A.3d 338 (2017); *In re Natalie S.*, 325 Conn. 849, 857–58, 163 A.3d 1189 (2017); *State* v. *Lopez*, 239 Conn. 56, 79, 681 A.2d 950 (1996); *State* v. *Haye*, 214 Conn. 476, 482–83, 572 A.2d 974 (1990). Even if, however, the majority were correct that "admissible evidence" is required and that a prosecutor's statements to the trial court are not admissible evidence, under well settled principles, the defendant's failure to object when the court solicited explanations from the prosecutor would constitute a waiver of any nonconstitutional claim that the statements were inadmissible evidence. See, e.g., *Pereira* v. *State Board of Education*, 304 Conn. 1, 46 n.33, 37 A.3d 625 (2012) ("[i]t is well established that [during trial] a party that fails to

The majority perceives unjustifiable nonchalance on the part of the state; I see sufficient evidence of due diligence in the brief period of time between the date the warrant was issued and the date it was executed.

Accordingly, I respectfully dissent.

STATE OF CONNECTICUT *v.* METESE HINDS (SC 20555)

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

Syllabus

Convicted of the crimes of murder and carrying a dangerous weapon in connection with the stabbing death of the victim, the defendant appealed to this court. The defendant had been staying with his friend L in L's apartment. On the evening of the murder, the victim, J, and another individual were consuming alcohol and drugs in J's apartment, which was on the floor above L's apartment. At some point that evening, the defendant, who was highly intoxicated, entered J's apartment and began arguing with the victim. J then expelled both men from her apartment. Soon thereafter, J learned that the victim had been in a fight, and she immediately went to the floor on which L's apartment was, where she found the victim, who had been stabbed multiple times. The police subsequently arrived at the scene, and, while they were attending to the victim, the defendant emerged from L's apartment and started kicking the victim and yelling. During a search of L's apartment, the police found a knife on the kitchen floor lying next to a pool of blood. It was later determined that the knife had both the victim's and the defendant's DNA on it. Following the incident, the police interviewed the defendant on two occasions. Over the course of those interviews, the defendant repeatedly changed his version of the events, stating first that he did not know the victim, but later stating that he fought with the victim, whom he knew, after confronting him about the victim's alleged sexual

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object timely to the introduction of evidence . . . is deemed to have waived such objection . . . and may not subsequently resurrect it" (internal quotation marks omitted)); *State* v. *Brown*, 279 Conn. 493, 503, 903 A.2d 169 (2006) ("any infirmity in the evidence . . . is deemed to be waived if not seasonably raised" (internal quotation marks omitted)).

Moreover, as I do not believe that the state had clear notice either that it was required to explain its failure to do more or that its representations to the trial court would not be accepted by reviewing courts, I do not agree with the majority's determination that a remand would not be warranted.

assault of J's daughter. The defendant also stated that he was attacked by the victim and his "crew," forcing him to fight with up to ten individuals at once. At trial, L testified that, after the defendant returned to L's apartment on the evening of the murder, he heard the defendant rummaging through a drawer in the kitchen and then saw him leave the apartment and engage in a physical altercation with the victim on the fire escape landing outside of L's apartment. L further testified that, when the victim collapsed, the defendant reentered L's apartment, and L observed that the defendant was holding a knife from the kitchen drawer. During closing argument, the prosecutor argued that the evidence overwhelmingly established the defendant's guilt, despite some discrepancies between the testimony of certain witnesses, and that the jury could infer that L's prior statements to the police, which L had given on the night of the victim's murder but were not in evidence, were consistent with his trial testimony because, otherwise, the defense would have used the statements to impeach him, as it had with respect to the prior statements of two of the state's other witnesses. Defense counsel did not object to these remarks by the prosecutor. During his closing argument, defense counsel argued that the state had failed to prove beyond a reasonable doubt that it was the defendant, as opposed to some other person, who murdered the victim and that the jury should not credit L's testimony because, inter alia, he had entered into a cooperation agreement with the state. During his rebuttal argument, the prosecutor referred to Occam's razor, the principle that the simplest of competing theories should be preferred over more complex ones, in arguing that the jury should credit the state's simple, straightforward version of events rather than the defendant's unreal, complex story. Defense counsel did not object to this reference either. On appeal, the defendant claimed that he was deprived of his due process right to a fair trial as a result of the prosecutor's allegedly improper remarks during closing and rebuttal arguments. *Held* that the defendant could not prevail on his claim that the prosecutor's references during closing argument to L's prior statements to the police and during rebuttal argument to Occam's razor constituted prosecutorial impropriety that deprived the defendant of his right to a fair trial: the prosecutor did not improperly reference facts not in evidence or vouch for L's credibility by inviting the jury to infer that L's prior statements to the police were consistent with his trial testimony, as L and two other witnesses testified that L had given statements to the police, and the jury was aware that certain other state witnesses had given statements to the police and that the defense had used their statements to discredit them, and, therefore, the prosecutor merely was asking the jurors to infer from evidence properly before them, and from their personal experience as jurors in this case, that, if L had changed his story as a result of his cooperation agreement, the defense could and would have used his prior statements to discredit him; moreover, the prosecutor's reference to Occam's razor did not

improperly dilute the state's burden of proof or otherwise mislead the jury as to the nature of that burden, as it was used as a rhetorical device in response to defense counsel's closing argument that the jury must choose between the state's and the defendant's competing versions of events, and nothing in the prosecutor's remarks expressly or implicitly suggested to the jurors that they must choose the simpler version of events, even if they did not find it proven beyond a reasonable doubt; furthermore, even if the prosecutor's remarks were improper, there was no possibility that they deprived the defendant of a fair trial, as each of the alleged improprieties occurred only once, neither was perceived by defense counsel as being so severe as to warrant an objection or a request for curative measures, this court did not perceive them as being severe, the state's case was strong, and the trial court's instructions pertaining to the jurors' exclusive role as the arbiters of credibility, the state's burden of proof, and the principle that jurors must confine themselves to the evidence in the record were more than adequate to counteract any harm resulting from the alleged improprieties.

