# AQUARION WATER COMPANY OF CONNECTICUT *v.* PUBLIC UTILITIES REGULATORY AUTHORITY (SC 21010)

Mullins, C. J., and D'Auria, Ecker, Alexander and Bright, Js.

*Syllabus*

Pursuant to statute (§ 16-19e (a) (4) and (5)), the Public Utilities Regulatory Authority (PURA) is required to ensure "that the level and structure of rates" charged by a public service company are "sufficient, but no more than sufficient, to allow [the company] to cover [its] operating costs including, but not limited to, appropriate staffing levels, and capital costs, to attract needed capital and to maintain [its] financial integrity, and yet provide appropriate protection to the relevant public interests," and "that the level and structure of rates charged customers . . . reflect prudent and efficient management of the franchise operation . . . ."

The plaintiff, A Co., a public service company that supplies water to certain Connecticut customers, appealed from the judgment of the trial court, which had dismissed in part A Co.'s administrative appeal from the final decision of the defendant, PURA, in connection with A Co.'s rate application, which A Co. had filed in August, 2022. In its application, A Co. sought an increase in the rates it charges customers, and it attributed the need for the increase to various capital improvements to water utility infrastructure (plant additions) that it had made since it last requested an amendment to its rates in 2013. Specifically, A Co. sought to include in its rate base approximately $650 million in plant additions that it had completed between 2013 and 2022. A Co. also sought to recover approximately $3 million in deferred water conservation expenses that it had incurred between 2017 and 2021, and to fund approximately $2.2 million in expenditures made in connection with its employee incentive compensation program. Overall, A Co. sought to increase its approved revenue requirement from approximately $199 million to approximately $236 million, and its return on equity (ROE) from 9.63 percent to 10.35 percent. Between September and December, 2022, while the administrative proceeding was pending, A Co. continued to invest in plant additions and thereafter supplemented its application, seeking to include in its rate base an additional approximately $48 million in postapplication plant additions. PURA declined A Co.'s request to increase its annual revenue requirement and its ROE, instead reducing those values to approximately $195 million and 8.7 percent, respectively. PURA concluded that the prudence of the approximately $650 million in plant additions that A Co. had completed on or before August 31, 2022, was supported by some limited evidence in the administrative record and, thus, permitted A Co. to include those expenditures in its rate base. PURA concluded, however, that there

was no evidence on which it could make a prudence determination with respect to the expenditure of the approximately $48 million in postapplication plant additions and, therefore, excluded the cost for the postapplication plant additions from A Co.'s rate base. PURA also concluded that the evidence in the record was insufficient to establish the prudence of A Co.'s request for approximately $2.2 million for its employee incentive compensation program and that only one half of the nearly approximately $3 million in deferred conservation expenses, or approximately $1.5 million, was prudent, as only that portion resulted in quantifiable cost savings for customers. On appeal, A Co. claimed that PURA had acted arbitrarily, capriciously, and in abuse of its discretion in finding that the evidence in the record was insufficient to establish the prudence of approximately $42 million out of the approximately $48 million in expenditures for the postapplication plant additions, for approximately $2.2 million in employee incentive compensation, and for the approximately $1.5 million of the approximately $3 million in deferred conservation expenses. A Co. also challenged the total effect of PURA's rate order, claiming, inter alia, that it constituted a confiscatory taking of A Co.'s property in violation of the takings clause of the fifth amendment to the United States constitution. *Held*:

PURA did not act arbitrarily, capriciously, or in abuse of its discretion in finding that the evidence was insufficient to establish that A Co.'s expenditure of approximately $42 million in postapplication plant additions, completed after August 31, 2022, was prudent, while simultaneously finding that the evidence was sufficient to establish the prudence of approximately $650 million in plant additions that A Co. had completed before August 31, 2022.

The evidence in the record supported the distinction made by PURA regarding the quality and type of evidence offered in support of the preapplication and postapplication plant additions, and it was not unreasonable for PURA to conclude that the data provided with respect to the postapplication plant additions lacked the particularity necessary for PURA to ascertain why those plant additions were undertaken, how they benefited customers, or whether the associated costs were prudently incurred.

PURA did not act arbitrarily, capriciously, or in abuse of its discretion in denying A Co.'s request for approximately $2.2 million to fund its employee incentive compensation program, as PURA's finding that the evidence was insufficient to establish the prudence of that program was supported by substantial evidence in the administrative record.

Moreover, contrary to A Co.'s claim, PURA did not improperly use hindsight to assess the prudence of the employee incentive compensation program but, rather, considered the prudence of A Co.'s future accrual of approximately $2.2 million in expenses for funding the program on the basis of relevant testimony about the program, the design and structure of the program, and historical data regarding the efficacy of the program.

PURA erred in rejecting A Co.'s request to recover approximately $1.5 million out of nearly $3 million in deferred water conservation expenses it incurred between 2017 and 2021, as PURA improperly used hindsight to evaluate the prudence of those expenses, and, therefore, this court reversed in part the

trial court's judgment, and the case was remanded so that PURA could reconsider the prudence of those expenses as of the time A Co. made the decision to incur them.

Rather than considering whether A Co.'s deferred conservation expenses were reasonable and prudent when they were incurred between 2017 and 2021, on the basis of information known to or ascertainable by A Co. at that time, PURA improperly relied on subsequent knowledge of the success of A Co.'s water conservation program to calculate customer savings, and the focus on the after-the-fact economic savings, rather than the prudence of A Co.'s decision to incur the conservation expenses at the time that decision was made, was improper.

Furthermore, PURA's use of hindsight to assess the prudence of A Co.'s deferred conservation expenses was not authorized by certain legislation (P.A. 13-78, § 2) allowing a water company to recover the costs of its water conservation program if it can demonstrate that the program's expenses were reasonable and prudent, as the language of the public act plainly contemplated that a utility would be required to establish, in a future rate case, that its past conservation expenses were reasonable and prudent.

There was no merit to A Co.'s claim that PURA's rate order approving an ROE of 8.7 percent resulted in a confiscatory taking of A Co.'s property, which was premised on the argument that PURA's denial of some of A Co.'s requested capital expenditures and operating costs effectively reduced the allowed ROE from 8.7 percent to approximately 5 percent.

This court previously concluded in *GenConn Energy, LLC* v. *Public Utilities Regulatory Authority* (348 Conn. 532) that PURA did not effectively prevent a utility company from earning a reasonable ROE by reducing the company's overall recoverable capital costs in violation of the general rate-making principles set forth in § 16-19e (a), *Genconn* applied equally to statutory and constitutional claims, insofar as the constitutional standard for determining whether a rate is confiscatory tracks nearly verbatim the standard for establishing just and reasonable rates under § 16-19e (a) (4), and *GenConn* compelled the conclusion that A Co.'s approved ROE of 8.7 percent was not altered by PURA's disallowance of certain capital expenditures and operating costs consistent with the general rate-making principles set forth in § 16-19e (a) (4) and (5).

Argued March 7—officially released July 15, 2025

*Procedural History*

Appeal from the decision of the defendant denying, inter alia, the plaintiff's request to recover certain operating costs, brought to the Superior Court in the judicial district of New Britain, where the court, *Budzik*,

*J.*, granted the motion to intervene filed by the Office of Consumer Counsel; thereafter, the case was tried to the court, *Budzik, J.*, which rendered judgment dismissing in part the appeal, from which the plaintiff appealed. *Reversed in part*; *further proceedings.*

*John W. Cerreta*, with whom were *Erick M. Sandler* and, on the brief, *Duncan R. MacKay*, *Vincent P. Pace*, *George C. Jepsen* and *Perry Z. Rowthorn*, for the appellant (plaintiff).

*Evan O'Roark*, assistant solicitor general, with whom, on the brief, was *William Tong*, attorney general, for the appellee (defendant).

*Thomas H. Wiehl*, legal and regulatory director, with whom were *Claire E. Coleman*, consumer counsel, and, on the brief, *Andrew W. Minikowski*, staff attorney, for the appellee (intervenor Office of Consumer Counsel).

*Opinion*

ECKER, J. The plaintiff, Aquarion Water Company of Connecticut (Aquarion), appeals from the judgment of the trial court dismissing in part its appeal from the final decision of the defendant, the Public Utility Regulatory Authority (PURA), on the rate application submitted by Aquarion in 2022. Aquarion claims that PURA acted arbitrarily, capriciously, and in abuse of its discretion by denying its requests (1) to include in its rate base[1] $42,136,826 million in capital improvements, and (2) to recover from ratepayers certain operating costs, namely, $2,222,298 million in employee incentive compensation and $1,498,050 million in deferred conservation expenses. Aquarion also claims that the total effect of PURA's rate order was confiscatory, in violation of

[1] Rate base "represents the total investment of the [utility] facility, or, in other words, the value of the property on which the facility is permitted to earn a rate of return." *GenConn Energy, LLC* v. *Public Utilities Regulatory Authority*, 348 Conn. 532, 539, 308 A.3d 1018 (2024).

the takings clause of the fifth amendment to the United States constitution and General Statutes § 16-19e (a). We conclude that PURA erred in rejecting Aquarion's request to recover $1,498,050 million in deferred conservation expenses but that its final decision on Aquarion's rate application was not otherwise improper or unconstitutional. Accordingly, we reverse in part the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. Aquarion is a public service company that supplies drinking water to approximately 685,000 Connecticut residents and businesses in fifty-six municipalities. In August, 2022, Aquarion filed an application with PURA pursuant to General Statutes §§ 16-19 and 16-19e, and § 16-1-53 et seq. of the Regulations of Connecticut State Agencies, to increase the rates it charges ratepayers. This was Aquarion's first rate application since 2013. It attributed the need for a rate increase primarily to its expenditure of approximately $700 million in capital improvements to water utility infrastructure, hereinafter referred to as plant additions, between 2013 and 2022. In its rate application, Aquarion sought to increase its approved revenue requirement by approximately $37 million, to $236 million.[2] Additionally, Aquarion requested a return on equity (ROE) of 10.35 percent, which was a .72 percent increase over the 9.63 percent ROE previously approved in 2013.

[2] A utility company's revenue requirement is the amount "required to recover its allowed costs and for it to receive a reasonable rate of return on equity." (Footnote omitted.) *GenConn Energy, LLC* v. *Public Utilities Regulatory Authority*, 348 Conn. 532, 536, 308 A.3d 1018 (2024); see also *Charlottesville* v. *Federal Energy Regulatory Commission*, 774 F.2d 1205, 1217 (D.C. Cir. 1985) ("R (revenue requirement) = C (operating costs) + Ir (invested capital or rate base times rate of return on capital)"), cert. denied, 475 U.S. 1108, 106 S. Ct. 1515, 89 L. Ed. 2d 914 (1986). "The allowed recoverable costs include the projected capital costs, operations and maintenance costs, and administrative and general expenses. Capital costs include the cost of debt." *GenConn Energy, LLC* v. *Public Utilities Regulatory Authority*, supra, 536 n.1.

Aquarion's requested rate increase would have cost the average residential ratepayer an additional 9 percent per year, or $61 annually.

PURA subjected Aquarion's rate application to an extensive review, which included revenue audits, public comment hearings, evidentiary hearings, exhibits, interrogatory responses, and late filed exhibits. The voluminous administrative record spans approximately 48,000 pages. Various entities were made parties to the administrative proceeding, including PURA's Office of Education, Outreach and Enforcement (EOE), the Commissioner of Energy and Environmental Protection, and the Office of Consumer Counsel (OCC).[3] See General Statutes §§ 16-2a (a), 16-9b and 16-19j (b). At the close of evidence, arguments, and briefing, PURA issued a 154 page final decision establishing a new rate, effective March 15, 2023, which was approved by a split vote of 2 to 1.

In its final decision, PURA declined to increase Aquarion's annual revenue requirement to $236 million; instead, it reduced the revenue requirement to $195,561,690. PURA also rejected Aquarion's request to increase its ROE to 10.35 percent, instead reducing it to 8.70 percent. PURA reasoned that a ROE of 8.70 percent was within the range suggested by the parties, would not adversely affect Aquarion's credit rating, and would provide the proper balance between the interests of shareholders and ratepayers. As a result of PURA's final decision, residential ratepayers would see a decrease in their water bill in the amount of 11 percent per year, or approximately $67 annually.

In arriving at its decision, PURA permitted Aquarion to include in its rate base approximately $650 million

[3] PURA also recognized the following parties as intervenors in the administrative proceeding: the Office of the Attorney General; the City of Rye and the Villages of Port Chester and Rye Brook, New York; Smart Water Westport; Veolia Water New York, Inc.; and all fifty-six Connecticut towns and municipalities within Aquarion's service territory.

in plant additions completed between the date of the last rate case in 2013 and the date of filing of Aquarion's rate application on August 31, 2022, but did not permit Aquarion to include $48,060,300 in plant additions completed between September 1 and December 15, 2022. PURA explained that Aquarion's capital investment in plant additions may be included in its rate base only if those additions were prudent and reasonable. See General Statutes § 16-19e (a) (5). PURA was highly critical of the evidence submitted by Aquarion to establish the prudence of all of the plant additions throughout the entire time period; however, it ultimately determined that the plant additions completed on or before August 31, 2022, were supported by "some, albeit limited, evidence . . . ." By contrast, PURA concluded that there was "simply *no* evidence (not even a bald statement) on which [it] could make a prudenc[e] determination" for the plant additions completed after that date. (Emphasis in original.)

With respect to operation and maintenance costs, PURA denied Aquarion's request for $2,222,298 to fund its employee incentive compensation program, concluding that "[t]he evidence in the record does not support a finding that the [i]ncentive [p]rogram properly incentivizes employees or benefits ratepayers in such a way that it constitutes prudent and efficient management of [Aquarion's] operation." PURA also denied Aquarion's request to recover $1,498,050 out of $2,996,101 in conservation expenses spent between 2015 and 2022 on the ground that only one half of Aquarion's conservation expenses were prudent in that they resulted in quantifiable cost savings to ratepayers.

Aquarion appealed to the Superior Court pursuant to General Statutes §§ 4-183 (a) and 16-35 (a),[4] raising twelve claims, only four of which are at issue in the

[4] The OCC participated in the proceedings in the trial court and the appeal before this court by filing briefs and participating in oral argument in support of PURA's final decision.

present appeal. Aquarion claimed that PURA's final decision was arbitrary, capricious, and an abuse of discretion because (1) the evidence in support of the approximately $650 million in allowed plant additions and $42,136,826 out of $48,060,300 in disallowed plant additions was essentially the same,[5] (2) the evidence was sufficient to establish that the employee incentive compensation program is reasonable, prudent, and necessary to achieve appropriate staffing levels, and (3) all of Aquarion's deferred conservation expenses were prudent when they were incurred. Lastly, Aquarion challenged the constitutionality of PURA's rate order, claiming that its overall effect was confiscatory and deprived Aquarion of a fair, just, and reasonable ROE.

The trial court rejected Aquarion's claims on the ground that there was substantial evidence in the record to support PURA's findings regarding Aquarion's failure to establish the prudence of the approximately $42 million in plant additions, $2.2 million in employee incentive compensation, and $1.5 million in deferred conservation expenses. The trial court also rejected Aquarion's claim that the overall effect of PURA's rate order was confiscatory, concluding that "PURA's authorization of an ROE of 8.70 percent is supported by substantial evidence in the record, is well within PURA's reasonable exercise of its broad discretion, and is well within the 'zone of reasonableness' for an enterprise facing such little economic risk." (Footnote omitted.) This appeal followed.[6]

[5] Aquarion also challenged PURA's disallowance of the remaining $5,923,474 in plant additions, claiming that PURA improperly had determined that they were not supported by reliable data. The trial court dismissed Aquarion's claim, concluding that "PURA's decision rejecting the disallowed plant additions . . . is supported by substantial evidence in the record." Aquarion has not challenged the trial court's dismissal of this portion of its claim, and, therefore, only $42,136,826 of the $48,060,300 in disallowed plant additions are at issue in the present appeal.

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

I

## WHETHER PURA'S PRUDENCE FINDINGS WERE ARBITRARY, CAPRICIOUS, OR AN ABUSE OF DISCRETION

Aquarion claims that PURA acted arbitrarily, capriciously, and in abuse of its discretion in finding that the evidence in the administrative record was insufficient to establish the prudence of its request for approximately $42 million in plant additions, $2.2 million in employee incentive compensation, and $1.5 million in deferred conservation expenses. Judicial review of PURA's rate order is governed by the Uniform Administrative Procedure Act, General Statutes § 4-166 et seq., which requires us "to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither this court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) *Wheelabrator Lisbon, Inc.* v. *Dept. of Public Utility Control*, 283 Conn. 672, 690–91, 931 A.2d 159 (2007); see also General Statutes § 4-183 (j).

In setting utility rates, PURA has broad regulatory authority "to take into account such varying factors as economics, public policies, accounting principles, fairness to the parties, and the context and intent of any prior agreements entered into by the utility, and to balance those factors by a process of reasoned decision-making. . . . [PURA] is not required, however, to place determinative weight on any single factor." (Internal quotation marks omitted.) *Office of Consumer Counsel*

v. *Dept. of Public Utility Control*, 279 Conn. 584, 593–94, 905 A.2d 1 (2006). PURA's rate-making authority is governed by the statutory factors set forth in § 16-19e (a), which require PURA to ensure, among other things, "that the level and structure of rates [are] sufficient, but no more than sufficient, to allow public service companies to cover their operating costs including, but not limited to, appropriate staffing levels, and capital costs, to attract needed capital and to maintain their financial integrity, and yet provide appropriate protection to the relevant public interests"; General Statutes § 16-19e (a) (4); and "that the level and structure of rates charged customers . . . reflect prudent and efficient management of the franchise operation . . . ." General Statutes § 16-19e (a) (5).

Pursuant to subdivision (5) of § 16-19e (a), "[a] public utility may . . . recover through rate base [only] those moneys that were spent prudently and reasonably. . . . Therefore, there exists a distinction between, on one hand, utility property and, on the other hand, the cost of utility property allowed in rate base, because only that portion of utility property that is the result of prudent and reasonable management is included in rate base." (Citation omitted.) *Connecticut Light & Power Co.* v. *Dept. of Public Utility Control*, 219 Conn. 51, 67–68, 591 A.2d 1231 (1991). "The prudence of a management decision depends on good faith and reasonableness, judged at the time the decision is made." *Connecticut Light & Power Co.* v. *Dept. of Public Utility Control*, 216 Conn. 627, 645, 583 A.2d 906 (1990).

Before addressing the merits of Aquarion's claims, it is helpful to briefly review the rate-making process. Rate-making is a prospective endeavor, in which PURA makes reasoned estimates about future events to establish a rate that "reflects a prospective anticipation of what rate will be necessary adequately to compensate" the utility. *Office of Consumer Counsel* v. *Dept. of Pub-*

*lic Utility Control*, 246 Conn. 18, 23–24, 716 A.2d 78 (1998); see also *Office of Consumer Counsel* v. *Dept. of Public Utility Control*, supra, 279 Conn. 602 (recognizing that "retroactive" rate-making generally is "not permissible"). To maximize the accuracy of PURA's estimates, a test year "is employed to show what the probable operating and financial condition of the company will be in the immediate future, in order that rates may be fixed [that] will compensate the company for all operating expenses and provide it with a fair return . . . ." *Southern New England Telephone Co.* v. *Public Utilities Commission*, 29 Conn. Supp. 253, 258, 282 A.2d 915 (1970); see Regs., Conn. State Agencies § 16-1-54 ("in each rate application the test year shall consist of the most recent twelve month period available ending at a calendar quarter").

