STATE OF CONNECTICUT *v.* TYHITT BEMBER
(SC 20708)

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

Syllabus

Convicted of felony murder, attempt to commit robbery in the first degree, and carrying a pistol or revolver without a permit in connection with the shooting death of the victim, the defendant appealed to this court. On the night of the victim's murder, the defendant, armed with a .22 caliber revolver with black duct tape wrapped around its grip, was parked at a restaurant with H in H's car. When the defendant saw the victim walking nearby, he instructed H to follow the victim in the car. At some point, the defendant exited the car to pursue the victim on foot. After confronting the victim, the defendant decided to rob him, but, when the victim resisted, the defendant shot the victim five times. At trial, the state's case rested almost entirely on the testimony of H and B, who were both facing charges for their involvement in another homicide and had entered into cooperation agreements with the state. The defendant had allegedly confessed his involvement in the victim's murder to B, who was the defendant's close friend. Prior to trial, the defense moved to preclude the state from introducing the cooperation agreements during its direct examination of H and B. The trial court granted the motion but ruled that the prosecutor would be permitted to use leading questions to flesh out the terms of the agreements. The defense also moved for a pretrial hearing regarding the reliability of H's and B's proposed trial testimony pursuant to the statute (§ 54-86p) governing the reliability and admissibility of jailhouse informant testimony. Following a hearing, at which H and B testified, the trial court, over defense counsel's objection, granted the state's motion to open the hearing for the purpose of introducing five exhibits relating to evidence that the parties had referenced during their arguments at the hearing. Thereafter, the trial court found that H's and B's proposed trial testimony was sufficiently reliable to be admitted at trial. In reaching its decision, the trial court relied on, inter alia, its credibility assessment of H's and B's testimony in another criminal case. At trial, the prosecutor elicited testimony from H and B on direct examination regarding their coopera-

tion agreements, including their obligation to tell the truth under the terms of those agreements. *Held*:

1. The defendant could not prevail on his claim that the trial court had abused its discretion in permitting the prosecutor to question H and B during direct examination regarding the specific terms of their cooperation agreements with the state:

   The defendant waived this claim, as defense counsel expressly agreed that the state could use leading questions during direct examination to flesh out the terms of the cooperation agreements and H's and B's understanding of them, and, even if the claim was not waived, it still would have failed because defense counsel informed the trial court, prior to the start of the trial, that he intended to cross-examine H and B about their expectations under the cooperation agreements, and, therefore, it was within the trial court's discretion to permit the prosecutor to use the agreements to rehabilitate H and B in advance, during direct examination.

2. The defendant could not prevail on his claim that the prosecutor had impermissibly vouched for H's and B's credibility by introducing the truthfulness provisions of their cooperation agreements, eliciting testimony from H and B that their attorneys were present in the courtroom, and referencing their prior testimony in other criminal cases on behalf of the state:

   This court, relying on *State* v. *Calhoun* (346 Conn. 288) and *State* v. *Flores* (344 Conn. 713), concluded that the introduction of the truthfulness provisions of H's and B's cooperation agreements did not constitute improper vouching because they did not refer to facts not in evidence, explicitly or implicitly indicate that the state had verified the accuracy of their testimony, or offer the prosecutor's personal opinion regarding the truthfulness of their testimony, and those provisions merely stated that the witnesses had an obligation to testify truthfully and explained the consequences for a breach of that obligation.

   It was unnecessary for this court to decide whether the prosecutor's questions relating to H's and B's testimony in other cases and their attorneys' presence in the courtroom were improper because, even if they were, they did not deprive the defendant of a fair trial, as defense counsel did not raise any objection to these questions or ask the trial court to take any curative measures, and, accordingly, it could be inferred that defense counsel did not regard the questions as seriously prejudicial when they were posed to H and B.

   Moreover, the alleged improprieties were infrequent, as the challenged questions comprised only a small portion of the prosecutor's lengthy examination of both witnesses, this court did not perceive the questions as blatantly egregious or inexcusable, and, although H's and B's testimony was central to the state's case, the state presented evidence that corrobo-

rated their testimony, including cell site data and analysis placing the defendant near the crime scene close to the time that the victim was shot and a .22 caliber revolver with black duct tape wrapped around its grip, which the defendant had given to his then girlfriend for safe keeping after the victim's murder.

3. The trial court did not abuse its discretion in opening the reliability hearing to allow the state to introduce evidence that the parties had referenced during the hearing or in determining that H's and B's proposed trial testimony was sufficiently reliable to be admissible at trial under § 54-86p:

With respect to the trial court's opening of the reliability hearing, the defendant failed to identify any resulting prejudice, as the court found that the state had inadvertently failed to introduce the evidence referenced at the hearing and that the defendant was aware of that evidence, and as the court properly could have considered most, if not all, of the evidence under § 54-86p, even if it had not been admitted at the hearing.

With respect to the trial court's reliability determination, the trial court conducted a careful review of the record of the hearing, the legal arguments advanced by both parties, and the statutory factors enumerated in § 54-86p (a) in concluding that H's and B's proposed testimony was sufficiently reliable to be admitted at trial.

Moreover, although the trial court erroneously included its own assessment of H's and B's testimony in another case in determining that their proposed testimony was sufficiently reliable to be admitted at trial in the present case, that error was harmless because it was clear that the court would have found H's and B's testimony sufficiently reliable utilizing only permissible statutory factors under § 54-86p, as its prior credibility assessment was one of many factors that it considered in determining that the testimony was sufficiently reliable, there was nothing in the record to suggest that it was a dispositive factor or that the court's decision might have been different in its absence, and defense counsel had ample opportunity to impeach H's and B's credibility at trial and thoroughly availed himself of that opportunity through cross-examination and during closing argument.

This court instructed trial courts to rely on objective criteria, to which all parties would have access through the discovery process, in considering information disclosed pursuant to statute (§ 54-86o (a) (5)) for purposes of making a prima facie reliability determination under § 54-86p (a).

4. There was no merit to the defendant's claim that the trial court's denial of his motion to suppress a recording of a phone conversation he had had with his then girlfriend, D, while he was being held in pretrial detention on unrelated charges and to suppress the .22 caliber revolver seized by the police as a fruit of the information acquired from the recording violated his rights under the fourth amendment to the United States constitution:

The defendant failed to demonstrate that he maintained a subjective expectation of privacy in the content of his phone conversation with D, as he stipulated that, at the time of his admission to the correctional facility, he was notified and signed a waiver acknowledging that all nonprivileged calls were subject to recording and monitoring, there were signs posted near the phone area at the correctional facility, and a recorded message played throughout his call with D, reminding him that his call was subject to recording and monitoring, and nothing about the defendant's actions in placing a call under these conditions indicated an intent to preserve the contents of the call as private.

Moreover, in the absence of such an expectation of privacy, the defendant was not entitled to suppression of the recording of the phone conversation or the .22 caliber revolver.

Argued October 27, 2023—officially released June 25, 2024

Procedural History

Substitute information charging the defendant with the crimes of murder, felony murder, attempt to commit robbery in the first degree, conspiracy to commit robbery in the first degree, and carrying a pistol or revolver without a permit, brought to the Superior Court in the judicial district of New Haven, where the court, *Vitale*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the case was tried to the jury before *Vitale*, *J.*; subsequently, the court granted the defendant's motion for a judgment of acquittal as to the charge of conspiracy to commit robbery in the first degree; verdict and judgment of guilty of felony murder, attempt to commit robbery in the first degree, and carrying a pistol or revolver without a permit, from which the defendant appealed to this court. *Affirmed.*

James B. Streeto, senior assistant public defender, for the appellant (defendant).

Meryl R. Gersz, assistant state's attorney, with whom were *John P. Doyle*, *Jr.*, state's attorney, and *Melissa Holmes*, assistant state's attorney, for the appellee (state).

Opinion

ALEXANDER, J. Following a jury trial, the defendant, Tyhitt Bember, was convicted of felony murder in violation of General Statutes § 53a-54c, attempt to commit robbery in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-134 (a) (2), and carrying a pistol or revolver without a permit in violation of General Statutes § 29-35.[1] On appeal,[2] the defendant claims that (1) the trial court abused its discretion in permitting the state to question two of its witnesses about their cooperation agreements with the state during direct examination and that this questioning amounted to prosecutorial impropriety, (2) the trial court abused its discretion in concluding that the testimony of the cooperating witnesses was reliable and admissible pursuant to General Statutes § 54-86p,[3] and (3) the trial

[1] The jury found the defendant not guilty of the charge of murder in violation of General Statutes § 53a-54a (a). The trial court granted the defendant's motion for a judgment of acquittal as to the charge of conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-134 (a) (2).

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

[3] General Statutes § 54-86p provides in relevant part: "(a) In any criminal prosecution of a defendant for a violation of section . . . 53a-54c . . . upon a motion of the defendant before the start of a trial on any such offense, the court shall conduct a hearing at which hearsay or secondary evidence shall be admissible to determine whether any jailhouse witness's testimony is reliable and admissible. The court shall make a prima facie determination concerning the reliability of such testimony after evaluation of the evidence submitted at the hearing and the information or material disclosed pursuant to subdivisions (1) to (5), inclusive, of subsection (a) of section 54-86o, and may consider the following factors:

"(1) The extent to which the jailhouse witness's testimony is confirmed by other evidence;

"(2) The specificity of the testimony;

"(3) The extent to which the testimony contains details known only by the perpetrator of the alleged offense;

"(4) The extent to which the details of the testimony could be obtained from a source other than the defendant; and

"(5) The circumstances under which the jailhouse witness initially provided information supporting such testimony to . . . a prosecutorial official, including whether the jailhouse witness was responding to a leading question. . . ."

court's denial of his motion to suppress the recording of a jailhouse phone call and the .22 caliber revolver seized by the police as a result of information acquired from that recording violated his rights under the fourth amendment to the United States constitution. We reject the defendant's claims and affirm the judgment of the trial court.

The following facts are relevant to our analysis of the defendant's claims. On the evening of December 27, 2013, the defendant was driving around New Haven with John Helwig and Melvin Younger in Helwig's car. The three men were friends and often spent time together smoking, drinking, and engaging in criminal activity. On the night of the murder, the defendant was armed with an older model .22 caliber revolver that had black duct tape wrapped around the grip. Sometime around midnight, Helwig drove the men to a Taco Bell restaurant near exit 8 on Interstate 91. While parked at the restaurant, the defendant saw the victim, Javier Martinez, walking nearby. The defendant mistook the victim for someone he did not like and with whom he previously had fought. The defendant told Helwig to follow the victim so that he could confront him. At some point, the defendant and Younger exited Helwig's car to pursue the victim on foot. When the defendant caught up to him, he realized that the victim was not the person he thought he was but decided to rob him anyway. When the victim resisted, the defendant shot him five times. The victim died at the scene. Upon returning to Helwig's car, the defendant told Helwig that he had shot the victim because the victim disrespected him during the robbery by pushing his gun out of the way.

A nearby resident found the victim's body in the street and summoned the police. Five .22 caliber bullets were later removed from the victim's body. Investigators were able to determine that four of the bullets had been

fired from the same weapon. The remaining bullet was too damaged for an accurate comparison.

In 2017, after a lengthy investigation, the state charged the defendant with several offenses relating to the victim's death. The state's case turned primarily on the testimony of two cooperating witnesses, Otis Burton, a close friend of the defendant to whom the defendant had confessed after the murder, and Helwig, who was with the defendant on the night of the murder. The state also presented cell site data and analysis placing the defendant near the crime scene close to the time that the victim was shot, and a .22 caliber revolver with black duct tape wrapped around its grip, which the defendant had given to his girlfriend for safe keeping. The bullets recovered from the victim's body and crime scene were too damaged to be directly connected to the defendant's .22 caliber revolver.

I

The defendant first claims that the trial court abused its discretion in permitting the state to question Helwig and Burton regarding the specific terms of their cooperation agreements with the state[4] during direct examina-

[4] Helwig's cooperation agreement, which was identical to Burton's in all pertinent respects, provided in relevant part: "The [state] agrees to: (1) [u]pon Helwig's request, to provide information regarding his cooperation pursuant to his agreement to any government agency in any matter or to any court in any proceeding. The [s]tate will not make a specific sentence recommendation unless required to do so by the [c]ourt.

"Helwig agrees to: (1) truthfully disclose all information pertaining to his criminal activities, and/or the criminal activities of others, as these activities relate to matters about which the [state] and any investigating police officer or agency inquires of him; (2) truthfully testify before any investigatory grand jury, and/or at any trial, retrial, or other court proceeding concerning such criminal activity when requested to do so by the [state]. . . .

"It is understood that this agreement contemplates the following criminal activities, whether completed, attempted, or conspired: murder; hindering prosecution; the discharge, theft, possession and trafficking of firearms; and that it may include any other criminal activities that may arise upon further information and investigation.

"It is understood that this is not an immunity agreement and that, in providing information pursuant to this agreement, Helwig may be subject to prosecution for any applicable state criminal offense.

tion. The defendant contends that the state should have been precluded from introducing the bolstering aspects of the agreements, particularly the truthfulness provisions, until after Helwig's and Burton's credibility was attacked by the defense. The defendant further contends that the state's use of the cooperation agreements during its direct examination, and the testimony elicited as a result, amounted to prosecutorial impropriety because it impermissibly vouched for the witnesses' credibility.

The state argues that the defendant waived this claim because defense counsel affirmatively agreed that the state could question Helwig and Burton about their cooperation agreements during direct examination. The state further argues that, even if the claim was not waived, the trial court did not abuse its discretion in

"It is understood that the [state], in fulfilling its obligations pursuant to this agreement, makes no promises or representations regarding the actual sentence imposed in any future matter, or the certainty of concurrent time. The disposition of such matters rests entirely with the trial court. . . . Helwig understands that the charges for which he has entered pleas carry an exposure of thirty years incarceration.

"It is understood that Helwig is obligated pursuant to this agreement to at all times give complete and truthful information and testimony. In the event that the [state] in its discretion reasonably determines that Helwig has given incomplete, false or misleading information, the agreement shall become null and void and of no further effect, and Helwig may be subject to prosecution of perjury and/or any other applicable state criminal offense relating to the giving of such information.

"It is understood that if the [state] reasonably determines that Helwig has violated any provision of this agreement, the agreement shall become null and void and of no effect. In the event that the agreement is rendered null and void, for any reason, Helwig understands that any information that he has provided pursuant to [the] agreement may be used against him in court and he agrees to waive (1) any claim in law that his statements conveying such information are subject to suppression, and (2) any statutes of limitations defense.

"It is understood that this contract embodies the entirety of the agreement between the parties, and that any amendment of, or addition to, the terms hereof shall be executed in writing that is signed by the [state], Helwig, and Helwig's attorney. By signing this agreement, Helwig acknowledges that he has carefully considered each of its provision[s], discussed each with his counsel, and has no questions or concerns relating to entering into the agreement."

allowing the challenged testimony under *State* v. *Calhoun*, 346 Conn. 288, 289 A.3d 584 (2023), and *State* v. *Flores*, 344 Conn. 713, 281 A.3d 420 (2022), because defense counsel informed the court, prior to the start of trial, that Helwig's and Burton's expectations under their cooperation agreements would be "front and center" in his cross-examination of them. The state further argues that, because the trial court did not abuse its discretion in permitting the state to introduce the cooperation agreements, there was no prosecutorial impropriety.

The following additional facts are relevant to the resolution of this claim. Prior to trial, the defendant moved to preclude the state "from offering [Helwig's and Burton's] cooperation agreement[s] in its case-in-chief." Defense counsel argued that the state should be precluded from presenting the agreements because the prosecutor trying the case was the sole signatory on the agreements, which was inherently bolstering of the witnesses' credibility. Defense counsel further argued that, because "[t]he expectations of the witnesses under [the cooperation] agreement[s] [would] be front and center of some portion of . . . [his] cross-examination . . . [he] should have the right to introduce [the agreements] . . . if [he] choose[s] to go down that road."

In making this argument, defense counsel acknowledged that, under *State* v. *Gentile*, 75 Conn. App. 839, 851–52, 818 A.2d 88, cert. denied, 263 Conn. 926, 823 A.2d 1218 (2003),[5] the trial court had discretion to admit

[5] In *Gentile*, the Appellate Court adopted the rule followed by the majority of federal appellate courts permitting courts to admit a cooperation agreement before the cooperating witness' credibility has been attacked. *State* v. *Gentile*, supra, 75 Conn. App. 851–52; see also id., 851 ("it is not improper bolstering for a prosecutor to question a witness on direct examination about [a] cooperation agreement's requirement that the witness testify truthfully to receive the benefits of the agreement"). We have not yet decided whether we agree with the Appellate Court's holding in *Gentile* on this issue, although we have held that the trial court may exercise its discretion to permit the state to question a witness about the terms of the witness' cooperation agreement during its direct examination, if defense counsel indicates that the

the cooperation agreements during the state's direct examination, before the cooperating witnesses' credibility was attacked. Defense counsel maintained, however, that, because Helwig's and Burton's credibility was pivotal to the success of the state's case, "this [was] the very sort of case [that] *Gentile* may have had in mind, [in which] the court ha[s] the ability to exercise its discretion and [to] say to the state, no, you don't get to offer [the agreements] in your case-in-chief. You can certainly mention [them]. . . . I don't think that's improper. But to . . . offer the document[s] [themselves] . . . especially when the [person who signed them] on behalf of the state . . . is the very [person] trying the case . . . [that is a bridge too] far. . . . [T]hat's implicit vouching that this court should prohibit . . . ."

The trial court thereafter granted the defense's request to preclude the state from introducing copies of the cooperation agreements during its direct examination. At that time, the court asked defense counsel if it correctly understood the defense's objection to the introduction of the agreements, stating in relevant part: "The [defense] has requested that the written agreement[s] be disallowed as . . . exhibit[s], but, as I understand the record, and I can be corrected shortly if I'm wrong . . . [the defense] has no objection to thorough and specific testimony by each witness as to the exact contents of the agreements and their understanding [of the agreements]. . . . There's no objection, as I understand it, to the [state's] examining the

defense intends to question the witness regarding the cooperation agreement during cross-examination. See *State* v. *Flores*, supra, 344 Conn. 748 ("[w]e need not decide today whether to follow the majority or the minority of jurisdictions regarding whether the admission of the agreements and their truthfulness provisions must await an attack on the witness' credibility because the trial court did not abuse its discretion under either approach"). Although *Flores* had not been decided at the time of the defendant's trial, it is controlling on appeal. See, e.g., *State* v. *Calhoun*, supra, 346 Conn. 302 n.4.

witnesses from a document not in evidence. . . . [Therefore], the state will be permitted leading questions on direct [examination] to fully [flesh] out the terms of the agreement[s]. The documents will be marked for [identification] purposes only."[6] When the trial court finished speaking, it asked defense counsel whether it had accurately conveyed for the record the defense's objection to the state's use of the cooperation agreements. Defense counsel responded, "Yes, I believe . . . that [the court has] stated [the defense's] position correctly . . . ."

Given this procedural history, we agree with the state that the defendant has waived the right to challenge the trial court's evidentiary ruling as it relates to the admission of the terms of the cooperation agreements on direct examination.[7] See, e.g., *State* v. *Hampton*, 293 Conn. 435, 449, 988 A.2d 167 (2009) ("[w]hen a party [or his counsel] consents to or expresses satisfaction with an issue at trial, claims arising from that issue are

[6] This procedure was initially proposed by defense counsel earlier at the hearing conducted pursuant to § 54-86p in response to a question from the trial court about how the jury would be made aware of the precise terms of Helwig's and Burton's cooperation agreements. Defense counsel then affirmatively stated: "I have consented to leading questions to avoid the harm that I'm complaining about here. . . . I would agree that leading questions would be appropriate there."

[7] With respect to his other evidentiary claims, the defendant contends that the trial court abused its discretion in permitting the state to use the text of the cooperation agreements to vouch for Helwig's and Burton's credibility. The defendant additionally contends that the trial court erred in allowing the state to further vouch for their credibility by eliciting testimony from them that they previously had testified on behalf of the state in other cases and that their attorneys were present in the courtroom at the defendant's trial. Defense counsel did not object at trial to the state's questioning relating to the text of the cooperation agreements, Helwig's and Burton's prior testimony, or their attorneys' presence in the courtroom. These claims are thus unpreserved, and we decline to review them on appeal. See, e.g., *State* v. *Qayyum*, 344 Conn. 302, 312, 279 A.3d 172 (2022) ("[D]efense counsel's failure to object to those questions necessarily means that he did not articulate his claim regarding those questions with sufficient clarity to put the trial court on notice. As a result, we conclude that the defendant failed to preserve this evidentiary claim, and, therefore, we do not review it.").

deemed waived and may not be reviewed on appeal" (internal quotation marks omitted)). The record leaves no reasonable question that defense counsel assented to the very procedure of which the defendant now complains. Defense counsel expressly agreed that the state could use "leading questions on direct [examination] to fully [flesh] out the terms of the agreement[s]" and the witnesses' understanding of them, which is exactly what occurred. Furthermore, even if the claim was not waived, it still would fail because defense counsel informed the trial court, prior to the start of trial, that Helwig's and Burton's expectations under their cooperation agreements would be "front and center" in his cross-examination of them. See, e.g., *State* v. *Calhoun*, supra, 346 Conn. 302 ("if defense counsel makes it clear that [the defense] intend[s] to cross-examine a witness on that witness' cooperation agreement, then the trial court has discretion to permit the state to use the text of the cooperation agreement to rehabilitate the witness in advance, during direct examination").