Argued May 5—officially released August 30, 2022

Procedural History

Substitute information charging the defendant with the crimes of murder and carrying a dangerous weapon, brought to the Superior Court in the judicial district of New London and tried to the jury before *Kwak*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Lisa J. Steele, assigned counsel, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom were *Thomas M. DeLillo*, senior assistant state's attorney, and, on the brief, *Paul J. Narducci*, state's attorney, for the appellee (state).

Opinion

ALEXANDER, J. Following a jury trial, the defendant, Metese Hinds, was convicted of murder in violation of General Statutes § 53a-54a (a) and carrying a dangerous weapon in violation of General Statutes § 53-206 (a). On

appeal,[1] he claims that two instances of prosecutorial impropriety, which occurred during the state's closing and rebuttal arguments, deprived him of his due process right to a fair trial. We disagree and affirm the judgment of conviction.

The following facts, which the jury reasonably could have found, and procedural history are relevant to our resolution of this appeal. In October, 2017, the defendant was staying with his childhood friend, James Cody Lewis, in a one bedroom apartment on Blackhall Street in New London. The apartment was located on the second floor of a three-story building. From the street, access to the second and third floor apartments was via a green steel fire escape that zigzagged across the front of the building.

Jacquelinnes Lopez and her infant daughter lived in the apartment above Lewis' apartment. In the early evening hours of October 24, 2017, Raheeim General (victim), Justice Rodriguez, and Lopez were together in Lopez' apartment drinking, smoking marijuana, and listening to music. All three individuals were extremely intoxicated as a result of having consumed a gallon of vodka, in addition to other alcoholic beverages, over the course of several hours. Jennifer Beard, Lopez' sister, was also present but was in the bedroom with her three year old son and Lopez' daughter. Beard was not drinking. At some point, the defendant showed up highly intoxicated and asked the victim for a shot of liquor. The victim obliged, but soon he and the defendant began arguing, prompting Lopez to kick all three men—the victim, Rodriguez, and the defendant—out of the apartment. Fifteen or twenty minutes later, someone knocked on Lopez' door to inform her that the victim—Lopez' best friend since childhood and the god-

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

father to her daughter—had been in a fight. Lopez immediately ran down the fire escape stairs to the second floor landing, where she found the victim lying there "lifeless."

Shortly before Lopez found the victim, Lewis was awakened by loud pounding on his front door. Lewis had spent the entire day sleeping after having been awake for three days straight playing video games and smoking crack cocaine. When Lewis opened the door, the defendant entered the apartment in an extremely agitated state and said, "they're touching the kids. I'm gonna kill them all." At the exact same moment, Rodriguez appeared in the doorway, and he and the defendant began to fight on the landing. After a few seconds, Rodriguez retreated up the stairs to Lopez' apartment, whereupon the defendant reentered Lewis' apartment, walked directly to the kitchen, and began rummaging through a drawer. The defendant then left the apartment through the front door.

The victim was standing on the second floor landing when the defendant came out of the apartment. Lewis watched as the two men began "tousling" and "throwing punches . . . ." He then saw the defendant thrusting his right hand back and forth "in an upward motion" into the victim's body, until the victim fell to the ground. After the victim collapsed, the defendant reentered Lewis' apartment and shut the door. It was then that Lewis observed that the defendant was holding a knife from his kitchen drawer. He also noticed that the defendant was bleeding from a wound to the back of his leg. When the police arrived, the defendant came out of Lewis' apartment and "started kicking" the victim, yelling "die, pussy, die." Later that evening, Lewis consented to a search of his apartment and provided the police with a sworn statement about the events of that evening.

At the time of the murder, Lisbeth Guzman was living at the corner of Blackhall and Belden Streets, across the street and a few buildings down from Lewis' building. On the night in question, she and her friend, Isiah Brown, were together after work when they heard loud arguing in the street. After a few minutes, the two friends stepped out onto Guzman's fire escape to see what was happening. From the fire escape, they saw a tall, skinny man, later identified as the victim, engaged in "a very intense argument" with a shorter, stockier man on the landing in front of Lewis' apartment.[2] Because it was dark and raining outside, they could not make out the face of either man. As the altercation progressed, the shorter man appeared to break a bottle over the taller man's head. He then began stabbing the taller man in the stomach with the bottle, while the taller man screamed for him to stop. This continued until Brown yelled from across the street for the men to "stop," at which point the shorter man "snapped back into, like, reality" and went inside Lewis' apartment. After the fight ended, a woman ran down the fire escape stairs from the third floor. When she reached the victim, she began pleading for help, saying, "please . . . he's unconscious. He's unconscious. He's not breathing." While she was tending to the victim, the shorter man "came back out of [Lewis'] apartment and yelled, I will kill all you," and then went back into the apartment.