There are two exceptions to the use of a test year in rate-making. First, the test year may be adjusted "forward for a reasonable period of time" to permit the utility to recover "definite, ascertainable expenses maturing or certain to materialize during that period of time." *Connecticut Natural Gas Corp.* v. *Public Utilities Commission*, 29 Conn. Supp. 379, 390–91, 289 A.2d 711 (1971); see also *El Paso* v. *Public Utility Commission*, 883 S.W.2d 179, 188 (Tex. 1994) (public utility commission "may, in its discretion, go outside the test year when necessary to achieve just and reasonable rates"). Such forward adjustments commonly are referred to as "pro forma adjustments . . . ." *Ameren Illinois Co.* v. *Illinois Commerce Commission*, 967 N.E.2d 298, 304 (Ill. App. 2012). Second, the utility may recover expenses incurred before the test year if those expenses were recognized as a deferred regulatory asset[7] in a

[7] "A regulatory asset is a liability of a utility's ratepayers. Utility companies may incur large expenses in various ways—storm damages, installation of new facilities, increased taxes and so forth. These expenses, if passed immediately on to ratepayers, could create havoc. An immediate recovery of such expenses could cause sudden upward increases in rates, commonly termed rate shock. In order to avoid rate shock, [public utility] commissions

prior administrative proceeding and the requirements of § 16-19e (a) (4) and (5), including the prudence requirement, have been met. See *Office of Consumer Counsel* v. *Dept. of Public Utility Control*, supra, 279 Conn. 601–602.

## A

## Plant Additions

Aquarion claims that PURA acted arbitrarily, capriciously, and in abuse of its discretion by finding the evidence insufficient to establish the prudence of the $42,136,826 in plant additions completed after August 31, 2022. The following additional facts and procedural history are relevant to this claim.

Aquarion filed its rate application on August 31, 2022, using a test year beginning on January 1, 2021, and ending on December 31, 2021. In its application, Aquarion sought to include in its rate base two categories of plant additions completed since 2013. The first category was comprised of approximately $600 million of plant additions completed between 2013 and the end of the 2021 test year (test year plant additions).[8] The second

often will permit utility companies to recover their expenses from ratepayers on a deferred basis, listing the ratepayers' debt as a regulatory asset. A regulatory asset is, therefore, a future debt of the ratepayers that can be passed on, together with interest, to the ratepayers." (Internal quotation marks omitted.) *Office of Consumer Counsel* v. *Dept. of Public Utility Control*, supra, 279 Conn. 594.

[8] Approximately one third of these plant additions, $202,312,780, previously had been the subject of a water infrastructure and conservation adjustment (WICA) pursuant to General Statutes § 16-262w. See General Statutes § 16-262w (a) (PURA may "authorize a water company to use a rate adjustment mechanism . . . for eligible projects completed and in service for the benefit of the customers in between rate cases"). The amount of the WICA that a water company may include in its charges between general rate cases is capped at "ten per cent of the water company's annual retail water revenues approved in its most recent rate filing" and cannot "exceed five per cent of such revenues for any twelve-month period." General Statutes § 16-262w (i). In 2021, PURA approved a 9.78 percent cumulative WICA surcharge on ratepayers. The WICA surcharge is not at issue in the present appeal.

category was comprised of $51,177,892 of pro forma plant additions completed between January 1 and August 31, 2022 (preapplication pro forma plant additions). In support of these two categories of plant additions, Aquarion submitted the prefiled testimony of Daniel R. Lawrence, its vice president of engineering and real estate. Lawrence's testimony addressed the major plant additions "that have been completed or will be completed by August 31, 2022," and provided a brief, narrative description of each.[9] For example, Lawrence explained that Aquarion spent $3.5 million on the Saugatuck dam and gatehouse to rehabilitate these "high hazard" structures built in 1941 and "to restore functionality and reliability of the gates and gatehouse operators including structural repairs to each of the gatehouses. Security improvements were incorporated. The project included the piping and valves required to meet streamflow regulations."

In September, 2022, PURA submitted interrogatories, asking Aquarion to provide more information regarding the test year plant additions and preapplication pro forma plant additions. Specifically, PURA asked Aquarion to list "all utility rate base plant additions implemented . . . as capital improvement projects since the 2013 Aquarion [r]ate [c]ase through year-end 2021" and to "identify the projects, the systems and divisions involved, the types of construction, the quantities, the actual and estimated costs, the actual or estimated in-service dates, and the percentages of completion to date. Discuss the results of those improvements." PURA also asked Aquarion to "[p]rovide a breakdown of the 2021 pro forma plant additions," including "when the project started, the percentage of completion to date, and the anticipated percentage of completion by December 15, 2022." In response, Aquarion submitted a 712 page

[9] These major additions totaled $531.8 million.

spreadsheet listing all completed plant additions, their locations, dates of completion, and cost.

Aquarion continued to invest in plant additions while the administrative proceeding was ongoing and supplemented its rate application by seeking to include a third category of plant additions consisting of $48,060,300 in pro forma plant additions completed between September 1 and December 15, 2022 (postapplication pro forma plant additions). In support of its request for postapplication pro forma plant additions, Aquarion provided various spreadsheets in a format similar to the spreadsheets previously submitted in support of the other two categories of plant additions. Additionally, Aquarion supplied a two page chart "summariz[ing] the major investments greater than $1 million . . . which represents approximately $34.5 million of the total investment [of $48,060,300]." The chart included a summary description of the reason for each of these major categories of investments. For example, Aquarion explained that it spent $1,078,972 to replace a water main on Dogwood Lane in Westport due to "[a]ging [i]nfrastructure and [c]apacity [i]mprovement," and $1,924,294 on "[v]arious" water "[t]reatment [p]rojects [costing] [l]ess than $100,000 at [v]arious [f]acilities" because of "[a]ging [i]nfrastructure."[10] No narrative testimony detailing the prudence of the postapplication pro forma plant additions was submitted.

In its final decision, PURA characterized the hundreds of millions of dollars in plant additions completed since Aquarion's last rate case in 2013 as "an astounding level of plant investment," noting that it previously had expressed concern about Aquarion's level of spending and cautioned Aquarion that it "should be scaling back" on capital improvements. (Internal quotation marks omitted.) PURA stated that, "[a]lthough capital addi-

[10] Additional examples from the chart and Lawrence's prefiled narrative testimony are set forth in our analysis of Aquarion's claim.

tions are within [Aquarion's] discretion, the rapid and substantial increases in spending, together with [PURA's] prior admonitions, would normally signal to a utility that the prudenc[e] of such additions would be particularly scrutinized and, thus, would need to be adequately supported by record evidence and balanced against the parameters of . . . § 16-19e (a)."

With respect to the test year and preapplication pro forma plant additions, in its final decision, PURA was critical of the evidence submitted by Aquarion, pointing out that Lawrence's prefiled testimony "provides [two or three] sentences generally explaining the completed additions and providing a cursory rationale for why the projects were undertaken. . . . However, the testimony does not, for any of the discrete projects, specifically address why the chosen investment was the best option or why the incurred costs were prudent and reasonable." (Citations omitted.) "[T]he word 'prudent' does not appear anywhere in . . . Lawrence's prefiled testimony," which was "completely silent" on millions of dollars of additions. The final decision also observed that Aquarion's interrogatory responses failed to "provide direct evidence in support of a determination that the investments, either individually or in [the] aggregate, were prudent." Nonetheless, "[n]either [the] OCC, [the Commissioner of Energy and Environmental Protection], nor [the Office of the Attorney General (OAG)] took a specific position on the prudenc[e]" of the plant additions, and, notwithstanding its expressed dissatisfaction with the evidence submitted by Aquarion, PURA determined that it provided at least "a mere wisp of 'evidential hair' covering 'bald statements' of [Aquarion's] executives." See *Connecticut Natural Gas Corp.* v. *Public Utilities Commission*, supra, 29 Conn. Supp. 394 ("[b]ald statements" of utility executives regarding prudence "need to be covered with some evidential hair . . . to be judicially acceptable"). PURA therefore

allowed Aquarion to include the approximately $650 million in test year and preapplication pro forma plant additions in its rate base.

PURA, however, reached the opposite conclusion with respect to the postapplication pro forma plant additions, concluding that the evidence was insufficient to establish the prudence of those additions because Aquarion "did not offer any prefiled testimony with respect to [them]." It noted that the spreadsheets and charts submitted in response to interrogatories, although abundant in "quantity," were deficient in "quality . . . ." PURA reasoned that Aquarion had "provided large volumes of data to support a finding that it has spent millions of dollars on capital improvements," but, "to be included as a pro forma adjustment to rate base, a finding that the expenditures were made is simply not enough. Instead, [PURA] must find that the expenditures were prudent and that the plant is used and useful. . . . None of the evidence explains why the expenditures were made, which options were considered, how the costs were managed, or any of the other factors that would allow [PURA] to assess the good faith and reasonableness of the management decisions related to the expenditures."[11] (Internal quotation marks

[11] PURA also expressed concern "about the use of late filed exhibits as a vehicle for proposing substantial changes to the [rate] [a]pplication," noting that, "two days before the late filed exhibit evidentiary hearings, [Aquarion] increased its proposed pro forma plant additions from $48 million through August 31, 2022, to $109 million through December 15, 2022." The late notice of the postapplication pro forma plant additions, PURA explained, deprived it, "other parties, and [the] intervenors of a meaningful opportunity to review and challenge the information and the proposed changes to the [a]pplication." PURA announced that, in "future water utility rate cases . . . pro forma adjustments for [plant in service] should generally be limited to [a] plant that is or will be placed in service as of the date of the rate amendment application—a date that is notably within a utility's sole discretion." PURA rejected Aquarion's contention that this new rule had been applied retroactively to Aquarion's rate application on the ground that "the sheer dearth of evidence with respect to capital additions alleged to be prudent and complete after the August 31, 2022 [a]pplication date, regardless of eligibility," rendered Aquarion's claim "superfluous."

omitted.) Because there was "simply *no* evidence (not even a bald statement) on which [PURA] could make a prudenc[e] determination for these proposed [postapplication] pro forma adjustments," PURA denied Aquarion's request to include in its rate base the $48,060,300 in plant additions completed between September 1 and December 15, 2022.[12] (Emphasis in original.)

The trial court upheld PURA's decision to disallow $42,136,826 of the $48,060,300 in postapplication pro forma plant additions. See footnotes 5 and 12 of this opinion. The court recognized that the evidence submitted in support of both the allowed and disallowed plant additions was similar in nature and observed that, "in light of PURA's universally negative characterization of Aquarion's evidence proffered in support of the allowed plant additions, there appears to be little basis . . . to infer" that PURA found any of the three categories of plant additions to be prudent. Nonetheless, the trial court reasoned that any incongruity between PURA's allowance of test year and preapplication pro forma plant additions and its disapproval of the postapplication pro forma costs was permissible because (1) on appeal, Aquarion challenged only the $42,136,826 in disallowed plant additions, not the approximately $650 million in approved test year and preapplication pro forma plant additions, and (2) "the court [could] find

[12] PURA also found that $5,923,474 of the postapplication pro forma plant additions were not supported by reliable data because they "were completed prior to or during the [t]est [y]ear and are not pro forma additions." See footnote 5 of this opinion.

Although PURA declined to include the $48,060,300 of postapplication pro forma plant additions in Aquarion's rate base, PURA does not dispute that Aquarion may seek to include these plant additions in its rate base in its next rate application. In the meantime, some of these plant additions are eligible for a water infrastructure and conservation adjustment (WICA) pursuant to General Statutes § 16-262w. See General Statutes § 16-262v (1) (WICA eligible projects include "those water company plant projects not previously included in the water company's rate base in its most recent general rate case and that are intended to improve or protect the quality and reliability of service to customers").

no legal support for the proposition that PURA's factual conclusions must be consistent across differing decisions." The court concluded that "PURA's decision rejecting the disallowed plant additions is supported by substantial evidence in the record because PURA's conclusion that it lacked evidence to make a prudenc[e] determination was reasonably supported by PURA's factual findings."

On appeal to this court, Aquarion contends that the evidence regarding the prudence of all of the plant additions, both preapplication and postapplication, was materially identical and that PURA thus arbitrarily and capriciously distinguished between the sufficiency of the evidence submitted in support of the plant additions completed before and after August 31, 2022. PURA responds that it found *all* of the evidence submitted in support of the plant additions to be insufficient but nonetheless exercised its general rate-making authority to establish just and reasonable rates pursuant to § 16-19 (a).[13] According to PURA, it permitted the approximately $650 million in test year and preapplication pro forma plant additions to enter rate base, despite Aquarion's failure to adduce sufficient evidence of prudence, because disallowing those plant additions "could have devastated [Aquarion]" and "because those capital investments were supported by at least 'some, albeit limited, evidence' of prudence and usefulness." To this argument, Aquarion replies that PURA's characterization of its final decision is inaccurate because PURA clearly found the first two categories of plant additions to be

[13] General Statutes § 16-19 (a) provides in relevant part: "If the authority finds any proposed amendment of rates to not conform to the principles and guidelines set forth in section 16-19e, or to be unreasonably discriminatory or more or less than just, reasonable and adequate to enable such company to provide properly for the public convenience, necessity and welfare, or the service to be inadequate or excessive, it shall determine and prescribe, as appropriate, an adequate service to be furnished or just and reasonable maximum rates and charges to be made by such company. . . ."

prudent, and, in addition, PURA lacks the discretion under § 16-19 (a) to include in rate base plant additions that were not prudently incurred, as required by § 16-19e (a) (5).

We need not decide whether PURA found the test year and preapplication pro forma plant additions to be prudently incurred under § 16-19e (a) (5), or whether PURA possesses statutory authority to exercise its discretion to include those plant additions in rate base under § 16-19 (a) in the absence of evidence of prudence.[14] Those claims are not before us because the inclusion of approximately $650 million in plant additions is not the subject of this appeal. What has been

[14] Although we do not decide the issue, we caution that PURA should not assume lightly that it is authorized to exercise its rate-making discretion under § 16-19 (a) in a manner inconsistent with the general rate-making principles codified in § 16-19e (a). The prudence requirement "counterbalance[s] the monopolistic effects on the ratepayers who do not have a choice about which company provides their utility service. . . . [A] utility's only motivation to act prudently arises from the prospect that imprudent costs may be disallowed." (Citation omitted; internal quotation marks omitted.) *Entergy Gulf States, Inc.* v. *Louisiana Public Service Commission*, 726 So. 2d 870, 873–74 (La. 1999). By requiring a utility to establish that its capital investments reflect prudent and efficient management, § 16-19e (a) (5) protects ratepayers from "negligent, wasteful or improvident expenditures, or for the cost of management decisions [that] are not made in good faith." (Internal quotation marks omitted.) *Public Service Co. of New Mexico* v. *New Mexico Public Regulation Commission*, 444 P.3d 460, 470 (N.M. 2019). PURA can honor the prudence requirement in § 16-19e (a) (5), while also ensuring that rates are sufficient to allow utilities "to maintain their financial integrity"; General Statutes § 16-19e (a) (4); by, for example, disallowing only the portion of an imprudently incurred investment decision that has an adverse effect on ratepayers. See, e.g., *Public Service Co. of New Mexico* v. *New Mexico Public Regulation Commission*, supra, 475 (recognizing that "total disallowance may be an appropriate remedy for [some imprudent investment decisions]" but upholding decision of regulatory agency permitting some costs of imprudent decision-making to be included in rate base because it conferred some "value to ratepayers"); see also *In re PacifiCorp*, UE 246, Order No. 12-493, p. 32 (Or. P.U.C. December 20, 2012) (concluding that disallowance of only 10 percent of imprudent investment decision was "reasonable in relationship to the potential harm to [ratepayers]" when evidence was insufficient "to precisely quantify the impact of . . . [the] imprudence"). Again, we need not resolve the issue to decide the present case.

challenged on appeal is the exclusion of $42,136,826 in postapplication pro forma plant additions, a ruling that PURA justifies on the ground that it found a discernible distinction in the quality and nature of the evidence submitted in support of the different categories of plant additions. We conclude that there was sufficient evidence to support the distinction made by PURA in the quality and type of evidence submitted in support of the test year and preapplication pro forma plant additions versus the postapplication pro forma plant additions and, therefore, that PURA's exclusion of the latter category of plant additions from rate base was not arbitrary, capricious, or an abuse of discretion.

In support of the test year and preapplication pro forma plant additions, Aquarion not only submitted hundreds of pages of spreadsheets and charts, but narrative testimony that contained some, albeit limited, detail from which prudence reasonably could be inferred. Lawrence's testimony described the major capital improvements to water infrastructure completed between 2013 and August 31, 2022, the location of each improvement, and the reason why it was completed. For purposes of illustration, Lawrence explained that Aquarion invested $3.4 million in the rehabilitation of the Means Brook dam and gatehouse "to ensure public safety in accordance with modern engineering standards, and to preserve and extend the useful life of these critical assets. In this instance, the rehabilitation of the dam and gatehouse was completed to improve the dam's stability in a flooded condition; functionality of the gates and valves was restored; structural repairs were completed for each of the gatehouses; the electric service was replaced (it was unsafe and [noncode] compliant); security improvements and [supervisory control and data acquisition] upgrades were incorporated. The project included the piping and valves required to meet streamflow regulations." Although Lawerence did not

characterize this $3.4 million investment as prudent or discuss alternative options, his testimony provides factual details that would allow PURA to satisfy itself that the project was reasonably necessary and conferred a valuable benefit on ratepayers.

In contrast, no narrative testimony was submitted in support of the prudence of the $42,136,826 in postapplication pro forma plant additions. Aquarion provided PURA with hundreds of pages of spreadsheets, but the data contained in those spreadsheets were limited to generic information like the name, location, date of completion, and cost of the project. For example, in a typical entry, the spreadsheet explained only that "Peaceable Ridge Rd. (W. Mountain)" in "Ridgefield" was completed on "9/30/2022" for $116,643.67. It was not unreasonable for PURA to decide that this data failed to explain adequately why these itemized plant additions were performed or how they benefited ratepayers.

Aquarion points out that, in response to one of PURA's interrogatories, it offered a two page chart providing information regarding $34.5 million out of $48,060,300 in postapplication pro forma plant additions. A representative excerpt of the chart is provided in the appendix of this opinion.

Although reasonable minds could differ regarding the conclusion reached by PURA, we disagree with Aquarion that this evidence is "exactly the same" or "materially identical" to Lawrence's narrative testimony describing the major test year and preapplication pro forma plant additions. Applying the deferential standard of review applicable to PURA's decision, we are compelled to conclude that there is a subtle but viable distinction between the two categories of evidence that is sufficient to merit differential treatment. See, e.g., *Connecticut Light & Power Co.* v. *Dept. of Public Utility Control*,

supra, 219 Conn. 56 ("[t]he court may not substitute its own balance of regulatory considerations for that of the agency"). In comparison to the evidence submitted in support of the allowed plant additions, the data provided with respect to the postapplication pro forma plant additions can reasonably be seen as lacking the particularity and detail necessary to ascertain exactly why the costs were prudently incurred.[15] The additional detail in Lawrence's narrative testimony constitutes a discernible, articulable difference in the kind and quality of evidence submitted in support of the test year and preapplication pro forma plant additions. On the present factual record, we cannot conclude that PURA acted arbitrarily, capriciously, or in abuse of its discretion by excluding the postapplication pro forma plant additions from Aquarion's rate base.

B

Employee Incentive Compensation

Aquarion challenges PURA's disallowance of $2,222,298 in employee incentive compensation, claiming that PURA improperly assessed the prudence of this program after the fact and with the benefit of hindsight, rather than applying the operative standard that requires PURA to judge Aquarion's decision-making at the time it was made. We disagree.

In support of its request to fund the employee incentive compensation program, Aquarion submitted the

[15] Aquarion contends that there is no principled, coherent distinction between the evidence submitted in support of the different categories of plant additions because Lawrence's prefiled testimony described Aquarion's four stage process for planning, designing, and delivering infrastructure projects, and addressed future plant additions beyond August 31, 2022. We reject this claim as grounds for reversal because Lawrence's general descriptions of Aquarion's four stage process for water infrastructure projects and five year capital investment plan are untethered to the facts and lack the particularity and detail that accompanied the narrative description of the major test year and preapplication pro forma plant additions.

prefiled testimony of Lucy A. Teixeira, its vice president of customer and administrative services. Teixeira explained that employee compensation is comprised of three key components: (1) base pay, which "is set within a range around the competitive market rate of each individual's job," (2) variable pay or incentive pay, which "provides additional individual earnings potential as a percentage of base pay if certain corporate, business unit, and individual goals are met," and (3) the employee benefits program, "such as retirement savings and health and welfare plan coverage . . . ." The second category of employee pay, incentive compensation, is "designed to incentivize employee behavior toward achievement of goals and objectives as outlined in the business plan, including financial achievement, employee, customer service and operations goals, as well as individual employee performance." The "funding of the annual variable pay program is dependent on the achievement of these goals and the individual payouts are directly related to the actual performance against these goals." According to Teixeira, incentive pay "is [a] standard labor market practice, both within the utility industry and within general industry," and, "[i]f Aquarion were to compensate employees only with the level of base pay provided for under the current compensation program, it would not be competitive with others in the market, and, over time, customers would be harmed because it would be unable to attract and retain the type of qualified employees needed to provide safe, reliable, and efficient service."