We now turn to the defendant's claims of prosecutorial impropriety. The defendant claims that the prosecutor impermissibly vouched for Helwig's and Burton's credibility by (1) introducing the truthfulness provisions of their cooperation agreements, (2) eliciting testimony from them that their attorneys were present in the courtroom, and (3) referencing their previous testimony in other cases on behalf of the state.[8] The state

[8] The state argues that these claims are merely a recharacterization of the defendant's evidentiary claims. See, e.g., *State* v. *Graham*, 344 Conn. 825, 858, 282 A.3d 435 (2022). We disagree. We previously have reviewed claims relating to the admission of truthfulness provisions as claims of prosecutorial impropriety. See, e.g., *State* v. *Flores*, supra, 344 Conn. 736, 742. We also disagree with the state's contention that the defendant's vouching claims relating to Helwig's and Burton's prior testimony and their attorneys' presence in the courtroom are strictly evidentiary. Although unpreserved challenges to the use of leading questions are unreviewable when the defendant "take[s] issue with the form of the prosecutor's questions and not the information elicited"; *State* v. *Morel-Vargas*, 343 Conn. 247, 273, 273 A.3d 661, cert. denied, U.S. , 143 S. Ct. 263, 214 L. Ed. 2d 114 (2022); in the present case, the defendant is not challenging the manner in

maintains that no impropriety occurred and, in the alternative, that the defendant was not deprived of a fair trial. Although defense counsel did not object to many of the questions the defendant now argues constituted impropriety, this court reviews unpreserved claims of prosecutorial impropriety under *State* v. *Williams*, 204 Conn. 523, 529 A.2d 653 (1987), and *State* v. *Warholic*, 278 Conn. 354, 897 A.2d 569 (2006). In so doing, however, "we continue to adhere to the well established maxim that defense counsel's failure to object to the prosecutor's [question] when it was [asked] suggests that defense counsel did not believe that it was [improper] in light of the record of the case at the time." (Internal quotation marks omitted.) *State* v. *Taft*, 306 Conn. 749, 762, 51 A.3d 988 (2012). We conduct a two step inquiry in analyzing a claim of prosecutorial impropriety: "(1) whether [impropriety] occurred in the first instance; and (2) whether that [impropriety] deprived a defendant of his due process right to a fair trial." (Internal quotation marks omitted.) Id., 761–62. "[I]n determining whether prosecutorial impropriety so infected the proceedings with unfairness as to deprive the defendant of a fair trial, this court applies the factors set forth in *State* v. *Williams*, [supra, 540]. 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 measures adopted . . . and the strength of the state's case." (Internal quotation marks omitted.) *State* v. *Hinds*, 344 Conn. 541, 563–64, 280 A.3d 446 (2022).

"Vouching occurs when the state expressly or impliedly attests to the credibility of a witness. . . . Although

which the testimony relating to the witnesses' prior testimony and their attorneys' presence at trial was elicited but, rather, is challenging the substance of that testimony.

the state would not put on a witness it did not believe, the state's confidence in its witnesses may not be stated or implied to the jury." (Citation omitted.) *State* v. *Calhoun*, supra, 346 Conn. 300. To avoid impermissible vouching, the state may not express a personal opinion about witness credibility, imply a guarantee of truthful testimony, or make suggestions to the jury on the basis of facts not in evidence. See, e.g., *United States* v. *Roundtree*, 534 F.3d 876, 880 (8th Cir. 2008). To avoid such impropriety, "the state must take care in drafting its cooperation agreements, and trial courts must carefully examine their language before admitting them fully into evidence." (Internal quotation marks omitted.) *State* v. *Calhoun*, supra, 301.

Looking first to whether recitation of the truthfulness provisions of Helwig's and Burton's cooperation agreements constituted impropriety in the first instance, we note that, in both *Calhoun* and *Flores*, this court concluded that the state's use of nearly identical cooperation agreements did not constitute improper vouching. See id.; *State* v. *Flores*, supra, 344 Conn. 748–50. The truthfulness provisions at issue in those cases and in the present case "are similar to the kind of provisions considered permissible in the federal case law discussed and cited [in *Flores*]—specifically, the provisions stating that [the witness] had a duty to 'truthfully disclose' and 'truthfully testify' and that he may be charged with perjury if he lies. Under applicable case law, these provisions do not constitute impermissible vouching because they do not refer to facts not in evidence, do not explicitly or implicitly indicate that the state has verified the accuracy of the testimony, and do not offer the prosecutor's personal opinion regarding the truthfulness of the testimony. Rather, [they] merely state that [the witness] had an obligation to testify truthfully—a duty all witnesses are sworn to uphold—and [to] explain the consequences for a breach of that obli-

gation." *State* v. *Flores*, supra, 748–49; see also *State* v. *Calhoun*, supra, 301–302 (truthfulness provision that witness could be prosecuted for perjury if state later determines that witness lied under oath was not vouching because it "[did] not imply that the state or judge knows that the witness presently is telling the truth, or that they possess information or means, unavailable to the jury, to determine the veracity of the witness' testimony"). Our analysis in these cases is dispositive of the defendant's prosecutorial impropriety claim with respect to the introduction of the truthfulness provisions of Helwig's and Burton's cooperation agreements.

The defendant next claims that the prosecutor vouched for Helwig's and Burton's credibility by eliciting testimony from them that both previously had testified on behalf of the state in other cases. He argues that this testimony, "[although] not objected to, constituted vouching in effect when combined with the testimony concerning the cooperation agreements" because "[i]t suggested to the jury that the prosecutor had already verified the truth of the testimony . . . or [else] he wouldn't have used them as witnesses in subsequent proceedings." Further, the defendant contends that the prosecutor vouched for Helwig's and Burton's credibility by eliciting from them the fact that their attorneys were present in the courtroom during their testimony. The defendant asserts that the prosecutor's questioning in this regard constituted vouching because, otherwise, the jury would necessarily have to conclude that both the prosecutor and defense counsel would be "willing to sit idly by while Helwig and Burton lied under oath." We conclude that it is unnecessary to decide whether the prosecutor's questions relating to Helwig's and Burton's prior testimony and their attorneys' presence in the courtroom were improper because, even if they were, they did not deprive the defendant of a fair trial. See, e.g., *State* v. *Hinds*, supra, 344 Conn. 563 ("even

if the prosecutor's remarks were improper, there is no possibility that they deprived the defendant of a fair trial").

There is no indication in the record that the defense invited the questions relating to Helwig's and Burton's prior testimony and their attorneys' presence in the courtroom. However, defense counsel did not object, and we interpret defense counsel's lack of objection "as a strong indication that [the alleged improprieties] 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. *Weatherspoon*, 332 Conn. 531, 558, 212 A.3d 208 (2019). Although a lack of objection is not dispositive in our analysis, "[w]hen no objection is raised at trial, we infer that defense counsel did not regard the remarks as seriously prejudicial at the time the statements were made." *State* v. *Medrano*, 308 Conn. 604, 620, 65 A.3d 503 (2013). Furthermore, even though the trial court did not adopt any curative measures, "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*, 343 Conn. 566, 581, 275 A.3d 578 (2022).

Moreover, we do not view the prosecutor's questioning regarding Helwig's and Burton's prior testimony or their attorney's presence in the courtroom to be "blatantly egregious or inexcusable." (Internal quotation marks omitted.) *State* v. *Ciullo*, 314 Conn. 28, 59, 100 A.3d 779 (2014). The allegedly improper questions were asked in conjunction with the state's introduction of the terms of the witnesses' cooperation agreements, were isolated in nature, did not constitute significant evidence in the context of their entire testimony, and, again, resulted in no objection from defense counsel. Given this context, we do not perceive the questions as blatantly egregious or inexcusable.

Nor can these instances of alleged impropriety be characterized as frequent. See, e.g., *State* v. *Felix R.*, 319 Conn. 1, 17, 124 A.3d 871 (2015) ("[i]mproper statements that are minor and isolated will generally not taint the overall fairness of an entire trial" (internal quotation marks omitted)). The challenged questions comprised only a small portion of the state's lengthy examination of both witnesses. Moreover, the few isolated questions relating to their prior testimony revealed the name and nature of the cases in which they previously had testified on behalf of the state. The prosecutor asked Helwig and Burton whether their attorneys were present in the courtroom once and did so in confirming that both witnesses were represented by counsel when they entered the pleas related to their cooperation agreements. Finally, although Helwig's and Burton's testimony was important to the state's case, the extent to which their credibility was a central issue is mitigated by the other evidence of guilt presented at trial. Specifically, both witnesses' testimony was corroborated in many respects by cell site data and analysis, which coincided with the testimony about the defendant's movements on the night of the murder, placing him close to the crime scene around the time of the shooting. The jury was also presented with evidence that the defendant had given his unique .22 caliber revolver—the same caliber weapon used to shoot and kill the victim—to his then girlfriend to hold for him shortly after the murder took place. This corroborating evidence reinforces our conclusion that, even if we assume the existence of impropriety, the defendant was not deprived of a fair trial. See, e.g., *State* v. *Weatherspoon*, supra, 332 Conn. 558 ("[W]e do not doubt that the jury's assessment of witness credibility was a significant factor in determining its verdict. But the jury was also presented with substantial physical and testimonial evidence corroborating [the witness'] story . . . ."); *State*

v. *Thompson*, 266 Conn. 440, 482, 832 A.2d 626 (2003) ("we see no reason why the nature of the evidence as circumstantial rather than direct should bear on the assessment of the strength of the state's case"). Considering all of these factors, we cannot conclude that the prosecutor's questions relating to Helwig's and Burton's testimony and their attorneys' presence in the courtroom "so infected the trial with unfairness as to make the conviction a denial of due process." (Internal quotation marks omitted.) *State* v. *Hinds*, supra, 344 Conn. 556. Accordingly, the defendant cannot prevail on any of his claims of prosecutorial impropriety.

II

The defendant next claims that the trial court abused its discretion in concluding that Helwig's and Burton's testimony was sufficiently reliable to be admissible under § 54-86p. The defendant makes three arguments in support of this claim: (1) the court abused its discretion in opening the hearing conducted pursuant to § 54-86p (reliability hearing) to allow the state to introduce evidence corroborating Helwig's and Burton's testimony, (2) the court abused its discretion in determining that the state made a prima facie showing of reliability, as required by § 54-86p, and (3) the court improperly relied on its own credibility assessment of Helwig's and Burton's testimony in another case in concluding that their testimony was sufficiently reliable to be admissible in the present case. The state responds that the trial court did not abuse its discretion in granting the motion to open the reliability hearing and in finding Helwig's and Burton's testimony reliable under § 54-86p. With respect to the defendant's third argument, the state contends that it is not preserved because defense counsel did not object to this part of the court's ruling at the reliability hearing, even though he had the opportunity to do so.

The following additional facts are relevant to our resolution of this claim. At the reliability hearing, Burton testified that, at the time of the victim's murder, he was sixteen years old and spent almost every day "hanging out" with a group of teenagers in the basement of an apartment building where a friend, McKinney Davis, lived. Most of the teenagers, including the defendant, were members of a New Haven street gang known as "Piru." At the time of the murder, Burton had known the defendant for approximately three years. Burton testified that the defendant often carried a revolver that had tape around the handle. It was in Davis' basement that he heard the defendant discuss the victim's murder. According to Burton, several individuals were present when this conversation occurred, including Younger, Helwig, Davis, and Torrence Gamble. The defendant told them that, on the night of the murder, he had gone out to look for someone he "had a beef with," who was in a relationship with the mother of his child. The defendant said that he did not find the person and that, when he came across the victim, whom he did not know, he decided to rob him, but "the robbery didn't go right . . . [because the victim] reached for the gun."

Burton further testified that, after the murder, New Haven police officers came to his home and told him that a confidential informant had informed them that Burton was present in Davis' basement when the defendant discussed the murder. Burton told the officers that he was wearing headphones at the time and did not hear anything. Burton testified that he lied to the officers because "it's street code . . . . Nobody likes a snitch."

In 2016, Burton was arrested for conspiracy to commit murder in connection with the murder of Gamble, who was killed because members of their gang suspected him of being a snitch. Burton was also arrested for assault in the first degree in an unrelated case. Burton testified that, after his arrests, he implicated the

defendant in the victim's murder and entered into plea and cooperation agreements with the state in the hope of receiving a more lenient sentence. At the time of the defendant's trial, Burton was awaiting sentencing in both the murder and assault cases. Under the cooperation agreement, his sentence exposure was capped at twenty years. Without the agreement, he could have faced up to forty-six years of incarceration.

Helwig testified that he met the defendant at the end of 2012 or the beginning of 2013 through a mutual friend. They grew so close that Helwig hired the defendant to work for his family's business. Most of the people they socialized with were affiliated with the Piru street gang, although Helwig was not a member of the gang. As the only person with a car, Helwig regularly drove gang members where they needed to go. Helwig testified that the defendant carried an older .22 caliber revolver with black tape around the grip. The gun was unique because it held more rounds than a normal revolver.

Helwig further testified that, on the night of the murder, he, the defendant, and Younger began the evening near Goffe and Orchard streets in New Haven. Later, they drove to the Taco Bell restaurant near exit 8 on Interstate 91. While parked at the restaurant, the defendant "noticed an individual that he thought he had problems with . . . and he wanted to confront [him]." They then drove down the street in the direction they thought the individual was headed. As the individual approached, the defendant and Younger got out of the car to pursue him on foot. A short time later, Helwig heard several gunshots, after which the defendant and Younger came running back to the car. According to Helwig, the defendant had his .22 caliber revolver in his hand when he entered the car. When Helwig asked the defendant what had happened, the defendant said that, when he tried to rob the individual, "the kid tried to mush the gun out of his hand, [so] he shot him." They then drove

back to Goffe Street, to the home of Rayshawn Burrows, where they hung out, smoking, drinking, and discussing the events of the evening.

When initially questioned by the police, Helwig denied any knowledge of the victim's murder. It was only after he was arrested for conspiracy to commit murder in connection with the killing of Gamble that he gave a statement to the police implicating the defendant in the victim's murder. He did so pursuant to a plea agreement that subjected him to a maximum term of incarceration of thirty years, which was considerably shorter than the sentence he would have faced without the cooperation agreement.

After Helwig and Burton testified, the trial court heard arguments from the parties. Defense counsel argued that the testimony was not sufficiently reliable to be admissible because there was absolutely no evidence corroborating any of it, the testimony itself was vague and contradictory, and there was no forensic evidence linking the defendant's .22 caliber revolver to the murder.

Following the parties' arguments, the trial court observed that § 54-86p (a) (1) provides that, in making its reliability determination, the court may consider the extent to which the witness' testimony is confirmed by other evidence. The court noted that, during their arguments, both sides had referenced evidence that they expected to be admitted at trial. The court stated that, "if counsel has . . . reached an accommodation or an agreement because counsel knows what the evidence is and what would be produced, that's fine. But the record is not going to show that . . . the evidence . . . was introduced at [this] hearing . . . ." The court further stated: "[Y]ou're all proceeding under the assumption that you know what [the evidence] is because you've got the discovery, it's been referenced. I've heard about it, you made a proffer. [Defense counsel] doesn't seem to dispute it, so, as long as everybody is on board

with that, that's fine with me. I just want to make sure that the record is clear that that's how [we chose to proceed]." In response, defense counsel asked whether the parties could discuss the matter in chambers.

When the parties returned to the courtroom, the trial court, over the defense's objection, granted the state's motion to open the reliability hearing for the purpose of introducing five exhibits: a police report on the victim's murder (exhibit 3), the defendant's and Helwig's arrest warrant applications (exhibits 4 and 5), the victim's autopsy report (exhibit 6), and the ballistics report on the defendant's .22 caliber revolver (exhibit 7). The court found that the state's failure to introduce this evidence was the result of "inadvertence or assumption" about the statutory requirements. The court further found that there would be "[no] undue prejudice to the defense by allowing the state to [open the hearing] just to complete the record" and that it was within the court's discretion to do so.

The next day, the trial court found that Helwig's and Burton's testimony was sufficiently reliable to be presented to the jury. In an oral ruling, the court stated that it had considered each of the factors set forth in § 54-86p (a) (1) through (5) in light of the evidence presented at the reliability hearing and the discovery provided pursuant to General Statutes § 54-86o (a) (1) through (5).[9] The court found Helwig's testimony to be

[9] General Statutes § 54-86o (a) provides in relevant part: "In any criminal prosecution . . . the defendant may request of the prosecutorial official whether such official intends to introduce testimony of a jailhouse witness. The prosecutorial official shall promptly . . . disclose to the defendant whether the official intends to introduce such testimony and, if so, the following information and material:

"(1) The complete criminal history of any such jailhouse witness, including any charges pending against such witness, or which were reduced or dismissed as part of a plea bargain;

"(2) The jailhouse witness's cooperation agreement with the prosecutorial official and any benefit that the official has provided, offered or may offer in the future to any such jailhouse witness;

"(3) The substance, time and place of any statement allegedly given by the defendant to a jailhouse witness, and the substance, time and place of

reliable because, at the time of the murder, he and the defendant had been friends for approximately eighteen months and saw each other nearly every day, and, thus, "[t]he night [the murder] occurred was . . . not an isolated occasion in which they were together." The court further noted that "Helwig's description of the general location of the crime scene, the number of shots he had heard, and the description of the gun he alleges that the defendant utilized was corroborated by state's exhibits 3, 5, and 6," that, consistent with Helwig's testimony, the victim suffered multiple gunshot wounds from a .22 caliber revolver, and that historical cell site data and analysis registered the defendant's phone in the vicinity of the murder scene at approximately 11:23 p.m., further corroborating Helwig's testimony. Finally, the court noted that Helwig statements to the police implicating the defendant in the victim's murder were statements against his own penal interest and that Helwig himself had been charged in the victim's murder.

The trial court reached similar conclusions with respect to Burton, stating: "Burton . . . had a close relationship with the defendant, they were similar in age, they associated with the same people, and [they] were fellow gang members. [Burton was] someone [in] whom the defendant would naturally confide as a result. Burton was . . . sixteen years of age at the time of the crime and the defendant's alleged admissions to him.

any statement given by a jailhouse witness implicating the defendant in an offense for which the defendant is indicted;

"(4) Whether at any time the jailhouse witness recanted any testimony subject to the disclosure, and, if so, the time and place of the recantation, the nature of the recantation and the name of any person present at the recantation; and

"(5) Information concerning any other criminal prosecution in which the jailhouse witness testified, or offered to testify, against a person suspected as the perpetrator of an offense or defendant with whom the jailhouse witness was imprisoned or otherwise confined, including any cooperation agreement with a prosecutorial official or any benefit provided or offered to such witness by a prosecutorial official."

The defendant and Burton had known each other since they were thirteen or fourteen years of age. [Burton] confirmed the defendant's association with . . . Helwig . . . [and], although . . . Burton denied knowing anything about the [victim's murder] when first approached by [the] police, citing what he called a 'street code,' . . . [h]e later provided specific information to [the] police [implicating the defendant in the victim's murder], which he has never recanted. He also described seeing the defendant in possession . . . of a .22 caliber revolver with tape on the handle."

In reaching its decision, the trial court addressed the defense's argument that Burton's testimony was unreliable because the information he provided was vague and could have come from sources other than the defendant, such as the police. The court concluded that, if Burton had acquired his information from other sources "in an effort to obtain favorable treatment . . . his account of the defendant's admissions [would] have been far more detailed and incriminating, and [would] have involved claims of multiple confessions by the defendant [and] everyone involved, or [it would have been] tailored to match [the testimony of] other witnesses."

Finally, the trial court observed: "Each of these witnesses has testified before this court on a prior occasion in [*State* v. *Bunn*, Superior Court, judicial district of New Haven, Docket No. NNH-CR15-0158844-T], and were among the witnesses that, in light of the verdict, were credited by a jury. This court found their testimony in that case to be credible." The court further observed that, "even if the state had not presented any corroboration [of the witnesses' testimony], their testimony standing alone was credible and reliable enough, and [therefore] worth[y] of consideration by the jury."

After issuing its ruling, the trial court asked both parties whether there was anything else they needed

to address. Defense counsel requested "a specific ruling as to one of the claims" made during the previous day. The court issued the ruling, which is not at issue in this appeal, and indicated that it understood that defense counsel "ha[s] to make the record for any future proceedings, if there are any." The court then gave the parties an additional opportunity to raise further questions or objections before concluding the hearing.