When the police and paramedics arrived at the scene, they found the victim unresponsive, with multiple stab wounds to his abdomen, neck, and head. As the first officer reached the second floor landing, the defendant came out of Lewis' apartment "and started kicking [the victim]" and yelling for the police to "get [the victim]

[2] The record indicates that the victim was six feet, four inches tall and weighed 175 pounds at the time of his death, whereas the defendant was five feet, nine inches tall and weighed 175 pounds.

the fuck out of here." After the defendant was subdued, both he and the victim were transported to a hospital, where the victim was pronounced dead and the defendant was treated for two minor puncture wounds to the back of his leg. The state later theorized that the defendant had accidentally stabbed himself while assaulting the victim. A toxicology screen performed at the hospital revealed that the defendant had a blood alcohol content of 0.18. Opiates, cannabinoids, and cocaine were also detected in the defendant's blood. During a search of Lewis' apartment, the police found a knife on the kitchen floor lying next to a pool of blood. The knife was later determined to have both the defendant's and the victim's DNA on it.

The defendant agreed to be interviewed by the police on two occasions, first at the hospital where he was taken after the incident and the next day at police headquarters. An audio recording of the hospital interview and a video recording of the police station interview were entered into evidence and played for the jury. Initially, the defendant denied knowing the victim. Later, however, he admitted knowing him, stating that he saw him "[a]ll the time," and that the victim and Lopez "seem like friends or whatever," but that "[h]e's not her boyfriend . . . ." The defendant also stated that the victim was "the devil" and a "son of a bitch."

The defendant asserted that he and the victim began fighting after he confronted the victim about "fucking changing the kid." The defendant stated: "He was—it was something with powder. I know it was something with powder 'cause I came in the room . . . through the back, and I said, yo, what? . . . I almost walked past the room, and I stopped and . . . looked in, and he was changing the little girl. . . . It's not his little girl. He ain't got no business in that little girl's room." The defendant later stated, "you know what, that's my godbaby. That's my—no it's not. I told you already."

Over the course of the two interviews, the defendant repeatedly changed his story about what the victim was doing when he confronted him. What began with the victim putting powder on the baby ended with the defendant's claiming that the victim "was performing oral sex" on her.

The defendant informed the police that all he really remembered about the evening was "fighting. Everything went black, boom, and I'm fighting. That's it." The defendant claimed that, once the fight began, the victim "gave an eye to the rest of his crew," ten of whom "jumped" the defendant, forcing him to fight "like, five of them" at once. When asked whether Lopez could confirm his story or identify the men who jumped him, the defendant replied that Lopez would not be able to do so because "there was too many of them guys" and Lopez is "sort of an airhead. She's an airhead." The defendant stated that, when he left Lopez' apartment, the victim and his "crew" followed him down the fire escape stairs and that he "tried to kill all of them." He stated that he "tried to get [the victim]" but "couldn't get him [because] . . . [t]here was too many of them." When asked by the police whether he had consumed any drugs or alcohol that evening, the defendant denied having done so, asserting that he was "[s]traight, straight, straight." Although he denied stabbing the victim or being in possession of a knife during the struggle, he did admit to "kicking [the victim] when the cop came."

The defendant was charged with murder in violation of § 53a-54a (a) and carrying a dangerous weapon (a knife) in violation of § 53-206 (a). Before trial, he raised the affirmative defense of extreme emotional disturbance. During the state's closing argument, the prosecutor argued that the evidence overwhelmingly established the defendant's guilt, despite some discrepancies between Lewis' testimony and the testimony of

Brown and Guzman. He argued: "Some of the pieces of evidence are unclear . . . [or] conflict with other pieces. People's memories can change. People forget things. . . . And people can also describe the same event differently." The prosecutor emphasized, however, that, although Brown and Guzman thought that the killer had used a broken bottle to stab the victim, their testimony that there were only two men fighting on the landing outside Lewis' apartment and that the killer walked directly into Lewis' apartment and shut the door after stabbing the victim was powerful corroboration of Lewis' testimony and conclusively refuted the defendant's claim of fighting with up to ten men on the fire escape stairs. The prosecutor further argued that the defendant's repeated lies to the police in the aftermath of the murder was strong evidence of his consciousness of guilt.

During his closing argument, defense counsel argued that the state had failed to prove beyond a reasonable doubt that it was the defendant—as opposed to some other party—who murdered the victim.[3] In support of this contention, he pointed out, among other things, that neither Brown nor Guzman, who had witnessed the murder from approximately "fifty yards away," saw the perpetrator's face, and both described him as "short and stocky," a description he maintained did not match the defendant. Defense counsel further argued that Brown and Guzman both testified that the victim was stabbed with a broken bottle, whereas it was the state's contention that the killer used a knife. As for Lewis, the only witness to identify the defendant as the perpetrator, defense counsel argued that the jury should not credit his testimony given his "cooperation agreement"

[3] Defense counsel suggested to the jury that the real killer may have been a man who lived down the street, who he claimed fit Brown's and Guzman's description of the perpetrator better than the defendant did.

with the state,[4] his more than thirty year addiction to crack cocaine, the fact that he had been awake for three days straight before the murder, and because "one of the first things he did" after the murder was lie to the police about whether the defendant kept belongings at his apartment.