The OCC submitted the prefiled testimony of John Defever, a certified public accountant who testified regarding various deficiencies in Aquarion's rationale regarding its employee incentive compensation program. First, Defever pointed out that "70 percent of the awards are based on financial goals" and that "[i]ncentive compensation based on financial goals is designed

to align the interest of the employees with [that of] the shareholders. As the goals are focused on shareholder benefit, the costs should not be recovered from ratepayers." Second, "practically every employee is rewarded,"[16] which diminishes the efficacy of the program. Third, according to Defever, "the goals are also insufficiently motivating" because Aquarion has not adjusted the plan's goals to create the requisite level of incentivization. For example, the incentive goal for customer service complaints had not changed between 2017 and 2020, even though the actual number of complaints was less than the incentive goal.[17] Because the incentive goals were not calibrated to reduce the number of customer complaints, Defever opined that there was "no incentive to improve" and that "ratepayers receive no benefit." Defever believed that "a complete disallowance could be justified based on the ineffective design of the plan" but recommended a 70 percent disallowance.

Aquarion provided rebuttal testimony clarifying that 70 percent of employee incentive compensation is tied to financial goals to ensure that there are sufficient earnings to fund the program. Without adequate financial results, "there will not be sufficient money to fund the incentive compensation pool . . . ." According to Aquarion, Defever's contention that the incentive compensation program is insufficiently motivating is "completely unfounded," but Aquarion acknowledged that "an employee squarely fulfilling the requirements of the position will likely receive 100 percent of target . . .

[16] Between 2017 and 2020, 99.9 percent of Aquarion's eligible employees received incentive compensation.

[17] In 2017, the actual number of customer service complaints was 2650, lower than the incentive goal of 3230. In 2018 and 2019, the incentive goal remained the same, even though the number of customer service complaints increased (there were 3009 complaints in 2018 and 3166 in 2019). Because the number of customer service complaints remained below the incentive goal, the goal was achieved despite the increase in the number of customer complaints.

because the incentive compensation plan is calibrated so that an award is earned by [an] employee [when he has] done [his] job on a satisfactory basis." (Emphasis omitted.)

In its final decision, PURA found that the evidence in the record was insufficient to establish the prudence of the employee incentive compensation program for four reasons. First, Aquarion had "failed to demonstrate that the [i]ncentive [p]rogram is required to maintain competitive salaries and employee retention" because nonexecutive compensation "appears to use base wages when comparing Aquarion employee compensation to compensation offered by peer utilities." Second, there was no evidence that the incentive program actually incentivizes employees because "[a]lmost 100 [percent] of eligible employees receive employee incentive compensation . . . . The record evidence instead supports a finding that the [p]rogram has no discernable impact on the customer-facing metrics." (Citation omitted.) Third, employees receive incentive compensation only if the program is funded, and "[t]his funding approach protects shareholders at the expense of ratepayers." Fourth, "since 70 [percent] of the employee incentive compensation is tied to [the] achievement of financial goals, the [i]ncentive [p]rogram primarily benefits [Aquarion's] shareholders, rather than ratepayers." PURA determined that the incentive program "is more accurately described as a bonus plan than an incentive plan" and "denie[d] [Aquarion's] request to recover $2,222,298 from ratepayers to fund the [i]ncentive [p]rogram as the program provides little, if any, benefit to ratepayers." (Internal quotation marks omitted.)

On appeal, Aquarion claims that employee incentive compensation is necessary to attract and maintain qualified workers and that PURA improperly used hindsight to assess the prudence of this program. We reject this claim. As we previously explained, rate-making is a

prospective endeavor, and, in the present case, PURA was not asked to decide whether to permit Aquarion to recover its *past* expenditure of $2,222,298 in employee incentive compensation during the 2021 test year but whether to fund the *future* expenditure of this amount for the program going forward through an increase in rates. To ascertain the prudence of this prospective cost, PURA did not use hindsight to deny past costs; instead, it considered the testimony of Teixeira and Defever, the design and structure of the employee compensation program, and historical data regarding the efficacy of the program in fulfilling its objectives.[18] PURA's factual finding that the program is not prudent is supported by substantial evidence in the administrative record, and we perceive no error. See, e.g., *Woodbury Water Co.* v. *Public Utilities Commission*, 174 Conn. 258, 263, 386 A.2d 232 (1978) ("[t]he weight and credibility of the evidence offered are . . . matters within the province of [an agency]," and "[the] court is not to substitute its own judgment or discretion for that of the [agency]" (internal quotation marks omitted)).

C

Deferred Conservation Expenses

We next address whether PURA applied the proper legal standard to assess the prudence of Aquarion's deferred water conservation expenses, which PURA previously designated as a regulatory asset. See footnote 7 of this opinion. Aquarion claims that PURA improperly focused on an after-the-fact measurement of the economic success of the water conservation program, rather than judging the prudence of the program at the time the expenses were incurred. PURA acknowledges that it used hindsight to evaluate the prudence of

[18] Aquarion does not claim that it is precluded from altering its employee incentive compensation plan going forward in light of PURA's conclusion, and there is nothing in the record that would support such a claim.

Aquarion's deferred conservation expenses but claims that it did so only after first finding that none of those expenditures was prudent at the time they were made. PURA contends that its use of hindsight in this manner was not improper because it resulted in Aquarion's recovery of one half of its deferred conservation expenses and was authorized by No. 13-78, § 2, of the 2013 Public Acts (P.A. 13-78). We agree with Aquarion.

The following additional background is relevant to our resolution of this claim. In 2013, the legislature enacted P.A. 13-78, which, in relevant part, requires PURA to "initiate a docket to identify water and energy conservation programs, including, as applicable, measures in an approved water supply plan pursuant to section 25-32d of the [G]eneral [S]tatutes, that would be eligible for recovery by any water company, as defined in section 16-1 of the [G]eneral [S]tatutes, in a general rate case, provided such company implements such programs and demonstrates with information and data available to the public that the expenses for such programs were reasonable and prudent. . . ." P.A. 13-78, § 2.

In accordance with this provision, PURA initiated a docket to identify eligible water conservation programs for cost recovery in the next general rate case. See Public Utilities Regulatory Authority, Decision, PURA Investigation of Water and Energy Conservation Programs Eligible for Cost Recovery During General Rate Cases (Docket No. 13-08-16) (July 6, 2016) (water conservation proceeding). Aquarion participated in the water conservation proceeding and offered evidence of new conservation programs, such as "enhanced public education; expanded customer auditing; implementing a subsidized customer fixture replacement program; incentive or rebate programs to incent conservation; expanded water audits to identify leaks; [conservation based] rate design and utilization of forecasted con-

sumption data; and implementation of full metering when economically feasible." Id., p. 2. PURA issued a final decision in 2016, stating that it was "reluctant to preselect specific programs for rate inclusion or exclusion. In general, the utilities are free to develop any program for rate consideration that is [cost-effective]. That is, the annual savings in typical rate case expenses, such as electric bills, water treatment and transportation costs must exceed annual program costs." Id., p. 3. In the meantime, PURA permitted Aquarion to treat its water conservation expenses as a deferred regulatory asset, provided it "implements them and demonstrates [in the next general rate case] that the expenses for such programs were reasonable and prudent." Id., p. 1.

After the water conservation proceeding, Aquarion incurred water conservation expenses for "(1) communication costs, including costs incurred for television ads, radio spots, social media, print media, including its Water Watch bill insert, and [Aquarion's] website; and (2) costs incurred for pilot programs in nine towns, education and irrigation consultants, and summer help to patrol during irrigation season." From 2017 through 2021, Aquarion spent a total of $2,996,101 on water conservation expenses.

In August, 2022, Aquarion instituted the present general rate case, seeking, among other things, to recover its deferred conservation expenses from ratepayers. To support recovery of these expenses, Aquarion submitted various charts, receipts, and invoices, as well as its 2018 long-term conservation plan and the testimony of Robert J. Ulrich, its vice president of Connecticut operations. Unlike the evidence submitted in support of Aquarion's employee incentive compensation program, this evidence was not proffered to establish the prudence of Aquarion's *future* accrual of these expenses but, instead, to establish the prudence of Aquarion's

*past* payment of these costs prior to the test year. See part I B of this opinion.

Ulrich testified that Aquarion evaluates the success of its water conservation program by measuring the difference in water consumption before and after implementation of the program. Since commencing its water conservation program, "[t]he average annual reduction from 2017 [to] 2021 is 754 million gallons or 12 percent of production." Additionally, Ulrich explained that the reduction in water consumption resulted in variable cost metric savings due to the need to use fewer chemicals and less power. From 2017 through 2021, these variable cost metric savings amounted to approximately $1.5 million.

As for the approximately $1.5 million in remaining water conservation costs, Aquarion argued that these expenses were prudent because they benefited ratepayers, even if the benefit could not easily be quantified monetarily. Ulrich testified that the incalculable benefits of water conservation include a decrease in the size of and need for future water infrastructure projects, an improvement in customer satisfaction, an increase in water pressure, a reduction in the carbon footprint associated with the transportation of chemicals, fewer drought restrictions, and the preservation of a limited natural resource.

On the basis of this evidence, PURA determined that Aquarion had failed to "demonstrate that 100 [percent] of the [water conservation] expenses are reasonable and prudent." Although water consumption had decreased between 2017 and 2021, Aquarion was "unable to attribute these reductions specifically to its conservation program; nor does [Aquarion] have any other way in which to assess the program's success, particularly with respect to its heavy reliance on customer communication and behavioral programs. Specifically, [Aquarion] does not

have any goals regarding water conservation . . . . It also does not have any [k]ey [p]erformance [i]ndicators . . . associated with its conservation communication campaigns, which [encompass] the majority of the costs of Aquarion's conservation program." (Citation omitted.) PURA found that Aquarion had "saved approximately $1.5 million in variable cost savings" due to "less consumption, primarily driven by reductions in chemical and power costs," but that it was unable to quantify the savings associated with the remaining $1.5 million in expenses. PURA therefore determined that "only $1,498,051 . . . or 50 [percent], of the deferred conservation expenses were reasonable and prudent" and recoverable through rates.

As we previously explained, for rate-making purposes, "[t]he prudence of a management decision" must be "judged at the time the decision is made." *Connecticut Light & Power Co.* v. *Dept. of Public Utility Control*, supra, 216 Conn. 645. Under this standard, "a utility is compensated for all prudent investments at their cost when made, irrespective of whether they are deemed necessary or beneficial in hindsight. . . . That is, the focus in a prudence inquiry is not whether a decision produced a favorable or unfavorable result, but rather, whether the process leading to the decision was a logical one, and whether the utility company reasonably relied on information and planning techniques known or knowable at the time. . . . Although a prudence review is necessarily retrospective in that it involves an examination of past circumstances, past information available, and past decisions, these factors may not be evaluated in light of subsequent knowledge." (Citations omitted.) *Gulf States Utilities Co.* v. *Louisiana Public Service Commission*, 578 So. 2d 71, 85 (La.), cert. denied, 502 U.S. 1004, 112 S. Ct. 637, 116 L. Ed. 2d 655 (1991); see also *Duquesne Light Co.* v. *Barasch*, 488 U.S. 299, 309, 109 S. Ct. 609, 102 L. Ed. 2d 646 (1989)

("[u]nder the prudent investment rule, the utility is compensated for all prudent investments at their actual cost when made (their 'historical' cost), irrespective of whether individual investments are deemed necessary or beneficial in hindsight").

Our review of the record reveals that PURA improperly used hindsight to evaluate the prudence of Aquarion's deferred conservation expenses. Rather than considering whether these expenses were reasonable and prudent when they were incurred in 2017 through 2021 on the basis of information known or knowable to Aquarion at that time, PURA relied on subsequent knowledge of the success of the program to calculate the dollar-to-dollar savings to ratepayers. PURA found that Aquarion had failed to meet its burden of establishing prudence with respect to one half of the deferred conservation expenses because Aquarion was unable to quantify the benefit to ratepayers in terms of a precise dollar amount. PURA's focus on after-the-fact economic savings, rather than the prudence of Aquarion's decision-making at the time, was improper. Cf. *Estate of Rock* v. *University of Connecticut*, 323 Conn. 26, 30, 144 A.3d 420 (2016) (administrative agency acts unreasonably, arbitrarily, illegally, or in abuse of its discretion when its decision "result[s] from an incorrect application of the law to the subordinate facts" (internal quotation marks omitted)).

PURA contends that it did not apply the wrong legal standard because it also relied on "several design flaws in the program that existed from the outset: Aquarion had no way of reliably assessing the program's success; never set water conservation goals; and never used key performance indicators for its communication campaigns." We reject this contention because these design flaws apply to *all* of Aquarion's deferred conservation expenses, yet PURA explicitly found that 50 percent of those expenses, or $1,498,051, "were reasonable and

prudent." As PURA stated in its final decision, the only difference between the two categories of conservation expenses was the after-the-fact hindsight evidence of the success of the water conservation program, insofar as it resulted in "cost savings associated with 50 [percent] of the deferred conservation costs . . . ."

Alternatively, PURA claims that its use of hindsight to assess the prudence of Aquarion's deferred conservation expenses is authorized by § 2 of P.A. 13-78.[19] PURA argues that the legislature's use of the past tense verb "were" in connection with the phrase "reasonable and prudent" reflects the legislature's intent to adopt a retrospective standard that uses hindsight to evaluate the reasonableness and prudence of a utility's conservation expenses.[20] See P.A. 13-78, § 2 (permitting recovery of water conservation expenses in next general rate case if utility "implements such programs and demonstrates with information and data available to the public that the expenses for such programs *were* reasonable and prudent" (emphasis added)). We are not convinced. By its plain language, P.A. 13-78, § 2, requires the utility to identify recoverable water conservation expenses

[19] PURA also contends that its use of hindsight was not improper because it benefitted Aquarion by allowing it to recover one half of its deferred conservation expenses through rates, despite the lack of evidence of prudence. PURA's premise, that it found the evidence insufficient to establish that *any* of the deferred conservation expenses were reasonable or prudent, is belied by its final decision in which it explicitly found that "$1,498,051 . . . or 50 [percent], of the deferred conservation expenses *were reasonable and prudent*." (Emphasis added.) Regardless, for the reasons explained in footnote 14 of this opinion, we are skeptical of PURA's contention that it can include imprudently incurred costs in rates, despite the plain language of § 16-19e (a) (5) requiring "that the level and structure of rates charged customers *shall reflect prudent and efficient management* . . . ." (Emphasis added.)

[20] PURA does not argue that its interpretation of P.A. 13-78, § 2, is time-tested or has been subjected to judicial scrutiny. Thus, our review of this claim is plenary. See, e.g., *GenConn Energy, LLC* v. *Public Utilities Regulatory Authority*, 348 Conn. 532, 542, 308 A.3d 1018 (2024). To ascertain the meaning of the public act, we apply the well established principles of statutory construction codified in General Statutes § 1-2z.

between general rate cases, meaning that PURA's prudence review always will occur after the utility's expenditure of funds to pay for identified conservation costs. In other words, the public act contemplates that a utility will be required to establish in a *future* rate case that its *past* conservation expenses were reasonable and prudent. Rather than implementing a substantive change to the conventional and well established methodology governing the prudence review of a utility's costs, the statutory language plainly reflects the prescribed method by which conservation costs are first identified in a water conservation proceeding, and, then, in the next general rate case, those historical costs are reviewed for reasonableness and prudence as of the time the costs were incurred.[21]

Because PURA used hindsight to evaluate the prudence of Aquarion's deferred conservation expenses, that portion of the trial court's judgment upholding PURA's final decision must be reversed, and the case must be remanded so that PURA may reconsider the prudence of Aquarion's deferred conservation expenses as of the time the decision to incur those expenses was made.

## II

## WHETHER PURA'S RATE ORDER WAS CONFISCATORY

Lastly, Aquarion claims that PURA's rate order resulted in a confiscatory taking of its property because (1) the denial of some of Aquarion's requested capital expendi-

[21] To the extent that the language of the public act is ambiguous, nothing in the legislative history supports PURA's assertion that the legislature intended to adopt a new prudence standard unique to deferred water conservation expenses. Instead, the purpose of the public act was to "save consumers some money and . . . [to] help the environment" by "protect[ing] our natural resources . . . ." 56 S. Proc., Pt. 4, 2013 Sess., p. 948, remarks of Senator Bob Duff.

tures and operating costs effectively reduced the allowed ROE from 8.70 percent to almost 5 percent, and (2) PURA's factual finding that the approved ROE would be sufficient to maintain Aquarion's credit rating and to attract capital was premised on an incorrect assumption that Aquarion would recover all of its requested capital expenditures and operating costs. We disagree.

In its rate application, Aquarion requested a ROE of 10.35 percent. Other parties objected and provided evidence in support of a lower ROE. In particular, the EOE recommended a ROE between 7.65 and 8.91 percent, the OCC recommended a ROE of 9 percent, and the OAG recommended a ROE between 8.33 and 9 percent. To ascertain a ROE that was sufficient, but no more than sufficient, to allow Aquarion to cover its capital expenditures and operating costs in accordance with § 16-19e (a) (4), PURA considered the respective effects that this range of ROEs would have on Aquarion's credit rating. PURA noted that Aquarion had maintained an "A3 [s]table [r]ating" from Moody's Investors Service (Moody's) since 2018. After evaluating the factors that Moody's uses to calculate credit ratings, PURA determined that, "[u]nder all the recommendations offered by [Aquarion], [the] OCC, and [the] EOE . . . the metrics remain in the range of the core metrics followed by Moody's to maintain its A3 rating." PURA therefore concluded that "an ROE set within the ranges presented by [the] EOE, [the] OCC, and [Aquarion] (i.e., 7.765 [percent] to 10.35 [percent]) would not adversely affect [Aquarion's] credit rating."

To arrive at a precise ROE, PURA examined "several factors . . . including current economic and market conditions, analytical models and cost of equity capital methodologies . . . ROEs of similar companies in other jurisdictions, and [Aquarion's] financial risk and credit rating." With respect to comparable allowed

ROEs, PURA noted that, "[o]ver the period [of] 2021 through July 26, 2022, water company allowed ROEs ranged from 7.46 [percent] to [10 percent], with an average of 9.37 [percent]." PURA also calculated various ROEs under two different analytical models, the discounted cash flow model and the capital asset pricing model, which yielded "a reasonable ROE for [Aquarion] . . . in the range of [8 percent] to [9.5 percent]." As for Aquarion's financial risk, PURA concluded that it was comparable to other similarly situated utility companies and that "the regulatory framework in Connecticut, by design, also provides certain risk mitigation mechanisms that should be accounted for in setting a reasonable ROE." See, e.g., General Statutes § 16-262w (authorizing use of water infrastructure and conservation adjustments); General Statutes § 16-262y (revenue adjustment mechanism); see also footnote 8 of this opinion. After a thorough analysis of Aquarion's "capital structure, its financial condition, ROEs from other jurisdictions, analytical models, testimony from the [p]arties and [i]ntervenors, prevailing and anticipated market conditions, and the regulatory environment," PURA found that "an ROE of [8.7 percent] is reasonable and provides the proper balance between shareholders and ratepayers."