As a preliminary matter, we set forth the standard of review. It is well established that a trial court's ruling on evidentiary matters will not be disturbed unless the court abused its discretion. See, e.g., *State* v. *Mark T.*, 339 Conn. 225, 232, 260 A.3d 402 (2021) ("[i]n determining whether there has been an abuse of discretion, every reasonable presumption should be made in favor of the correctness of the trial court's ruling" (internal quotation marks omitted)). We likewise review a trial court's decision to open the evidence under the abuse of discretion standard. See, e.g., *State* v. *Allen*, 205 Conn. 370, 380, 533 A.2d 559 (1987) ("[t]he reopening of a criminal case either to present omitted evidence or to add further testimony after either of the parties has rested is within the sound discretion of the [t]rial [c]ourt" (internal quotation marks omitted)).

We disagree with the defendant that the trial court abused its discretion in granting the state's motion to open the reliability hearing to allow the state to introduce evidence that the parties had referenced during the hearing. The court found that the state's failure to introduce this evidence was merely attributable to "inadvertence" and that the defendant was aware of the evidence the state sought to admit. See, e.g., *State* v. *Freeman*, 132 Conn. App. 438, 446, 33 A.3d 256 (2011) (court did not abuse its discretion in opening pretrial hearing when state "inadvertently excluded . . . testimony from the . . . hearing" and "[t]he additional testimony offered . . . [came] as no surprise to the

defendant" (internal quotation marks omitted)), aff'd, 310 Conn. 370, 77 A.3d 745 (2013). We note that most, if not all, of the admitted evidence was part of the discovery turned over to the defense pursuant to § 54-86o, which, under § 54-86p (a), the court properly could have considered, even if it had not been admitted at the reliability hearing. See General Statutes § 54-86p (a) ("[t]he court shall make a prima facie determination concerning the reliability of [a jailhouse witness'] testimony after evaluation of the evidence submitted at the hearing *and the information or material disclosed pursuant to subdivisions (1) to (5), inclusive, of subsection (a) of section 54-86o*" (emphasis added)). In light of the foregoing, and because the defendant has not identified any prejudice resulting from the trial court's ruling, we cannot conclude that the trial court abused its discretion in opening the reliability hearing for the purpose of completing the record.

We also disagree with the defendant that the trial court erred in concluding that Helwig's and Burton's testimony was sufficiently reliable to be presented to the jury. Section 54-86p (a) provides in relevant part: "The court shall make a prima facie determination concerning the reliability of [a jailhouse witness'] testimony after evaluation of the evidence submitted at the hearing and the information or material disclosed pursuant to subdivisions (1) to (5), inclusive, of subsection (a) of section 54-86o, and may consider the following factors: (1) The extent to which the . . . testimony is confirmed by other evidence; (2) The specificity of the testimony; (3) The extent to which the testimony contains details known only by the perpetrator of the alleged offense; (4) The extent to which the details of the testimony could be obtained from a source other than the defendant; and (5) The circumstances under which the jailhouse witness initially provided information supporting such testimony to . . . a prosecutorial

official, including whether the jailhouse witness was responding to a leading question." Importantly, the statute does not provide that any one of the enumerated factors is dispositive or that any are mandatory considerations. See *State* v. *Christopher S.*, 338 Conn. 255, 288, 257 A.3d 912 (2021) ("[a]lthough corroborating evidence is included in the list [of factors in § 54-86p (a)], it is only one factor that the court may consider").

In considering Helwig's testimony, the trial court made explicit findings under subdivisions (1), (2), (3), and (5) of § 54-86p (a) in concluding that his testimony was sufficiently reliable to be admitted at trial. The court made similar explicit findings relating to Burton's testimony. Although Burton could offer very little information about the murder, the court noted that his account was largely corroborated by Helwig's testimony in that both men described what was essentially a robbery gone wrong, and both stated that the defendant did not know the victim. The court further found that Burton provided a detailed description of the alleged murder weapon and testified to having handled the weapon himself on occasion. In short, the record reveals that the court underwent a careful review of the hearing record, the legal arguments advanced by both parties, and the statutory factors enumerated in § 54-86p (a) in concluding that Helwig's and Burton's testimony was sufficiently reliable to be admissible.

We turn, therefore, to the defendant's contention that the trial court abused its discretion in considering its own assessment of Helwig's and Burton's testimony in *Bunn* in concluding that their testimony was sufficiently reliable to be admitted in the present case. Although we agree that the trial court erroneously included this assessment in its pretrial ruling, we conclude that this error was harmless. See, e.g., *State* v. *Raynor*, 337 Conn. 527, 541, 254 A.3d 874 (2020) ("[i]n order to establish the harmfulness of a trial court ruling, the defendant

must show that it is more probable than not that the improper action affected the result" (internal quotation marks omitted)).

We begin our analysis by noting that § 54-86p (a) permits a court, in making its prima facie reliability determination, to evaluate not only evidence submitted at the hearing, but also "the information . . . disclosed pursuant to . . . subsection (a) of section 54-86o . . . ." General Statutes § 54-86p (a). This includes "[i]nformation concerning *any other criminal prosecution* in which the jailhouse witness testified . . . against a person suspected as the perpetrator of an offense . . . ." (Emphasis added.) General Statutes § 54-86o (a) (5). Thus, the trial court was clearly authorized to consider "information" concerning Helwig's and Burton's participation in *Bunn*.

Although the trial court likely understood "information" to include its own prior credibility assessment, we do not interpret the statute's use of the term "information" so broadly. Section 54-86o (a) sets forth the state's disclosure obligations when it seeks to introduce testimony of a jailhouse witness in a criminal prosecution. Section 54-86o (a) (5) requires the state to disclose to the defendant information relating to the other prosecutions in which the witness may have participated on behalf of the state. This includes, if applicable, the fact that the witness has testified previously and details about how many other proceedings in which the witness has participated. It follows that the defendant could use this information in attacking the witness' credibility both at a § 54-86p reliability hearing and, potentially, later during cross-examination at trial. Thus, the trial court's prior credibility assessment of a testifying witness in a jury trial, in which the court was not serving as the fact finder, is not relevant information under § 54-86o (a) (5). This credibility assessment of a witness could not be utilized by both parties in the same manner

as the information properly discoverable under § 54-86o (a) (5), including the number of times the witness previously has testified and the verdicts in those cases.

We therefore instruct trial courts to rely on objective criteria, to which all parties would have access through the discovery process, in considering information disclosed pursuant to § 54-86o (a) (5) for purposes of making a prima facie reliability determination under § 54-86p (a). This is consistent with the language of the statute, which allows the parties and the trial court to consider the witness' participation on behalf of the state but does not include this type of collateral assessment of a witness' testimony.

However, because it is clear that the trial court would have found Helwig's and Burton's testimony sufficiently reliable to be admitted utilizing only permissible statutory factors under § 54-86p, we conclude that the error was harmless. The trial court's prior credibility assessment was one of many factors that the court considered in determining that Helwig's and Burton's testimony was sufficiently reliable to be presented to the jury. There is nothing in the record to suggest that it was a dispositive factor or that the court's decision might have been different in its absence. Moreover, defense counsel had ample opportunity to impeach Helwig's and Burton's credibility at trial and thoroughly availed himself of that opportunity through cross-examination and in closing argument, during which he cataloged every conceivable reason why their testimony should not be credited. For all of these reasons, there is no error warranting reversal of the judgment.

III

The defendant finally claims that the trial court erred in denying his motion to suppress the recording of a phone call that he had made while incarcerated and the .22 caliber revolver that the police had seized as

a result of information acquired from the recording. Although the defendant acknowledges that inmate phone calls may be monitored and recorded for purposes of prison safety, he contends that the fourth amendment to the United States constitution[10] prohibits the state from using pretrial detainee phone call recordings for investigative purposes.[11] The state argues that the defendant had no reasonable expectation of privacy in his nonprivileged phone calls, and, thus, the subsequent use of the recording did not implicate the fourth amendment.

The following additional facts are relevant to our resolution of this claim. In March, 2014, the defendant placed a phone call to his then girlfriend, Lavenia Darden, while being held in pretrial detention on unrelated charges. During the call, which was recorded and monitored by the Department of Correction, the defendant referred to a .22 caliber firearm that he had given to Darden for safekeeping. At the time of the call, Darden lived at her grandmother's home in New Haven. In April, 2014, the Department of Correction sent the recording to the New Haven Police Department, which obtained

[10] The fourth amendment to the United States constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The fourth amendment's protection against unreasonable searches and seizures is made applicable to the states through the due process clause of the fourteenth amendment to the United States constitution. See, e.g., *Mapp* v. *Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).

[11] The defendant additionally claims that monitoring inmate calls "may have a chilling effect on speech" and "can give rise to first amendment concerns." Because this statement constitutes the entirety of the defendant's argument concerning this issue, we agree with the state that the claim is inadequately briefed, and, therefore, we decline to review it. See, e.g., *State* v. *Buhl*, 321 Conn. 688, 726, 138 A.3d 868 (2016) ("[The] relative sparsity [of briefing] weighs in favor of concluding that the argument has been inadequately briefed. This is especially so with regard to first amendment and other constitutional claims, which are often analytically complex.").

permission from Darden's grandmother to search her residence for the firearm. During the search, the police located a small .22 caliber revolver with black tape on the handle and eight rounds of ammunition in a closet in Darden's bedroom. The next day, Darden gave a statement to the police identifying the revolver as belonging to the defendant.

Before trial, the defendant filed a motion to suppress the recording of his phone conversation with Darden as an illegal search in violation of the fourth amendment. He also sought to suppress the .22 caliber revolver and ammunition as fruits of the allegedly unlawful search. At the hearing on the motion to suppress, the defendant stipulated that, at the time of his admission to the correctional facility, he was notified and signed a waiver acknowledging that all his nonprivileged phone calls were subject to recording and monitoring. The defendant further stipulated that, at the time of his call to Darden, he was aware that the phone calls of all inmates, pretrial detainees and convicted inmates alike, were subject to recording and monitoring, and that there were signs posted near the phones reminding inmates of this policy. Finally, the defendant stipulated that, at the beginning of his call to Darden, a recorded message notified him that the call was subject to recording and monitoring, and that this message repeated at regular intervals throughout the call.

After stipulating to the foregoing facts, defense counsel argued that the defense "[did] not dispute the legitimate penological interests of the Department of Correction, as reflected in its regulations and its practice, to monitor the calls . . . of all inmates." Defense counsel further acknowledged that the Department of Correction was responsible for the protection and safety of all inmates, pretrial detainees and convicted inmates alike, and that the recording and monitoring policy furthered institutional safety concerns. Defense

counsel argued, however, that, in the case of pretrial detainees still "cloaked in the presumption of innocence, unable to make bond," the Department of Correction has "no right to become adjuncts to the investigative process" and that "a presumption of privacy for pretrial detainees at least with respect to law enforcement purposes" should prevail and preclude the department from turning recordings of their phone calls over to the police.

At the conclusion of the hearing, the trial court denied the defendant's motion to suppress. The court observed that, in applying the federal constitution, courts uniformly have held that an inmate's limited privacy rights do not include a right to make unmonitored, nonprivileged phone calls. The court explained that, without a reasonable expectation of privacy, there can be no fourth amendment violation. The court further observed that, although defense counsel had argued that a distinction should be drawn between the privacy rights of pretrial detainees and convicted inmates with respect to their phone calls, he had not cited a single case in which such a distinction had been drawn, whereas the court was aware of many cases rejecting the existence of any such distinction.

We agree with the trial court that the defendant's claim is without merit. Whether the defendant had a right to privacy in his nonprivileged prison phone calls presents a question of law, over which we exercise plenary review. See, e.g., *State* v. *Houghtaling*, 326 Conn. 330, 340–41, 163 A.3d 563 (2017), cert. denied, 584 U.S. 949, 138 S. Ct. 1593, 200 L. Ed. 2d 776 (2018). "To receive fourth amendment protection against unreasonable searches and seizures, a defendant must have a legitimate expectation of privacy in the [subject of the search]. . . . [In the absence of] such an expectation, the subsequent police action has no constitutional ramifications." (Internal quotation marks omitted.)

State v. *Russo*, 259 Conn. 436, 441 n.7, 790 A.2d 1132, cert. denied, 537 U.S. 879, 123 S. Ct. 79, 154 L. Ed. 2d 134 (2002); see also *State* v. *Houghtaling*, supra, 341 ("[t]o determine whether a person has a reasonable expectation of privacy in an invaded place or seized effect, that person must satisfy [both the subjective and objective prongs of] the *Katz*[12] test"). "The burden of proving the existence of a reasonable expectation of privacy rests [with] the defendant." (Internal quotation marks omitted.) *State* v. *Jacques*, 332 Conn. 271, 279, 210 A.3d 533 (2019).

In *Washington* v. *Meachum*, 238 Conn. 692, 680 A.2d 262 (1996), this court held that "[t]he inmates of Connecticut's correctional institutions . . . have no reasonable expectation of privacy in their nonprivileged telephone calls and [that] those calls may be monitored and recorded." Id., 725. We concluded that, even if inmates retain a subjective privacy interest in their nonprivileged calls, "[t]he general law of privacy attendant upon incarceration, and the recognized need for institutional security, clearly do not legitimize such an expectation." Id., 724.

The defendant does not ask this court to reconsider *Meachum* but, instead, urges us to recognize a fourth amendment distinction between the privacy expectations of pretrial detainees and convicted inmates in their nonprivileged phone calls. We need not reach this issue because we conclude that the defendant in the present case maintained no subjective expectation of privacy. See *State* v. *Houghtaling*, supra, 326 Conn 341–42 ("In analyzing the subjective prong of the *Katz* test, we look for actions or conduct demonstrating that the defendant sought to preserve the property or location as private. . . . Although this prong is the subjec-

[12] *Katz* v. *United States*, 389 U.S. 347, 361, 88 S. Ct. 507, 19 L. Ed. 2d. 576 (1967) (Harlan, J., concurring).

tive portion of the test, it does not rest solely on the defendant's actual beliefs." (Citations omitted; internal quotation marks omitted.)).

As he stipulated to at the hearing on his motion to suppress, the defendant was notified and signed a waiver acknowledging that all nonprivileged calls were subject to recording and monitoring. Further, there were signs posted near the phone area at the correctional facility and a recorded message played throughout the defendant's call with Darden, reminding him that his call was subject to recording and monitoring. Nothing about the defendant's actions in placing a call under these conditions indicates an intent to preserve the contents of the call as private. See id., 348 ("we reaffirm that courts should properly test a defendant's subjective expectations by looking for conduct demonstrating an intent to preserve [something] as private and free from knowing exposure to the view of others" (internal quotation marks omitted)). Because the defendant failed to demonstrate that he maintained a subjective expectation of privacy in the content of his phone call to Darden, "the subsequent police action ha[d] no constitutional ramifications." (Internal quotation marks omitted.) *State* v. *Correa*, 340 Conn. 619, 640, 264 A.3d 894 (2021); cf. *United States* v. *Eggleston*, 165 F.3d 624, 626 (8th Cir.) ("The defendant concedes that he agreed to the recording and monitoring of the calls, but argued that he did not consent to their use in evidence against him. We do not think that the loaf can be sliced so thin. If someone agrees that the police may listen to his conversations and may record them, all reasonable expectation of privacy is lost, and there is no legitimate reason to think that the recordings, like any other evidence lawfully discovered, would not be admissible."), cert. denied, 526 U.S. 1031, 119 S. Ct. 1280, 143 L. Ed. 2d 373 (1999); *People* v. *Diaz*, 33 N.Y.3d 92, 99–100, 122 N.E.3d 61, 98 N.Y.S.3d 544 ("[when pretrial] detainees

are aware that their phone calls are being [monitored and] recorded, all reasonable expectation of privacy in the content of those phone calls is lost, and there is no legitimate reason to think that the recordings, like any other evidence lawfully discovered, would not be admissible" (internal quotation marks omitted)), cert. denied, U.S. , 140 S. Ct. 394, 205 L. Ed. 2d 215 (2019). In light of the foregoing, the defendant cannot prevail on his claim that the trial court erred in denying his motion to suppress.

The judgment is affirmed.

In this opinion the other justices concurred.

IAN T. COOKE *v.* JOHN R. WILLIAMS ET AL. (SC 20719)

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

Syllabus

The plaintiff, who previously had been convicted of murder, among other crimes, sought to recover damages from the defendants, his former attorney and his law firm, for, inter alia, their alleged legal malpractice and fraud while representing him in connection with a federal civil rights action and a separate, state habeas action. In his unsuccessful habeas action, the plaintiff alleged that the attorney who had represented him at his murder trial provided ineffective assistance of counsel. In the present malpractice action, the plaintiff claimed, inter alia, that the defendants had failed to prosecute his habeas petition fully and properly. The trial court granted the defendants' motion to dismiss the plaintiff's claims relating to the habeas action, concluding that those claims sounded in legal malpractice and were not ripe for adjudication because the plaintiff's underlying criminal conviction had not been invalidated either on appeal or in a postconviction proceeding. The plaintiff appealed to the Appellate Court, asserting that the trial court had improperly dismissed his legal malpractice claim. The plaintiff also contended that the Appellate Court had improperly dismissed his fraud claim because it was distinct from any claim of legal malpractice. The Appellate Court affirmed the trial court's judgment with respect to the plaintiff's legal malpractice claim, but it reversed with respect to the fraud claim, reasoning that the fraud claim was distinct from the legal malpractice claim because the former did not challenge the validity of the plaintiff's under-

lying conviction. The plaintiff, on the granting of certification, appealed to this court.

Held that, as a matter of form, the Appellate Court improperly affirmed the trial court's dismissal of the plaintiff's legal malpractice claim for lack of subject matter jurisdiction, this court having concluded that appellate or postconviction relief from the plaintiff's underlying conviction was a necessary element of his claim for malpractice against his former attorneys and that the plaintiff's failure to plead or prove that he had obtained such relief meant that his malpractice claim was insufficient as a matter of law rather than subject to dismissal for lack of jurisdiction:

This court disagreed with the holding in *Taylor* v. *Wallace* (184 Conn. App. 43), on which the Appellate Court relied in the present case, that a criminally convicted plaintiff's failure to obtain appellate or postconviction relief from his conviction prior to commencing a criminal malpractice action, that is, a legal malpractice action against an attorney who previously had represented the criminally convicted plaintiff in a criminal or habeas case, renders the action unripe and presents an issue of justiciability that implicates a court's subject matter jurisdiction.

Rather, this court determined that, because legal malpractice claims are of the type of claims that courts have the authority to adjudicate, the question was not whether a court is competent to adjudicate the controversy between the parties or whether there is a live controversy between the parties but, rather, whether a criminally convicted plaintiff who had not obtained appellate or postconviction relief from his conviction has alleged facts sufficient to state a valid cause of action for criminal malpractice, and whether that requirement has been met is a matter concerning sufficiency of the pleadings.

In determining the necessary elements of a criminal malpractice claim, this court observed that the adjudication of causation and harm in a criminal malpractice action ordinarily will necessarily implicate the finding of the criminally convicted plaintiff's guilt in the underlying criminal case, and a verdict in favor of the plaintiff in the criminal malpractice action would undermine the validity of his criminal conviction.

Accordingly, this court joined the majority of other jurisdictions that have addressed the issue and adopted the exoneration rule, and, pursuant to that rule, when proof of a criminal malpractice claim requires a plaintiff to prove that his former attorney's negligence was a proximate cause of his underlying criminal conviction, the claim is insufficient as a matter of law unless the plaintiff has obtained appellate or postconviction relief from his underlying conviction.

In adopting the exoneration rule, this court reasoned that such a rule supports the judicial policy against inconsistent judgments arising out of the same transaction, which would occur if a plaintiff whose criminal

conviction had not been overturned were to prevail in a criminal malpractice action alleging that, in the absence of the attorney's negligence, the plaintiff would not have been convicted.

This court also reasoned that there are other mechanisms to obtain redress for the negligence of criminal defense counsel, including the elaborate remedial system embodied in Connecticut's postconviction review laws, which provide comprehensive and robust procedures that are intended to address allegations that a criminal conviction was the result of the ineffective assistance of counsel, thereby ensuring that any wrongs resulting from such ineffective assistance will be identified and addressed.

This court made clear that, if a plaintiff's claim in a criminal malpractice action does not require findings that would undermine the validity of the underlying conviction, such a claim would not be barred for lack of exoneration, and, in the present case, the Appellate Court correctly concluded that the plaintiff's fraud claim, which related to the plaintiff's fee dispute with the defendants, could proceed, as that claim did not challenge the validity of the plaintiff's conviction.

To prevail on his malpractice claim, however, the plaintiff was required to prove that the defendants' conduct was the proximate cause of his harm, namely, the denial of his habeas petition and continued incarceration, the plaintiff necessarily would have had to prove that he would have prevailed in his habeas action if the defendants' negligence had not occurred, and such a claim necessarily challenged the validity of the plaintiff's underlying conviction.

Accordingly, because the plaintiff could not establish that he had obtained appellate or postconviction relief from his conviction, he failed to state a cognizable claim of criminal malpractice against the defendants, and, accordingly, the plaintiff's criminal malpractice claim should have been the subject of a motion to strike rather than a motion to dismiss.