Finally, defense counsel argued that, as a result of the defendant's high level of intoxication, he could not possibly have formed the requisite intent to commit the murder.[5] Specifically, defense counsel argued that the defendant "wasn't in a normal state of mind" that evening and that he was in fact "delusional . . . ." He further argued: "The evidence [of his delusional state] comes from the statements that [he made to the police and others] about the kids being molested, about the gang members that were upstairs. And [the state touched on the defendant's] claims [that] he was fighting ten, then two, then four, and six individuals [at once]. That's because it was a delusion. He had no idea

[4] At trial, the state elicited testimony from Lewis that, after the victim's murder, in August, 2018, he was arrested for selling crack cocaine. In July, 2019, he reached a plea agreement with the state whereby his sentence would be suspended if he completed a drug treatment program. Lewis relapsed before completing that program and later failed to appear for sentencing. At the time of the defendant's trial, Lewis was "looking at possibly the original [sentence] recommendation, plus an additional charge for the failure to appear." Lewis testified that, although no promises were made to him, he had been told by the state that his cooperation and "truthful testimony" would be brought to the judge's attention at the time of his sentencing.

[5] With respect to the defendant's intoxication, the trial court instructed the jury in relevant part: "The statute pertaining to intoxication [provides] in pertinent part as follows: intoxication shall not be a defense to a criminal charge, but in any prosecution . . . evidence of intoxication . . . may be offered . . . whenever it is relevant to negate an element of the crime charged. . . . If you find that [the defendant] was under the influence of an intoxicant at the time of the alleged acts, you must then determine what effect, if any, this voluntary intoxication had on his ability to form the specific intent required to commit the alleged crimes. Note that intoxication is not a defense to or an excuse for the commission of a crime. It is only relevant to negate an element of the crime charged, such as intent."

what was going on. The child being molested . . . . [The victim] . . . putting powder on the baby. . . . No evidence of that. [The defendant] was . . . clearly [in] a delusional state." In support of this contention, defense counsel noted that at least one witness had described the defendant as "drugged the fuck out or bugged the fuck out," whereas another opined that he was clearly "on something."

After closing arguments, the trial court instructed the jury on the applicable law, including the presumption of innocence, the definition of reasonable doubt, and the state's burden to prove each and every element of the charged offenses beyond a reasonable doubt. After deliberating less than one day, the jury found the defendant guilty as charged. The trial court later sentenced him to a term of imprisonment of fifty-five years for murder and a concurrent sentence of three years of imprisonment for carrying a dangerous weapon.

On appeal, the defendant claims that two instances of prosecutorial impropriety, neither of which the defense objected to at trial, deprived him of his right to a fair trial. The first alleged impropriety occurred during the state's closing argument when the prosecutor argued that the jury could infer that Lewis' prior statements to the police, which were not in evidence, were consistent with his trial testimony because, otherwise, the defense would have used the statements to impeach him. The defendant contends that the prosecutor's argument was improper because it referred to facts not in evidence and impermissibly vouched for Lewis' credibility.

The second alleged impropriety occurred during the state's rebuttal argument, when the prosecutor invoked the principle of Occam's razor[6] in arguing that the jury

[6] The Oxford English Dictionary defines "Occam's razor" as "[t]he principle that in explaining anything no more assumptions should be made than are necessary." Oxford English Dictionary (3d Ed. 2004) (online version).

should credit the state's "simple, straightforward" version of events over the defendant's "unreal, complex" story about child molestation and fighting off ten men. The defendant contends that the prosecutor's reference to Occam's razor diluted the state's burden of proof and that the two improprieties together were harmful because they "struck at the heart of the case—the credibility of the only witness to claim that he saw [the defendant] stab [the victim], and the issue of reasonable doubt."

The state responds that the first argument "admittedly presents a close call" but that, ultimately, it "passes muster . . . because it was specifically based on the evidence that Lewis, Beard, and Rodriguez all had made statements to the police, but that only Beard and Rodriguez were impeached for making prior inconsistent statements . . . ." As for the second argument, the state contends that, when viewed in context of the entire trial, there is no possibility that the prosecutor's reference to Occam's razor misled or confused the jury as to the state's burden of proof. The state finally contends that, even if we assume for purposes of our analysis that the challenged arguments were improper, they did not deprive the defendant of a fair trial. We agree with the state.

The following additional facts are relevant to our resolution of the defendant's claims. At trial, the prosecutor adduced the testimony of Jorden Salas, one of the first officers to arrive at the crime scene. Salas testified that, when he reached the second floor landing, another officer on the scene was standing over the defendant and that the officer informed Salas that the defendant had just come out of Lewis' apartment. Salas stated that he and another officer immediately entered Lewis' apartment to perform a protective sweep, that the only person they encountered inside the apartment was Lewis, and that Lewis did not appear to be under

the influence of drugs or alcohol. When asked what he did after completing the protective sweep, Salas responded that he "took a signed sworn statement from [Lewis] . . . ." The prosecutor replied, "[w]ell, the rules of evidence preclude us from talking about anything that he may have told you, but I do want to ask you some . . . general questions." He then proceeded to question Salas about the procedures he followed in taking Lewis' statement, how long he spent with Lewis, and what he did afterward. Salas responded that he spent approximately fifteen minutes with Lewis, that he wrote down Lewis' exact words rather than summarize them, and that, afterward, he obtained Lewis' consent to search the apartment. The prosecutor adduced similar testimony from Sergeant Joshua Bergeson, who also took a statement from Lewis on the night in question. As he had done with Salas, the prosecutor admonished Bergeson not to disclose to the jury the contents of Lewis' statement to him.