The trial court upheld PURA's determination, reasoning that a ROE of 8.7 percent was within the range recommended by the parties and was reflective of the fact that Aquarion operates in a highly regulated, monopolistic environment involving little practical economic risk. The court rejected Aquarion's claim that the "actual ROE will be closer to 5 percent because Aquarion will be forced to use revenue it has otherwise designated to return to investors in order to make up for the revenue shortfalls caused by PURA's denial of Aquarion's revenue requests in other areas" on the basis of *GenConn Energy, LLC* v. *Public Utilities Regulatory*

*Authority*, 348 Conn. 532, 548–50, 308 A.3d 1018 (2024) (*GenConn*), which held that a reduction in overall recoverable capital costs does not alter a utility company's allowed ROE. The court also was not persuaded by Aquarion's claim that the combined effect of disallowing certain capital expenditures and operating costs, and adopting a ROE of 8.7 percent would undermine Aquarion's financial integrity or ability to attract capital, pointing out that "PURA specifically made the factual determination that [its] decision would not harm Aquarion's credit rating" and that, even if this factual finding was clearly erroneous, "a credit rating is only one factor in a company's ability to attract capital." Because there was no evidence that a downgrade in Aquarion's credit rating "would wholly prevent Aquarion from raising capital or . . . [would] jeopardize its financial integrity," the court determined that PURA's rate order was not confiscatory.

Our review of the constitutionality of PURA's rate order is governed by the standards articulated by the United States Supreme Court in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 64 S. Ct. 281, 88 L. Ed. 333 (1944). See *Woodbury Water Co.* v. *Public Utilities Commission*, supra, 174 Conn. 264. When a rate order is challenged as confiscatory, the appellant "carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." *Federal Power Commission* v. *Hope Natural Gas Co.*, supra, 602. A regulatory agency is "not bound to the use of any single formula or combination of formulae in determining rates," and may exercise its rate-making authority to make "pragmatic adjustments." (Internal quotation marks omitted.) Id. "[I]t is the result reached not the method employed [that] is controlling. . . . It is not theory but the impact of the rate order [that] counts. If the total effect of the rate order cannot be said to

be unjust and unreasonable, judicial inquiry . . . is at an end. The fact that the method employed to reach that result may contain infirmities is not then important." (Citations omitted.) Id. A rate order is not unjust and unreasonable if the utility company's return on investment is enough "not only for operating expenses but also for the capital costs of the business," "commensurate with returns on investments in other enterprises having corresponding risks," and "sufficient to [ensure] confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital." Id., 603.

We first address whether our holding in *GenConn Energy, LLC* v. *Public Utilities Regulatory Authority*, supra, 348 Conn. 548–50, applies to Aquarion's claim that disallowance of some requested capital expenditures and operating costs effectively lowered Aquarion's approved ROE below 8.7 percent and resulted in a confiscatory taking. In *GenConn*, the plaintiff, GenConn Energy, LLC (GenConn), claimed that, by disallowing recovery of certain prudently incurred operating costs to prevent an over recovery, PURA effectively prevented GenConn from earning a reasonable ROE in violation of General Statutes §§ 16-19e (a) and 16-243u. Id. We rejected GenConn's claim that the denial of costs effectively reduced the allowed rate of ROE from 9.85 percent to 7.59 percent on the ground that "[t]he rate of [ROE] was not lowered by PURA. It is true that GenConn's recoverable capital is lower than what it requested . . . but this is a result of a reduction in the debt rate. The rate of [ROE] remains 9.85 percent . . . . Simply because GenConn's overall recoverable capital was lowered as a result of the reduction in the debt rate does not mean that the [ROE] has been altered." Id., 548. Thus, despite the reduction in recoverable capital costs, GenConn was "allowed a reasonable rate of [ROE] pursuant to the same rate of return" authorized by PURA. Id., 549.

Aquarion claims that *GenConn* is distinguishable because, in that case, the court "did not confront, or express any view about, the federal constitutional rule against confiscatory rates." Aquarion's claim lacks merit because the statutory standard for establishing just and reasonable rates under § 16-19e (a) (4) tracks, almost verbatim, the constitutional standard articulated in *Federal Power Commission* v. *Hope Natural Gas Co.*, supra, 320 U.S. 602–603. As we explained in *Connecticut Light & Power Co.* v. *Dept. of Public Utility Control*, supra, 219 Conn. 55–56, the statutory requirement that rates be sufficient to enable utility companies "to cover their operating costs including, but not limited to, appropriate staffing levels, and capital costs, to attract needed capital and to maintain their financial integrity"; General Statutes § 16-19e (a) (4); is not materially different from the constitutional requirement that rates be "sufficient to [ensure] confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital." *Federal Power Commission* v. *Hope Natural Gas Co.*, supra, 603; see *Connecticut Light & Power Co.* v. *Dept. of Public Utility Control*, supra, 56 ("§ 16-19e (a) (4) embodies the 'just and reasonable' provision of *Hope* [*Natural Gas Co.*]"). Our decision in *GenConn* applies equally to statutory and constitutional claims, and compels the conclusion that Aquarion's approved ROE of 8.7 percent was not altered, for purposes of our constitutional analysis, by the disallowance of certain capital expenditures and operating costs consistent with the general rate-making principles codified in § 16-19e (a) (4) and (5). See *Fitchburg Gas & Electric Light Co.* v. *Dept. of Public Utilities*, 375 Mass. 571, 575, 380 N.E.2d 1304 (1978) ("A confiscation claim is not made out by showing that the effective rate of return will be less than the allowed rate of return" because inherent in policy of disallowing certain costs "is the possibility that a company's effective rate of return will be less than its allowed rate of return. Such

a result is not a constitutional violation."); *Toledo Edison Co.* v. *Public Utilities Commission*, 12 Ohio St. 3d 143, 146, 465 N.E.2d 886 (1984) (utility's claim that disallowance of requested costs resulted in confiscatory taking because "the 'effective' rate of return [fell] outside of the range approved by the commission" was "without merit," insofar as "[t]he 'effective' rate of return . . . was computed outside Ohio's [rate-making] formula").

Alternatively, Aquarion contends that PURA improperly found that a ROE of 8.7 percent would not adversely affect Aquarion's credit rating and ability to attract capital because this finding was premised on the incorrect assumption that Aquarion would recover all of its requested capital expenditures and operating costs. According to Aquarion, if PURA had evaluated its credit outlook using the approved revenue requirement of $195,561,690, instead of the requested revenue requirement of $236 million, PURA necessarily would have found that a ROE of 8.7 percent was insufficient to maintain Aquarion's credit rating and its ability to attract capital. This claim fails because it is unsupported by legal analysis or citation to evidence in the administrative record. Notably, Aquarion has not examined the financial metrics that Moody's uses to calculate credit ratings,[22] applied those metrics to the evidence in the administrative record,[23] or explained how a ROE of 8.7

[22] According to the evidence in the administrative record, one half of Moody's credit rating is based on a utility's business profile, which includes the stability and predictability of the regulatory environment (15 percent), asset ownership model (5 percent), cost and investment recovery (15 percent), revenue risk (5 percent), and the scale and complexity of the capital program and asset condition risk (10 percent). Forty percent of Moody's credit rating is based on leverage and coverage, which includes adjusted interest coverage or FFO (funds from operations) interest coverage (12.5 percent), net debt/regulated asset base, or debt/capitalization (10 percent), FFO/net debt (12.5 percent), and retained cash flow/net debt (5 percent). The remaining 10 percent depends on financial policy.

[23] Aquarion relies on a June, 2024 article in the Hartford Business Journal reporting that, after PURA's decision in the present case, Moody's down-

percent is insufficient to permit Aquarion to maintain its credit rating or ability to attract capital. "[I]t is the result reached not the method employed [that] is controlling," and, in the absence of any concrete analysis demonstrating that the result reached by PURA was unjust and unreasonable, Aquarion has failed to fulfill its "heavy burden" of establishing a confiscatory taking. *Federal Power Commission* v. *Hope Natural Gas Co.*, supra, 320 U.S. 602; see *Trunkline Gas Co.* v. *Federal Energy Regulatory Commission*, 880 F.2d 546, 552 (D.C. Cir. 1989) (utility could not prevail on claim that rate order undermined its creditworthiness and deprived investors of reasonable financial safeguards because "much more concrete information [was] required . . . [to] hold these consequences to be unjust and unreasonable").

The judgment is reversed only with respect to the trial court's decision to uphold PURA's assessment as to the prudence of Aquarion's deferred conservation expenses and the case is remanded with direction to remand to PURA for further proceedings concerning those expenses; the judgment is affirmed in all other respects.

In this opinion the other justices concurred.

graded Aquarion's credit rating from A3 to Baa1. See A. Larson, "Moody's Downgrades Water Utility's Credit Rating, Citing Weakening Finances, Debt," Hartford Business Journal, June 4, 2024, available at https://www.hartfordbusiness.com/article/moodys-downgrades-water-utilitys-credit-rating-citing-weakening-finances-debt (last visited July 7, 2025). We decline to consider this evidence because it is outside of the administrative record, and PURA did not have, and could not have had, knowledge of this evidence at the time it rendered a final decision on Aquarion's rate application. See, e.g., *Adriani* v. *Commission on Human Rights & Opportunities*, 220 Conn. 307, 325–26, 596 A.2d 426 (1991) ("[a]n appeal from an administrative tribunal should ordinarily be determined upon the record of that tribunal, and only when that record fails to present the hearing in a manner sufficient for the determination of the merits of the appeal, or when some extraordinary reason requires it, should the court hear the evidence" (internal quotation marks omitted)); see also General Statutes § 4-183 (i) (administrative appeals "shall be confined to the record").

## APPENDIX

| Project ID | Asset Description | Sum of Amount | Water System | Reference and Other Details | Type of Project | Project Purpose |
|---|---|---|---|---|---|---|
| XC211-2020-065-A02<br>XC211-2020-065-D03<br>XC211-2020-065-E04-331<br>XC211-2020-065-E04-332<br>XC211-2020-065-E04-91H | Trap Falls Hypo/Alum Chemical Feed and Storage | $29,679<br>$156,831<br>$175,909<br>$1,403,030<br>$15,998 | Main in Shelton | NA | Chemical Feed Improvements to Trap Falls Water Treatment Plant | Water Treatment Chemical Storage and Feed Improvements |
| XR210-2022-021-91H-002 | Core Switch Upgrades | $1,170,662 | All | NA | Network Switch IT Replacements–IT | Existing Equipment is at [E]nd of Useful Life |
| XC-211-2021-024-A02<br>XC-211-2021-024-E04-91S | HHXM SuccessFactors Employee Central and Payroll | $409,289<br>$1,689,775 | All | NA | Human Resource Employee Management and Payroll Upgrades | Improvements to Existing Process and Standardize Process |

# STATE OF CONNECTICUT *v.* CHRISTOPHER J. IVERSON (SC 20844)

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

*Syllabus*

Convicted of murder, attempt to commit murder, burglary in the first degree, and arson in the first degree in connection with the stabbing death of the victim and assault of the victim's son, the defendant appealed to this court. The defendant claimed that the trial court had improperly denied his request to charge the jury on manslaughter in the first degree as a lesser included offense of murder and had improperly admitted a report concerning the victim's autopsy that was prepared by a medical examiner who did not testify at the defendant's trial. *Held*:

The trial court correctly determined that the defendant was not entitled to an instruction on the lesser included offense of manslaughter in the first degree, the defendant having failed to demonstrate that he satisfied either the third or the fourth prong of the test set forth in *State* v. *Whistnant* (179 Conn. 576) for determining whether a defendant is entitled to a lesser included offense instruction.

The defendant did not present sufficient evidence at trial to justify a conviction of manslaughter in the first degree, and the evidence presented with respect to the element that differentiates manslaughter from murder, namely, whether the defendant acted recklessly with extreme indifference to human life or whether he acted intentionally, was not sufficiently in dispute to permit the jury to find the defendant not guilty of murder but guilty of first degree manslaughter.

Specifically, the state presented overwhelming evidence that the defendant had intended to kill the victim, and there was no evidence that would have supported a conclusion that the defendant had acted recklessly in causing the victim's death.

The defendant could not prevail on his unpreserved claim that the trial court had improperly admitted into evidence an autopsy report that was prepared by a medical examiner who performed the autopsy but who did not testify at the defendant's trial, in violation of the defendant's constitutional right to confrontation.

Because defense counsel made a strategic decision at trial not to object to the admission of the autopsy report, autopsy photographs, and the testimony of another medical examiner who observed the autopsy and testified about the autopsy on the basis of her own opinions, defense counsel waived the

defendant's confrontation clause claim, and the defendant's claim on appeal therefore failed under the third prong of *State* v. *Golding* (213 Conn. 233), as modified by *In re Yasiel R.* (317 Conn. 773).

Argued April 17—officially released July 15, 2025

*Procedural History*

Substitute information charging the defendant with the crimes of murder, attempt to commit murder, burglary in the first degree, and arson in the first degree, brought to the Superior Court in the judicial district of Waterbury and tried to the jury before *Kwak*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed*.

*Shanna P. Hugle*, deputy assistant public defender, for the appellant (defendant).

*Nathan J. Buchok*, assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, *Don Therkildsen*, supervisory assistant state's attorney, and *Alexandra Arroyo*, assistant state's attorney, for the appellee (state).

*Opinion*

MULLINS, C. J. Following a trial, the jury found the defendant, Christopher J. Iverson, guilty of murder in violation of General Statutes § 53a-54a (a), attempted murder in violation of General Statutes § 53a-49 (a) (2) and § 53a-54a (a), burglary in the first degree in violation of General Statutes § 53a-101 (a) (3), and arson in the first degree in violation of General Statutes § 53a-111 (a) (1). The trial court subsequently sentenced the defendant to a total effective sentence of 105 years of imprisonment for those crimes. In this direct appeal,[1] the defendant asserts that the trial court improperly (1) denied his request to charge the jury on the lesser included offense

[1] Pursuant to General Statutes § 51-199 (b) (3), "an appeal in any criminal action involving a conviction for a . . . class A felony" shall be taken directly to this court.

of manslaughter in the first degree, and (2) admitted into evidence an autopsy report authored by a nontestifying expert in violation of his confrontation rights under the federal constitution. Because the evidence was insufficient to justify an instruction on the lesser included offense of manslaughter and the defendant waived any challenge to the admission of the autopsy report, we affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On August 28, 2018, the victim was at home with her eleven year old son, J.[2] The victim's husband was out of the home, working an overnight shift. In the early morning hours, J was woken up when the victim suddenly grabbed his leg. She begged J to "call your daddy, I'm getting killed." J saw the defendant, whom he recognized as a longtime family friend, stabbing the victim with a knife from the home's kitchen knife set. J sprang into action and shoved the defendant away from the victim. The defendant then ran back toward the victim and continued to stab her. During this vicious attack, the victim asked the defendant, "[w]hy are you doing this," to which the defendant responded, "[b]ecause I hate you." The defendant continued to stab the victim until she ultimately collapsed on the bedroom floor and bled to death.

After fatally stabbing the victim, the defendant threatened to "slice [J's] throat" if he identified the defendant as the perpetrator. The defendant next grabbed J and tied him to a chair near his deceased mother, using a pair of headphones, a jump rope, and J's karate belt. The defendant then went into the kitchen and grabbed

[2] In accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49, 851; we decline to identify any person protected or sought to be protected under a protection order, protective order, or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

a beer bottle. He returned to the bedroom and struck J in the back of his head with the beer bottle, rendering him unconscious. While J was unconscious, the defendant entered the bedroom of the victim and her husband, took one of her husband's clean shirts and put it on. He took off his dirty shirt and wrapped it around the bloody knife before returning to J's bedroom to take the victim's and J's cell phones.

After changing his shirt, the defendant set fire to the bedspread in the victim and her husband's bedroom, the shear window curtain in the living room, the bathroom shower curtain, and the bathroom window curtain. Believing the fires would engulf the crime scene and kill J, the defendant left the victim's home and walked toward his own home, disposing of his shirt, the knife, and the cell phones in two different storm drains along the way.

Once the victim's husband finished his work shift, he drove directly home and arrived around 7:15 a.m. Noticing that the back door was slightly ajar, the victim's husband entered the home and found that the lights were off and the home smelled of smoke. J freed himself from his restraints and yelled to his father to "come go look in my room." The victim's husband raced into J's room and found the victim on the floor covered in cuts and blood. The victim's husband called 911 and performed cardiopulmonary resuscitation until the police arrived. Once the police and paramedics arrived on the scene, the paramedics pronounced the victim dead.

Shortly thereafter, J identified the defendant as the perpetrator, and the police immediately brought the defendant in for questioning. The defendant signed a *Miranda*[3] waiver and spoke with detectives. Initially, the defendant claimed that the last time he had spoken to anyone from the victim's family was one week prior,

[3] Miranda v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

when they all had returned from a joint family vacation in Florida. He further denied going to the victim's residence that evening and claimed he was in bed by 1 a.m.

Eventually, however, the defendant admitted that he had an affair with the victim that had ended several years earlier. He claimed that, on the evening of the incident, the victim invited him over. When he arrived, the victim was intoxicated[4] and held a frying pan decorated with yellow flowers[5] in one hand and a knife in the other. The victim then told the defendant, "you're not going to leave here alive anyway." The victim and the defendant began to "tussle . . . ." According to the defendant, the victim had already tied up J in his room. The defendant told the police that he tried to flee into the victim and her husband's bedroom but that the victim took a yellow BIC lighter and flicked it on the bed, causing the mattress to ignite. He claimed that he then went back into J's room and attempted to untie him, but the victim jumped on his back and the two tumbled to the ground. During the scuffle, he heard the victim exclaim that she stabbed herself. The defendant said that he did not remember anything beyond that and believed he must have then blacked out.[6]

When detectives confronted the defendant about the possibility that he could have stabbed the victim after the "tussle" without realizing it, he first responded, "no" but then said, "I'm not even sure. I'm not gonna say yes. I'm not gonna say no." The defendant claimed that, when he awoke from his blackout, he saw the knife

[4] Despite the defendant's assertion that the victim was intoxicated and that he could smell alcohol on her breath, "the toxicology report was negative for any [alcohol] . . . ."

[5] Investigators never recovered a frying pan matching the defendant's description at the scene.

[6] At trial, the defendant did not claim that he acted in self-defense or seek a self-defense instruction. He also admitted during cross-examination that whoever stabbed the victim did so intentionally.

sticking out of the victim and took the knife out of her body. He explained that he then left the house out of fear and walked home. He told the detectives that, on his way home, he purchased a bottle of water from the gas station to wash his hands of the victim's blood. After adamantly denying that he took the victim's and J's cell phones, the defendant finally admitted that he did take them from the scene. The defendant then directed Detective Peter Morgan to two different storm drains located along the route he took to go home. The police recovered the cell phones and the knife wrapped in a shirt from the two storm drains. Shortly thereafter, the defendant was arrested.

The victim's autopsy revealed that her "cause of death [was] sharp force injuries of the torso and extremities." Sharp force injuries are "a classification of injuries . . . use[d] to describe any time a sharp implement is used to cut someone's body." More precisely, the victim sustained twenty-six "stab wounds and incised wounds" to her body. Nine of them were stab wounds, meaning that they were "deeper into the body than they [were] long on the surface of the skin." Seventeen were incised wounds, meaning that they were "longer on the skin [than] they [were] deep." Three of the stab wounds were to the victim's neck, chest, and right armpit. The other six were on her back, aligned along the left side of the spine. One of the wounds, cutting into her jugular vein, likely caused a "significant amount of bleeding . . . ." The deepest penetration of the stab wounds was about four inches.

The seventeen incised wounds were primarily found on the victim's upper extremities, including her hands. The location of the wounds on her hands was consistent with her trying to defend herself. Further examination revealed that the victim also had blunt force injuries to the head, as well as indications that she was strangled. The medical examiner concluded that the victim

died from the collective blood loss caused by the twenty-six sharp force injuries.

After a trial, the jury found the defendant guilty on all counts. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

On appeal, the defendant first asserts that the trial court improperly denied his request to charge the jury on the lesser included offense of manslaughter in the first degree. Specifically, the defendant claims that he was entitled to an instruction on this lesser included offense pursuant to *State* v. *Whistnant*, 179 Conn. 576, 427 A.2d 414 (1980), because the evidence adduced at trial would have permitted the jury to find the defendant guilty of manslaughter in the first degree. We disagree.