(*One justice concurring separately*)

Argued September 14, 2023—officially released June 25, 2024

Procedural History

Action to recover damages for, inter alia, legal malpractice, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Markle*, *J.*, granted in part the defendants' motion to dismiss and rendered judgment thereon; thereafter, the plaintiff withdrew the remaining counts of his complaint and appealed to the Appellate Court, *Bright*, *C. J.*, and *Suarez* and *DiPentima*, *Js.*, which reversed in

part the trial court's judgment and remanded the case to that court with direction to deny the motion to dismiss only as to the plaintiff's claim of fraud relating solely to a fee dispute, and the plaintiff, on the granting of certification, appealed to this court. *Reversed in part*; *further proceedings.*

Michael W. Brown, for the appellant (plaintiff).

William Tong, attorney general, and *Stephen R. Finucane*, assistant attorney general, filed a brief for the state of Connecticut as amicus curiae.

Kenneth Rosenthal and *Audrey Felsen* filed a brief for the Connecticut Criminal Defense Lawyers Association as amicus curiae.

Opinion

MULLINS, J. In *Taylor* v. *Wallace*, 184 Conn. App. 43, 51–52, 194 A.3d 343 (2018), the Appellate Court adopted what is generally referred to as the exoneration rule for civil claims seeking relief against a plaintiff's former criminal defense or habeas counsel for harm allegedly caused by the lawyer's legal malpractice.[1] The exoneration rule[2] provides that appellate or postconviction relief is a necessary element of a claim for criminal malpractice if that claim challenges the validity of an underlying conviction by requiring proof that the attorney's negligence was the cause of the plaintiff's conviction as a defendant in the underlying criminal case. Id. The Appellate Court in *Taylor* further explained that the failure to obtain appellate or postconviction relief renders the criminal malpractice claim unripe and, therefore, not justiciable. Id. Applying the exoneration rule to the present case,

[1] We use the term "criminal malpractice" to refer to claims in which a lawyer is sued for legal malpractice by a client he or she has previously represented in a criminal or habeas case.

[2] "Exoneration," as the term is used in this context, means that a convicted person has obtained appellate or postconviction relief from his or her conviction.

the Appellate Court upheld the trial court's dismissal of the claim of criminal malpractice filed by the plaintiff, Ian T. Cooke, against the defendants, John R. Williams and John R. Williams and Associates, LLC, the attorney and law firm that represented the plaintiff in his habeas case.[3] *Cooke* v. *Williams*, 206 Conn. App. 151, 165, 259 A.3d 1211 (2021).

This case presents our first opportunity to address whether to adopt the exoneration rule in Connecticut. After review, we join the majority of other jurisdictions that also have adopted the exoneration rule. In doing so, we explain herein that appellate or postconviction relief from the underlying criminal conviction is a necessary element of a criminal malpractice claim if that claim requires findings that would undermine the validity of the criminal conviction. To avoid this unacceptable scenario, we hold that a plaintiff must plead and prove that he or she has obtained a favorable resolution of the underlying criminal case to state a cognizable claim of criminal malpractice. We also clarify that the failure to plead and prove exoneration is not an issue of justiciability and, thus, does not implicate the subject matter jurisdiction of the court. Instead, under our rules of practice, the failure to state a legally sufficient claim is subject to a motion to strike, rather than a motion to dismiss.

In the present case, we conclude that, because the plaintiff's claim of criminal malpractice necessarily requires findings that would undermine the validity of his underlying conviction and he has not obtained appellate or postconviction relief, he has not alleged a cognizable claim of criminal malpractice. We reverse the Appellate

[3] The defendants did not participate in this appeal. Pursuant to Practice Book § 67-7, we granted the application of the state of Connecticut and the Connecticut Criminal Defense Lawyers Association to appear and file briefs as amici curiae and to appear at oral argument to respond to questions by this court.

Court's judgment dismissing the criminal malpractice claim for lack of subject matter jurisdiction and remand for further proceedings consistent with this opinion.

The following facts and procedural history, as set forth by the Appellate Court, are relevant to our resolution of this appeal. In 2006, the plaintiff shot and killed two people with a sawed-off shotgun. See *State* v. *Cooke*, 134 Conn. App. 573, 575–76, 39 A.3d 1178, cert. denied, 305 Conn. 903, 43 A.3d 662 (2012). Four years later, he was convicted, after a jury trial, of two counts of murder, among other crimes, and sentenced to a term of life imprisonment without the possibility of release. Id., 576–77. The plaintiff appealed his conviction, which the Appellate Court affirmed. Id., 581.

In 2011, as a self-represented party, the plaintiff filed a petition in state court for a writ of habeas corpus, alleging ineffective assistance of his criminal trial counsel. *Cooke* v. *Williams*, supra, 206 Conn. App. 153. In that petition, the plaintiff had alleged that his criminal trial counsel was ineffective due to "his failures to investigate and to present a defense, to use expert witnesses, particularly experts in forensic science, and to ensure the plaintiff's competency to stand trial." Id., 157. Shortly after he filed the petition, the plaintiff retained the defendants to represent him. Id.

Around the same time, the plaintiff, also initially as a self-represented party, commenced a civil rights action in federal court, alleging numerous constitutional and tort claims stemming from the conditions of his pretrial incarceration. Id., 153. The state habeas petition did not proceed while proceedings concerning the federal petition were ongoing. See id., 153–54. Ultimately, the defendants agreed to represent the plaintiff in the federal civil rights action as well. Id., 153. In 2014, the federal civil rights action was settled. Id.

After the federal action settled, the habeas court proceeded with the trial on the plaintiff's pending 2011 state habeas petition. Id., 154. At the habeas trial, the plaintiff wanted to call an expert witness who would present evidence of a third-party perpetrator and ballistics suggesting that a firearm other than that posited by the prosecution was the murder weapon. Id., 157. The defendants, however, presented no such evidence. Id. Following the trial, the habeas court rejected the plaintiff's claim of ineffective assistance of counsel and consequently denied the petition for a writ of habeas corpus. See id., 154.

Thereafter, the plaintiff, as a self-represented party, commenced the present action against the defendants based on their representation of him in both the federal civil rights action and the habeas proceeding. Id. In his amended eight count complaint, the plaintiff asserted claims for legal malpractice, negligence, fraud, breach of the covenant of good faith and fair dealing, and breach of contract.[4] See id. He alleged that the defendants, in violation of their duties, neglected to prosecute his habeas petition fully and properly.

Specifically, the plaintiff alleged that the defendants' failures "in investigation and comprehension of the facts of the case yielded a failure to present and prove

[4] The plaintiff's complaint included the following counts against the defendants: (1) legal malpractice for their representation of him in his federal civil rights action; (2) criminal malpractice for their representation of him in his state habeas action; (3) negligence for their representation of him in his federal civil rights action; (4) negligence for their representation of him in his state habeas action; (5) fraud/unjust enrichment for their representation of him in his federal civil rights action; (6) fraud for their representation of him in his state habeas action; (7) breach of the implied covenant of good faith and fair dealing for their representation of him in his federal civil rights action; and (8) breach of contract for their representation of him in both the federal civil rights action and the state habeas proceeding. All of the claims regarding the federal civil rights action have subsequently been withdrawn. See footnote 5 of this opinion.

prejudice" pursuant to *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). He further alleged that the defendants failed to prosecute his habeas action fully and properly because the "aspects of the case that were investigated were misused by the defendants due to failures to comprehend the requisite law, facts and issues, and to have any coherent trial strategy . . . ." The plaintiff also alleged that the "defendants failed to adequately prepare the plaintiff for trial," "failed to develop evidence in support of the habeas case," and "failed to properly prepare and present court documents, [including] . . . motions, posttrial briefs, and postjudgment remedies." The plaintiff claimed that he "suffered financial loss and/or hardship and/or mental and emotional distress as a result."

For these alleged failures, the plaintiff sought monetary damages, as well as injunctive and declaratory relief. In particular, he requested that the defendants be suspended or disbarred from the practice of law and that the trial court "[i]ssue a declaratory ruling stating that the plaintiff's right to counsel pursuant to the sixth amendment to the [United States] constitution and article first, § 8, of the Connecticut constitution, as well as the common-law rights to counsel, [had] been violated wherein the defendant[s] provided ineffective assistance of counsel."

The defendants filed a motion to dismiss the plaintiff's action. They argued that the plaintiff's claims relating to the state habeas proceedings were not justiciable because his underlying criminal conviction had not been vacated through either a direct appeal or a successful petition for a writ of habeas corpus.[5]

[5] The defendants also asserted that the plaintiff's claims related to his federal civil rights action should be dismissed because they were barred by the statute of limitations. Ultimately, the trial court denied the motion to dismiss for the counts related to his federal civil rights action (counts one, three, five, and seven and count eight "to the extent it is based on the

After hearing argument, the trial court issued its memorandum of decision, granting the motion to dismiss as to all of the plaintiff's claims relating to the habeas proceedings. The court rejected the plaintiff's argument that his present action was independent of his underlying criminal conviction because he was not challenging his conviction but was, instead, seeking monetary damages, in part, for the fraudulent billing by the defendants for work they had not done.[6] Ultimately, relying on *Taylor*, the trial court concluded that all of the plaintiff's claims against the defendants sounded in legal malpractice and were not ripe for adjudication because his underlying criminal conviction had not been invalidated.

The plaintiff appealed to the Appellate Court. He claimed that the trial court improperly dismissed (1) his criminal malpractice claim by misapplying the justiciability bar to criminal malpractice claims set forth in *Taylor*, a bar originally articulated in *Heck* v. *Humphrey*, 512 U.S. 477, 486–87, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994), and (2) his fraud claim because it was distinct from his claim of criminal malpractice. *Cooke* v. *Williams*, supra, 206 Conn. App. 153. With respect to the criminal malpractice claim, the Appellate Court affirmed the judgment of the trial court. Id., 165, 177. The Appellate Court reasoned that, "[t]o prove his malpractice action, [the plaintiff] presumably would have [had] to prove that he would not have sustained the injury had professional negligence not occurred. Thus, a successful result in this case would necessarily imply that the conviction was improper. Inconsistency of

circumstances of the plaintiff's federal civil rights action"). The trial court reasoned that a statute of limitations special defense must be specially pleaded and cannot be raised by a motion to dismiss. Ultimately, the plaintiff withdrew the counts of his complaint related to his federal civil rights action, and, therefore, those claims are not the subject of this appeal.

[6] The plaintiff alleged that, in total, he incurred $258,442.65 in charges that were fraudulent.

judgments is avoided by the requirement that the conviction first be vacated." (Internal quotation marks omitted.) Id., 162. The Appellate Court explained that "the plaintiff's [criminal] malpractice claim [was] a collateral attack on his underlying conviction that ha[d] not been invalidated either on direct appeal . . . or through habeas proceedings." (Citation omitted.) Id., 162–63. On the basis of this analysis, the Appellate Court concluded that the plaintiff's criminal malpractice claim was not ripe for adjudication. Id., 165.

The Appellate Court reached a different conclusion with respect to the plaintiff's claim of fraud relating to the fee dispute. Id., 165–66. The Appellate Court reasoned that the plaintiff's fraud claim was distinct from his criminal malpractice claim because proof of the fraud claim did not challenge the validity of his underlying conviction. Id., 166. As a result, the Appellate Court reversed the judgment of the trial court with respect to the claim of fraud and remanded the case to the trial court with direction to deny the motion to dismiss as to the fraud claim.[7] Id., 177. This appeal followed.

We granted the plaintiff's petition for certification to appeal from the judgment of the Appellate Court. *Cooke* v. *Williams*, 343 Conn. 919, 919–20, 275 A.3d 213 (2022). Our grant of certification was limited to the following issue: "Did the Appellate Court correctly conclude that the justiciability bar set forth in *Heck* v. *Humphrey*, [supra, 512 U.S. 477], which the Appellate Court adopted in *Taylor* v. *Wallace*, [supra, 184 Conn. App. 43], required dismissal of the plaintiff's [criminal] malpractice claims against his former habeas counsel as unripe in the absence of prior invalidation of the plaintiff's underlying criminal conviction?" *Cooke* v. *Williams*, supra, 343 Conn. 920.

[7] The plaintiff's claim of fraud is not part of the present appeal.

After having reviewed the plaintiff's brief and the briefs of the amici curiae, we recognize that the certified question does not adequately frame the more fundamental issue posed by the present case, that is, what elements must a criminally convicted plaintiff plead and prove to assert a cognizable cause of action of criminal malpractice against his habeas or criminal trial counsel. Consequently, we reformulate the certified question to conform to the issue actually presented. See, e.g., *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 276 Conn. 168, 191–92, 884 A.2d 981 (2005) (this court may reframe certified question to more accurately reflect issue presented). The specific issue before us is one of first impression for this court: whether appellate or postconviction relief from the underlying conviction is a necessary element of a claim of criminal malpractice filed by a criminally convicted plaintiff.

Before we tackle that issue, and to provide some clarity on our ultimate conclusion, it is helpful to first examine *Heck* v. *Humphrey*, supra, 512 U.S. 477, and its relationship to the Appellate Court's adoption of what it called a "justiciability bar" for criminal malpractice claims filed by criminally convicted plaintiffs. *Cooke* v. *Williams*, supra, 206 Conn. App. 153. In *Heck*, the United States Supreme Court examined whether a prisoner may challenge the constitutionality of his conviction in an action for damages under 42 U.S.C. § 1983. *Heck* v. *Humphrey*, supra, 487. In that case, the petitioner, Roy Heck, had been convicted in an Indiana state court of voluntary manslaughter. Id., 478. At the time of his appeal, he was serving a fifteen year prison sentence. Id. While the appeal from his conviction was pending, Heck filed an action in federal court under 42 U.S.C. § 1983, against two of the prosecutors and an investigator involved in his criminal action, claiming that they had engaged in an "unlawful, unreasonable, and arbitrary investigation leading to [his] arrest; know-

ingly destroyed [exculpatory] evidence . . . and caused an illegal and unlawful voice identification procedure to be used at [his] trial." (Internal quotation marks omitted.) Id., 479. Heck sought compensatory and punitive monetary damages but did not seek injunctive relief or release from custody. Id. While the appeal in his § 1983 action was pending, the Indiana Supreme Court upheld his conviction and sentence in his direct appeal. Id.

Analogizing Heck's claims of legal malfeasance to a common-law claim of malicious prosecution, the United States Supreme Court explained that "[o]ne element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused. . . . This requirement avoids parallel litigation over the issues of probable cause and guilt . . . and it precludes the possibility of the [plaintiff's] . . . succeeding in the tort action after having been convicted in the underlying criminal prosecution, in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction. . . . Furthermore, to permit a convicted criminal defendant to proceed with a malicious prosecution claim would permit a collateral attack on the conviction through the vehicle of a civil suit. . . . [The United States Supreme] Court has long expressed similar concerns for finality and consistency and has generally declined to expand opportunities for collateral attack . . . . We think the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement, just as it has always applied to actions for malicious prosecution." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 484–86.

Accordingly, the court held that, "in order to recover damages for [an] allegedly unconstitutional conviction or imprisonment, *or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid*, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such [a] determination, or called into question by a federal court's issuance of a writ of habeas corpus . . . [pursuant to] 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under [42 U.S.C.] § 1983." (Emphasis altered; footnote omitted.) Id., 486–87.

Although *Heck* involved a civil rights complaint brought under § 1983, alleging that Heck's prosecution violated his civil rights; see id., 479; courts have relied on its reasoning when addressing claims of criminal malpractice brought by convicted criminal defendants against their criminal defense attorneys. See, e.g., *Britt* v. *Legal Aid Society, Inc.*, 95 N.Y.2d 443, 448, 741 N.E.2d 109, 718 N.Y.S.2d 264 (2000) ("[t]he principle . . . that 'civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments' . . . applies with equal force to [criminal malpractice claims]" (citation omitted)); *Gibson* v. *Trant*, 58 S.W.3d 103, 108–109 (Tenn. 2001) (citing *Heck* as analogous authority for proposition that plaintiff in criminal malpractice action must obtain exoneration before bringing action). Among those courts that have applied the rationale of *Heck* outside of the § 1983 context is our own Appellate Court.

In *Taylor* v. *Wallace*, supra, 184 Conn. App. 43, the criminally convicted plaintiff brought a criminal malpractice action against the lawyer who represented him in his unsuccessful habeas trial. See id., 45–46. The Appellate Court relied on the policy rationale applied

in *Heck* and concluded that it lacked subject matter jurisdiction over a claim of criminal malpractice against the plaintiff's former habeas counsel because the plaintiff had not obtained appellate or postconviction relief from his conviction. Id., 49. The Appellate Court "agree[d] with the policy enunciated in *Heck*: if success in a tort action would necessarily imply the invalidity of a conviction [by requiring a finding that the underlying conviction was the result of the attorney's negligence], the action is to be dismissed unless the underlying conviction has been invalidated." Id., 51. The court held that, because the plaintiff's conviction had withstood multiple attacks, as "long as the conviction stands, an action collaterally attacking the conviction may not be maintained." (Footnote omitted.) Id., 52. The Appellate Court concluded that the claim was nonjusticiable and dismissed it. See id., 51–52 and n.5.

One observation is immediately apparent. The United States Supreme Court in *Heck* determined that the plaintiff failed to state a legally cognizable claim in the absence of a favorable disposition of the underlying conviction. *Heck* v. *Humphrey*, supra, 512 U.S. 486–87. The court did not conclude that the failure to state a claim rendered the claim nonjusticiable. Indeed, it is "firmly established . . . that the absence of a valid . . . cause of action does not implicate [subject matter] jurisdiction . . . ." *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 89, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998). Unlike in *Heck*, in which the United States Supreme Court interpreted the failure to obtain a favorable resolution of the underlying conviction as a failure to state a claim; *Heck* v. *Humphrey*, supra, 486–87; the Appellate Court in *Taylor* analyzed the issue as one of justiciability, concluding that the plaintiff's claim was not ripe because his criminal conviction had not been invalidated. *Taylor* v. *Wallace*, supra, 184 Conn. App. 51–52. In doing so, the Appellate Court relied on the

rationale that "[a] tort case is not ripe for adjudication if resolution of an unresolved underlying case is necessary for reliable adjudication." Id., 51.

Having reviewed *Heck* and *Taylor*, we find the analyses in both cases instructive. Although not directly on point, we agree that the rationale of *Heck* helps inform our resolution of the issue of whether a plaintiff must obtain postconviction or appellate relief from an underlying criminal conviction before he or she can state a cognizable claim of criminal malpractice. To the extent that *Taylor* adopts the underlying reasoning of *Heck*, we agree.

We disagree, however, with the Appellate Court's determination in *Taylor* that the failure to obtain appellate or postconviction relief presents an issue of justiciability that implicates a court's subject matter jurisdiction. "[J]usticiability . . . implicate[s] a court's subject matter jurisdiction and its competency to adjudicate a particular matter." (Internal quotation marks omitted.) *Francis* v. *Board of Pardons & Paroles*, 338 Conn. 347, 358, 258 A.3d 71 (2021). Because legal malpractice claims are of the type that courts have the power to adjudicate, the issue is not whether the court is competent to adjudicate the controversy between the parties or whether there is a live controversy between the parties. Rather, the issue is whether a criminally convicted plaintiff who has not obtained appellate or postconviction relief from the underlying conviction has alleged facts that are sufficient to state a valid cause of action for criminal malpractice. Consequently, whether that requirement is met is a matter of the sufficiency of the pleadings, not the power of the court to entertain the action.

Having clarified that the issue is not one of justiciability, we now turn to the question of whether appellate or postconviction relief from the underlying criminal

case is a necessary element of a claim of criminal malpractice relating to representation in the underlying criminal or habeas case.[8] We begin our analysis by looking at the elements of a traditional legal malpractice claim.

"In general, the plaintiff in [a legal] malpractice action must establish: (1) the existence of an attorney-client relationship; (2) the attorney's wrongful act or omission; (3) causation; and (4) damages." (Internal quotation marks omitted.) *Grimm* v. *Fox*, 303 Conn. 322, 329, 33 A.3d 205 (2012). "The essential element of causation has two components. The first component, causation in fact, requires us to determine whether the injury would have occurred but for the [attorney's] conduct . . . . The second component, proximate causation, requires us to determine whether the [attorney's] conduct is a substantial factor in bringing about the plaintiff's injuries. . . . The existence of the proximate cause of an injury is determined by looking from the injury to the negligent act complained of for the necessary causal connection. . . . In legal malpractice actions arising from prior litigation, the plaintiff typi-

[8] The plaintiff asserts that this court already has decided that favorable resolution of an underlying criminal conviction is not required to sustain a cause of action for malpractice for criminally convicted plaintiffs. Specifically, the plaintiff asserts that, in *Bozelko* v. *Papastavros*, 323 Conn. 275, 283–85, 147 A.3d 1023 (2016), this court examined what was required to prove causation in a criminal malpractice claim against a criminal defense attorney and did not suggest that exoneration was necessary. We disagree that this issue was decided in *Bozelko*.