During his closing argument, the prosecutor argued that "[t]here are three eyewitnesses to this crime, [Lewis, Brown, and Guzman]. I want to talk about [Lewis'] testimony. But, before I do, let me talk a little bit about . . . Lewis himself. You had the opportunity to watch him testify, and you will judge his credibility. . . . He has cases pending against him, and he's hoping that we will tell his sentencing judge that he testified truthfully in this case with the hope that the judge will consider that when imposing his sentence.

"His cooperation [agreement] will require you to evaluate his credibility with additional scrutiny. Please remember, however, that long before . . . Lewis picked up any criminal charges, he spoke to the police on two occasions immediately after the incident [in question], and, [on] one of those occasions, gave a sworn and written statement.

"And you saw how things work in here. If someone says something inconsistent from what they said previously, they get called out on it. That really didn't happen with . . . Lewis. I think you can conclude from your common sense that his testimony during the trial is, essentially, the same as the information he provided to the police shortly after the incident and long before he picked up any criminal charges."

Later, during his rebuttal argument, the prosecutor invoked the principle of Occam's razor when responding to an argument defense counsel had made during his closing argument: "Let me go back to the initial statement that [defense counsel] made when he began his argument. He said that the state had its version of events and that the defendant had . . . his own version of the events. I'm sure you've concluded by now that, when it comes to that scientific stuff and that math, I'm no rocket scientist. I'm no, you know, physicist of any kind.

"But there was this guy back in the, like, eleventh or twelfth century, and he was sort of a precursor to the modern physicists of today, and his name was William of Ockham. And he was trying to formulate some way to figure out when there are two competing versions of events, how do you figure out which one is correct and which one is incorrect?

"And he came up with this [theory]—and this was all in the context, obviously, of physics—and he comes up with this theory which is known as Occam's razor. And Occam's razor is, you know, when there's two competing theories of events; when there's the state's version and [the defendant's] version, how do you figure out which one is believable? Which one is credible? His theory was, you take the theory that's simple and straightforward. In other words, you take the theory

that makes common sense. What theory makes common sense?

"This story of [the defendant]—these lies of two to ten people attacking [him], and [his] fighting them off with [his] fists, and disarming people, and, you know, [he] was stabbed . . . [but doesn't] know who stabbed [him]. Somebody [else] stabbed [the victim]. It could have been somebody else. It could have been this person.

"I guess, now, it could have been this guy Dre . . . who was interviewed by the police shortly [afterward], [who] appeared calm, as you'll remember from the testimony. . . . [H]e was calm during all of [it]. He . . . called 911 himself. There's really no evidence that he was involved in this. It just so happens that he was described as somewhat short and somewhat stocky.

"Well, so do you believe that sort of unreal, complex story or do you believe the simple, straightforward story that makes common sense, which is that . . . Lewis saw the defendant attack [the victim] violently with [a] knife, repeatedly, and [kill] him."

As previously indicated, defense counsel did not object to either of the challenged arguments.[7] We address the defendant's contentions with respect to each of them in turn.

We begin by setting forth the legal principles governing our analysis. "In analyzing claims of prosecutorial impropriety, we engage in a two step analytical process. . . . The two steps are separate and distinct. . . . We first examine whether prosecutorial impropriety occurr-

[7] Although the defendant's claims are unpreserved, "under settled law, a defendant who fails to preserve claims of prosecutorial [impropriety] need not seek to prevail under the specific requirements of *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), and, similarly, it is unnecessary for a reviewing court to apply the four-pronged *Golding* test." (Internal quotation marks omitted.) *State* v. *Ortiz*, 343 Conn. 566, 579, 275 A.3d 578 (2022).

ed. . . . Second, if an impropriety exists, we then examine whether it deprived the defendant of his due process right to a fair trial. . . . In other words, an impropriety is an impropriety, regardless of its ultimate effect on the fairness of the trial. Whether that impropriety was harmful and thus caused or contributed to a due process violation involves a separate and distinct inquiry. . . .

"It is well established that prosecutorial impropriety can occur during final or rebuttal argument. . . . To prove prosecutorial [impropriety], the defendant must demonstrate substantial prejudice. . . . In order to demonstrate this, the defendant must establish that the trial as a whole was fundamentally unfair and that the [impropriety] so infected the trial with unfairness as to make the conviction a denial of due process." (Citations omitted; internal quotation marks omitted.) *State* v. *Ortiz*, 343 Conn. 566, 579–80, 275 A.3d 578 (2022).

We previously have stated that, "[w]hen making closing arguments to the jury, [counsel] must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument. . . . Thus, as the state's advocate, a prosecutor may argue the state's case forcefully, [provided the argument is] fair and based [on] the facts in evidence and the reasonable inferences to be drawn therefrom. . . . Moreover, [i]t does not follow . . . that every use of rhetorical language or device [by the prosecutor] is improper. . . . The occasional use of rhetorical devices is simply fair argument. . . .