The applicable legal principles are well established. "Although there is no constitutional right to have a jury consider possible lesser included offenses, Connecticut law entitles a defendant to a lesser included offense charge if his request satisfies the four requirements set forth in *State* v. *Whistnant*, [supra, 179 Conn. 588]." *State* v. *Crafts*, 226 Conn. 237, 250, 627 A.2d 877 (1993). "A defendant is entitled to an instruction on a lesser offense if, and only if, the following conditions are met: (1) an appropriate instruction is requested by either the state or the defendant; (2) it is not possible to commit the greater offense, in the manner described in the information or bill of particulars, without having first committed the lesser; (3) there is some evidence, introduced by either the state or the defendant, or by a combination of their proofs, [that] justifies conviction of the lesser offense; and (4) the proof on the element or elements [that] differentiate the lesser offense from the offense charged is sufficiently in dispute to permit the jury consistently to find the defendant [not guilty] of the greater offense but guilty of the lesser." *State* v.

*Whistnant*, supra, 588. "The *Whistnant* test is conjunctive, requiring satisfaction of all four prongs." *State* v. *Smith*, 262 Conn. 453, 461, 815 A.2d 1216 (2003).

"The defendant's claim that he had improperly been denied an instruction on a lesser included offense requires us, on appeal, to review the facts in the light most favorable to the defendant. . . . Whether one offense is a lesser included offense of another presents a question of law. . . . Accordingly, our review is de novo." (Internal quotation marks omitted.) *State* v. *Marsala*, 337 Conn. 55, 65, 252 A.3d 349 (2020).

We are unpersuaded by the defendant's contention that he meets all the requirements of the *Whistnant* test. Instead, we conclude that his claim fails on the third and fourth *Whistnant* prongs. See, e.g., *State* v. *Jones*, 289 Conn. 742, 762, 961 A.2d 322 (2008) ("[d]espite being conceptually distinct parts of the *Whistnant* formulation, the third and fourth prongs are subject to the same evidentiary analysis . . . [and, therefore, can be analyzed] simultaneously" (internal quotation marks omitted)). The defendant fails to meet the third prong because there was not sufficient evidence presented at trial to justify a conviction of manslaughter in the first degree. The defendant also fails to meet the fourth prong because the evidence presented on the element that differentiates manslaughter from murder—whether the defendant acted recklessly with extreme indifference to human life for manslaughter or acted intentionally for murder—was not sufficiently in dispute to permit the jury consistently to find the defendant not guilty of murder but guilty of manslaughter.[7]

[7] Manslaughter in the first degree under General Statutes § 53a-55 (a) (3) requires "that the defendant must have (1) engaged in conduct that created a grave risk of death, (2) acted recklessly, (3) acted under circumstances evincing an extreme indifference to human life, and (4) caused the death of the victim." *State* v. *Hughes*, 341 Conn. 387, 405, 267 A.3d 81 (2021). Murder, on the other hand, requires the defendant to act "with intent to cause the death of another person, [and also requires that] he causes the death of such person . . . ." General Statutes § 53a-54a (a).

The state unquestionably presented overwhelming evidence that the defendant had intended to kill the victim, and there was no evidence that would have supported a conclusion that the defendant acted recklessly in causing the victim's death. To start, the nature and extent of the victim's injuries demonstrated an intent to kill rather than recklessness. As this court has explained, the defendant's intent to kill can be inferred from evidence that the defendant used a deadly weapon and from the nature and number of wounds inflicted. See, e.g., *State* v. *Coleman*, 304 Conn. 161, 167–68, 37 A.3d 713 (2012) ("[t]he fact that the defendant stabbed [the victim] in her chest with a knife and did so deeply enough to penetrate her heart . . . would support an inference that he intended to kill her"); *State* v. *Edwards*, 247 Conn. 318, 322–23, 721 A.2d 519 (1998) ("[w]e have stated that [o]ne who uses a deadly weapon [on] a vital part of another will be deemed to have intended the probable result of that act, and from such a circumstance a proper inference may be drawn in some cases that there was an intent to kill" (internal quotation marks omitted)). In the present case, the evidence established that the defendant used a kitchen knife to stab the victim and that she had twenty-six sharp force wounds. In addition, the evidence established that six of the stab wounds were in a fairly straight line on her back and that one of the stab wounds consisted of a cut through her jugular vein. See *State* v. *Rasmussen*, 225 Conn. 55, 72–73, 621 A.2d 728 (1993) (rejecting claim that trial court should have instructed jury on lesser included offenses of manslaughter because "[i]t requires nothing more than common sense to conclude that slashes to the neck of a conscious victim that severed the victim's jugular vein . . . are evidence of an intent to kill rather than mere recklessness"). Given the nature and extent of the victim's wounds, we conclude that there was overwhelming evidence of the defendant's intent to cause the death of the victim. During

cross-examination, the defendant agreed that whoever murdered the victim did so intentionally and not accidentally.

Moreover, we also are unconvinced by the defendant's argument that, because this was a sudden confrontation that was "spontaneous, unplanned, and lacked motive," he was entitled to an instruction on manslaughter in the first degree. As additional circumstances supporting this argument, he contends that he blacked out during the altercation and that the victim sustained only two stab wounds, the one to her hand and the other to her chest, while he was conscious. He testified that it was the victim who accidentally inflicted both of these wounds on herself while he was trying to run away.

"It is well established that intent [can] be formed instantaneously and [does] not require any specific period of time for thought or premeditation for its formation." (Internal quotation marks omitted.) *State* v. *Brown*, 345 Conn. 354, 373 n.10, 285 A.3d 367 (2022). In *State* v. *Crafts*, supra, 226 Conn. 237, the defendant, who was charged with murder, claimed that he was entitled to instructions on the offenses of manslaughter in the first and second degree because the evidence at trial suggested a sudden confrontation that resulted in the victim's death. Id., 238, 251–52. This court rejected the defendant's claim of a sudden confrontation as "too speculative" on the basis of the preplanning evidence that the defendant had rented a woodchipper before the killing to dispose of the victim's body. Id., 251.

Here, although there was no evidence of preplanning presented at trial, the defendant's own testimony does not supply the factual basis necessary to support a charge for manslaughter. He testified that the victim's fatal wounds were inflicted while he was unconscious and that he did not know who was responsible for stabbing the victim multiple times. He also testified that

he was defending himself from the victim's attack and that at least some of her wounds were self-inflicted. Thus, the defendant denied engaging in any conduct, reckless or otherwise, that caused the victim's death. But see *State* v. *Smith*, supra, 262 Conn. 473, 476 (determining that defendant was entitled to instruction on manslaughter in first degree after he responded, when police asked if he had killed victim, "I guess you could say we both did, *but not on purpose*" (emphasis in original; internal quotation marks omitted)). The defendant's denial of any conduct that would support a finding of recklessness fails to put the element of intent sufficiently in dispute.

Indeed, in addition to the number and nature of the stab wounds, J's testimony further removes any dispute regarding the intentional nature of this crime. J testified that he was awoken by the victim, pulling at his leg, as the defendant was attacking her. J then stated that he tried to defend the victim from the brutal attack by pushing the defendant away. The defendant, however, was not deterred and instead charged back toward the victim and resumed the attack. See *State* v. *Greenfield*, 228 Conn. 62, 78, 634 A.2d 879 (1993) (finding that defendant intended to cause victim's death after pursuing him through apartment). J also testified that, when the victim begged the defendant to explain why he was harming her, J heard the defendant reply that he hated her. J's testimony undoubtedly describes an intentional killing at the hands of the defendant.

Thus, the defendant's denial of any conduct—coupled with his admission to the jury that whoever inflicted the victim's wounds did so intentionally, the severity, depth and number of the victim's stab wounds, and J's testimony about the sustained and vicious nature of the attack—makes the defendant's theory of a spontaneous tussle far "too speculative" to warrant an instruction on a lesser charge. See, e.g., *State* v. *Tomlin*, 266 Conn.

608, 631, 835 A.2d 12 (2003) ("[we] expressly [reject] the proposition that a defendant is entitled to instructions on lesser included offenses based on merely theoretical or possible scenarios" (internal quotation marks omitted)). Put differently, there is no construction of this evidence, even in the light most favorable to the defendant, that would suggest anything other than an intentional killing.

In light of the evidence presented at trial, we cannot conclude that the defendant satisfied either the third or fourth prongs of *Whistnant*. We agree with the trial court that the defendant was not entitled to an instruction on the lesser included offense of manslaughter in the first degree.

## II

The defendant also claims that the trial court improperly admitted into evidence an autopsy report prepared by a nontestifying expert in violation of his right to confrontation under the sixth and fourteenth amendments to the federal constitution. The defendant acknowledges that he did not raise this claim at trial, so he seeks review of his claim pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).[8] The state asserts that defense counsel made a strategic decision not to object to the autopsy report or the medical examiner's testimony and therefore has waived this claim. Consequently, the state contends, there is

[8] A defendant may prevail on an unpreserved claim under *Golding* when "(1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40; see *In re Yasiel R.*, supra, 317 Conn. 781 (modifying third prong of *Golding*).

no constitutional violation because a waived claim fails under the third prong of *Golding*. We agree with the state.

The following additional facts and procedural history are necessary for our resolution of this claim. On the second day of trial, defense counsel sought to preclude the state from admitting into evidence three photographs of the crime scene that depicted the victim's wounds. He argued that the photographs had little probative value because "there's no dispute as to the cause or manner of death in this case." He further explained that "[t]he crime scene [photographs] are not necessary . . . to assist the medical examiner . . . in describing the cause of death or the manner of death," and, given their gruesome nature, their probative value was outweighed by their prejudicial effect.

The prosecutor claimed that the crime scene photographs would corroborate not only the medical examiner's testimony but also the testimony of J and the paramedics. The court, concerned with cumulative evidence, asked the prosecutor, "[w]on't the [medical examiner] be able to show how many incisions or stab wounds . . . the victim sustained?" The prosecutor responded, "according to the [*medical examiner's*] *report* and the *autopsy photographs*, they will document every single wound." (Emphasis added.) Defense counsel responded that, even if the three crime scene photographs were relevant, the rules of evidence still permit the exclusion of evidence when there is "the needless presentation of cumulative evidence . . . [and], with what the [medical examiner is] bringing in, [that] should be enough" to warrant exclusion of this evidence. The court "agree[d] with [defense counsel] that [the crime scene photographs] could be too prejudicial to the defendant. Any information the state needs can be brought forth through the [medical examiner]. The number of stab wounds, the manner of death, that's

where [the court] think[s] it's also cumulative . . . ." As a result, the court excluded two of the photographs, but it allowed one of them to be admitted, as it was merely a close-up of a previously admitted photograph.

The next day, when Deputy Chief Medical Examiner Maura DeJoseph testified, she made it clear that, even though she observed the autopsy, she did not personally conduct the autopsy or author the autopsy report.[9] She explained that the author of the report, Associate Medical Examiner Angela McGuire, was no longer employed by the Office of the Chief Medical Examiner. During DeJoseph's testimony, after she explained that she had not conducted the autopsy, the prosecutor moved to introduce into evidence the autopsy report authored by McGuire.[10] The trial court asked defense counsel directly if he had any objections. Defense counsel replied, "[n]o, Your Honor." Thereafter, the trial court admitted the exhibit containing the autopsy report.[11] DeJoseph then testified about what each autopsy photograph depicted to catalog the victim's various injuries for the jury.

[9] When asked, "based on your autopsy of [the victim], within the bounds of reasonable medical certainty, have you formed an expert opinion concerning her cause of death," DeJoseph responded: "Yes. Just for clarification though, I did not perform the autopsy, but I was present when the autopsy was performed. So, I have reviewed everything and concluded—made my own opinion about the findings."

[10] The autopsy report was admitted into evidence as part of state's exhibit 61. That exhibit was composed of the autopsy report, the anthropology consultation report, the toxicology report, an identification form, a fingerprint identification form, an evidence-out receipt to the crime lab, and an evidence-out receipt to the police department. The defendant does not challenge the admission of the other reports in this exhibit on appeal. The autopsy photographs of the victim's body were not part of the autopsy report and were addressed separately from the admission of the autopsy report. See footnote 11 of this opinion.

[11] The autopsy photographs are separate exhibits from the autopsy report. The parties agreed, before DeJoseph's testimony, that these photographs would be admitted. When the prosecutor indicated to the court that there was an agreement that these twenty-two photographs could be admitted as full exhibits, defense counsel confirmed, "[t]hat is correct."

Defense counsel had the opportunity to cross-examine DeJoseph but declined to do so.

On appeal, the defendant asserts that he has satisfied *Golding* because the trial court's decision to admit the autopsy report into evidence constituted a violation of his constitutional right of confrontation and was harmful. We disagree and conclude that his claim fails under the third prong of *Golding* because he waived it.

It is well established that "[a] waived claim, as opposed to an unpreserved claim, does not satisfy the third prong of the *Golding* test because, in such circumstances, we simply cannot conclude that injustice [has been] done to either party . . . or that the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial . . . . It is well established that [a] defendant in a criminal prosecution may waive one or more of his or her fundamental rights. . . . The mechanism by which a right may be waived . . . varies according to the right at stake. . . . For certain fundamental rights, the defendant must personally make an informed waiver. . . . For other rights, however, waiver may be effected by action of counsel. . . . The decision to admit or exclude evidence on constitutional, statutory, or evidentiary grounds is the type of tactical trial decision that appropriately may be waived by counsel acting alone . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Culbreath*, 340 Conn. 167, 179–80, 263 A.3d 350 (2021).

In the present case, a review of the record demonstrates that defense counsel was aware that DeJoseph had not conducted the autopsy. Despite knowing this fact, when the court asked defense counsel directly if he had any objection to the admission of the report, he replied, "[n]o, Your Honor." The decision not to object appears to be part of defense counsel's trial strategy. Indeed, at the hearing on the motion to suppress the

crime scene photographs, defense counsel, in significant part, justified his objection to the admissibility of the crime scene photographs on the basis of the anticipated admission of the testimony of the medical examiner regarding the number and extent of the victim's injuries. To be sure, our review of the autopsy photographs, the admission of which defense counsel also did not object to, confirms that the number of stab wounds and the manner of death are depicted in a more sanitized manner than they are in the gruesome crime scene photographs that defense counsel sought to suppress.

On the basis of our thorough review of the record, we conclude that defense counsel's decision not to object to the admission of the autopsy report was a strategic decision made to strengthen his argument that the court should preclude admission of the crime scene photographs. Given that defense counsel made a strategic choice to seek to preclude the crime scene photographs but raised no objection to the admission of the autopsy report, the medical examiner's testimony or the autopsy photographs, we cannot conclude that the trial court violated the defendant's constitutional rights by admitting these items into evidence. See, e.g., *Mozell* v. *Commissioner of Correction*, 291 Conn. 62, 73, 967 A.2d 41 (2009) ("[t]o allow the [defendant] to seek reversal now that his trial strategy has failed would amount to allowing him to induce potentially harmful error, and then ambush the state with that claim on appeal" (internal quotation marks omitted)).

Lastly, the defendant claims that he could not waive his constitutional claim because the controlling precedent changed in 2024, when the United States Supreme Court decided *Smith* v. *Arizona*, 602 U.S. 779, 144 S. Ct. 1785, 219 L. Ed. 2d 420 (2024). See *State* v. *Johnson*, 345 Conn. 174, 188–89, 283 A.3d 477 (2022) ("when the law governing a defendant's constitutional claim has

changed after the defendant's trial, counsel acting under binding precedent in effect at the time of the trial cannot make a knowing and intelligent waiver of rights affected by the later decision changing the law"). We disagree because *Smith* did not change the controlling law governing the defendant's claim. *Smith* held in relevant part that "[a] [s]tate may not introduce the testimonial out-of-court statements of a forensic analyst at trial, unless she is unavailable and the defendant has had a prior chance to cross-examine her. . . . Neither may the [s]tate introduce those statements through a surrogate analyst *who did not participate in their creation.* . . . And nothing changes if the surrogate . . . presents the out-of-court statements as the basis for his expert opinion." (Citations omitted; emphasis added.) *Smith* v. *Arizona*, supra, 802–803.

This holding is consistent with controlling precedent in existence since at least 2011. Indeed, in *Bullcoming* v. *New Mexico*, 564 U.S. 647, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011), the United States Supreme Court explained that "surrogate testimony"—when the testifying expert neither participated in nor observed the test but worked in the same laboratory as the nontestifying expert who conducted the test—does not satisfy the confrontation clause because the testifying "surrogate" could not convey what the original expert knew or observed about the particular test utilized. Id., 652, 661. In *State* v. *Walker*, 332 Conn. 678, 212 A.3d 1244 (2019), decided more than three years before trial in the present case, we relied on *Bullcoming* to hold that an expert may testify regarding a nontestifying expert's results only if the testifying expert personally observed the testing or retested the raw materials herself. Id., 716–19.

In the present case, it is undisputed that DeJoseph personally observed the autopsy being conducted, reviewed the autopsy findings and photographs, and

formed her own opinions. See footnote 9 of this opinion. Because *Smith* v. *Arizona*, supra, 602 U.S. 779, did not change the law regarding the constitutional right of confrontation applicable to these circumstances, "we must presume that defense counsel was aware of the defendant's federal constitutional claim and made a strategic decision to waive it." *State* v. *Culbreath*, supra, 340 Conn. 182.

Accordingly, defense counsel waived the defendant's constitutional claim at trial, and the defendant's claim fails under the third prong of *Golding*.

The judgment is affirmed.

In this opinion the other justices concurred.

---

## STATE OF CONNECTICUT *v.* DAVIS ROMAN VILLANUEVA (SC 20869)

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

*Syllabus*

Convicted of murder, carrying a pistol without a permit, and criminal possession of a firearm in connection with the shooting death of the victim, the defendant appealed to this court. The defendant claimed that the trial court had deprived him of his constitutional right to present a defense by declining to instruct the jury on the adequacy of the police investigation into the victim's murder. He also claimed that the trial court had violated his right to due process under the state constitution by admitting into evidence an out-of-court identification of him by B, an eyewitness to the shooting, and his constitutional right to confrontation by admitting certain testimony of a medical examiner, N, who did not personally perform the victim's autopsy. *Held*:

There was no merit to the defendant's claim that he was deprived of his right to present a defense when the trial court declined to instruct the jury that it could consider inadequacies in the investigation of the victim's murder by the police.

To the extent that the defendant's investigative inadequacy claim was premised on the contention that the investigation by the officers responding to

the crime scene resulted in certain lapses, this court declined to review that portion of the defendant's claim because defense counsel did not raise it in the trial court.

Moreover, as to the portion of the defendant's investigative inadequacy claim regarding the failure of the police to investigate another individual as an alternative suspect and to perform a victimology, there was no evidence in the record to support these contentions.

The trial court did not violate the defendant's state constitutional right to due process by denying the defendant's motion to preclude B's out-of-court identification of the defendant.

The defendant could not prevail on his claim that the identification procedure employed by the police was suggestive and that the resulting identification was unreliable on the ground that, one week before a police officer administered the photographic array, another police officer had allegedly pressured B to identify someone or face possible prosecution for the victim's murder, as B provided uncontroverted testimony at trial that the officer administering the photographic array reassured her that it was fine if she did not identify anyone from the array and that she did not select the defendant's photograph due to coercion or the potential threat of prosecution.

Furthermore, the failure of the police officer administering the identification procedure to instruct B, in accordance with the statute (§ 54-1p) mandating certain procedures for lineups and photographic arrays, that the investigation would continue regardless of whether B identified someone did not render the identification procedure suggestive, as the other required instructions, including warnings that the perpetrator was not necessarily among those pictured in the array and that B should not feel obligated to identify someone, were provided, there was no evidence that B actually believed that the investigation would not continue if she failed to identify a suspect, and the array otherwise constituted a properly conducted, double-blind sequential identification procedure.

The trial court did not violate the defendant's sixth amendment right to confrontation by allowing N to testify regarding the victim's injuries and cause of death, even though N did not personally perform the victim's autopsy.

To the extent that the defendant's claim was based on his contention that a certain autopsy photograph admitted into evidence communicated the apparent conclusions of W, the medical examiner who conducted the autopsy and that N's testimony interpreting that photograph violated his right to confront W, the confrontation clause bars only the introduction of hearsay, and this court concluded that the autopsy photograph itself was not hearsay and that N's testimony about the victim's wounds as depicted in the photograph was based solely on her review and interpretation of the

photograph rather than on the findings and conclusions W included in the autopsy report.

Moreover, even if some of N's other testimony regarding the autopsy and the victim's injuries constituted improperly admitted testimonial hearsay, the error was harmless beyond a reasonable doubt, as the improperly admitted evidence could not have affected the verdict because there was no dispute regarding the cause of the victim's death and the evidence of the defendant's guilt was overwhelming.