In *Bozelko*, the convicted plaintiff brought a claim of criminal malpractice against her criminal defense attorney. Id., 278–79. The issue before this court was whether the trial court properly had granted the defendant's motion for summary judgment because the plaintiff failed to disclose an expert witness. Id., 277. This court concluded that expert testimony was required for a legal malpractice action. Id., 289–90. None of the parties raised the claim presented in the present case, namely, that the plaintiff had not alleged a valid cause of action for criminal malpractice because she had not obtained a favorable resolution of her underlying criminal case. Therefore, that issue was not before the court in *Bozelko* and, thus, was not decided in that case.

cally proves that the . . . attorney's professional negligence caused injury to the plaintiff by presenting evidence of what would have happened in the underlying action had the [attorney] not been negligent. . . . More specifically, the plaintiff must prove that, in the absence of the alleged breach of duty by her attorney, the plaintiff would have prevailed [in] the underlying cause of action and would have been entitled to judgment. . . . To meet this burden, the plaintiff must produce evidence explaining the legal significance of the attorney's failure and the impact this had on the underlying action." (Citations omitted; internal quotation marks omitted.) *Bozelko* v. *Papastavros*, 323 Conn. 275, 283–84, 147 A.3d 1023 (2016); see, e.g., *Mayer* v. *Biafore, Florek & O'Neill*, 245 Conn. 88, 92, 713 A.2d 1267 (1998) ("[i]n general, the plaintiff in an attorney malpractice action must establish: (1) the existence of an attorney-client relationship; (2) the attorney's wrongful act or omission; (3) causation; and (4) damages").

We agree with the Oregon Supreme Court that "[l]egal malpractice is a common-law tort claim. In the absence of any pertinent legislation, it is for this court to define what constitutes legally cognizable harm in a tort case. The legislature has not addressed directly the question of when a person whose lawyer in a criminal case is guilty of professional negligence has been harmed for the purposes of a professional negligence action; [the] court therefore must do so." *Stevens* v. *Bispham*, 316 Or. 221, 229, 851 P.2d 556 (1993).

Having carefully considered the issue, we conclude that the adjudication of causation and harm in a criminal malpractice case ordinarily will necessarily implicate the finding of guilt in the underlying criminal case, and a verdict in favor of the plaintiff will thereby undermine the legitimacy of the criminal conviction, as the courts in *Heck* and *Taylor* explained. See *Heck* v. *Humphrey*, supra, 512 U.S. 484–85; *Taylor* v. *Wallace*, supra, 184

Conn. App. 51–52. We join the jurisdictions that have reached the same conclusion and, as a result, require that a convicted criminal defendant turned civil plaintiff must prove that he or she has obtained either postconviction or appellate relief from his or her conviction before pursuing a criminal malpractice action. See, e.g., *Trigg* v. *Farese*, 266 So. 3d 611, 616 (Miss. 2018) ("We join the substantial majority of courts in holding that, because these allegations would entitle the plaintiff to relief from his underlying conviction, he must first pursue them through the [criminal justice] process. In other words, a convict must 'exonerate' himself by obtaining relief from his conviction or sentence before he may pursue a claim against his defense attorney for causing him to be convicted or sentenced more harshly than he should have been."); *Gibson* v. *Trant*, supra, 58 S.W.3d 108 ("The large majority of courts [that have] address[ed] this issue have held that some form of exoneration is a precondition to maintaining a criminal malpractice claim. A plaintiff must meet this exoneration requirement before he can sue his defense lawyer.").

Although the majority of jurisdictions adhere to this requirement and have imposed an exoneration rule, they are far from uniform in their approach. Some jurisdictions require plaintiffs to prove only that they have obtained appellate or postconviction relief, i.e., having the conviction overturned or being granted habeas relief.[9]

[9] See, e.g., *Hastings* v. *Wilbur Smith Law Firm*, Docket No. 20-10313, 2021 WL 3207320, *3 (11th Cir. July 29, 2021) ("a convicted criminal defendant must obtain appellate or [postconviction] relief as a precondition to maintaining a legal malpractice action"); *Shaw* v. *State, Dept. of Administration*, 816 P.2d 1358, 1360 (Alaska 1991) ("[w]e hold that a convicted criminal defendant must obtain [postconviction] relief before pursuing an action for legal malpractice against his or her attorney"); *Steele* v. *Kehoe*, 747 So. 2d 931, 933 (Fla. 1999) ("a convicted criminal defendant must obtain appellate or postconviction relief as a precondition to maintaining a legal malpractice action"); *Noske* v. *Friedberg*, 656 N.W.2d 409, 414 (Minn. App.) (date of conviction relief triggers accrual of criminal malpractice action), aff'd, 670 N.W.2d 740 (Minn. 2003); *Johnson* v. *Schmidt*, 719 S.W.2d 825, 826 (Mo. App. 1986) ("[i]n order for [the] appellant to proceed on his alleged claim of legal malpractice, he must first allege and establish that the actions or

Others take a more stringent approach and require that plaintiffs in criminal malpractice actions not only prove that they have obtained appellate or postconviction relief but also prove by a preponderance of the evidence that they are actually innocent of the crimes of which they were convicted (actual innocence).[10] Under either approach,

omissions by [the] respondent prevented his acquittal"); *Clark* v. *Robison*, 113 Nev. 949, 951, 944 P.2d 788 (1997) (once relief from conviction is granted, criminal malpractice claim may be brought); *Stevens* v. *Bispham*, supra, 316 Or. 230–31 (reversal through direct appeal, postconviction relief or otherwise is required to bring professional negligence claim against criminal defense counsel); *Gibson* v. *Trant*, supra, 58 S.W.3d 116 (adopting requirement that plaintiff must prove exoneration to bring criminal malpractice action); *Peeler* v. *Hughes & Luce*, 909 S.W.2d 494, 497–98 (Tex. 1995) ("[b]ecause of public policy, we side with the majority of courts and hold that plaintiffs who have been convicted of a criminal offense may negate the sole proximate cause bar to their claim for legal malpractice in connection with that conviction only if they have been exonerated on direct appeal, through [postconviction] relief, or otherwise"); *Adkins* v. *Dixon*, 253 Va. 275, 281–82, 482 S.E.2d 797 ("a [postconviction] ruling adverse to the defendant will prevent a recovery for legal malpractice"), cert. denied, 522 U.S. 937, 118 S. Ct. 348, 139 L. Ed. 2d 270 (1997); *Falkner* v. *Foshaug*, 108 Wn. App. 113, 118–19, 29 P.3d 771 (2001) (appellate court's reversal of conviction on ineffective assistance grounds gave rise to criminal malpractice action).

[10] See, e.g., *Coscia* v. *McKenna & Cuneo*, 25 Cal. 4th 1194, 1200, 25 P.3d 670, 108 Cal. Rptr. 2d 471 (2001) ("[i]n a legal malpractice case arising out of a criminal proceeding, California, like most jurisdictions, also requires proof of actual innocence"); *Ray* v. *Stone*, 952 S.W.2d 220, 224 (Ky. App. 1997) ("[b]efore it can be demonstrated that the attorney's actions were the proximate cause of his damages, the plaintiff must establish his innocence"); *Glenn* v. *Aiken*, 409 Mass. 699, 707, 569 N.E.2d 783 (1991) ("in order to justify a right to recover, a plaintiff . . . must prove by a preponderance of the evidence, not only that the negligence of the attorney defendant caused him harm, but also that he is innocent of the crime charged"); *Rodriguez* v. *Nielsen*, 259 Neb. 264, 273, 609 N.W.2d 368 (2000) ("[w]e therefore hold that a convicted criminal who files a legal malpractice claim against his or her defense counsel must allege and prove that he or she is innocent of the underlying crime"); *Morgano* v. *Smith*, 110 Nev. 1025, 1029, 879 P.2d 735 (1994) ("to prevail at trial, the plaintiff must prove actual innocence of the underlying charge"); *Mahoney* v. *Shaheen*, *Cappiello*, *Stein & Gordon*, *P.A.*, 143 N.H. 491, 496, 727 A.2d 996 (1999) ("It is not sufficient for a [plaintiff] to allege and prove that if counsel had acted differently, legal guilt would not have been established. As a matter of law, the gateway to damages will remain closed unless a [plaintiff] can establish that he or she is, in fact, innocent of the conduct underlying the criminal charge." (Emphasis omitted.)); *Carmel* v. *Lunney*, 70 N.Y.2d 169, 173, 511 N.E.2d 1126, 518 N.Y.S.2d 605 (1987) ("[t]o state a cause of action for legal

most jurisdictions make proof of appellate or postconviction relief—whether it be solely appellate or postconviction relief or such relief and proof of actual innocence—an additional element of a criminal malpractice claim. Some states employ the exoneration rule in a way that does not require a plaintiff to demonstrate actual innocence but allows the defendant in the criminal malpractice action to raise the actual guilt of the plaintiff as an affirmative defense.[11]

Many jurisdictions justify adopting the exoneration rule on the ground that it is not unfair to require that the plaintiff first obtain relief from the judgment of conviction precisely because the criminally convicted person, unlike a plaintiff alleging malpractice in an underlying civil case, has other mechanisms to obtain redress for the incompetence of counsel, namely, a claim of ineffective assistance of counsel through habeas actions available at both the state and federal level. See, e.g., *Winniczek* v. *Nagelberg*, 394 F.3d 505, 507 (7th Cir. 2005) ("[a] criminal defendant can establish ineffective assistance of counsel, the counterpart to malpractice"). These courts reason that, without exoneration, the criminal conviction is a determination by the

malpractice arising from negligent representation in a criminal proceeding, plaintiff must allege his innocence or a colorable claim of innocence of the underlying offense"); *Bailey* v. *Tucker*, 533 Pa. 237, 247, 621 A.2d 108 (1993) ("[i]f a person is found guilty of a crime, and that person is indeed innocent of any degree of that crime, and it is established that the wrongful conviction was proximately caused by counsel's gross dereliction in his duty to represent the defendant, only then will the defendant be able to collect monetary damages").

[11] See *Shaw* v. *State, Dept. of Administration*, 861 P.2d 566, 572 (Alaska 1993) ("[r]ather than require the plaintiff to prove his actual innocence in order to succeed, we hold that the defendant may raise the issue of the plaintiff's actual guilt as an affirmative defense"). In a similar vein, some courts allow malpractice cases to proceed without exoneration but require proof of actual innocence at trial. See, e.g., *Rodriguez* v. *Nielsen*, 259 Neb. 264, 273, 609 N.W.2d 368 (2000); *Gaylor* v. *Jeffco*, 160 N.H. 367, 369–71, 999 A.2d 290 (2010), citing *Mahoney* v. *Shaheen, Cappiello, Stein & Gordon, P.A.*, 143 N.H. 491, 727 A.2d 996 (1999).

criminal court that the cause of the imprisonment is the plaintiff's criminal wrongdoing, not the negligence of his or her attorney.[12] Requiring a plaintiff to obtain appellate or postconviction relief as an element of his or her criminal malpractice claim demonstrates that, at the very least, the plaintiff is legally innocent and any conviction is not the result of the plaintiff's own criminal wrongdoing, but of the negligence of his or her attorney.[13]

Another closely related rationale for the rule is that it prevents collateral attacks on a judgment of conviction in another court. See, e.g., *Gaines* v. *Manson*, 194 Conn. 510, 516, 481 A.2d 1084 (1984) (explaining that, "[a]lthough collateral attacks on criminal judgments are

[12] Not all courts that have adopted the exoneration rule apply it to a plaintiff who has pleaded guilty, rather than having been adjudicated guilty after a trial. See, e.g., *Mrozek* v. *Intra Financial Corp.*, 281 Wis. 2d 448, 467–68, 699 N.W.2d 54 (2005) (rejecting idea that canvass for guilty plea was akin to adjudication on merits).

[13] Many courts rely on this same rationale for imposing the more stringent actual innocence requirement, as well. As the Supreme Judicial Court of Massachusetts has explained, "[w]hen a plaintiff is a former criminal defendant claiming that his or her defense attorney negligently defended the plaintiff against a criminal charge, [t]he causal requirement between the lawyer's negligence and damage then becomes twofold . . . . The plaintiff must prove by a preponderance of the evidence, not only that the negligence of the attorney defendant caused [the plaintiff] harm, but also that [the plaintiff] is innocent of the crime charged. . . . Thus, the attorney's negligence is not the cause of the former client's injury as a matter of law, unless the plaintiff former client proves that he [or she] did not commit the crime." (Citations omitted; internal quotation marks omitted.) *Correia* v. *Fagan*, 452 Mass. 120, 127, 891 N.E.2d 227 (2008). In other words, "[u]nless criminal malpractice plaintiffs can prove by a preponderance of the evidence their actual innocence of the charges, their own bad acts, not the alleged negligence of defense counsel, should be regarded as the cause in fact of their harm." *Ang* v. *Martin*, 154 Wn. 2d 477, 485, 114 P.3d 637 (2005). These courts explain that the purpose behind our tort law does not support permitting a person who is guilty of a crime to profit from his or her own wrongdoing. "Only an innocent person wrongly convicted due to inadequate representation has suffered a compensable injury because in that situation the nexus between the malpractice and palpable harm is sufficient to warrant a civil action, however inadequate, to redress the loss." *Wiley* v. *San Diego*, 19 Cal. 4th 532, 539, 966 P.2d 883, 79 Cal. Rptr. 2d 672 (1998).

generally disfavored, the writ of habeas corpus holds an honored position in our jurisprudence . . . [as] a bulwark against convictions that violate fundamental fairness" (internal quotation marks omitted)). Because a plaintiff in a criminal malpractice action must demonstrate that, in the absence of his or her attorney's negligence, he or she would not have been convicted, the civil action acts as a collateral attack on the criminal conviction. Therefore, most courts have concluded that, "by operation of the doctrine of collateral estoppel, a valid criminal conviction acts as a bar to overturning that conviction in a civil damages suit." *Levine* v. *Kling*, 123 F.3d 580, 583 (7th Cir. 1997); accord *Trigg* v. *Farese*, supra, 266 So. 3d 622. Moreover, because other avenues of relief—both direct and collateral—are available to criminally convicted persons, allowing such plaintiffs to challenge the propriety of their convictions in a criminal malpractice action after they have been unsuccessful in challenging their convictions through direct appeals or habeas corpus proceedings would allow challenges to the correctness of judgments of other courts and conflict with the well established doctrine of collateral estoppel. Put differently, if individuals with criminal convictions are permitted to bring claims of criminal malpractice without having to demonstrate that they have obtained appellate or postconviction relief, they can essentially take another bite of the apple and ask the civil court to weigh in on whether their convictions were caused by the negligence of their lawyers, even if habeas review has resulted in the consideration of that very issue and a finding of no merit. Indeed, the rationale of the United States Supreme Court in *Heck* supports precluding such a scenario.

Specifically, the court in *Heck* explained that, in a claim of malicious prosecution, requiring invalidation of the underlying conviction "avoids parallel litigation over the issues of probable cause and guilt . . . and it

precludes the possibility of the [plaintiff's] . . . succeeding in the tort action after having been convicted in the underlying criminal prosecution, in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction. . . . Furthermore, to permit a convicted criminal defendant to proceed with a malicious prosecution claim would permit a collateral attack on the conviction through the vehicle of a civil suit." (Citation omitted; internal quotation marks omitted.) *Heck* v. *Humphrey*, supra, 512 U.S. 484. The United States Supreme Court further explained that it believes that "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement . . . . [Therefore] when a state prisoner seeks damages in a § 1983 [action], the [D]istrict [C]ourt must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." (Footnotes omitted.) Id., 486–87; see also *Wiley* v. *San Diego*, 19 Cal. 4th 532, 544, 966 P.2d 983, 79 Cal. Rptr. 2d 672 (1998) (requiring exoneration as element of criminal malpractice action is consistent with "a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction" (internal quotation marks omitted)). The inconsistency of the judgments would sow doubt in the legitimacy of the criminal conviction.

Admittedly, there is an opposing view regarding whether to impose an exoneration rule for criminally convicted plaintiffs in criminal malpractice actions, and it is not without some merit. A minority of courts that have considered the issue have rejected the requirement of

appellate or postconviction relief and have chosen to impose no additional elements in connection with criminal malpractice claims.[14] The courts that have rejected the exoneration requirement have explained that there is no reason to treat criminal and civil plaintiffs differently because both types of plaintiffs can be harmed by their attorney's malpractice. See, e.g., *Duncan* v. *Campbell*, 123 N.M. 181, 186, 936 P.2d 863 (App.), cert. denied, 123 N.M. 168, 936 P.2d 337 (1997).

Although we understand this argument for treating the negligence of criminal defense or habeas counsel in the same manner that we treat the negligence of civil counsel, we find the minority view unpersuasive because it does not account for the real differences between civil and criminal cases. These jurisdictions do not adequately consider the important policy reasons underlying the exoneration requirement, in particular, the substantial harm that may result from an inconsistent tort judgment casting doubt on the validity of a criminal conviction that has not been vacated or reversed through the established mechanisms of postconviction relief that are specifically intended to safeguard the integrity of criminal convictions in our system of justice.

We recognize that there is an argument that it is unfair to require someone whose conviction is caused by the

[14] See, e.g., *Molen* v. *Christian*, 161 Idaho 577, 582, 388 P.3d 591 (2017) ("[a]ctual innocence is not an element of a criminal malpractice cause of action"); *Gebhardt* v. *O'Rourke*, 444 Mich. 535, 552, 510 N.W.2d 900 (1994) ("a cause of action for malpractice could well exist regardless of the outcome of [postjudgment] proceedings" (internal quotation marks omitted)); *Jepson* v. *Stubbs*, 555 S.W.2d 307, 313–14 (Mo. 1977) (explaining that, like plaintiff in civil malpractice case, who would not be collaterally estopped from bringing action by judgment that he was negligent, plaintiff in criminal malpractice case would not be collaterally estopped from bringing action by judgment of conviction); *Duncan* v. *Campbell*, 123 N.M. 181, 184–86, 936 P.2d 863 (App.) (rejecting reasoning behind exoneration rule), cert. denied, 123 N.M. 168, 936 P.2d 337 (1997); *Krahn* v. *Kinney*, 43 Ohio St. 3d 103, 106, 538 N.E.2d 1058 (1989) (rejecting rule that plaintiff must allege reversal of his conviction to state cause of action for criminal malpractice).

negligence of his or her criminal defense or habeas counsel to obtain appellate or postconviction relief before seeking damages for criminal malpractice, particularly when the negligence is extreme. We do not take this concern lightly. We are confident, however, that the substantial protections already in place in our criminal justice system—both direct appellate and collateral relief—adequately ensure that these types of wrongs would be identified and addressed, particularly in light of the right to appellate and postconviction representation. Accordingly, we are not persuaded that this is a reason not to adopt the exoneration rule.

Having considered these various opinions and the policies that underlie both the majority position and the minority position, we find the majority position more persuasive. The main reasons for adopting this approach are interrelated: first, the judicial policy against inconsistent judgments arising out of the same transaction; and, second, the elaborate remedial system embodied in Connecticut's habeas laws providing comprehensive and robust postconviction procedures intended to address, among other things, allegations that a criminal conviction was the result of the ineffective assistance of criminal defense counsel. Specifically, the legislature has created a statutory entitlement to counsel in "any habeas corpus proceeding arising from a criminal matter . . . ." General Statutes § 51-296 (a). This statutory right includes the right to " 'effective and competent' " habeas counsel. *Lozada* v. *Warden*, 223 Conn. 834, 838–39, 613 A.2d 818 (1992). Connecticut takes that statutory right so seriously that habeas petitioners in this state are afforded the opportunity to challenge their convictions through successive petitions based on inadequate performance by habeas counsel. See, e.g., *Kaddah* v. *Commissioner of Correction*, 324 Conn. 548, 559, 153 A.3d 1233 (2017) ("a third habeas petition is available as a matter of fundamental fairness to vindicate the statu-

tory right under § 51-296 (a) to competent counsel in litigating a second habeas petition").

We are confident that Connecticut's rights to appeal and to postconviction proceedings, along with the availability of federal habeas remedies, provide an efficient structure for obtaining relief from a criminal conviction or the denial of habeas relief caused by the negligence of counsel. Accordingly, the protections afforded to criminal defendants to challenge their convictions through the habeas process in Connecticut lend even more support to our adoption of the exoneration rule for claims of criminal malpractice.

In fact, the elaborate and comprehensive nature of our criminal justice system's scheme to address convictions resulting from negligent lawyers "also appears to establish something else, [namely], that it is the public policy of this state to treat any person who has been convicted of [a] criminal offense as validly convicted unless and until the person's conviction has been reversed, whether on appeal or through [postconviction] relief, or the person otherwise has been exonerated. Any policy choice that [the] court might make concerning when a person [who has been convicted of a crime] . . . should be deemed to have been harmed by legal malpractice on the part of the person's criminal defense counsel should respect, and not hinder, the valid policy choices already made by the legislature. Respecting the legislature's comprehensive criminal justice construct means, at a minimum, that it is inappropriate to permit a person who has been convicted of a criminal offense to assert in the courts a claim for legal malpractice in connection with that conviction unless and until the person has challenged successfully the conviction through the direct appeal or [postconviction] processes [provided by state law] . . . ." *Stevens* v. *Bispham*, supra, 316 Or. 230–31.