"Nevertheless, the prosecutor has a heightened duty to avoid argument that strays from the evidence or diverts the jury's attention from the facts of the case." (Internal quotation marks omitted.) *State* v. *Ciullo*, 314

Conn. 28, 37, 100 A.3d 779 (2014); see also *State* v. *Martinez*, 319 Conn. 712, 727–28, 127 A.3d 164 (2015) ("[w]hile the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered, it must never be used as a license to state, or to comment [on], or to suggest an inference from, facts not in evidence, or to present matters [that] the jury ha[s] no right to consider" (internal quotation marks omitted)).

"As a general rule, a witness' prior consistent statements are inadmissible at trial. . . . Such statements clearly are barred by the hearsay rule if sought to be used to prove the truth of the matters asserted therein . . . . The rationale [on] which this rule is based is that the witness' story is not made more probable or more trustworthy by any number of repetitions of it. . . .

"This rule, however, is not absolute. The trial court, within its discretion, may admit a prior consistent statement if offered to rehabilitate a witness who has been impeached by a prior inconsistent statement . . . by the suggestion of bias, motive, or interest arising after the time the prior consistent statement was made . . . by a claim of recent fabrication . . . or by a claim of faulty memory. . . . When a prior consistent statement is admitted under any of these exceptions, it is admitted to affect credibility only and not to establish the truth of the statement." (Citations omitted; internal quotation marks omitted.) *State* v. *Valentine*, 240 Conn. 395, 412–413, 692 A.2d 727 (1997); see also Conn. Code Evid. § 6-11 (b) ("[i]f the credibility of a witness is impeached by (1) a prior inconsistent statement of the witness, (2) a suggestion of bias, interest or improper motive that was not present at the time the witness made the prior consistent statement, or (3) a suggestion of recent contrivance, evidence of a prior consistent statement made by the witness is admissible, in the discretion of the court, to rebut the impeachment").

Additionally, "[although a] prosecutor is permitted to comment [on] the evidence presented at trial and to argue the inferences that the jurors might draw therefrom, he is not permitted to vouch personally for the truth or veracity of the state's witnesses." (Internal quotation marks omitted.) *State* v. *Albino*, 312 Conn. 763, 780, 97 A.3d 478 (2014). Similarly, "[i]t is axiomatic that prosecutors are not permitted to misstate the law or to distort the government's burden of proof . . . because such statements are likely to improperly mislead the jury." (Internal quotation marks omitted.) *State* v. *Courtney G.*, 339 Conn. 328, 357, 260 A.3d 1152 (2021).

Applying these principles to the present case, we conclude, first, that the prosecutor's argument concerning Lewis' prior statements to the police did not improperly vouch for Lewis' credibility or reference facts not in evidence. Anticipating that defense counsel would argue that Lewis' testimony should not be credited because of his cooperation agreement and knowing that the court would instruct the jury that it must scrutinize Lewis' testimony with particular care in light of that agreement,[8] the prosecutor reminded the jurors that

[8] During its final charge to the jury, the trial court instructed the jury in relevant part: "Lewis . . . testified in this case as [a] cooperating [witness]. A cooperating witness is someone who is currently incarcerated or is awaiting trial for some crime other than the crime involved in this case and who agrees to testify for the state.

"You must look with particular care at the testimony of cooperating witnesses and scrutinize it very carefully before you accept it. You should determine the credibility of that witness in light of any motive for testifying falsely and inculpating the accused.

"In considering the testimony of this witness, you may consider such things as the extent to which the cooperating [witness'] testimony is confirmed by other evidence, the specificity of the testimony . . . the cooperating [witness'] criminal record, any benefits received in exchange for the testimony . . . and the circumstances under which the cooperating witness initially provided the information to the police or the prosecutor, including whether the cooperating witness was responding to leading questions.

"Like all questions of credibility, this is a question you must decide based on all the evidence presented to you."

Lewis' cooperation agreement related to crimes he committed after he gave a sworn statement to the police about the victim's murder. The prosecutor then argued that, if Lewis had changed his account of the murder as a result of the cooperation agreement, the defense would have used his prior statements to impeach him, just as it had used Beard's and Rodriguez' prior statements to impeach them.

We are not persuaded by the defendant's assertion that this argument was based on facts not in evidence. Cf. *State* v. *Payne*, 260 Conn. 446, 456, 797 A.2d 1088 (2002) (concluding that it was improper for prosecutor to tell jury "that the defendant probably had been involved in a second robbery even though there was no evidence suggesting that to be true"). Nor did the argument directly or indirectly vouch for Lewis' credibility. Cf. *State* v. *Vazquez*, 79 Conn. App. 219, 232, 830 A.2d 261 (concluding that it was improper for prosecutor to argue that police officers "raised their hand[s] to tell the truth, and that's exactly what [they] did" (internal quotation marks omitted)), cert. denied, 266 Conn. 918, 833 A.2d 468 (2003). Three different witnesses (Lewis, Salas, and Bergeson) testified that Lewis gave statements to the police on the night of the murder. The jury was also aware that Beard and Rodriguez gave statements to the police and that the defense had used their statements to discredit them. It is this specific combination of facts—the jury's awareness of the existence of Lewis' prior statements and the defense's use of Beard's and Rodriguez' prior statements to impeach them—that convinces us that "the prosecutor's remarks [simply] underscored an inference that the jury [reasonably] could have drawn entirely on its own, based on the evidence presented [at trial]." (Internal quotation marks omitted.) *State* v. *Fauci*, 282 Conn. 23, 37, 917 A.2d 978 (2007); see also *State* v. *Courtney G.*, supra, 339 Conn. 355 ("[a]lthough a prosecutor may not express