Argued April 16—officially released July 15, 2025

*Procedural History*

Substitute information charging the defendant with the crimes of murder, carrying a pistol without a permit, and criminal possession of a weapon, brought to the Superior Court in the district of New Haven, where the court, *Alander*, *J.*, denied the defendant's motion to preclude a witness' out-of-court identification; thereafter, the charges of murder and carrying a pistol without a permit were tried to the jury before *Alander*, *J.*; verdict of guilty; subsequently, the charge of criminal possession of a weapon was tried to the court, *Alander*, *J.*; finding of guilty; thereafter, the court, *Alander*, *J.*, rendered judgment in accordance with the verdict and the finding, from which the defendant appealed to this court. *Affirmed.*

*Denis J. O'Malley III*, assistant public defender, for the appellant (defendant).

*Laurie N. Feldman*, assistant state's attorney, with whom were *Melissa R. Holmes*, deputy assistant state's attorney, and, on the brief, *John P. Doyle*, state's attorney, and *Seth R. Garbarsky*, senior assistant state's attorney, for the appellee (state).

*Opinion*

DANNEHY, J. The defendant, Davis Roman Villanueva, appeals[1] from the judgment of conviction, ren-

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

dered after a jury trial, of murder in violation of General Statutes § 53a-54a (a), carrying a pistol without a permit in violation of General Statutes (Rev. to 2019) § 29-35 (a), and criminal possession of a firearm in violation of General Statutes (Rev. to 2019) § 53a-217 (a) (1). The defendant claims that the trial court (1) deprived him of his right to present a defense by refusing to instruct the jury on investigative inadequacy, (2) violated his right to due process under the state constitution by admitting a witness' out-of-court identification of him, and (3) violated his right of confrontation under the sixth amendment to the United States constitution by admitting the testimony of a medical examiner who did not personally perform the autopsy on the victim, Casey Schoonover. We affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to our resolution of this appeal. In the early morning hours of October 4, 2020, the defendant shot and killed the victim outside Mr. Bentley's Café on Grove Street in Meriden. The entire incident was captured by various video surveillance cameras connected to the café. At approximately 12 a.m. that morning, Diana Baez, an eyewitness to the shooting, had gone with her siblings and brother-in-law to a private, after-hours club located on the second floor of the café. There, she interacted with the defendant but never exchanged names with him. At approximately 4 a.m., Baez and her family decided to go to an all-night diner and invited the defendant to accompany them. As the group was leaving the club, they ran into a former boyfriend of Baez' sister, Ramphis Pacheco, who was extremely intoxicated and acting belligerent. For his own good, the family convinced Pacheco to leave with them.

The victim arrived at the club just as Baez' group was leaving. At the door, Pacheco threw his arm around the victim and started hassling him. The victim told

Pacheco to leave him alone and go home. In response, the defendant threw a beer can at the victim and charged at him. Baez and her siblings pulled the defendant off the victim, after which the defendant ran to his red pickup truck, which was parked in an empty lot next to the café. When he got there, he retrieved something from inside the truck. As he was doing this, Baez walked up behind him, and they began talking. Within seconds, the victim appeared and started walking diagonally across the lot in the direction of Foster Court, a no outlet road where he had left his car. Foster Court runs parallel to Grove Street along the west side of the lot where the defendant's truck was parked. Footage from the café's surveillance cameras shows that, when the defendant saw the victim, he ran toward him, struck him forcefully on the head and then shot him twice. The footage also shows the victim's body jerk violently after the first shot was fired, at which point Baez and her brother-in-law tried to intervene on the victim's behalf. After shooting the victim, the defendant jumped into his truck and sped away. Baez did not see a gun in the defendant's hand until after the shooting, although she did see a muzzle flash when the weapon discharged. The victim ran away after the shooting, which led Baez to assume he was uninjured. In fact, one of the bullets severed a major artery in his abdomen.

Meriden Police Officer Zackary Golebiewski arrived at the scene seconds after the shooting. Golebiewski heard two gunshots from where he was parked a short distance away and saw the defendant's red truck speeding away. Just as he heard the gunshots, Golebiewski saw Pacheco cross Grove Street and walk toward Union Street. He then saw Pacheco's grey Chevrolet Malibu turn south on Grove Street and then take an immediate right on Springdale Avenue. Golebiewski advised police dispatch of what was happening at the café and then proceeded to search for the defendant's red truck. While

enroute, Golebiewski pulled alongside Baez' family and asked whether they too had heard gunshots and whether the red truck was involved in the shooting. They responded falsely that the shots had come from an area west of the café and that the driver of the truck was not involved. Golebiewski searched for the red truck for several minutes and then returned to the café. By then, other officers were on the scene searching for evidence of a shooting. A few minutes later, Golebiewski was summoned to a traffic stop, where another officer, while enroute to the café, had stopped Pacheco's Chevrolet Malibu. Golebiewski identified Pacheco's vehicle as the grey sedan he had seen driving on Grove Street immediately after the shooting. Pacheco was briefly questioned and allowed to leave. No witness reported hearing any other gunshots in the vicinity of the café apart from the two gunshots fired from the defendant's gun.

With the help of a phone locator application, the victim's girlfriend found the victim's body three hours later, lying next to his car on Foster Court, about forty feet from where the defendant had shot him. Because the victim's gunshot wounds were not immediately incapacitating, he would have been able to walk or run for one or two minutes before succumbing to his injuries.

Four days later, on October 8, 2020, two Meriden police detectives visited Baez at her Manchester apartment, having identified her from the café's surveillance video footage. During the interview, they told Baez that she could be charged with conspiracy to commit murder or hindering if she did not reveal the name of the person who shot the victim. Baez told them that she had never met the shooter prior to the night in question, that they had not exchanged names that evening, and that, if she had known that the victim had been shot, she would have summoned help immediately.

As part of their investigation, the police collected several beer cans from near the café's entrance, where the shooter was seen on the surveillance video footage throwing a can of beer at the victim. A DNA mixture collected from one of the cans included the defendant's DNA, with a profile 100 billion times more likely to occur if it originated from the defendant and an unknown individual than from two unknown individuals.

Within days of the murder, Lieutenant Noel Perez Crespo, a twenty-eight year veteran of the Puerto Rico police who had known the defendant his entire life, received a tip from an informant that the defendant had murdered a man in Meriden. Meriden police sent Crespo a still photograph of the defendant taken from the surveillance footage. Crespo identified the defendant immediately from that photograph.

A few days later, Baez identified the defendant through a double-blind, sequential photographic array procedure conducted by an officer from the Manchester Police Department. After the identification, Baez informed the officer that she was not 100 percent certain that the person she identified was the person who shot the victim because the shooter was wearing eyeglasses on the night in question, whereas none of the men in the photographic array was wearing glasses. The defendant was subsequently arrested in Puerto Rico and extradited to Connecticut to stand trial for the victim's murder. At trial, Baez did not identify the defendant. When asked whether the person in the surveillance footage and whom she had identified in the photographic array was present in the court room, Baez replied, "[n]o."[2]

During closing arguments, defense counsel argued, among other things, that the surveillance footage caused the Meriden police to experience tunnel vision to such a degree that they did not consider the possibility that

[2] Crespo testified at trial that the defendant was heavier at the time of trial and had longer hair than he had at the time of the murder.

Pacheco was the actual killer. Counsel reminded the jury that, according to Baez, the victim ran away after the shooting, meaning it was possible that he had not been shot. Counsel further argued that, according to Golebiewski and the surveillance footage, Pacheco drove his car around the block after leaving the café, which meant he could have shot the victim when he passed by Foster Court. As for the DNA evidence, counsel argued that there was no way of knowing when it was left by the defendant and, therefore, that it did not prove that the defendant was present at the café on the night in question.

I

The defendant first claims that the trial court deprived him of his right to present a defense by declining to instruct the jury that it could consider inadequacies in the police investigation in determining whether the state had proven his guilt beyond a reasonable doubt. We disagree.

The following additional facts are relevant to this claim. Near the end of the trial, the court, *Alander*, *J.*, conducted a charging conference at which defense counsel requested that the court provide the jury with an investigative inadequacy instruction. Counsel requested the instruction "on the theory that . . . there were multiple failures" in the police investigation. The court asked defense counsel if she could be more specific as to the nature of the alleged failures. Counsel replied that there was a failure to inspect the victim's cell phone. When the court responded that, according to the testimony, the victim's phone was sent to the Federal Bureau of Investigation for forensic analysis, defense counsel argued that the prosecutor should have presented evidence concerning the results of that analysis. She further stated, "I'm not sure that we necessarily need to specifically identify the cell phone, but I think it's a . . . broader question of whether or not the police failed to inspect

the . . . evidence that was seized." The trial court replied, "[w]ell, there needs to be some evidence that they didn't . . . evaluate evidence that was seized. Right? I mean, there needs to be some evidence of an inadequate investigation before I can give the charge. So, that's what I'm trying to understand. What evidence is there that you're claiming in this case . . . arguably . . . shows an inadequate investigation?" Defense counsel responded that there was testimony that, "in . . . due course, they would have done a victimology [which is a study that] . . . look[s] into the victim . . . [to determine] whether or not he had a criminal history, whether or not he had any enemies on the street. And . . . there was no evidence that [this] was done in this case." She further argued that there was no evidence that the police investigated alternative suspects.

At this point, the prosecutor interjected that there was "no evidence at all that [any of this] wasn't done," that, in fact, all of it had been done, and that, in order to instruct the jury on investigative inadequacy, there must be evidence of a specific investigative lapse or a failure on the part of the police. The prosecutor further argued that the defense had every opportunity at trial to adduce evidence that the state had failed to investigate other suspects, perform a victimology, or examine the victim's cell phone, but failed to do so. Defense counsel responded that it was not the defendant's burden "to prove or disprove anything" and that it was incumbent on the state to present evidence that the police performed an adequate investigation. The court then stated: "[Just] because they charged [the defendant] doesn't mean they didn't investigate other people. I mean, so is it your claim that the state has to present witnesses that say not only did we look at [the defendant], we [also] looked at [other suspects] . . . and then if they don't do that, you can argue that the investigation was inadequate?" When defense counsel answered

that this was the defendant's claim, the trial court stated: "Here's the problem. The form jury instruction on adequacy [of the] police investigation, the first sentence is 'you have heard some testimony of witnesses and arguments by counsel that the state did not [do] X.' I don't have any . . . evidence that I remember in this case from a witness that the state did not do X or failed to do Y. That's the problem. And so, for that reason, I decline to give the . . . instruction on [the] adequacy of [the] police investigation."[3]

The following legal principles guide our analysis of this claim. "In determining whether the trial court improperly refused a request to charge, [w]e . . . review the evidence presented at trial in the light most favorable to supporting the . . . proposed charge. . . . A request to charge [that] is relevant to the issues of [a] case and [that] is an accurate statement of the law must be given. . . . If, however, the evidence would not rea-

[3] Instruction 2.6-13 of the Connecticut Criminal Jury Instructions, entitled "Adequacy of Police Investigation," provides: "You have heard some testimony of witnesses and arguments by counsel that the state did not *<insert alleged investigative failure(s): e.g., conduct scientific tests, perform a thorough and impartial investigation, follow standard procedure, etc.>*. This is a factor that you may consider in deciding whether the state has met its burden of proof in this case because the defendant may rely on relevant deficiencies or lapses in the police investigation to raise reasonable doubt. Specifically, you may consider whether *<insert evidence of alleged police deficiencies or lapses>* would normally be taken under the circumstances, whether if (that/these) action(s) (was/were) taken, (it/they) could reasonably have been expected to lead to significant evidence of the defendant's guilt or evidence creating a reasonable doubt of his guilt, and whether there are reasonable explanations for the omission of (that/those) actions. If you find that any omissions in the investigation were significant and not reasonably explained, you may consider whether the omissions tend to affect the quality, reliability, or credibility of the evidence presented by the state to prove beyond a reasonable doubt that the defendant is guilty of the count(s) with which (he/she) is charged in the information. The ultimate issue for you to decide, however, is whether the state, in light of all the evidence before you, has proved beyond a reasonable doubt that the defendant is guilty of the count(s) with which (he/she) is charged." Connecticut Criminal Jury Instructions 2.6-13, available at https://jud.ct.gov/JI/Criminal/Criminal.pdf (last visited July 9, 2025).

sonably support a finding of the particular issue, the trial court has a duty not to submit it to the jury. . . . Thus, a trial court should instruct the jury in accordance with a party's request to charge [only] if the proposed instructions are reasonably supported by the evidence." (Internal quotation marks omitted.) *State* v. *Ashby*, 336 Conn. 452, 497–98, 247 A.3d 521 (2020).

"As a general rule, a defendant is entitled to have instructions on a defense for which there is evidence produced at trial to justify the instruction, no matter how weak or incredible the claim." *State* v. *Varszegi*, 236 Conn. 266, 282, 673 A.2d 90 (1996). Thus, "[i]f [a] defendant asserts a recognized legal defense and the evidence indicates the availability of that defense, such a charge is obligatory and the defendant is entitled, as a matter of law, to a theory of defense instruction. . . . The defendant's right to such an instruction is founded on the principles of due process. . . . Before an instruction is warranted, however, [a] defendant bears the initial burden of producing sufficient evidence to inject [the defense] into the case." (Internal quotation marks omitted.) *State* v. *Lynch*, 287 Conn. 464, 470–71, 948 A.2d 1026 (2008).

On appeal, the defendant argues that the trial court incorrectly concluded that the evidence was insufficient to warrant an investigative inadequacy instruction. He contends that a defendant is entitled to a theory of defense instruction no matter how weak or incredible the evidence supporting it may be and that the evidence in the present case "more than satisfied" this low threshold. In particular, the defendant claims that the following evidence warranted the instruction: (1) Golebiewski chose to pursue the red pickup truck rather than interview witnesses, namely, Baez and her family, "even though he 'did not know what direction the truck went in,' " (2) those same witnesses "told him they heard gunshots [coming] from the west," which was the direc-

tion of Foster Court, and yet he and his fellow officers limited their search to the parking lot next to the café, (3) despite stopping Pacheco's vehicle shortly after the shooting, "the police failed to investigate [him] as a suspect," and (4) no witness testified that a victimology was performed, even though a Meriden police officer testified that a victimology is " 'very important' " in homicide investigations.

As the state argues, and our review of the record confirms, the defendant did not claim in the trial court that investigative lapses on the part of Golebiewski—or any of the other responding officers—supported an investigative inadequacy instruction. Counsel argued that the instruction was warranted on the theory that the police had failed to inspect the victim's cell phone, perform a victimology, and investigate other suspects. As a result, the trial court was not on notice that the defendant was seeking the instruction on the basis of any investigative error on the part of the responding officers. Because the claim was not raised in the trial court, we decline to review it on appeal.[4]

As for the defendant's remaining contentions relating to his investigative inadequacy claim, a review of the record reveals no evidence that the police had failed to investigate Pacheco as an alternative suspect or perform a victimology. Indeed, when asked by the trial court if she could identify any evidence supporting either contention, defense counsel was unable to do so. Instead, she argued that the defendant was not required to present evidence of specific investigative lapses, that it was the state's burden to prove that the police con-

[4] See, e.g., *State* v. *Ortega*, 345 Conn. 220, 255, 284 A.3d 1 (2022) ("[f]or this court to . . . consider [a] claim on the basis of a specific legal ground not raised during trial would amount to trial by ambuscade, unfair both to the [court] and to the opposing party" (internal quotation marks omitted)); *Diaz* v. *Commissioner of Correction*, 335 Conn. 53, 58, 225 A.3d 953 (2020) ("[o]nly in [the] most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court" (internal quotation marks omitted)).

ducted an adequate investigation, and that the jury could infer an inadequate investigation from the absence of evidence indicating differently. Suffice it to say, the trial court properly rejected these contentions as contrary to settled principles of law. See, e.g., *State* v. *Gomes*, 337 Conn. 826, 851, 256 A.3d 131 (2021) ("[c]onducting a thorough, professional investigation is not an element of the government's case" (internal quotation marks omitted)); see also *State* v. *Terwilliger*, 294 Conn. 399, 409, 984 A.2d 721 (2009) (defendant must produce evidence to justify theory of defense instruction); *State* v. *Singh*, 259 Conn. 693, 701, 793 A.2d 226 (2002) ("[counsel may not] comment [on], or . . . suggest an inference from, facts not in evidence" (internal quotation marks omitted)); *State* v. *Copas*, 252 Conn. 318, 338–39, 746 A.2d 761 (2000) (inferences drawn by jury must be founded on evidence and not on conjecture). In light of the foregoing, the defendant cannot prevail on his claim that the trial court improperly declined to instruct the jury on investigative inadequacy.[5]

II

The defendant next claims that the trial court violated his state constitutional right to due process by denying

[5] Contrary to the defendant's assertions, this case bears no resemblance to *State* v. *Gomes*, supra, 337 Conn. 826, in which the trial court instructed the jury on investigative inadequacy on the basis of evidence suggesting a number of investigative lapses on the part of the police. Id., 832–33. In *Gomes*, the victim was struck on the head with a bottle while standing on the patio of a crowded bar. Id., 829. "At trial, the [defense] sought to persuade the jury that reasonable doubt existed regarding the victim's identification of the defendant as the person who assaulted her." (Internal quotation marks omitted.) Id., 832. Specifically, defense counsel argued "that the victim had misidentified him . . . either mistakenly or intentionally to protect . . . the actual assailant [who had been at the club attending the same party as the victim], and that, if the police had conducted even a minimally adequate investigation, they would have realized this to be the case." Id., 847. In support of this contention, defense counsel adduced the testimony of various witnesses, including the club owner, who testified that the alleged assailant "was beaten up by a group of club patrons immediately after the victim sustained her injuries." Id., 848. Counsel also elicited testimony from the responding officers that, although they were informed by the police dis-

his motion in limine to preclude Baez' out-of-court identification of him. The defendant argues that the identification was the product of an unnecessarily suggestive identification procedure because the Manchester police officer who administered it failed to instruct Baez, in accordance with General Statutes § 54-1p (c) (3) (G),[6]

patcher that the 911 caller had identified the alleged assailant as the attacker, neither officer ever investigated him as a suspect. Id. The officers also acknowledged that they were approached at the scene by several club patrons claiming to have information about the assault, but they never attempted to interview any of them regarding what they had seen. Id. During closing arguments, "[d]efense counsel asked the jury to find the defendant not guilty on the basis of these investigative lapses because they raised a reasonable doubt as to the trustworthiness of the victim's identification of him as the person who attacked her." Id., 856. In the present case, however, in stark contrast to *Gomes*, the record reflects no evidence, and the defendant was unable to identify any evidence at trial, that supported his requested investigative inadequacy instruction. Consequently, the trial court properly declined to give that instruction.

[6] General Statutes § 54-1p (c) provides in relevant part: "(1) Whenever a specific person is suspected as the perpetrator of an offense, the photographs included in a photo lineup . . . shall be presented sequentially so that the eyewitness views one photograph . . . at a time in accordance with the policies and guidelines developed and promulgated by the Police Officer Standards and Training Council and the Division of State Police within the Department of Emergency Services and Public Protection pursuant to subsection (b) of this section;

"(2) The identification procedure shall be conducted in such a manner that the person conducting the procedure does not know which person in the photo lineup . . . is suspected as the perpetrator of the offense, except that, if it is not practicable to conduct a photo lineup in such a manner, the photo lineup shall be conducted by the use of a folder shuffle method, computer program or other comparable method so that the person conducting the procedure does not know which photograph the eyewitness is viewing during the procedure;

"(3) The eyewitness shall be instructed prior to the identification procedure:

"(A) That the eyewitness will be asked to view an array of photographs . . . and that each photograph . . . will be presented one at a time;

"(B) That it is as important to exclude innocent persons as it is to identify the perpetrator;

"(C) That the persons in a photo lineup . . . may not look exactly as they did on the date of the offense because features like facial or head hair can change;

"(D) That the perpetrator may or may not be among the persons in the photo lineup . . .

that the police would continue to investigate the victim's murder regardless of whether Baez identified someone. The defendant additionally argues that the identification procedure was suggestive, and the resulting identification unreliable, because of pressure that the Meriden police allegedly placed on Baez, one week before the identification, "to identify someone—anyone—or be charged with murder and exposed to twenty-five years to life in prison." (Emphasis omitted.) We disagree.