Accordingly, we now hold that, when proof of a criminal malpractice claim requires a plaintiff to prove that the attorney's negligence was a proximate cause of the

underlying criminal conviction, the claim is insufficient as a matter of law unless the plaintiff has obtained appellate or postconviction relief for the underlying conviction. Having adopted the exoneration rule, we now must decide which version of that rule will best serve the interests that we have articulated, i.e., whether it is adequate to require that the would-be plaintiff must first obtain appellate or postconviction relief overturning the conviction, or must also demonstrate actual innocence, as some courts require. Because of the procedural posture of this case, in which the plaintiff has not even pleaded that he has obtained appellate or postconviction relief for his underlying criminal conviction, the issue of whether we will not only require exoneration, but also that a plaintiff prove his or her actual innocence, is not necessary to our resolution of this appeal. Therefore, we save for another day the question of whether to adopt the actual innocence rule.[15]

Importantly, notwithstanding our adoption of the exoneration rule, it should be clear that, if the plaintiff's criminal malpractice claim does not require findings that would undermine the validity of the underlying conviction, our holding today does not mean that such a claim would be barred for lack of exoneration. See, e.g., *Cortez* v. *Gindhart*, 435 N.J. Super. 589, 603, 90 A.3d 653 (App. Div. 2014) (concluding that criminal malpractice claim did not require proof of exoneration when allegation did not depend on invalidity of plaintiff's conviction or his admission of guilt), cert. denied, 220 N.J. 269, 105 A.3d 1102 (2015). Indeed, the Appellate Court correctly concluded that the plaintiff's claim of fraud in the present case could proceed; see *Cooke* v.

[15] We recognize that there are concerns regarding the applicability of the statute of limitations to claims of criminal malpractice. See General Statutes § 52-577 (three year statute of repose). We also appreciate Justice McDonald's effort to highlight those concerns. Because those issues were not raised and are thus not at issue in this appeal, however, we leave resolution of those concerns for another day.

Williams, supra, 206 Conn. App. 177; and that claim is not the subject of this appeal. Such claims do not directly or indirectly challenge the validity of the conviction and, thus, are not subject to the exoneration rule.

In the present case, the only claim of criminal malpractice before this court relates to the alleged professional negligence in connection with the defendants' representation of the plaintiff in his habeas proceeding. The plaintiff was not successful in that habeas action and has unsuccessfully challenged his conviction through direct appeals. See *Cooke* v. *Commissioner of Correction*, 194 Conn. App. 807, 810, 222 A.3d 1000 (2019), cert. denied, 335 Conn. 911, 228 A.3d 1041 (2020); *State* v. *Cooke*, supra, 134 Conn. App. 574. The plaintiff is currently challenging his conviction in yet another habeas action that is scheduled for trial later this year. In his criminal malpractice action at issue here, the plaintiff alleges that the defendants' failures resulted in his inability to prove ineffective assistance of his trial counsel.

Therefore, to prove that the defendants' conduct was the proximate cause of the plaintiff's harm, namely, the denial of his habeas petition and continued incarceration, the plaintiff necessarily would have to prove that the defendants' negligence was a substantial cause of his conviction and that he probably would have prevailed on his habeas petition if the negligence had not occurred. Because the plaintiff has not obtained any appellate or postconviction relief, we conclude that the plaintiff's claim of criminal malpractice fails to state a cognizable claim of criminal malpractice.

To the extent that the plaintiff asserts that, even if we adopt the exoneration rule, it should not apply to his claim of criminal malpractice because he is alleging that his habeas counsel, instead of defense counsel in his criminal case, committed malpractice, we disagree.

Instead of focusing on whether the claim of criminal malpractice is brought against trial, appellate, or habeas counsel, the focus of whether the exoneration rule applies is on whether the claim of criminal malpractice challenges the validity of the underlying conviction. As the Appellate Court aptly explained: "In his amended complaint, the plaintiff alleges that the defendants, in violation of their duties, neglected to prosecute his habeas petition fully and properly because the 'aspects of the case that were investigated were misused by the defendants due to failures to comprehend the requisite law, facts and issues, and to have any coherent trial strategy,' the 'defendants failed to adequately prepare the plaintiff for trial,' the 'defendants failed to develop evidence in support of the habeas case,' and the 'defendants failed to properly prepare and present court documents, [including] . . . motions, posttrial briefs, and postjudgment remedies.' He further alleges that the defendants' failures 'in investigation and comprehension of the facts of the case yielded a failure to present and prove prejudice' pursuant to *Strickland* v. *Washington*, supra, 466 U.S. 668. These allegations clearly implicate the sufficiency of the defendants' representation in the habeas proceedings and, to prove these allegations [in a negligence case], the plaintiff presumably would have to demonstrate that he would not have sustained an injury of continued incarceration had professional negligence not occurred. . . . The allegations in the plaintiff's legal malpractice claim thus necessarily imply the invalidity of the plaintiff's conviction." (Citation omitted.) *Cooke* v. *Williams*, supra, 206 Conn. App. 163. Given that the plaintiff's claim of criminal malpractice necessarily challenges the validity of his underlying conviction, his claim fails for failure to plead and prove that he has obtained appellate or postconviction relief from his criminal conviction.

Having adopted the exoneration rule today and explained that it is not an issue of justiciability but,

instead, requires an additional element to be alleged and proven in a cause of action for criminal malpractice, we conclude that the plaintiff's claim of criminal malpractice should not have been the subject of a motion to dismiss, but was more properly the subject of a motion to strike. Compare Practice Book § 10-30 (a) ("[a] motion to dismiss shall be used to assert . . . lack of jurisdiction over the subject matter"), with Practice Book § 10-39 (a) ("[a] motion to strike shall be used whenever any party wishes to contest . . . the legal sufficiency of the allegations of any complaint . . . or of any one or more counts thereof, to state a claim upon which relief can be granted"). Therefore, we conclude as a matter of form that the Appellate Court improperly affirmed the judgment of the trial court dismissing the plaintiff's claim of criminal malpractice for lack of subject matter jurisdiction.

The judgment of the Appellate Court is reversed with respect to the plaintiff's claim of criminal malpractice and the case is remanded to that court with direction to remand to the trial court with direction to deny the defendants' motion to dismiss and for further proceedings consistent with this opinion; the judgment of the Appellate Court is affirmed in all other respects.

In this opinion the other justices concurred.

McDONALD, J., concurring. I agree with and join the majority's well reasoned opinion. I also agree with the result the majority reaches. I write separately to highlight a likely problem posed by the applicability of the statute of limitations to a claim of criminal malpractice and to provide guidance to litigants and trial courts on how the problem may perhaps be minimized.

It is undisputed that General Statutes § 52-577 governs claims of legal malpractice in Connecticut. See, e.g., *Doe* v. *Boy Scouts of America Corp.*, 323 Conn.

303, 340 n.25, 147 A.3d 104 (2016) (recognizing § 52-577 "applies, for example, to legal malpractice actions"); *DeLeo* v. *Nusbaum*, 263 Conn. 588, 589–90, 821 A.2d 744 (2003) (applying statute of limitations in § 52-577 to legal malpractice action); *Straw Pond Associates, LLC* v. *Fitzpatrick, Mariano & Santos, P.C.*, 167 Conn. App. 691, 714, 145 A.3d 292 ("[a]n action alleging legal malpractice or negligence is a tort claim subject to the three year statute of limitations set forth in § 52-577"), cert. denied, 323 Conn. 930, 150 A.3d 231 (2016).

Section 52-577 provides: "No action founded upon a tort shall be brought but within three years *from the date of the act or omission complained of*." (Emphasis added.) "This court has explained that the history of that legislative choice of language precludes any construction thereof delaying the start of the limitation period until the cause of action has accrued or the injury has occurred. . . . The date of the act or omission complained of is the date when the . . . conduct of the defendant occurs . . . . *Certain Underwriters at Lloyd's, London* v. *Cooperman*, 289 Conn. 383, 408, 957 A.2d 836 (2008); see also *Rosato* v. *Mascardo*, 82 Conn. App. 396, 407, 844 A.2d 893 (2004) (characterizing § 52-577 as statute of repose). As such, an action commenced more than three years from the date of the negligent act or omission complained of is [time] barred . . . regardless of whether the plaintiff had not, or in the exercise of [reasonable] care could not reasonably have discovered the nature of the injuries within that time period. . . . *Martinelli* v. *Fusi*, 290 Conn. 347, 355, 963 A.2d 640 (2009)." (Internal quotation marks omitted.) *Essex Ins. Co.* v. *William Kramer & Associates, LLC*, 331 Conn. 493, 503, 205 A.3d 534 (2019).

As the Appellate Court has recognized, "[§] 52-577 is a statute of repose in that it sets a fixed limit after which the tortfeasor will not be held liable and in some cases will serve to bar an action before it accrues."

(Internal quotation marks omitted.) *Piteo* v. *Gottier*, 112 Conn. App. 441, 445, 963 A.2d 83 (2009). Moreover, "[i]gnorance of his rights on the part of the person against whom the statute has begun to run . . . will not suspend its operation. He may discover his injury too late to take advantage of the appropriate remedy." *Bank of Hartford County* v. *Waterman*, 26 Conn. 324, 329 (1857).

In light of the majority's conclusion that exoneration from the underlying conviction is an element of a cause of action for criminal malpractice, I foresee § 52-577 presenting a significant issue for plaintiffs. In other words, if one waits to obtain appellate or postconviction relief before bringing a meritorious cause of action for criminal malpractice, it is unlikely that he or she will be able to do so within three years of the act or omission constituting malpractice, given the time frames usually associated with such postconviction litigation efforts. Some courts, however, have provided guidance on how to avoid the unfortunate circumstance of the running of a statute of limitations before the plaintiff's cause of action even accrues: a plaintiff claiming to be injured by the criminal malpractice of his defense attorney may file a timely cause of action for criminal malpractice and seek an immediate stay of that action while he pursues appellate or postconviction relief relating to his underlying conviction. See, e.g., *Coscia* v. *McKenna & Cuneo*, 25 Cal. 4th 1194, 1210–11, 25 P.3d 670, 108 Cal. Rptr. 2d 471 (2001) ("[T]he plaintiff must file a malpractice claim within the . . . [limitation] period set forth in [the code of civil procedure]. Although such an action is subject to [a motion to strike] or summary judgment while a plaintiff's conviction remains intact, the court should stay the malpractice action during the period in which such a plaintiff timely and diligently pursues postconviction remedies."); see also, e.g., *Gibson* v. *Trant*, 58 S.W.3d 103, 117 (Tenn. 2001).

Accordingly, I concur in the judgment.

SUSANNE P. WAHBA *v.* JPMORGAN CHASE BANK, N.A.
(SC 20807)

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

Syllabus

The plaintiff appealed to the Appellate Court from the judgment of the trial court, which had rendered a judgment of strict foreclosure in favor of the defendant bank. The Appellate Court subsequently affirmed the trial court's judgment and remanded the case for the setting of new law days. On remand, the plaintiff objected to the defendant's motion to reset the law days, claiming that the judgment of strict foreclosure did not account for the substantial increase in property values that had occurred during the pendency of the appeal. The plaintiff sought, inter alia, a determination by the trial court regarding whether a foreclosure by sale would be appropriate at that point in light of the increase in the value of the subject property. The trial court concluded, however, that it had no authority to revisit the merits of the strict foreclosure judgment, as it was bound by the Appellate Court's rescript order requiring the setting of new law days. The plaintiff then filed a second appeal with the Appellate Court, claiming that the trial court had incorrectly determined that it had no authority on remand to order a foreclosure by sale. The Appellate Court affirmed, concluding that the plaintiff's claim was barred by the court's earlier decision in *Connecticut National Bank* v. *Zuckerman* (31 Conn. App. 440), in which it held that, when an appellate court affirms a judgment of strict foreclosure and remands to the trial court for the setting of new law days, the trial court has no authority on remand to deviate from the appellate court's remand order. The Appellate Court also concluded that, even if a trial court had the authority to order a foreclosure by sale, the plaintiff failed to file a motion to open the judgment for such a purpose or to adduce evidence that a judgment of strict foreclosure, rather than a judgment of foreclosure by sale, would have resulted in a substantial windfall for the defendant. On the granting of certification, the plaintiff appealed to this court. *Held*:

1. The defendant could not prevail on its claim, as an alternative ground for affirming the Appellate Court's judgment, that the doctrine of res judicata barred the trial court from entertaining the plaintiff's request that the court modify the judgment of strict foreclosure and order a foreclosure by sale:

   There was support in the case law for the conclusion that, when law days have passed and the trial court must reset them, the parties to the foreclosure proceedings are not barred from seeking updated findings

on the amount of the debt and the value of the subject property, or from requesting a foreclosure by sale in lieu of strict foreclosure if the updated findings warrant it, and the Appellate Court also had recently suggested in dictum in *U.S. Bank National Assn.* v. *Rago* (216 Conn. App. 200) that, in such circumstances, sound policy reasons weigh in favor of allowing a trial court to consider whether it should order a foreclosure by sale without regard to whether doing so would run afoul of res judicata principles.

Because a judgment of strict foreclosure is uniquely susceptible to becoming ineffective and stale over the course of time, insofar as the amount of the mortgage debt can change and property values can fluctuate, and because foreclosure is peculiarly an equitable action, this court deemed it necessary, in cases in which an appellate court has affirmed a judgment of strict foreclosure and remanded for the setting of new law days, for a trial court to make a new finding as to the amount of the debt so that the parties know what the mortgagor must pay to redeem the property, at least in the absence of any contrary direction by the appellate court.

In such cases, equity demands that the trial court ascertain the current value of the subject property in order to determine whether strict foreclosure would result in a potential windfall to the mortgagee, and, if such a potential windfall exists, equity also demands that the trial court exercise its discretion and decide whether to modify the form of the judgment and to order a foreclosure by sale, and these practical and equitable considerations outweigh the interests in finality and repose that underlie the doctrine of res judicata.

2. The Appellate Court incorrectly concluded that the trial court lacked authority to entertain the plaintiff's request that the trial court modify the judgment of strict foreclosure and order a foreclosure by sale:

When, as in the present case, the claim on appeal from the judgment of strict foreclosure is not that the trial court had abused its discretion by ordering a strict foreclosure but, rather, that the trial court improperly had rendered a judgment of foreclosure in any form, there is no reason to conclude that a reviewing court's affirmance of the judgment of strict foreclosure and remand for the setting of new law days reflect an intent to prohibit a foreclosure by sale if such a modification is warranted by new findings as to the value of the subject property.

Accordingly, in the absence of any evidence that a reviewing court's remand order reflects an actual intent to limit the trial court's equitable discretion to modify the form of the judgment of foreclosure, an order remanding the case with direction to set new law days merely embodies a rebuttable presumption that the original form of the foreclosure judgment should stand, and that presumption may be rebutted if the trial court,

upon an adequately supported request by a party, makes new findings warranting a foreclosure by sale.

To the extent that the Appellate Court in *Connecticut National Bank* v. *Zuckerman* held that an appellate court's order affirming a judgment of strict foreclosure and remanding the case to the trial court for the purpose of setting new law days precludes the trial court from opening the judgment and ordering a foreclosure by sale, it was hereby overruled.

In the present case, the Appellate Court's affirmance of the judgment of strict foreclosure and remand for new law days did not strip the trial court of authority to order a foreclosure by sale when the plaintiff sought such a modification, and the plaintiff was not required to ask the Appellate Court to reconsider and modify the form of its remand order before asking the trial court to consider modifying the judgment and ordering a foreclosure by sale.

This court nevertheless noted that an appellate court that has affirmed a judgment of strict foreclosure and remanded the case to the trial court for the setting of new law days may, in appropriate cases, indicate in its remand order that the trial court should not modify the form of the original judgment, even under circumstances in which the equity in the property is significantly greater than the amount of the debt, such as in the case of a frivolous appeal filed by the mortgagor solely for the purpose of delay, and, if an appellate court so indicates, the trial court would lack authority to entertain, on remand, a request for a foreclosure by sale.

3. The Appellate Court incorrectly concluded that, even if the trial court had the authority on remand to order a foreclosure by sale, the plaintiff was required to file a motion to open the judgment of strict foreclosure and to present evidence that the value of the subject property had substantially increased since the date of the original judgment before the trial court could exercise that authority:

The Appellate Court had held in a prior decision that a remand in a foreclosure appeal with direction to set new law days is the functional equivalent of an order to open the judgment, the defendant in the present case did not move to open the judgment before asking the trial court to reset the law days, presumably because it believed that there was no need for such a motion in light of the Appellate Court's remand order, and, thus, there also was no need for the plaintiff to move to open the judgment before the trial court could entertain her request to order a foreclosure by sale.

Moreover, the plaintiff made an adequate proffer to support her request that the trial court order the defendant to provide an updated amount of the debt owed and a property appraisal, and, if warranted by the new information obtained, a foreclosure by sale, as the plaintiff represented

in her objection to the defendant's motion to reset the law days that the original appraisal was almost four years old, that property values had increased dramatically in the area of the subject property, and that the estimated current value of the subject property was approximately $2 million greater than the amount of the debt owed.

Furthermore, the plaintiff's representations in her objection to the defendant's motion to reset the law days were sufficient to establish the need for a hearing at which the parties could offer evidence to establish the value of the subject property, and the plaintiff was not required to prove that the value of the property had increased before she could request an evidentiary hearing on that issue.

Argued December 18, 2023—officially released June 25, 2024

Procedural History

Action to recover damages for the defendant's alleged unfair trade practices, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendant filed a counterclaim; thereafter, the plaintiff's claim was tried to the jury before *Povodator*, *J.*; verdict for the defendant; subsequently, the counterclaim was tried to the court; judgment for the defendant on the complaint and on the counterclaim, from which the plaintiff appealed to the Appellate Court, *Lavine*, *Alvord* and *Harper*, *Js.*, which dismissed the appeal in part and remanded the case to the trial court for the purpose of setting new law days; thereafter, the court, *Hon. Kenneth B. Povodator*, judge trial referee, rendered judgment of strict foreclosure, and the plaintiff appealed to the Appellate Court, *Elgo*, *Moll* and *Suarez*, *Js.*, which affirmed the trial court's judgment and remanded the case to the trial court for the purpose of setting new law days, and the plaintiff, on the granting of certification, appealed to this court. *Reversed*; *further proceedings*.

Thomas P. Willcutts, for the appellant (plaintiff).

Brian D. Rich, for the appellee (defendant).

Opinion

D'AURIA, J. The primary issue before us in this appeal is whether, after an appellate court has affirmed a trial court's judgment of strict foreclosure and remanded the case to the trial court to set new law days, the trial court has authority to open that judgment and render instead a judgment of foreclosure by sale based on changed market conditions. The Appellate Court, in the second appeal taken in this case, answered this question in the negative and further concluded that, even if the trial court had such authority, the plaintiff, Susanne P. Wahba, did not provide an adequate evidentiary foundation for her request that the court consider ordering a foreclosure by sale. See *Wahba* v. *JPMorgan Chase Bank, N.A.*, 216 Conn. App. 236, 239–40, 283 A.3d 1095 (2022) (*Wahba II*). We granted the plaintiff's petition for certification to appeal to this court from these rulings. See *Wahba* v. *JPMorgan Chase Bank, N.A.*, 346 Conn. 912, 289 A.3d 597 (2023).[1] We conclude that, contrary to the contention of the defendant, JPMorgan Chase Bank, N.A., the doctrine of res judicata did not bar the trial court from entertaining the plaintiff's request that the trial court consider ordering a foreclosure by sale instead of simply resetting the law days. We further conclude

[1] We certified the following two issues for appeal: "1. Did the Appellate Court properly uphold the trial court's determination that the trial court was precluded on remand from ordering a foreclosure by sale after the Appellate Court had previously affirmed a judgment of strict foreclosure and remanded the case to the trial court 'solely for the purpose of setting new law days.' *Wahba* v. *JPMorgan Chase Bank, N.A.*, 200 Conn. App. 852, 869, 241 A.3d 706 (2020), cert. denied, 336 Conn. 909, 244 A.3d 562 (2021)?

"2. If the answer to the first question is 'no,' did the Appellate Court correctly conclude that the plaintiff nonetheless could not prevail on appeal because, after remand, she did not file a motion to open the judgment to request a foreclosure by sale and failed to preserve her claim on appeal because she did not provide the trial court with an evidentiary foundation to support her argument that the market value of the property had increased in value by more than $2 million since the judgment of strict foreclosure was rendered?" *Wahba* v. *JPMorgan Chase Bank, N.A.*, supra, 346 Conn. 912.

that the Appellate Court incorrectly determined that (1) its remand order directing the trial court to set new law days deprived the trial court of authority to entertain the plaintiff's request, and (2) even if the trial court had such authority, the plaintiff's request was not supported by an adequate evidentiary foundation. We therefore reverse the judgment of the Appellate Court.