a personal opinion as to a witness' credibility, he or she . . . may ask the jurors to draw inferences that are based on their common sense and life experience" (internal quotation marks omitted)). In other words, the prosecutor asked the jurors to infer from evidence properly before them, and from their personal experience as jurors in this case, that, if Lewis had changed his story as a result of his cooperation agreement, the defense could and would have used his prior statements to discredit him.[9] For these reasons, we conclude that the first challenged argument did not exceed the bounds of permissible argument.

We also disagree with the defendant that the prosecutor's reference to Occam's razor—the principle that " 'the simplest of competing theories should be preferred over more complex and subtle ones' "; *Brodie* v. *Workers' Compensation Appeals Board*, 40 Cal. 4th 1313, 1328 n.10, 156 P.3d 1100, 57 Cal. Rptr. 3d 644 (2007);—diluted the state's burden of proof or other-

[9] The defendant contends that the prosecutor's argument was an attempt to "bypass" the rules of evidence during closing arguments. He argues that, if the prosecutor wanted to introduce the contents of Lewis' prior statements to rebut an inference that he had changed his story because he hoped for consideration in connection with pending charges, then he could have asked the trial court to allow it to do so under § 6-11 (b) of the Connecticut Code of Evidence, which permits the court, in its discretion, to admit a witness' prior consistent statement to rebut "a suggestion of bias, interest or improper motive that was not present at the time the witness made the prior consistent statement, or . . . a suggestion of recent contrivance . . . ." Conn. Code Evid. § 6-11 (b). Under slightly different facts, the defendant's argument might be persuasive, and we recommend that prosecutors seek admission of a prior consistent statement whenever they want to use it for one of the purposes sanctioned by § 6-11 (b) of the Connecticut Code of Evidence. Although the prosecutor in this case chose not to request admission of Lewis' prior statements, it is fair to assume that the prosecutor believed that the argument could be made without them on the basis of evidence already in the record. In reaching our decision, we are mindful that the prior consistent statements in this case would have been admissible to rebut the suggestion that Lewis had falsely implicated the defendant, presumably to gain favor with the state, and there has been no suggestion that the statements did not, in fact, support that inference.

wise misled the jury as to the nature of that burden. "[W]e do not review the propriety of a prosecutor's statements in a vacuum but, rather . . . in the context of the entire trial." (Internal quotation marks omitted.) *State* v. *Courtney G.*, supra, 339 Conn. 351. In reviewing those statements, we are also mindful that the prosecutor is allowed some rhetorical leeway in making his closing argument. See, e.g., *State* v. *Gibson*, 302 Conn. 653, 659, 31 A.3d 346 (2011) ("[I]t does not follow . . . that every use of rhetorical language or device [by the prosecutor] is improper. . . . The occasional use of rhetorical devices is simply fair argument." (Internal quotation marks omitted.)).

In the present case, it is evident that the prosecutor's reference to Occam's razor was used as a rhetorical device in response to the defense counsel's closing argument that the jury must choose between the state's and the defendant's competing "versions" of events. The prosecutor responded to defense counsel's argument, first by arguing that the defendant's constantly changing story to the police belied his claim of extreme emotional disturbance precipitated by a delusion about Lopez' daughter having been sexually abused. The prosecutor then addressed defense counsel's assertion that inconsistences in the testimony of the state's witnesses created a reasonable doubt.[10] Finally, it is clear from our review of the record that the prosecutor invoked Occam's razor in an effort to address the absurdity of defense counsel's assertion that there were "two different versions of what . . . happened that night"

[10] For example, with respect to Rodriguez' testimony, the prosecutor argued: "We put him on the [witness] stand because we believe it is our obligation to provide you with all of the potentially relevant information regarding this homicide. We offered that information with the understanding that there were going to be these inconsistences in what he said . . . in comparison to what . . . other people said . . . . But we were confident . . . that you can sort through [these] differences and figure out what the facts . . . are."