"(E) That the eyewitness should not feel compelled to make an identification;

"(F) That the eyewitness should take as much time as needed in making a decision; and

"(G) That the police will continue to investigate the offense regardless of whether the eyewitness makes an identification;

"(4) In addition to the instructions required by subdivision (3) of this subsection, the eyewitness shall be given such instructions as may be developed and promulgated by the Police Officer Standards and Training Council and the Division of State Police within the Department of Emergency Services and Public Protection pursuant to subsection (b) of this section;

"(5) The photo lineup . . . shall be composed so that the fillers generally fit the description of the person suspected as the perpetrator and . . . so that the photograph of the person suspected as the perpetrator resembles his or her appearance at the time of the offense and does not unduly stand out;

"(6) If the eyewitness has previously viewed a photo lineup . . . in connection with the identification of another person suspected of involvement in the offense, the fillers in the lineup in which . . . the photograph of the person suspected as the perpetrator is included shall be different from the fillers used in any prior lineups;

"(7) At least five fillers shall be included in the photo lineup . . . in addition to the person suspected as the perpetrator;

"(8) In a photo lineup, no writings or information concerning any previous arrest of the person suspected as the perpetrator shall be visible to the eyewitness;

* * *

"(11) The person suspected as the perpetrator shall be the only suspected perpetrator included in the identification procedure;

"(12) Nothing shall be said to the eyewitness regarding the position in the photo lineup . . . of the person suspected as the perpetrator;

"(13) Nothing shall be said to the eyewitness that might influence the eyewitness's selection of the person suspected as the perpetrator; [and]

"(14) If the eyewitness identifies a person as the perpetrator, the eyewitness shall not be provided any information concerning such person prior

During the probable cause hearing, defense counsel asked to be heard on the defendant's motion to preclude Baez' October 14, 2020 out-of-court identification, arguing that the procedure by which the identification was obtained was unnecessarily suggestive because of the omitted instruction and the Meriden police officers' October 8, 2020 threats of prosecution. With respect to the instruction, defense counsel argued that the photographic array instruction sheet that Baez had signed on October 14, 2020, was incomplete under § 54-1p (c) (3) insofar as it was missing a second page containing the omitted instruction.[7]

When the trial court questioned the relevance of the October 8, 2020 interview to the issue of whether the identification procedure conducted "by a different police department" at a later date was unnecessarily suggestive, defense counsel responded: "The way that it impacts [the identification is that Baez] . . . could have reasonably believed, and I think reasonably did believe, that, in order for the investigation against her to stop, she had to provide them with somebody, and that kind of pressure is not conducive to reliability. Typically, our reliability cases concern disinterested eyewitnesses. In

to obtaining the eyewitness's statement regarding how certain he or she is of the selection . . . ."

[7] Although the second page of the instruction sheet contained five instructions, the defendant's claim in the trial court related only to the instruction advising the witness that the investigation would continue regardless of whether she identified someone from the photographic array. The following other four instructions were contained on the second page of the instruction sheet: "If there are other witnesses, you must not indicate to them that you have or have not made an identification of a person . . . . The officer administering this procedure either does not know whether any of the people in the photographic array or in the lineup were involved in the crime or does not know the order in which you are viewing the photographs . . . . If you do select someone, the officer will not be able to provide you any information about the person you have selected . . . . If you select a person or photograph you will be asked to provide a statement about this process and the results. If you don't recognize anyone in the lineup, please say so . . . ."

this context, the police had shifted her into the role of a participant . . . .'' Counsel further argued, ''if you said to somebody, if you don't go and . . . cooperate or if you don't go and identify a witness, something bad will happen to you, that would be relevant to the court's assessment as to whether or not the person believed . . . they had to pick somebody out of [the photographic array], as opposed to just looking at the pictures.'' The court responded, ''so, your claim then is that there was a carryover'' from the October 8 interview to the October 14, 2020 photographic array, ''making the procedure [administered by the Manchester police officer] unnecessarily suggestive . . . ? Do you have any authority for that?'' When counsel replied that he had no authority, the court permitted him ''to explore with [Baez] the circumstances surrounding the [identification] procedure in an effort to try to lay a [factual] basis for [the claim] . . . .''

Thereafter, defense counsel asked Baez whether the Meriden police informed her during the October 8, 2020 interview that she ''[was] possibly in trouble for being associated with the murder,'' to which Baez replied, ''[t]hat's true.'' Counsel also asked her whether the police had told her, ''I'm going to find out who did it, and I need your help,'' to which Baez replied, ''I don't recall those exact words, but yes.'' She further stated, ''they . . . ask[ed] me if I had any connections in any way, shape or form with [the defendant]'' and ''ask[ed] . . . for . . . [my] help in trying to track [him] down . . . .'' Counsel asked Baez, ''[a]nd you understood from them that, if you didn't help them, you could be looking at . . . criminal charges, right?'' Baez replied, ''[t]hat was clear, yes.'' Counsel then asked Baez whether, when she was asked to look at the photographic array on October 14, 2020, she ''understood that it would be helpful for [her] . . . if [she] could identify somebody

from [the] photos?" Baez replied, "[i]t would have been ideal, yes."[8]

After defense counsel finished questioning Baez, the prosecutor asked Baez, "did the Manchester officer that conducted the photo array [on October 14, 2020] . . . reiterate . . . that they could potentially charge you with . . . crimes" and "[d]id he [intimidate] you in any way?" When Baez replied, "[n]o sir," the following exchange occurred:

"[The Prosecutor]: . . . Safe to say there [were] no threats . . . made by the Manchester cop?

"[Baez]: Absolutely not; he was very helpful.

[8] At trial, defense counsel asked Baez again whether, when she identified the defendant, she thought "it would be ideal if [she] could be helpful to [the police]." At that time, Baez clarified that "[i]t wasn't a matter of being helpful to anybody . . . with respect to whatever it was that I was facing, it was just a matter of doing the right thing. . . . If I can help [the police], I'm gonna help." During redirect examination, the following exchange occurred between the prosecutor and Baez:

"[The Prosecutor]: You were asked some questions about being [threatened with prosecution]. Were you ever charged with this incident?

"[Baez]: No.

"[The Prosecutor]: Okay. Did the [Meriden] cops—when they met [you] the second time in Manchester [before the photographic array], did they [threaten] you again [with] charges and all that?

"[Baez]: No.

"[The Prosecutor]: How about the Manchester cop, did he threaten you at all?

"[Baez]: Not at all.

"[The Prosecutor]: Did he coerce you at all?

"[Baez]: No.

"[The Prosecutor]: Did he tell you at any time who to pick out of that lineup?

"[Baez]: No.

"[The Prosecutor]: You said you wanted to cooperate with the cops. You were just asked that a moment ago.

"[Baez]: Yes.

"[The Prosecutor]: Be helpful?

"[Baez]: Yes.

"[The Prosecutor]: How come?

"[Baez]: It's the right thing to do."

"[The Prosecutor]: How about the Meriden cop, and I don't mean at your house . . . on [October 8, 2020], but [rather] when you made the photo identification, did he say once again, hey, we're going to charge you with murder and all that?

"[Baez]: No, sir.

"[The Prosecutor]: What was the exchange you had with him to the extent you had any exchange?

"[Baez]: They knocked on my door, I opened it. He said hey, [Baez], it's me again. I was like sure, come on in. He just introduced the Manchester police [officer] and . . . said . . . we have some pictures that we would like to . . . show you. I'm gonna step out of your apartment, and . . . [the Manchester officer is] gonna go over everything with you, and that's exactly what happened. . . .

"[The Prosecutor]: And then from then on, the Manchester [cop] showed you the pictures and [gave you] instructions . . . ?

"[Baez]: Yes, he read . . . things in depth, and he explained things in depth, and I was completely honest with him . . . [that] I wasn't sure . . . and he reassured me. He's like, if you're not sure, then you're not sure—you know. There was absolutely no pressure.

"[The Prosecutor]: Okay, and along those lines, did you feel pressure either from the Manchester police officer or from the Meriden detectives to pick someone out of that [photographic] lineup . . . ?

"[Baez]: No."

At the conclusion of the hearing, the trial court denied the defendant's motion to preclude Baez' identification, concluding that the identification procedure conducted by the Manchester police was not in any way suggestive. In reaching its determination, the court applied the test

adopted in *State* v. *Harris*, 330 Conn. 91, 191 A.3d 119 (2018), for determining whether an out-of-court identification is admissible under the state constitution. See id., 131. The court found "zero evidence" that the officer who administered the procedure put any pressure on Baez to make an identification or that the procedure did not adhere to best practices in terms of the composition of the photographic array and the care taken to ensure Baez' attention was not directed toward the defendant's photograph. Likewise, the court found "zero evidence" that Baez spoke to anyone who would impact any matter the court have had to decide relative to the admissibility of the identification.

The trial court also rejected the defendant's contention that the omitted instruction rendered the identification procedure unnecessarily suggestive. In so doing, the court noted that, in *State* v. *Marquez*, 291 Conn. 122, 967 A.2d 56, cert. denied, 558 U.S. 895, 130 S. Ct. 237, 175 L. Ed. 2d 163 (2009), this court held that there is no presumption of suggestiveness, even when the police omit more critical instructions. See id., 162. The court further observed that the Manchester officer's instructions that the perpetrator's photograph may or may not be among the photographs in the array, that it was just as important to exclude innocent persons as it was to identify the perpetrator, and that Baez should not feel compelled to make an identification were more important than the omitted instruction in terms of reducing the procedure's potential suggestiveness. The court finally observed that, even if it was later determined that the procedure was unnecessarily suggestive, the identification itself was reliable and, therefore, admissible under the eight "estimator variables" adopted in *Harris* for determining the admissibility of identifications that are the product of unnecessarily suggestive identification procedures.[9]

[9] We note that the defendant did not make any claim in the trial court with respect to the eight estimator variables and their impact on the overall

On appeal, the defendant reasserts his claim that the Manchester police officer's failure to instruct Baez that the investigation would continue regardless of whether she identified a suspect, combined with the Meriden police officers' earlier threats of prosecution, gave rise to a substantial risk of misidentification and, therefore, that the identification should have been suppressed.[10] We disagree.

"[A] challenge to a trial court's conclusion regarding whether the pretrial identification procedure was unnecessarily suggestive presents a mixed question of law and fact. . . . [B]ecause . . . the reliability of an identification involves the constitutional rights of an accused . . . we are obliged to examine the record scrupulously to determine whether the facts found are adequately supported by the evidence and whether the court's ultimate inference of reliability was reasonable." (Citation omitted; internal quotation marks omitted.) *State* v. *Outing*, 298 Conn. 34, 50, 3 A.3d 1 (2010), cert. denied, 562 U.S. 1225, 131 S. Ct. 1479, 179 L. Ed. 2d 316 (2011).

reliability of the identification. When asked by the court whether defense counsel wished to make an argument with respect to the reliability prong of the *Harris* test, counsel responded only that the prosecutor had overstated the amount of time Baez spent with the defendant on the night in question, but, other than that, he had nothing more to add. On multiple occasions during the hearing, the trial court sought to clarify defense counsel's precise argument for precluding Baez' identification. The court summarized the argument at various times as follows: "The defendant claims the out-of-court identification is unnecessarily suggestive . . . for two reasons. First reason, the absence of certain warnings required by statute, [§] 54-1p (c) (3), and also what counsel has argued is a . . . spillover effect—from an interview that was conducted by the Meriden Police Department several days before the photo [identification] procedure in question was administered by the Manchester Police Department."

[10] Shortly before trial, the defendant filed a second motion to exclude Baez' out-of-court and possible in-court identification of him on several grounds, including those raised in the defendant's 2021 motion to preclude Baez' identification, which Judge Vitale had denied at the probable cause hearing. Judge Alander adopted Judge Vitale's prior ruling as the law of the case and denied the second motion.

In *State* v. *Harris*, supra, 330 Conn. 115, this court adopted the burden shifting framework embraced by the New Jersey Supreme Court in *State* v. *Henderson*, 208 N.J. 208, 27 A.3d 872 (2011), for determining the admissibility of an eyewitness identification under the state constitution. We held, "as a matter of state constitutional law, that, when an eyewitness identification allegedly results from an unnecessarily suggestive procedure, the defendant has the initial burden of offering some evidence that a system variable undermined the reliability of the eyewitness identification. . . . If the defendant meets this burden, the state must then offer evidence demonstrating that the identification was reliable in light of all relevant system and estimator variables. . . . If the state adduces such evidence, the defendant must then prove a very substantial likelihood of misidentification." (Internal quotation marks omitted.) *State* v. *White*, 334 Conn. 742, 770, 224 A.3d 855 (2020).

"System variables are factors, such as lineup procedures, that are within the control of the criminal justice system." (Internal quotation marks omitted.) *State* v. *Harris*, supra, 330 Conn. 124 n.24. "Estimator variables are factors that stem from conditions over which the criminal justice system has no control and generally arise out of the circumstances under which the eyewitness viewed the perpetrator during the commission of the crime, such as lighting, distance or presence of a weapon." (Internal quotation marks omitted.) Id., 124 n.25. "When there is evidence of a suggestive procedure, the trial court should consider the eight estimator variables . . . identified in *State* v. *Guilbert*, [306 Conn. 218, 253–54, 49 A.3d 705 (2012)] in determining whether the identification is [nevertheless] reliable.[11]" (Footnote

[11] "The eight estimator variables . . . are: (1) there is at best a weak correlation between a witness' confidence in his or her identification and the identification's accuracy; (2) the reliability of an identification can be diminished by a witness' focus on a weapon; (3) high stress at the time of observation may render a witness less able to retain an accurate perception

altered; internal quotation marks omitted.) *State* v. *White*, supra, 334 Conn. 770. When there is no evidence of a suggestive procedure, the reliability of the identification is generally a matter for the jury to decide. See, e.g., *State* v. *Harris*, supra, 132 ("[i]n the absence of evidence of a suggestive procedure or other extraordinary circumstances . . . we continue to believe that evidence relating solely to estimator factors that affect the reliability of the identification goes to the weight, not the admissibility, of the identification").

The first issue we must decide, then, is whether there was evidence of a suggestive identification procedure. The defendant argues that the Meriden police officers' prior threats of prosecution "coerced Baez' identification of the defendant" by giving her "a powerful incentive, fueled by self-interest, to . . . [select] a photo from the lineup despite her lack of confidence that anyone pictured was in fact the perpetrator." (Internal quotation marks omitted.) The defendant further argues that the officers' "highly coercive threat to charge Baez with murder unless she helped [them] was exacerbated by the [Manchester] officer's failure to instruct Baez . . . that the investigation would still continue, regardless of whether . . . [she] identified someone. Instead, Baez was left . . . with the . . . false . . . impression . . . that she only had two options: identify the perpetrator or take the fall for the murder."

and memory of the observed events; (4) cross-racial identifications are considerably less accurate than identifications involving the same race; (5) memory diminishes most rapidly in the hours immediately following an event and less dramatically in the days and weeks thereafter; (6) an identification may be less reliable in the absence of a double-blind, sequential identification procedure; (7) witnesses may develop unwarranted confidence in their identifications if they are privy to postevent or postidentification information about the event or the identification; and (8) the accuracy of an eyewitness identification may be undermined by unconscious transference, which occurs when a person seen in one context is confused with a person seen in another." (Internal quotation marks omitted.) *State* v. *White*, supra, 334 Conn. 770–71 n.15.

The defendant's claim that earlier threats caused Baez to believe that she must identify someone or else she would be charged with murder is utterly at odds with Baez' testimony—which the trial court credited—that she felt "absolutely no pressure" to identify a suspect during the identification procedure that took place on October 14, 2020. Indeed, Baez testified that (1) the Manchester officer "reassured" her that it was perfectly fine if she did not identify a suspect, (2) she did not pick the defendant's photograph because of any threats or coercion by the Meriden police, and (3) when she stated that she wanted to help the police, that was because it was "the right thing to do," not because she thought it would benefit her personally. Given Baez' uncontroverted testimony in this regard, the trial court correctly concluded that the defendant's claim concerning the suggestiveness of the prior threats was baseless. See *State* v. *Henderson*, supra, 208 N.J. 290–91 ("If . . . at any time during the hearing the trial court concludes from the testimony that [the] defendant's initial claim of suggestiveness is baseless, and if no other evidence of suggestiveness has been demonstrated by the evidence, the court may exercise its discretion to end the hearing. Under those circumstances, the court need not permit the defendant or require the [s]tate to elicit more evidence about estimator variables; that evidence would be reserved for the jury."); see also *State* v. *White*, supra, 334 Conn. 772 ("like the court in *Henderson*, we conclude that [no further inquiry] ordinarily is . . . required when there is no evidence of a suggestive procedure").

We are not persuaded that the failure to instruct Baez that the investigation would continue regardless of whether she identified someone rendered the identification procedure suggestive. Although *Harris* adopted a new framework for assessing the reliability of an identification once it is determined to have been the

product of a suggestive procedure; *State* v. *Harris*, supra, 330 Conn. 131; the standard for assessing whether a procedure was suggestive in the first instance remains the same. That is, "any analysis of unnecessary suggestiveness must be conducted in light of the totality of the circumstances and must focus specifically on the presentation of the photographic array itself as well as the behavior of law enforcement personnel to determine if the procedure was designed or administered in such a way as to suggest to the witness that a particular photograph represents the individual under suspicion." *State* v. *Marquez*, supra, 291 Conn. 161.

"The second factor [the behavior of the administering officer], which is related to the first but conceptually broader, requires the court to examine the actions of law enforcement personnel to determine whether the witness' attention was directed to a suspect because of police conduct. . . . It stands to reason that police officers administering a photographic identification procedure have the potential to taint the process by drawing the witness' attention to a particular suspect. This could occur either through the construction of the array itself or through physical or verbal cues provided by an officer." (Internal quotation marks omitted.) *State* v. *Outing*, supra, 298 Conn. 49.

In the present case, the defendant makes no claim that the composition of the photographic array or the conduct of the Manchester officer was suggestive in the sense that either directed Baez' attention toward the defendant's photograph. His claim concerns only the Manchester officer's failure to instruct Baez, prior to administering the procedure, that the investigation would continue regardless of whether she identified someone. As the trial court aptly noted, this court has rejected claims that the failure to provide specific warnings prior to an identification rendered an identification procedure unnecessarily suggestive. See, e.g., *State* v. *Marquez*, supra, 291 Conn. 162–63 (citing cases and

observing that, "[e]ven if a court finds that the police expressly informed witnesses [contrary to established protocol] that the defendant would be in the array, our courts have found the identification procedure unnecessarily suggestive only when other factors exist that otherwise emphasize the defendant's photograph" (internal quotation marks omitted)).

This is not to say that preidentification instructions are irrelevant to the suggestiveness inquiry. In *Marquez*, this court "[found] it significant that the . . . photographic arrays contained a conspicuous might or might not be present warning, indicating to each witness that the perpetrator was not necessarily among those pictured and that the witnesses should not feel obligated to choose someone. The presence of such a warning is a consistent recommendation of the scientific literature . . . and is deemed to counteract effectively the tendency of witnesses to use relative judgment. . . . Moreover, this court expressly has endorsed . . . the use of such warnings and has recognized their potential prophylactic effect against the dangers of the relative judgment process."[12] (Citations omitted; internal quota-

[12] In *State* v. *Ledbetter*, 275 Conn. 534, 571–73, 881 A.2d 290 (2005) (overruled in part on other grounds by *State* v. *Harris*, 330 Conn. 91, 191 A.3d 119 (2018)), cert. denied, 547 U.S. 1082, 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2006), "this court acknowledged an ever growing body of empirical research demonstrating that eyewitnesses often engage in a relative judgment process, under which they tend to identify the person from the lineup who, in the opinion of the eyewitness, looks most like the culprit relative to the other members of the lineup . . . . This research concluded that [t]he problem with the relative judgment process . . . is that it includes no mechanism for deciding that the culprit is none of the people in the lineup, which, in turn, leads to a higher percentage of false identifications. . . . The research further concluded that the tendency to apply relative judgment could be significantly reduced when the administrator informed the witness that the perpetrator may or may not be present in the identification procedure. . . . Although this court agreed that the trial court, as part of its analysis, should consider whether such a warning had been given, the court determined that a per se rule deeming unnecessarily suggestive any identification procedure lacking such a warning to the witness should not be adopted." (Citations omitted; internal quotation marks omitted.) *State* v. *Sanchez*, 308 Conn. 64, 73–74, 60 A.3d 271 (2013).

tion marks omitted.) Id., 162. It is undisputed that both of these instructions were given in this case.