The record reveals the following undisputed facts and procedural history. In 2003, the plaintiff obtained a loan from Washington Mutual that was secured by a mortgage on property located at 111 Byram Shore Road in Greenwich (property). See *Wahba* v. *JPMorgan Chase Bank, N.A.*, 200 Conn. App. 852, 855, 241 A.3d 706 (2020) (*Wahba I*), cert. denied, 336 Conn. 909, 244 A.3d 562 (2021). The defendant acquired the loan from Washington Mutual in 2008. Id., 856.

The plaintiff later sought a loan modification. It was her failed efforts to obtain that modification that led to this action alleging that the defendant had engaged in deceptive and unfair trade practices in violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. Id. The defendant counterclaimed to foreclose the mortgage. Id., 854 n.1. The parties tried the CUTPA claim to a jury, which returned a verdict in the defendant's favor. Id., 856–57. They tried the foreclosure counterclaim to the court on October 26, 2017. On June 28, 2018, the court issued a memorandum of decision, concluding that the defendant was entitled to a judgment of foreclosure and ordering a hearing on the issues of attorney's fees and whether the court should order a strict foreclosure or a foreclosure by sale. That hearing was held on July 30, 2018. The court issued a supplemental memorandum of decision on November 28, 2018, rendering a judgment of strict foreclosure. The court determined that, as of the date of trial, October 26, 2017, the fair market value of the property was $6,700,000, that, as of November 27,

2018, the outstanding mortgage debt was $6,179,199.57, and that the defendant was entitled to fees and expenses in the amount of $121,305.80.

The plaintiff appealed to the Appellate Court, challenging the verdict on her CUTPA claim and the judgment of strict foreclosure. Id., 854 n.1, 857. The Appellate Court upheld the verdict on the CUTPA claim, affirmed the judgment of strict foreclosure and remanded the case to the trial court "solely for the purpose of setting new law days." Id., 869. The plaintiff then moved for reconsideration, requesting that the Appellate Court reconsider its ruling that the trial court properly had barred her from presenting certain evidence at trial. The Appellate Court denied the motion.

On remand, the defendant moved the trial court to reset the law days. See *Wahba* v. *JPMorgan Chase Bank, N.A.*, supra, 216 Conn. App. 238. The plaintiff objected, arguing that the original judgment of strict foreclosure did "not take into account the steep rise in Connecticut property values that has occurred since the court determined to enter a judgment of strict foreclosure, rather than a foreclosure by sale.[2] The steep rise in property values has been most dramatic for high-end shoreline properties, which describes the [plaintiff's] property . . . ." (Footnote added; internal quotation marks omitted.) Id. The plaintiff requested that the court require the defendant to file a motion to open the judgment and to provide an updated appraisal and updated debt figures to allow the court to determine whether a foreclosure by sale would be appropriate. Id. The court concluded that, under *Rizzo Pool Co.* v. *Del Grosso*, 240 Conn. 58, 689 A.2d 1097 (1997), it was bound by the Appellate Court's rescript order in *Wahba I*, requiring

[2] When the plaintiff filed her objection, almost four years had elapsed since the original appraisal and almost three years had elapsed since the date that the trial court ordered a strict foreclosure.

it to set new law days. See *Wahba* v. *JPMorgan Chase Bank, N.A.*, supra, 216 Conn. App. 238–29; see also *Rizzo Pool Co.* v. *Del Grosso*, supra, 65 ("[i]t is the duty of the trial court on remand to comply strictly with the mandate of [an] appellate court according to its true intent and meaning" (internal quotation marks omitted)). Accordingly, the court denied the plaintiff's request and granted the defendant's request to reset the law days. See *Wahba* v. *JPMorgan Chase Bank, N.A.*, supra, 216 Conn. App. 240.

The plaintiff moved the trial court for reargument and reconsideration, contending that *Rizzo Pool Co.* did not prohibit the court from exercising its discretion to render an equitable decision in a foreclosure proceeding. She also requested that the court take judicial notice that Zillow Group, Inc. (Zillow),[3] estimated the current value of the property at $8,817,600, approximately $2 million more than the appraisal the court had relied on when it rendered the judgment of strict foreclosure. She also represented that, even after adding an additional three years of interest to the 2018 debt amount, the current estimated value of the property was approximately $2 million greater than the debt. The trial court denied the motion, again noting that it had no authority to revisit the merits of the strict foreclosure judgment in light of the Appellate Court's rescript remanding the case solely for the purpose of setting new law days. The court also noted that the plaintiff had not sought to expand the scope of the remand order in her motion for reconsideration of the Appellate Court's decision.

The plaintiff appealed again to the Appellate Court, claiming that the trial court had incorrectly determined

[3] Zillow is an online real estate marketplace website that offers comprehensive real estate market data, including estimated values of real property. See *Pickett Fence Preview, Inc.* v. *Zillow, Inc.*, Docket No. 22-2066-cv, 2023 WL 4852971, *1 (2d Cir. July 31, 2023).

that it had no authority on remand to order a foreclosure by sale. See id., 238. The Appellate Court rejected the claim for two reasons. First, it concluded that the claim was barred by its decision in *Connecticut National Bank* v. *Zuckerman*, 31 Conn. App. 440, 441, 624 A.2d 1163 (1993), which held that, when an appellate court has affirmed a judgment of strict foreclosure and remanded the case for the setting of new law days, the "trial court cannot deviate from the directions given by the appellate court." (Internal quotation marks omitted.) *Wahba* v. *JPMorgan Chase Bank, N.A.*, supra, 216 Conn. App. 240. Second, the Appellate Court concluded that, even if the trial court had authority to order a foreclosure by sale, the plaintiff neither moved to open the judgment for such a purpose nor preserved her claim by providing the trial court with evidence that a judgment of strict foreclosure would result in a windfall of more than $2 million to the defendant. See id. Accordingly, the Appellate Court affirmed the trial court's judgment and again remanded the case to set new law days. See id.

The plaintiff then filed this certified appeal challenging the Appellate Court's conclusions. The defendant claims as an alternative ground for affirmance that, even if the Appellate Court's rescript in *Wahba I* did not deprive the trial court of its authority to entertain a request for a judgment of foreclosure by sale on remand, the trial court was barred from doing so by the doctrine of res judicata.[4] Relatedly, the defendant

[4] The defendant did not expressly characterize this claim as an alternative ground for affirmance and did not file a preliminary statement identifying the issue pursuant to Practice Book § 63-4 (a) (1) (A). Nevertheless, the defendant raised the claim in its brief to the Appellate Court, as well as in its brief to this court, and the plaintiff has responded to the claim in her reply brief. "Given the fact that neither party would be prejudiced by our doing so, we treat [this claim] as if [it] had been properly raised as . . . [an alternative ground] for affirmance." (Internal quotation marks omitted.) *Gerardi* v. *Bridgeport*, 294 Conn. 461, 466, 985 A.2d 328 (2010).

contends that the plaintiff had to appeal from the original judgment of strict foreclosure before the Appellate Court could authorize the trial court to modify the judgment and order a foreclosure by sale. We conclude that the doctrine of res judicata did not bar the trial court from modifying the judgment, that the Appellate Court's remand order did not deprive the trial court of its authority to do so, and that the plaintiff adequately raised and preserved her claim that the trial court had such authority. We therefore reverse the judgment of the Appellate Court.

I

Because the defendant's claim that the doctrine of res judicata barred the trial court from modifying the judgment of strict foreclosure and ordering a foreclosure by sale is potentially dispositive and has some bearing on our analysis of the plaintiff's claims on appeal, we address it first. We conclude that, under the circumstances of the present case, the doctrine of res judicata did not bar the trial court from entertaining the plaintiff's request on remand that it order a foreclosure by sale.

"[T]he doctrine of res judicata provides that [a] judgment is final not only as to every matter which was offered to sustain the claim, *but also as to any other admissible matter which might have been offered for that purpose*. . . . The rule of claim preclusion prevents reassertion of the same claim regardless of what additional or different evidence or legal theories might be advanced in support of it." (Emphasis in original; internal quotation marks omitted.) *Weiss* v. *Weiss*, 297 Conn. 446, 463, 998 A.2d 766 (2010). The doctrine provides that "[a] valid, final judgment rendered on the merits by a court of competent jurisdiction is an absolute bar to a subsequent action between the same par-

ties . . . upon the same claim or demand." (Internal quotation marks omitted.) Id., 459.

"Because [res judicata is a] judicially created [rule] of reason that [is] enforced on public policy grounds . . . we have observed that whether to apply [the] doctrine in any particular case should be made based upon a consideration of the doctrine's underlying policies, namely, the interests of the defendant and of the courts in bringing litigation to a close . . . and the competing interest of the plaintiff in the vindication of a just claim. . . . These [underlying] purposes are generally identified as being (1) to promote judicial economy by minimizing repetitive litigation; (2) to prevent inconsistent judgments which undermine the integrity of the judicial system; and (3) to provide repose by preventing a person from being harassed by vexatious litigation." (Citation omitted; internal quotation marks omitted.) Id., 460. The doctrine is "flexible and must give way when [its] mechanical application would frustrate other social policies based on values equally or more important than the convenience afforded by finality in legal controversies." (Internal quotation marks omitted.) Id.

Our analysis must begin by examining the unusual status of a judgment of strict foreclosure when execution of that judgment has been stayed pending appeal pursuant to Practice Book § 61-11 and the original law days have passed. On the one hand, this court has held that, when law days have passed "[b]ecause of delays incident to the legal process of appeal, the judgment of the trial court [becomes] ineffective in an essential respect . . . ." (Internal quotation marks omitted.) *RAL Management, Inc.* v. *Valley View Associates*, 278 Conn. 672, 683, 899 A.2d 586 (2006); see also *Bank of New York Mellon* v. *Francois*, 198 Conn. App. 885, 896, 234 A.3d 1089 (2020) ("[w]ithout the setting of law days, the time for redemption has not been limited and the parties' rights remain unconcluded as to that issue"

(internal quotation marks omitted)). On the other hand, the passing of the law days during an appellate stay does not deprive the judgment of all vitality, which would render the appeal moot. Cf. *RAL Management, Inc.* v. *Valley View Associates*, supra, 685 (opening of judgment of strict foreclosure to modify certain terms during pendency of appeal does not necessarily render judgment void and appeal moot). Instead, even when an appellate court affirms the judgment of strict foreclosure, it must remand the case to the trial court to effectively render a new judgment. See id., 683 (when law days pass, "what is in effect a new judgment [becomes] necessary" (internal quotation marks omitted)); *L & R Realty* v. *Connecticut National Bank*, 53 Conn. App. 524, 548–49, 732 A.2d 181 ("One of the distinguishing features of a defendant's appeal from a judgment of strict foreclosure is that a remand to the trial court is almost always required, even if the appeal resulted in a finding of no error in the entry of the original judgment. Since the taking of an appeal stays the passing of the law days, once the appeal is concluded the trial court must once again act on the case and set new law days." (Internal quotation marks omitted.)), cert. denied, 250 Conn. 901, 734 A.2d 984 (1999); see also Practice Book § 17-10 ("[i]f a judgment fixing a set time for the performance of an act is affirmed on appeal by the Supreme Court and such time has elapsed pending the appeal, the judicial authority which rendered the judgment appealed from may, on motion and after due notice, modify it by extending the time"). Thus, after the law days have passed while an appellate stay is in effect, a judgment of strict foreclosure is effectively in limbo: although it is " 'ineffective in an essential respect,' " it retains sufficient vitality to prevent the appeal from becoming moot. *RAL Management, Inc.* v. *Valley View Associates*, supra, 683. The question that we must address in the present case is whether the judgment

has sufficient vitality to act as an absolute bar to the modification of any terms of the judgment other than the law days.

Although it is not directly on point, we find instructive this court's decision in *Hartford National Bank & Trust Co.* v. *Tucker*, 195 Conn. 218, 487 A.2d 528, cert. denied, 474 U.S. 845, 106 S. Ct. 135, 88 L. Ed. 2d 111 (1985). In *Tucker*, this court initially remanded the case to the trial court "for the setting of a new date for a public sale of the mortgaged premises and other formalities not inconsistent with our decision." Id., 220–21. On remand, the plaintiff moved for the setting of a new date for the public sale. Id., 221. The trial court conducted a hearing at which it ascertained the amount due on the mortgage and undertook an "extended inquiry into the value of the mortgaged premises . . . ." Id., 221–22. The court then set a new date for foreclosure by sale. Id., 222.

The defendant again appealed, claiming that the trial court had not followed the specific direction of this court's mandate. Id. This court concluded that, to the contrary, it was "proper for the trial court in the new judgment to confirm the original one in all respects *except as modification was made necessary by the delays incident to the appellate process*." (Emphasis added.) Id., 222–23. Accordingly, this court concluded that, in addition to setting a new date for a public sale, the trial court had the authority "to ascertain the amount due the plaintiff, and to add to that amount interest and reimbursement for expenses, costs, attorney['s] fees and appraiser's fees." Id., 223.

Unlike the trial court in the present case, the trial court in *Tucker* was not asked to change the *form* of the foreclosure judgment on remand. The Appellate Court has recognized in a different context, however, that, when law days have passed during the course of

an appeal from a foreclosure judgment, requiring that the trial court render a new judgment, the trial court has the authority to entertain a request for a foreclosure by sale. See *US Bank National Assn.* v. *Christophersen*, 179 Conn. App. 378, 391–93, 180 A.3d 611, cert. denied, 328 Conn. 928, 182 A.3d 1192 (2018). Although *Christophersen* is distinguishable from the present case because it involved the opening of a judgment of strict foreclosure by operation of General Statutes § 49-15 (b),[5] and not a judgment that had become ineffective as the result of the passing of law days during the course of an appeal, the case provides some support for the conclusion that, when law days have passed and the trial court must reset them, the parties are not barred from seeking updated findings on the amount of the debt and the value of the property or from requesting a foreclosure by sale, if the updated findings warrant it. We further note that the Appellate Court has held that, just as when a judgment of strict foreclosure has been opened as the result of a bankruptcy filing, when law days have passed during the pendency of an appeal and the case is remanded to the trial court to set new law days, the trial court "ha[s] jurisdiction over the matter and properly set[s] law days *pursuant to § 49-*

[5] General Statutes § 49-15 provides in relevant part: "(a) (1) Any judgment foreclosing the title to real estate by strict foreclosure may, at the discretion of the court rendering the judgment, upon the written motion of any person having an interest in the judgment and for cause shown, be opened and modified, notwithstanding the limitation imposed by section 52-212a, upon such terms as to costs as the court deems reasonable, provided no such judgment shall be opened after the title has become absolute in any encumbrancer except as provided in subdivision (2) of this subsection.

* * *

"(b) Upon the filing of a bankruptcy petition by a mortgagor under Title 11 of the United States Code, any judgment against the mortgagor foreclosing the title to real estate by strict foreclosure shall be opened automatically without action by any party or the court, provided, the provisions of such judgment, other than the establishment of law days, shall not be set aside under this subsection, provided no such judgment shall be opened after the title has become absolute in any encumbrancer or the mortgagee, or any person claiming under such encumbrancer or mortgagee. . . ."

15 [*(a) (1)*]." (Emphasis added.) *L & R Realty* v. *Connecticut National Bank*, supra, 53 Conn. App. 549. In other words, a remand order to set new law days is the functional equivalent of an order to open the judgment of strict foreclosure. See *RAL Management, Inc.* v. *Valley View Associates*, supra, 278 Conn. 683 ("a *new judgment* [becomes] necessary" when law days have passed during pendency of appeal (emphasis added; internal quotation marks omitted).

More recently, the Appellate Court has suggested in dictum that, when a judgment of strict foreclosure has been affirmed and the case has been remanded to the trial court to set new law days, "sound policy reasons" weigh in favor of allowing a trial court to consider whether it should order a foreclosure by sale without expressing any concerns that doing so would run afoul of principles of res judicata. *U.S. Bank National Assn.* v. *Rago*, 216 Conn. App. 200, 207 n.9, 284 A.3d 629 (2022). The court in *Rago* noted that it is well established that, to prevent a windfall to the mortgagee, foreclosure by sale is the preferred form of judgment in cases in which the value of the property exceeds the amount of the debt. Id., 208. Critically, it further noted that "foreclosure is peculiarly an equitable action . . . ." (Citations omitted; internal quotation marks omitted.) Id. The court acknowledged that "it is not difficult to conceive"; id.; contrary to the holding of *Connecticut National Bank* v. *Zuckerman*, supra, 31 Conn. App. 441, that the "trial court cannot deviate" from a remand order directing the trial court only to set new law days; (internal quotation marks omitted); *U.S. Bank National Assn.* v. *Rago*, supra, 207 n.9; that, "on a proper motion with an evidentiary showing and due notice and an opportunity to be heard," the trial court could make new findings and order a foreclosure by sale. Id., 208–209. The Appellate Court concluded in *Rago* that there was no need to resolve this issue, however, because, regardless

of whether there are circumstances under which a trial court would have such authority, the trial court in that case improperly had made updated findings concerning the value of the property and the amount of the debt "sua sponte and without providing to the parties adequate notice and an opportunity to be heard." Id., 209; see also id., 207–208 n.9.

With these precedents in mind, we conclude that, when a reviewing court affirms a judgment of strict foreclosure and remands the case to the trial court for the setting of new law days, mechanically applying the doctrine of res judicata to bar the trial court from modifying the judgment of strict foreclosure in any other respect would "frustrate other social policies based on values equally or more important than the convenience afforded by finality in legal controversies." (Internal quotation marks omitted.) *Weiss* v. *Weiss*, supra, 297 Conn. 466. As the foregoing discussion makes clear, a judgment of strict foreclosure is uniquely susceptible to becoming ineffective and stale over the course of time. Law days pass, the amount of the debt changes, and the property's value fluctuates. It is also axiomatic that "foreclosure is peculiarly an equitable action . . . ." (Citations omitted; internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Rago*, supra, 216 Conn. App. 208; see also *U.S. Bank National Assn.* v. *Rothermel*, 339 Conn. 366, 374, 260 A.3d 1187 (2021) ("[b]ecause foreclosure is peculiarly an equitable action . . . the court may entertain such questions as are necessary to be determined in order that complete justice may be done" (internal quotation marks omitted)). Thus, when an appellate court has affirmed a judgment of strict foreclosure and remanded the case to the trial court with direction to set new law days—perhaps years after the original judgment—we deem it necessary, unless expressly prohibited for some reason by the reviewing court's remand order, for the trial court to

make a new finding as to the amount of the debt so that the parties know what the mortgagor must pay to redeem the property. See *US Bank National Assn.* v. *Christophersen*, supra, 179 Conn. App. 394 ("[the] case law is clear that the governing principle is that a mortgagee is . . . entitled to the payment of the debt owing him" and to no more (internal quotation marks omitted)). That being the case, we see no reason why, if the mortgagor makes an adequate proffer, equity would not also demand that the court determine the property's current value so that the court knows whether a strict foreclosure would result in potential windfall to the mortgagee. And, if a windfall to the mortgagee would result, we also see no reason why, in an appropriate case, equity would not demand that the court exercise its discretion and determine whether to modify the form of the judgment and to order a foreclosure by sale. See *Toro Credit Co.* v. *Zeytoonjian*, 341 Conn. 316, 330, 267 A.3d 71 (2021) ("foreclosure by sale is the preferred decree in situations in which the property's fair market value exceeds the debt" (internal quotation marks omitted)); *Caliber Home Loans, Inc.* v. *Zeller*, 205 Conn. App. 642, 659, 259 A.3d 1 ("[w]e have recognized that when the value of the property substantially exceeds the value of the lien being foreclosed, the trial court abuses its discretion when it refuses to order a foreclosure by sale" (internal quotation marks omitted)), cert. denied, 338 Conn. 914, 259 A.3d 1179 (2021); *US Bank National Assn.* v. *Christophersen*, supra, 179 Conn. App. 394 ("[s]ince a mortgage foreclosure is an equitable proceeding . . . a windfall should be avoided if possible" (internal quotation marks omitted)). In our view, these practical and equitable considerations outweigh the interests in finality and repose that underlie the doctrine of res judicata.

This analysis disposes of the defendant's claim that, because the plaintiff failed to challenge the judgment

of strict foreclosure in her initial appeal, even though there was some equity in the property at that time, the trial court was barred from entertaining the plaintiff's request for a foreclosure by sale on remand from the Appellate Court after it had resolved the first appeal. As we have explained, the justification for the exception to the doctrine of res judicata in this specific situation is that relevant circumstances have changed during the course of the appeal. The fact that the plaintiff failed to challenge the form of the original judgment on appeal, despite having some equity in the property, does not mean that she was barred from seeking a foreclosure by sale on remand years later, at which time she claimed that the property's value had increased by more than $2 million.[6] We conclude, therefore, that the doctrine of res judicata did not bar the trial court from entertaining the plaintiff's request that it modify the judgment and order a foreclosure by sale.