and that both were worthy of consideration. Specifically, the prosecutor argued that the jury should choose the version "that makes common sense" rather than the "unreal, complex story" that defense counsel himself had labeled "delusional" and entirely lacking in evidentiary support. Nothing in the prosecutor's argument expressly or implicitly suggested to the jurors that they *must* choose the simpler version of events, even if they did not find it proven beyond a reasonable doubt. See *State* v. *Murray*, Docket No. A16-2053, 2017 WL 6567651, *9 (Minn. App. December 26, 2017) (by invoking Occam's razor, "[t]he prosecutor did not make a statement that [was] contrary to the state's burden of proof or contrary to the jury's task of weighing conflicting evidence"), review denied, Minnesota Supreme Court, Docket No. A16-2053 (March 20, 2018); *State* v. *McGovern*, Docket No. 36328-7-III, 2020 WL 3468197, *5 (Wn. App. June 25, 2020) (decision without published opinion, 13 Wn. App. 2d 1114) ("In context, the prosecutor's comments about Occam's [r]azor amounted to an argument about how to assess circumstantial evidence, not the burden of proof. The prosecutor's point was that the simplest explanation for the circumstantial evidence pointing to [the defendant's] guilt was that [the defendant] in fact stole the money. This perspective contrasted with [the defendant's] theory of the case, which was that he was the victim of an unfortunate combination of circumstances . . . ."), review denied, 196 Wn. 2d 1023, 474 P.3d 1043 (2020). Nor do we believe that the jury could have interpreted the prosecutor's argument in such a manner or ignored the trial court's explicit instructions to the contrary. See, e.g., *State* v. *Williams*, 258 Conn. 1, 15 n.14, 778 A.2d 186 (2001) ("[i]t is a fundamental principle that jurors are presumed to follow the instructions given by the judge" (internal quotation marks omitted)). We therefore reject the defendant's claim that the prosecutor's argument

diluted or misled the jury as to the state's burden of proof.[11]

We note, finally, our agreement with the state that, even if the prosecutor's remarks were improper, there is no possibility that they deprived the defendant of a fair trial. "To prove prosecutorial [impropriety], the defendant must demonstrate substantial prejudice. . . . In order to demonstrate this, the defendant must establish that the trial as a whole was fundamentally unfair and that the [impropriety] so infected the trial with unfairness as to make the conviction a denial of due process. . . . In weighing the significance of an instance of prosecutorial impropriety, a reviewing court must consider the entire context of the trial, and [t]he question of whether the defendant has been prejudiced by prosecutorial [impropriety] . . . depends on whether there is a reasonable likelihood that the jury's verdict would have been different [in the absence of] the sum total of the improprieties." (Citation omitted; internal quotation marks omitted.) *State* v. *Long*, 293 Conn. 31, 37, 975 A.2d 660 (2009).

To aid us in determining whether prosecutorial impropriety so infected the proceedings with unfairness as to deprive a defendant of a fair trial, this court applies the factors set forth in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987). "These factors include: the extent to which the [impropriety] was invited by defense conduct or argument . . . the severity of the [impropriety] . . . the frequency of the [impropriety] . . . the centrality of the [impropriety] to the critical issues in the case . . . the strength of the curative mea-

[11] We note that our decision is based on the specific facts of this case. In another case, the prosecutor's use of Occam's razor may run the risk of misleading the jury as to the state's burden of proof. To avoid any such confusion, we think it prudent for prosecutors to refrain from using Occam's razor as a rhetorical device, as there are better ways to convey to a jury that the defense's version of events is unworthy of belief.

sures adopted . . . and the strength of the state's case." (Internal quotation marks omitted.) *State* v. *Ortiz*, supra, 343 Conn. 580. Applying these factors here, we conclude that it is manifestly clear that the two alleged improprieties did not deprive the defendant of a fair trial. Each occurred only once, and neither was perceived by defense counsel as being so severe as to warrant an objection. See, e.g., *State* v. *Weatherspoon*, 332 Conn. 531, 558, 212 A.3d 208 (2019) (defense counsel's failure to object to allegedly improper comments is "a strong indication that they did not carry substantial weight in the course of the trial as a whole and were not so egregious that they caused the defendant harm"); *State* v. *Ceballos*, 266 Conn. 364, 414, 832 A.2d 14 (2003) ("[defense] counsel's failure to object at trial, [although] not by itself fatal to a defendant's claim, frequently will indicate on appellate review that the challenged comments do not rise to the magnitude of constitutional error" (emphasis omitted)). Nor do we perceive them as severe. Furthermore, although no curative measures were adopted, "the absence of such measures is attributable to [defense counsel's] failure to object or request any curative instruction from the court." *State* v. *Ortiz*, supra, 581. Despite defense counsel's failure to request such an instruction, however, we are persuaded that the trial court's instructions pertaining to the jurors' exclusive role as the arbiters of credibility, the state's burden of proof, and the bedrock rule that jurors must confine themselves to the evidence in the record were more than adequate to counteract any harm resulting from the alleged improprieties. With respect to the strength of the state's case, we conclude that the state's evidence identifying the defendant as the victim's killer was compelling.[12] Although some of the witnesses' testi-

[12] The defendant asserts that the state's case was weak, arguing that "[t]here are several different versions of [the victim's] death—none of which agree with each other." Defense counsel made a similar argument at trial, asserting that slight deviations in the timelines or factual recalls of the state's eyewitnesses (Lewis, Lopez, Rodriguez, Guzman, and Brown) were

mony conflicted in certain details, their testimony coincided in all material respects and, together with the forensic evidence, established the defendant's guilt beyond a reasonable doubt.

The judgment is affirmed.

In this opinion the other justices concurred.

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sufficient to raise reasonable doubt. To be sure, there were discrepancies and gaps in the testimony of these five witnesses, the inevitable result of the chaos, darkness, and rain, and the extreme intoxication of two of them, Lopez and Rodriguez. Notwithstanding these inconsistencies, we believe that there was considerable overlap in their testimony and that, when their accounts were combined with the forensic evidence and the defendant's highly incriminating statements and conduct, it left no doubt as to the defendant's culpability for the victim's murder.