In *Harris*, moreover, we rejected a claim by the amici curiae, the Connecticut Innocence Project and the Innocence Project, "that, for purposes of our state constitutional framework, any material violation of the identification procedures mandated by § 54-1p should render the identification inadmissible per se." *State* v. *Harris*, supra, 330 Conn. 134 n.32. Just as we were not persuaded by the amici's claim in *Harris*, we are not convinced that the failure to provide the omitted instruction in the present case, one of fifteen procedures mandated by § 54-1p; see footnote 6 of this opinion;[13] rendered the identification procedure suggestive per se. Rather, we continue to be of the view that the suggestiveness inquiry should "be made on an ad hoc basis, and . . . that the courts of this state should continue to evaluate whether individual identification procedures are unnecessarily suggestive on the basis of the totality of the circumstances surrounding the procedure, rather than replacing that inquiry with a per se rule." (Internal quotation marks omitted.) *State* v. *Marquez*, supra, 291 Conn. 156.

Applying this standard to the present case, we conclude that the totality of the circumstances supported

[13] As previously indicated; see footnote 7 of this opinion; the Manchester police officer failed to provide five instructions contained on the second page of the Meriden Police Department's photographic array instruction sheet. Although only the omitted instruction at issue in this appeal is expressly required by § 54-1p (c) (3) (G), subdivision (4) of § 54-1p (c) provides that, "[i]n addition to the instructions required by subdivision (3) of this subsection, the eyewitness shall be given such instructions as may be developed and promulgated by the Police Officer Standards and Training Council and the Division of State Police within the Department of Emergency Services and Public Protection pursuant to subsection (b) of this section . . . ." The defendant claims on appeal that the other four instructions were required by subdivision (4) but does not argue that their omission affected the suggestiveness of the identification procedure. We cannot perceive how their omission could have affected the suggestiveness of the procedure.

the trial court's determination that the failure to provide the omitted instruction did not render suggestive what was otherwise a properly conducted double-blind sequential array procedure. To be sure, as the defendant argues, the omitted instruction is one of several required instructions intended to assure witnesses that the case does not depend on them and that they need not feel any pressure to identify a suspect. When, however, the remainder of those required instructions are provided,[14] as they were in the present case, and there is no evidence that the witness actually thought the investigation would *not* continue if she failed to identify a suspect, the failure to provide the omitted instruction will not render what was otherwise a textbook double-blind sequential identification procedure suggestive.

## III

The defendant next claims that the trial court violated his sixth amendment right to confrontation[15] under *Smith* v. *Arizona*, 602 U.S. 779, 144 S. Ct. 1785, 219 L. Ed. 2d 420 (2024), by allowing Associate Medical Examiner Jacqueline Nunez to testify regarding the victim's injuries and cause of death, even though another medical examiner, Dollett White, performed the autopsy. The defendant argues that Nunez "impermissibly conveyed the testimonial statements of the absent . . . White as the basis of [her] own conclusions." In particular, the defendant argues that a photograph of a metal probe inserted through the victim's four neck wounds communicated White's apparent conclusion

[14] It is undisputed that the Manchester officer instructed Baez that it was "just as important to exclude innocent persons as it is to identify the perpetrator," that "[t]he perpetrator may or may not be among the persons in the photographic lineup" and that "[y]ou should not feel that you must make an identification . . . ."

[15] The sixth amendment right to confrontation is made applicable to the states through the due process clause of the fourteenth amendment. See, e.g., *Pointer* v. *Texas*, 380 U.S. 400, 403, 406, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965).

that a single bullet caused all four wounds and that this photograph and Nunez' testimony regarding the neck wounds were testimonial hearsay. The defendant further argues that Nunez conveyed the following additional hearsay statements during her testimony: "White performed an external and internal investigation of the victim's body. . . . White recovered a bullet from the victim's midsection. . . . The bullet injured the victim's spine, colon, and a large artery . . . [and] [t]he arterial injury caused 'approximately two liters' of internal bleeding." (Citations omitted.) For the reasons that follow, we conclude that the probe photograph and Nunez' testimony interpreting that photograph were not hearsay and that, to the extent some of the cited hearsay statements were improperly admitted, the state has sustained its burden of demonstrating that the error was harmless beyond a reasonable doubt.

The following facts are relevant to our resolution of this claim. At trial, the defendant sought to preclude Nunez' testimony on the ground that she had not performed the victim's autopsy. The trial court allowed defense counsel to voir dire Nunez outside the presence of the jury to ascertain the bases for her conclusions regarding the victim's injuries. At that time, Nunez stated that, although she had reviewed White's autopsy report, her opinions would be based solely on her review of the victim's autopsy photographs. Defense counsel then showed Nunez a photograph depicting a metal probe threaded through four perforations in the victim's neck and asked her whether she could tell if the neck perforations were caused by one or two bullets. Nunez responded that the photograph was "consistent with either one . . . projectile causing all [four] perforations or two separate projectiles causing the four [perforations]" but that she could not say for sure. Nunez agreed that, were it not for the metal probe photograph, she would not be able to conclude that

one projectile could have caused two entrance wounds. She also agreed that she could not determine from the photograph "the degree to which the probe had to be manipulated or pushed to line up those holes." On the basis of this testimony, defense counsel argued that the prosecutor would ask Nunez "to render an opinion about a photograph [that] . . . documents a particular test that was done by a [different] medical examiner" and that, if Nunez were allowed to testify about this particular photograph, the defendant would "lose the right of confrontation on . . . a critical issue in this case," namely, whether the victim was shot two or three times.

The trial court responded that there could be no confrontation clause violation if Nunez based her opinions on the photographs alone and that defense counsel would be able to cross-examine her "as to whether she [could] actually give [an] opinion not knowing things you think she should know [about the probe] . . . ." The court further stated, "what this witness won't be able to do is tell the jury what [White's] conclusions were . . . . And if she, on the stand, says 'from that photograph, I make the following conclusions,' that's okay, and [it] is admissible. And you're free to cross-examine her as to how [she] can . . . [draw] that conclusion when [she doesn't] know [certain facts pertaining to the insertion of the probe]."

At the conclusion of voir dire, the prosecutor clarified that the state was not seeking to admit White's autopsy report and that the only questions he intended to ask Nunez pertained to "the nature of the [victim's] wounds, both internal and external, the number of wounds, and the cause and manner of death." The court then asked Nunez, "can you give those opinions . . . without referencing any [of the] opinions or conclusions . . . of . . . White? [Will] these [be] your own independent conclusions?" Nunez responded that the opinions she

expressed would be her own and would be based entirely on her review of the autopsy photographs.

Thereafter, upon direct examination, Nunez was shown a series of autopsy photographs and was asked to explain what each one depicted. The autopsy report was not entered as a full exhibit at trial. With respect to the photograph of the metal probe in the victim's neck, Nunez testified generally about the use of probes. She explained that probes are often used to determine a bullet's trajectory. She further testified that the victim's four neck perforations were all superficial skin wounds that could have been caused by either one or two bullets but that she could not say for sure. Nunez opined, on the basis of the photograph, that the four perforations resulted from either one bullet that entered and exited twice, or two bullets that each entered and exited once. Nunez further testified that only one of the four perforations resembled an entrance wound. The others, she stated, were "ambiguous," although their irregular edges were more consistent with exit wounds. Nunez was also shown a photograph of a wound in the center of the victim's lower back, which she testified was a single entrance wound for which there was no corresponding exit wound. She testified that the projectile that entered the lower back had damaged the victim's lower spinal cord, colon, and a large artery, causing him to lose approximately two liters of blood.

During cross-examination, Nunez repeated that she did not perform the autopsy and that her knowledge was based on a review of the photographs and the autopsy report. Defense counsel asked Nunez whether it would have required a considerable amount of force or manipulation to insert the probe into the victim's neck wounds. Nunez responded that she could not tell from the photographs how much, if any, force or manipulation was involved but that it could have required some of each. Defense counsel also asked Nunez, "your

expertise . . . as a medical examiner . . . only allows you to conclude what the body tells you. . . . And, in this particular case, what . . . the body has told you is what the photographs have told you. Is that fair to say?" Nunez responded, "[y]es."

The following legal principles guide our analysis of the defendant's claim. The confrontation clause bars admission of "testimonial statements of a witness who did not appear at trial unless [the witness] was unavailable to testify, and the defendant had a prior opportunity for cross-examination." *Crawford* v. *Washington*, 541 U.S. 36, 53–54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The clause's prohibition "applies only to testimonial hearsay . . . ." *State* v. *Slater*, 285 Conn. 162, 170, 939 A.2d 1105, cert. denied, 553 U.S. 1085, 128 S. Ct. 2885, 171 L. Ed. 2d 822 (2008). Relevant for purposes of the questions presented here is that the confrontation clause bars only the introduction of hearsay, meaning "a statement, *other than one made by the declarant while testifying at the proceeding*, offered in evidence to establish the truth of the matter asserted." (Emphasis added.) Conn. Code Evid. § 8-1 (3). In *State* v. *Walker*, 332 Conn. 678, 212 A.3d 1244 (2019), we explained that "the threshold inquiries [for purposes of] a confrontation clause analysis are whether the statement was hearsay, and if so, whether the statement was testimonial in nature . . . . These are questions of law over which our review is plenary." (Citation omitted; internal quotation marks omitted.) Id., 690.

The defendant claims that his right to confrontation was violated because the probe photograph communicated White's purported conclusion that a single bullet caused the four neck wounds and because Nunez' testimony that the wounds could have been caused by one or two bullets did nothing more than convey the out-of-court testimonial statements of White from the autopsy report. The defendant is essentially arguing that both

the photograph and Nunez' statement interpreting the photograph were hearsay statements. We disagree and conclude that the probe photograph was not hearsay and that Nunez' testimony about the neck wounds was based solely on her review and interpretation of the probe photograph, not on White's autopsy report.

As we have explained, the confrontation clause bars the admission of "testimonial statements" when certain conditions are met. See, e.g., *Crawford* v. *Washington*, supra, 541 U.S. 68–69. Section 8-1 (1) of the Connecticut Code of Evidence defines "[s]tatement" as "(A) an oral or written assertion or (B) nonverbal conduct of a person, if it is intended by the person as an assertion." Conn. Code Evid. § 8-1 (1). The question presented, therefore, is whether the probe photograph depicts nonverbal conduct of White intended as an assertion.

Contrary to the defendant's contention, the photograph does not state or imply that one bullet caused these wounds. It simply depicts an image of the victim's body with a probe inserted through four wounds. The probe photograph does not include or depict any words, gestures, or some other indicative content that can reasonably be understood as an assertion. It does not convey White's intention with respect to the probe; it does not communicate how the probe was inserted, why the probe was inserted, what White intended the probe to show, or what conclusions she drew from the probe. Nunez testified that probes generally are used to determine the trajectory of a bullet but are also used to determine whether a wound is a bullet wound or whether two or more wounds are connected. Here, however, the photograph does not convey White's reason for inserting the probe, which could have been for one or more of the purposes identified by Nunez. We do know, however, that Nunez relied on the photograph to deduce and communicate her own conclusions about the wounds. Nunez testified that, while looking at the

photograph, she could not state with a reasonable degree of medical certainty whether one or two bullets had caused the wounds depicted in the photograph. Finally, in providing her opinion of the probe photograph, Nunez did not reference White's process for inserting the probe, the autopsy report, or what, if any, conclusions White documented in that report with respect to the probe. Rather, Nunez relied on the probe photograph's objective depiction of the wounds and patterns.

This court has held that medical examiners may testify regarding a victim's injuries, even though they did not perform the autopsy, so long as their testimony is based solely on the autopsy photographs. See, e.g., *State* v. *Robles*, 348 Conn. 1, 11, 301 A.3d 498 (2023) ("to the extent that the defendant challenges the admission of [the substitute medical examiner's] testimony concerning the autopsy photographs, the admission of that testimony did not violate the confrontation clause . . . [because] [t]his portion of [the witness'] testimony was based solely on his examination of the autopsy photographs, not on the autopsy report"). *Robles* did not present the question of whether the photographs relied on by the testifying medical examiner were hearsay, and the defendant points to no case that supports his claim that autopsy photographs are testimonial hearsay. Indeed, the overwhelming weight of authority suggests that they are not hearsay unless the photographs contain words, markings, or some other indicative contention that can reasonably be understood as an assertion. See, e.g., *United States* v. *Clotaire*, 963 F.3d 1288, 1295 (11th Cir. 2020) ("pictures are not statements at all, let alone testimonial ones"), cert. denied, U.S. , 141 S. Ct. 1743, 209 L. Ed. 2d 508 (2021); *United States* v. *Brooks*, 772 F.3d 1161, 1167 (9th Cir. 2014) ("As the [United States] Supreme Court explained in *Crawford* . . . the [c]onfrontation [c]lause applies to

witnesses against the accused—in other words, those who bear testimony. . . . Testimony, in turn, is typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact. . . . The photographs of the seized parcel were not witnesses against [the defendant]. They did not bear testimony by declaring or affirming anything with a purpose." (Citations omitted; internal quotation marks omitted.)); *United States* v. *Wallace*, 753 F.3d 671, 675 (7th Cir. 2014) ("Pictures can convey incriminating information (think of the famous scene in [the movie] Blow-Up[16] in which David [Hemmings'] processing of a photo negative finally reveals the corpse). But one can't cross-examine a picture." (Footnote added.)), cert. denied, 574 U.S. 1160, 135 S. Ct. 1399, 191 L. Ed. 2d 372 (2015); *People* v. *Leon*, 61 Cal. 4th 569, 603, 352 P.3d 289, 189 Cal. Rptr. 3d 703 (2015) ("It is clear that the admission of autopsy photographs, and competent testimony based on such photographs, does not violate the confrontation clause. Hearsay is defined as an out-of-court 'statement.' . . . A statement is defined for this purpose as an 'oral or written verbal expression or . . . nonverbal conduct of a person' intended as a substitute for oral or written expression. . . . Only people can make hearsay statements; machines cannot." (Citations omitted; emphasis omitted.)); *State* v. *Pruett*, 263 Neb. 99, 108–109, 638 N.W.2d 809 (2002) ("[T]he autopsy photographs were not oral or written assertions, nor were they nonverbal conduct of a person. Under these circumstances, photographs are demonstrative evidence and are not hearsay."); *Wood* v. *State*, 299 S.W.3d 200, 214–15 (Tex. App. 2009) (There was no confrontation clause violation when "[t]he bulk of [the medical examiner's] testimony was devoted to describing and explaining what was shown in the photographs taken during the autopsy. A photograph is not an out-of-court statement.").

[16] Blow-Up (Metro-Goldwyn-Mayer, Inc. 1966).

Contrary to the defendant's claim, this issue is not "squarely controlled" by *Smith* v. *Arizona*, supra, 602 U.S. 779. In *Smith*, the United States Supreme Court held that "[a] [s]tate may not introduce the testimonial out-of-court statements of a forensic analyst at trial, unless she is unavailable and the defendant has had a prior chance to cross-examine her. . . . Neither may the [s]tate introduce those statements through a surrogate analyst who did not participate in their creation. . . . And nothing changes if the surrogate . . . presents the out-of-court statements as the basis for his expert opinion. Those statements, as we have explained, come into evidence for their truth—because only if true can they provide a reason to credit the substitute expert. So a defendant has the right to cross-examine the person who made them." Id., 802–803. In the present case, however, no testimonial, out-of-court statement made by White about the neck wounds was introduced through Nunez. Indeed, Nunez never mentioned any of White's findings or conclusions, including whether White believed the neck perforations were caused by one bullet or thought, as Nunez did, that they could have been caused by one or two bullets. As *Smith* makes clear, the confrontation clause prevents the state from introducing testimonial, out-of-court *statements*. See id. In the present case, because no such statement about the neck wounds was introduced through Nunez, *Smith* is not controlling. Because we conclude that the photograph in the present case was not hearsay, we do not reach the question of whether it was testimonial.

The defendant next claims that Nunez' testimony that (1) White "performed an external and internal investigation of the victim's body," (2) White "recovered a bullet from the victim's midsection," (3) "[t]he [midsection] bullet injured the victim's spine, colon, and a large artery," and (4) "[t]he arterial injury caused 'approximately two liters' of internal bleeding" was inadmissible

testimonial hearsay that Nunez could have known only by reading White's autopsy report. Even if we assume that these statements were improperly admitted, we nevertheless conclude that their admission was harmless beyond a reasonable doubt.[17] See, e.g., *State* v. *Merriam*, 264 Conn. 617, 649, 835 A.2d 895 (2003) ("[a]s with other constitutional violations that are subject to harmless error analysis, the state has the burden of demonstrating that a confrontation clause violation was harmless beyond a reasonable doubt").

As previously indicated, the sole issue before the jury was whether the defendant or someone else—ostensibly Pacheco—killed the victim. There was no dispute over the cause of the victim's death. He died from a gunshot wound to his lower back. Evidence from Nunez that White had performed an external and internal investigation of the victim's body, recovered a bullet from his midsection, and measured two liters of blood was, therefore, not harmful to the defendant. To the contrary, such evidence supported one of his defense theories. Defense counsel argued at trial that, if the jury believed the defendant was the individual who shot the victim in the parking lot, Nunez' testimony that the superficial wounds on the victim's neck could have been caused by two bullets meant that the defendant did not deliver the fatal shot to the victim. Instead, that shot was likely delivered by Pacheco. Consequently, none of Nunez' testimony regarding the abdominal injuries could have affected the verdict. See, e.g., *State* v. *Johnson*, 345 Conn. 174, 196, 283 A.3d 477 (2022) ("the test for determining whether a constitutional [error] is harmless . . . is whether it appears beyond a reasonable doubt that the [error] complained of did not contribute to the verdict obtained" (internal quotation marks omitted)).

[17] Given our disposition, we need not decide whether these statements, or the autopsy report more generally, are testimonial hearsay.

As to the strength of the state's case, two different people identified the defendant as the person who shot the victim. One of them, Crespo, had known the defendant his entire life. The other, Baez, was standing next to the defendant when the shooting occurred and had a number of face-to-face interactions with the defendant prior to the shooting. Moreover, the surveillance footage showed the victim convulse violently when the first bullet struck him, providing powerful evidence as to the identity of the person who inflicted his fatal injuries. Finally, the defendant's DNA was recovered from a beer can that the shooter in the surveillance footage threw at the victim minutes before shooting him. In short, evidence of the defendant's guilt was overwhelming. See, e.g., *State* v. *Campbell*, 328 Conn. 444, 512–13, 180 A.3d 882 (2018) (confrontation clause violation was harmless when evidence of guilt was overwhelming).

Despite the state's substantial evidence, the defendant contends that, but for a portion of Nunez' testimony, the jury reasonably could have found that the victim was struck by three bullets, rather than two, and, on the basis of this finding, reasonably could have concluded that Pacheco, rather than the defendant, was the actual killer. The only evidence supporting this theory consists of several still photographs from the surveillance footage indicating that, after leaving the café, Pacheco drove his Chevrolet Malibu around the block, which would have taken him past the turnoff to Foster Court, where the victim's body was found. According to the time stamps on these photographs, however, Pacheco's trip around the block, which began approximately one minute after the defendant shot the victim, took Pacheco approximately seventy-two seconds to complete. During this time frame, no one reported hearing any additional gunshots in the vicinity of the café. Nor was there any evidence that Pacheco knew that the victim was parked on Foster Court, much less that

Pacheco stopped at that location, found the victim, shot him, and returned to the front of the café in that short length of time. In light of the foregoing, we conclude that, even if some of the cited testimony was improperly admitted, the state has sustained its burden of demonstrating that the error was harmless beyond a reasonable doubt.

The judgment is affirmed.

In this opinion the other justices concurred.