II

For similar reasons, we agree with the plaintiff that the Appellate Court incorrectly determined that the trial court had no authority to entertain the plaintiff's request that it modify the judgment and order a foreclosure by sale on the ground that the Appellate Court remanded the case to the trial court "solely for the purpose of

[6] We note that the trial court stated in its November 26, 2018 ruling rendering the judgment of strict foreclosure that "the equity may be perceived as substantial insofar as, at the time of the foreclosure trial, the apparent equity was in the hundreds of thousands of dollars, but as measured against the overall value of the property, in the millions of dollars, the equity is a relatively small percentage of the value, and, unless a foreclosure by sale were to realize some 90 [percent, plus or minus] of the value of the property (seemingly an optimistic viewpoint), a foreclosure by sale might well be deemed counterproductive. (As reflected by a supplemental submission by the defendant, the amount of the debt ha[d] increased by approximately $200,000, since the time of the foreclosure trial (and still further since July 30, 2018), further diminishing the possibly available equity were a sale to be ordered.)"

setting new law days." *Wahba* v. *JPMorgan Chase Bank, N.A.*, supra, 200 Conn. App. 869.

The following well established principles govern proceedings in the trial court after a remand by an appellate court. "In carrying out a mandate of [the reviewing] court, the trial court is limited to the specific direction of the mandate as interpreted *in light of the opinion.* . . . This is the guiding principle that the trial court must observe. . . . Compliance means that the direction is not deviated from. The trial court cannot adjudicate rights and duties not within the scope of the remand. . . . It is the duty of the trial court on remand to comply strictly with the mandate of the appellate court according to its true intent and meaning. No judgment other than that directed or permitted by the reviewing court may be rendered, even though it may be one that the appellate court might have directed. The trial court should examine the mandate and *the opinion of the reviewing court and proceed in conformity with the views expressed therein.* . . .

"We have also cautioned, however, that . . . remand orders should not be construed so narrowly as to prohibit a trial court from considering matters relevant to the issues upon which further proceedings are ordered that may not have been envisioned at the time of the remand. . . . So long as these matters are not extraneous to the issues and purposes of the remand, they may be brought into the remand hearing." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Rizzo Pool Co.* v. *Del Grosso*, supra, 240 Conn. 65–66.

"Determining the scope of a remand is a matter of law because it requires the trial court to undertake a legal interpretation of the higher court's mandate in light of that court's analysis. . . . Because a mandate defines the trial court's authority to proceed with the case on remand, determining the scope of a remand is

akin to determining subject matter jurisdiction. . . . We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary." (Internal quotation marks omitted.) *State* v. *Brundage*, 320 Conn. 740, 747, 135 A.3d 697 (2016).

Purporting to apply these principles, the Appellate Court in *Connecticut National Bank* v. *Zuckerman*, supra, 31 Conn. App. 442, held in no uncertain terms that its earlier order in that case affirming a judgment of strict foreclosure and remanding the case to the trial court "for the purpose of setting new law days" precluded the trial court from opening the judgment and ordering a foreclosure by sale. The Appellate Court dismissed the defendant's appeal claiming otherwise as purely dilatory. See id. As we suggested in part I of this opinion, however, the Appellate Court recently has expressed concern that it might have wrongly decided *Zuckerman*. See *U.S. Bank National Assn.* v. *Rago*, supra, 216 Conn. App. 207–208 n.9. In *Rago*, published on the same date as the Appellate Court's decision in *Wahba II*, the decision presently under review, the court recognized, as we have in part I of this opinion, that there are "important policy reasons that are not extraneous to the purposes of a remand in the foreclosure context"; id., 207; that might justify opening a judgment of strict foreclosure and ordering a foreclosure by sale, "notwithstanding a prior affirmance of [the] judgment of strict foreclosure and an attendant remand for the purpose of setting new law days." Id., 209; see also *Wahba* v. *JPMorgan Chase Bank, N.A.*, supra, 216 Conn. App. 239 n.3 (citing *Rago* and noting that for Appellate Court to overrule *Zuckerman* would require en banc consideration by that court).

We agree with the Appellate Court in *Rago* that, to the extent *Zuckerman* held that a remand order that solely directs the trial court to set new law days always

bars the trial court from making new findings as to the value of the property and the amount of the debt and, if warranted by those findings, ordering a foreclosure of sale, the case was wrongly decided, and it is hereby overruled. When, as in the present case, the claim on appeal is not that the trial court abused its equitable discretion by ordering a strict foreclosure but that the trial court improperly rendered a judgment of foreclosure *in any form*, there simply is no reason to conclude that a reviewing court's affirmance of a judgment of strict foreclosure and remand of the case to set new law days reflected an intent to prohibit a foreclosure by sale if justified by new findings as to the value of the property. Indeed, the defendant concedes that "the issue of whether the underlying foreclosure judgment should have been a strict foreclosure or a foreclosure by sale was not put to [the Appellate Court] in [*Wahba I*]." Under these circumstances, an interpretation of the remand order to set new law days as prohibiting the court from considering a request for a foreclosure by sale would not reflect any actual decision by the reviewing court that a foreclosure by sale is unwarranted. See 5 Am. Jur. 2d, Appellate Review § 689 (2024) (mandate rule precludes further consideration only of "issues actually decided on appeal"); see also *United States* v. *Perez*, 475 F.3d 1110, 1113 (9th Cir. 2007) (when applying mandate rule, "[t]he ultimate task is to distinguish matters that have been decided on appeal, and *are therefore beyond the jurisdiction of the lower court*, from matters that have not" (emphasis in original; internal quotation marks omitted)). Thus, as the Appellate Court aptly observed in *Rago*, such an interpretation of the remand order would interfere with the trial court's obligation to do equity and potentially result in an unwarranted windfall to the mortgagee for no discernable reason.

In the absence of any evidence that the reviewing court's remand order reflected an actual intent to limit

the trial court's equitable discretion as to the form of the order, we find it far more reasonable to conclude that an order remanding the case with direction to set new law days merely embodies a rebuttable presumption that the original form of the foreclosure judgment should stand. That presumption may be rebutted if *the trial court, upon an adequately supported request by a party, makes new findings warranting a foreclosure by sale.* Such an interpretation would be consistent with the well established principle that trial courts may consider "matters relevant to the issues upon which further proceedings are ordered that may not have been envisioned at the time of the remand." (Internal quotation marks omitted.) *Rizzo Pool Co.* v. *Del Grosso*, supra, 240 Conn. 65–66; see also *State* v. *Brundage*, supra, 320 Conn. 749 ("A reviewing court . . . cannot and should not attempt to anticipate in its decision every procedural and factual eventuality that could arise upon remand to the trial court. By contrast, the trial court is in the best position to deal with procedural and factual developments in a case on remand and is the proper court to address such eventualities as they arise."); 5 Am. Jur. 2d, supra, § 689 ("lower courts are free as to anything not foreclosed by the mandate, and, under certain circumstances, an order issued after remand may deviate from the mandate if it is not counter to the spirit of the higher court's decision"); id. ("a court on remand . . . is ordinarily free to make an order or direction on questions not presented or settled by [an] appellate court which is not inconsistent with the appellate court's opinion" (footnote omitted)); cf. *Rizzo Pool Co.* v. *Del Grosso*, supra, 69 (trial court properly followed "standard operating procedure" when it awarded attorney's fees pursuant to General Statutes § 42-150bb on remand despite lack of specific direction in Supreme Court's rescript); *Hartford National Bank & Trust Co.* v. *Tucker*, supra, 195 Conn. 221 (when case was

remanded to trial court "for the setting of a new date for a public sale of the mortgaged premises and any other necessary orders not inconsistent with this opinion," trial court had implicit authority to make new findings as to amount of debt and value of property (internal quotation marks omitted)); *Mazzotta* v. *Bornstein*, 105 Conn. 242, 244, 135 A. 38 (1926) ("[w]hile the rescript did not specify that the judgment as directed bore [mandatory statutory] interest from the date of the judgment appealed from, it can bear no other interpretation"). We conclude, therefore, that the Appellate Court incorrectly determined that its rescript in *Wahba I* stripped the trial court of authority to order a foreclosure by sale if a party so requests and it is warranted by a change in circumstances. It follows that, contrary to the defendant's claim, the plaintiff was not required to ask the Appellate Court to reconsider and modify the form of the remand order before she could ask the trial court to consider a foreclosure by sale.

In reaching its conclusion that the trial court had no such authority, the Appellate Court appears to have concluded that the trial court was required to apply a version of the plain meaning rule[7] to interpret the rescript in *Wahba I*. See *Wahba* v. *JPMorgan Chase Bank, N.A.*, supra, 216 Conn. App. 239–40 (because rescript in *Wahba I* directed trial court only to set new law days, trial court could not take any other action). That is, it appears to have concluded that, because the plain meaning of the rescript in *Wahba I* was clear and unambiguous, the trial court could not, based on the

[7] The plain meaning rule, embodied in General Statutes § 1-2z, is a principle of statutory construction that precludes courts from considering extratextual evidence as to the meaning of statutory language if, after first examining the statute and its relationship to the broader statutory scheme of which it is part, the court determines that the language at issue is plain and unambiguous and does not yield absurd or unworkable results. See, e.g., *777 Residential, LLC* v. *Metropolitan District Commission*, 336 Conn. 819, 827–28, 251 A.3d 56 (2020).

plaintiff's request to consider a foreclosure by sale, inquire into the actual intent of the Appellate Court as revealed in its decision as a whole, including the facts and procedural history of the case, the nature of the claims made by the plaintiff on appeal and whether there was any evidence that the Appellate Court intended that the trial court should deviate from standard operating procedures on remand.[8] The weight of authority clearly indicates, however, that trial courts are not strictly bound by the plain meaning of the rescript language but may consider all evidence of the reviewing court's intent when determining what the rescript authorizes and what it prohibits.

Although we have concluded that neither the language of the Appellate Court's remand order nor the doctrine of res judicata barred the trial court from entertaining the plaintiff's request for a foreclosure by sale, we emphasize that nothing in this opinion would prevent a reviewing court that has affirmed a judgment of strict foreclosure from, in an appropriate case, indicating in its remand order that the trial court should not modify the form of the original judgment on remand merely because it makes a finding that the equity in the property is now significantly greater than the amount of the debt. For example, if the reviewing court were to conclude that the mortgagor brought a meritless appeal from a judgment of strict foreclosure *solely* for the purpose of delay, the court might reasonably conclude that the mortgagee, which presumably would have taken absolute title to the property upon the passage of the original law day if not for the meritless appeal, is equitably entitled to the benefit of any increase in the value of the property resulting from the

[8] In taking this approach, the Appellate Court in *Wahba II* relied on its decision in *Connecticut National Bank* v. *Zuckerman*, supra, 31 Conn. App. 440, the correctness of which it has now acknowledged to be doubtful. See *U.S. Bank National Assn.* v. *Rago*, supra, 216 Conn. App. 207–208 n.9.

delay.[9] Obviously, if the reviewing court so determines, and signals as much, the trial court would lack authority to entertain a request to order a foreclosure by sale on remand. Nothing in *Wahba I*, however, indicates that the Appellate Court intended to limit the exercise of the trial court's equitable powers on remand in this way. See 5 Am. Jur. 2d, supra, § 689 ("a court on remand . . . is ordinarily free to make an order or direction on questions not presented or settled by [an] appellate court which is not inconsistent with the appellate court's opinion" (footnote omitted)). We therefore conclude that the Appellate Court's remand order in *Wahba I* did not deprive the trial court of its equitable discretion to order a foreclosure by sale.

Although we have concluded that an appellate court's affirmance of a judgment of strict foreclosure and remand of the case to the trial court with direction only to set new law days does not necessarily preclude the trial court from considering a request to order a foreclosure by sale, we take this opportunity to instruct reviewing courts (including ourselves) that they should take care to craft remand orders that accurately reflect the scope of the court's ruling and its intent. Our goal should be

[9] We are not persuaded by the defendant's contention at oral argument before this court that allowing the trial court to entertain a request for a judgment of foreclosure by sale when a reviewing court has affirmed a judgment of strict foreclosure and remanded the case with direction to set new law days would result in a "perpetual motion" machine. If there is evidence that a mortgagor is using successive appeals merely for the purpose of delay, there are tools to prevent such behavior. For example, Practice Book § 61-11 (g) provides that, if a mortgagor files more than two motions to open, "no automatic stay shall arise upon the court's denial of any subsequent contested motion by that party, unless the party certifies under oath, in an affidavit accompanying the motion, that the motion was filed for good cause arising after the court's ruling on the party's most recent motion." In addition, the rule provides that, even if the mortgagor files such an affidavit, the mortgagee may seek to terminate the automatic stay of execution pending appeal "by filing a motion requesting such relief accompanied by an affidavit stating the basis for [its] claim." Practice Book § 61-11 (g). Finally, most mortgages contain provisions requiring the mortgagor to pay the mortgagee's attorney's fees in the event of a foreclosure.

to provide trial courts with precise guidance about what action we expect them to undertake on remand and not to require them to parse opinions or to speculate about an appellate court's intent to determine what actions are or are not permitted on remand. For example, if a reviewing court affirms a judgment of strict foreclosure and remands the case to the trial court to set new law days but does not intend to prohibit the trial court from considering a party's request to order a judgment by sale if warranted by a change in circumstances, the reviewing court should expressly manifest that intent in the rescript by remanding the case for further proceedings consistent with our opinion in the present case.[10]

III

Finally, we address the plaintiff's claim that the Appellate Court incorrectly determined that, even if the trial court had the authority on remand to order a foreclosure by sale, she was required to file a motion to open the judgment of strict foreclosure and to present evidence that the property's value had substantially increased since the date of the original judgment before the court could exercise that authority. We agree with the plaintiff.

This claim presents a question of law subject to plenary review. See, e.g., *Traystman, Coric & Keramidas, P.C.* v. *Daigle*, 282 Conn. 418, 428–29, 922 A.2d 1056 (2007) (whether party followed proper procedure under governing statutes and rules of practice is question of law subject to plenary review).

[10] We recommend that courts use the following rescript language in such situations: "The judgment is affirmed and the case is remanded for the purpose of making a new finding as to the amount of the debt, for the setting of new law days, and for other proceedings according to law." We also recommend including a citation to this decision, "See *Wahba* v. *JPMorgan Chase Bank, N.A.*, 349 Conn. 483, A.3d (2024)," in a footnote appended to the end of the rescript as support for the foregoing rescript language.

Although our case law supports the proposition that a judgment of strict foreclosure may be modified on remand, even when the reviewing court has affirmed the judgment, the plaintiff points out that our statutes and rules of practice do not contain any express provisions governing the procedure for seeking a modification at that time. As we explained in part I of this opinion, however, upon the passing of the law days while an appellate stay of execution is in effect, a judgment of strict foreclosure becomes "ineffective in an essential respect"; (internal quotation marks omitted) *RAL Management, Inc.* v. *Valley View Associates*, supra, 278 Conn. 683; leaving that judgment in a state of limbo. As we also explained, the Appellate Court has held that a remand to the trial court with direction to set new law days is the functional equivalent of an order to open the judgment. See *L & R Realty* v. *Connecticut National Bank*, supra, 53 Conn. App. 549. Indeed, the defendant did not see fit to move to open the judgment before asking the trial court to reset the law days, presumably because it believed that there was no need for such a motion in light of the remand order. We therefore conclude that there was also no need for the plaintiff to move to open the judgment before the court could entertain her request to order a foreclosure by sale.

We also conclude that the plaintiff made an adequate proffer to support her request that the trial court order the defendant to provide an updated amount of the debt and property appraisal and, if warranted by the new information obtained, order a foreclosure by sale. In her objection to the defendant's motion to set new law days, the plaintiff represented to the court that the original appraisal was almost four years old, property values had increased statewide during that time, and the increase in values "ha[d] been most dramatic for high-end shoreline properties" such as the plaintiff's. The defendant did not contradict the plaintiff on these

points. In her motion for reconsideration of the trial court's denial of that request, the plaintiff represented that Zillow had estimated the current value of the property at $8,817,600, an increase of more than $2 million over the amount of the original appraisal. She also represented that the current estimated value of the property was approximately $2 million greater than the current amount of the debt.

This court has held that "[o]ffers of proof are allegations by the attorney . . . in which he represents to the court that he could prove them if granted an evidentiary hearing. . . . The purpose of an offer of proof has been well established by our courts. First, it informs the court of the legal theory under which the evidence is admissible. Second, it should inform the trial [court] of the specific nature of the evidence so that the court can judge its admissibility. Third, it creates a record for appellate review. . . . Additionally, an offer of proof should contain specific evidence rather than vague assertions and sheer speculation." (Internal quotation marks omitted.) *State* v. *Anderson*, 318 Conn. 680, 689–90, 122 A.3d 254 (2015).

These principles apply equally to the plaintiff's filings requesting that the trial court consider rendering a judgment for a foreclosure by sale, in which she effectively advised the trial court what she *could prove* about the property's value if the court agreed to entertain her request. We conclude that the plaintiff's representations were adequate for this purpose. Although it would have been preferable if the plaintiff, in support of her request, had cited admissible evidence as to the property's value, her failure to do so does not mean that her representation was inadequate to establish the need for a hearing at which the parties could offer such evidence to establish the property's value, including a new appraisal if either party wanted to offer one. This opportunity was all that the plaintiff requested. Indeed, there is authority

for the proposition that an owner and occupant of real property is competent to testify as to its market value. See *Misisco* v. *La Maita*, 150 Conn. 680, 684, 192 A.2d 891 (1963). We conclude, therefore, that the plaintiff's representations concerning the property's value sufficed to establish the need for a hearing. This is especially so considering that the previous appraisal was more than four years old,[11] and it was widely reported in 2020 and 2021 that residential values in Connecticut were skyrocketing in the wake of the COVID-19 pandemic, particularly in the southwest corner of the state where the subject property was located. See, e.g., A. Soule, Home Prices Continue To Surge in Connecticut, Where Real Estate Is Already Red-Hot, Conn. Post, June 3, 2021, available at https://www.ctpost.com/business/article/Home-prices-continue-to-surge-in-Connecticut-16220322.php) (last visited June 21, 2024); A. Soule, Study: Real Estate Prices in CT Set To Continue Increasing in 2021, Conn. Post, December 4, 2020, available at https://www.ctpost.com/business/article/Study-Real-estate-prices-in-CT-set-to-continue-15774394.php (last visited June 21, 2024); see also *Moore* v. *Moore*, 173 Conn. 120, 123, 376 A.2d 1085 (1977) ("fact of inflation . . . could be judicially noticed without affording an opportunity to be heard," but plaintiff was required to present evidence that inflation justified increasing amount of child support order); *Quanah, Acme & Pacific Railway Co.* v. *Eblen*, 87 S.W.2d 540, 543 (Tex. Civ. App.

[11] We note that paragraph 1 of the court issued Foreclosure Worksheet, Form JD-CV-77 (Rev. 12-16), provides that "[t]he appraisal report (NOT merely the affidavit of the appraiser) MUST be dated within *120 days* of the date of judgment, regardless of whether an initial judgment is being entered or a judgment is being reopened." (Emphasis in original.) In addition, Paragraph F of the Uniform Foreclosure Standing Orders, Form JD-CV-104 (Rev. 11-20), issued by the Superior Court provides that, after a bankruptcy stay has been lifted allowing a foreclosure action to proceed, "if the last finding made by the court as to the fair market value of the premises is more than 120 days old, then the plaintiff must also present to the court an updated appraisal for the court to make an updated finding of the fair market value of the premises on the date of the hearing."

1935, writ ref'd) (court can take judicial notice of "general economical conditions"). We further note that the defendant, a bank in the business of issuing mortgage loans, and therefore in a position to know about statewide changes in real estate values and general economic conditions, did not contest the plaintiff's claim. Nor did the trial court indicate that it believed that there was an inadequate proffer for the plaintiff's claim that the value of the property had substantially increased when it denied the plaintiff's initial request that the court consider a foreclosure by sale and her later motion for reconsideration. Rather, the court based both decisions solely on its belief that the Appellate Court's remand order in *Wahba I* precluded it from entertaining the request. We therefore reject the defendant's contention that the plaintiff's request was based on an "entirely unsupported assumption as to this purported increase in the property value" and that remanding the case to the trial court for further proceedings would give the plaintiff "yet another bite of the apple . . . ." (Internal quotation marks omitted.) The plaintiff was not required to *prove* that the value of the property had increased before she could request an evidentiary hearing on that issue.

IV

In summary, we conclude that the doctrine of res judicata did not bar the trial court from entertaining the plaintiff's request that it order a new appraisal of the property and consider ordering a foreclosure by sale. We further conclude the Appellate Court incorrectly determined that (1) the trial court's ruling that the rescript in *Wahba I* deprived the trial court of the authority to entertain the plaintiff's request was correct, and (2) even if the trial court had such authority, the plaintiff provided an inadequate evidentiary foundation for the trial court to exercise that authority. We therefore reverse the judgment of the Appellate Court

affirming the judgment of the trial court. We, of course, express no opinion here as to the merits of the plaintiff's request for a foreclosure by sale but leave that issue to be determined by the trial court on remand.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the judgment of the trial court and to remand the case to that court for the purpose of making a new finding as to the amount of the debt, for the setting of new law days, and for other proceedings consistent with this opinion.

In this opinion the other justices concurred.