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quotation marks omitted.) *O'Brien* v. *O'Brien*, supra, 161 Conn. App. 592.

Because the trial court had not found contempt or dissipation, the Appellate Court concluded that the trial court did not have the authority to compensate the defendant for the plaintiff's transactions, even though those transactions had violated the automatic orders. Id., 593. The Appellate Court reversed the trial court's judgment with respect to its financial orders and remanded the case for a new hearing on all financial matters. Id.

We then granted the defendant's petition for certification to decide whether the Appellate Court correctly concluded that the trial court should not have considered the plaintiff's violations of the automatic orders in its division of the marital assets because the court had not held the plaintiff in contempt for those violations. *O'Brien* v. *O'Brien*, supra, 320 Conn. 916. We answer the certified question in the negative. The plaintiff also has raised three alternative grounds for affirming the Appellate Court's judgment, all of which we reject.

I

We begin with the certified question. The defendant claims that the Appellate Court incorrectly concluded that the trial court lacked the authority to afford her a remedy for the plaintiff's violations of the automatic orders in the absence of a contempt finding. In support of this claim, the defendant contends that the trial court has the power to consider the plaintiff's actions under § 46b-81, which governs a trial court's distribution of marital assets in a dissolution proceeding and empowers the trial court to divide marital assets between the parties upon consideration of "the contribution of each of the parties in the acquisition, *preservation* or *appreciation* in value of" the marital assets. (Emphasis added.) General Statutes § 46b-81 (c). The defendant further contends that the plaintiff's unilateral decision to swap a substantial equity stake—along with its poten-

tial for increase in value and dividends—for an asset like cash is the antithesis of preservation and appreciation, and thus may be considered by a court when it divides property under the statute.

We agree with the defendant that the trial court had the authority to consider the plaintiff's transactions when distributing the marital property, but for reasons different from those advanced by the defendant. Applying plenary review to this question of law; see, e.g., *Maturo* v. *Maturo*, 296 Conn. 80, 88, 995 A.2d 1 (2010); we conclude in part I A of this opinion that a trial court possesses inherent authority to make a party whole for harm caused by a violation of a court order, even when the trial court does not find the offending party in contempt. In part I B of this opinion, we conclude that the trial court properly exercised that authority in the present case.[5]

A

It has long been settled that a trial court has the authority to enforce its own orders. This authority arises from the common law and is inherent in the court's function as a tribunal with the power to decide disputes. *Papa* v. *New Haven Federation of Teachers*, 186 Conn. 725, 737–38, 444 A.2d 196 (1982). The court's enforcement power is necessary to "preserve its dignity

[5] In her brief to this court, the defendant did not specifically argue that the trial court possessed discretion, pursuant to its *inherent* authority, to address the plaintiff's violations but instead focused her arguments on the trial court's *statutory* authority under § 46b-81. We nevertheless resolve the present appeal in reliance on the trial court's inherent authority because (1) the defendant raised this ground in her brief to the Appellate Court, (2) the Appellate Court decided the case in part on this ground, concluding that the trial court lacked the inherent authority in a contempt proceeding to afford the defendant a remedy for the plaintiff's violations unless it first found contempt; *O'Brien* v. *O'Brien*, supra, 161 Conn. App. 589–91; (3) this ground falls within the scope of the certified question, which was not limited to the trial court's statutory authority but more broadly asked whether "the Appellate Court correctly determine[d] that the trial court [had] abused its discretion when it considered the plaintiff's purported violations of the automatic orders in its decision dividing marital assets"; *O'Brien* v. *O'Brien*, supra, 320 Conn. 916; and (4) at oral argument before this court, the plaintiff's counsel acknowledged that the trial court had inherent authority to address the plaintiff's violations of the automatic orders and clarified that the plaintiff was disputing only how the trial court exercised that authority in the present case. See, e.g., *McManus* v. *Commissioner of Environmental Protection*, 229 Conn. 654, 661 n.6, 642 A.2d 1199 (1994) ("We recognize that although this precise claim was raised and briefed before the trial court, it was neither considered by the Appellate Court nor explicitly briefed before this court. Nevertheless, this court may consider claims that fall within the scope of the certified question.").

CONNECTICUT REPORTS

Vol. 327

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

LATONE JAMES *v.* COMMISSIONER OF CORRECTION (SC 19787)

Rogers, C. J., and Palmer, Eveleigh, McDonald, Espinosa, Robinson and Vertefeuille, Js.*

Syllabus

Pursuant to statute (§ 18-98d [a] [1]), an offender may receive credit for presentence confinement, except that "(A) each day of presentence confinement shall be counted only once for the purpose of reducing all sentences imposed after such presentence confinement; and (B) [such credit] shall only apply to a person for whom the existence of a mittimus, an inability to obtain bail or the denial of bail is the sole reason for such person's presentence confinement . . . ."

* This case originally was scheduled to be argued before a panel of this court consisting of Chief Justice Rogers and Justices Palmer, Eveleigh, McDonald, Espinosa, Robinson and Vertefeuille. Although Justice Robinson was not present when the case was argued before the court, he has read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision. The listing of justices reflects their seniority status on this court as of the date of oral argument.

The petitioner, who had been convicted of felony murder and robbery in the first degree, appealed from the denial of his amended petition for a writ of habeas corpus, asserting, inter alia, that the respondent, the Commissioner of Correction, had improperly calculated the applicable presentence confinement credit. The petitioner, who had been held in lieu of bond on multiple charges following his arrest, was tried and convicted of robbery. The trial court declared a mistrial on the remaining charges, including the felony murder charge, and sentenced the petitioner to twenty years of imprisonment on the robbery conviction. The respondent subsequently credited the robbery sentence for the petitioner's presentence confinement in accordance with § 18-98d (a) (1). On retrial of the felony murder charge, the petitioner filed a motion to dismiss that charge on the ground that the prosecution violated the constitutional protection against double jeopardy. The trial court denied that motion, the petitioner appealed, and this court upheld the denial of that motion. Thereafter, the petitioner was convicted of felony murder and sentenced to fifty years imprisonment, which was to be served concurrently with the robbery sentence. The respondent declined to apply any presentence confinement credit to the felony murder sentence under § 18-98d (a) (1), concluding that any credit for confinement before the imposition of the robbery sentence had already been applied and that any confinement thereafter was for the purpose of serving that existing sentence. The petitioner subsequently filed a habeas petition challenging the respondent's method of calculation, which the habeas court denied. From the habeas court's judgment, the petitioner, on the granting of certification, appealed. *Held* that the respondent's calculation of the presentence confinement credit applicable to the petitioner's felony murder sentence was incorrect: § 18-98d (a) (1) (A) required the transfer of the petitioner's presentence confinement credit from the earlier imposed robbery sentence to the later imposed, concurrent felony murder sentence when the two sentences merged into one effective sentence under one docket number, in light of the ambiguity created by the relationship of § 18-98d to other statutes, the legislative history surrounding its enactment, as well as that of its predecessor statutes, and the legislature's perceived intent; moreover, the petitioner was entitled to presentence confinement credit for the period of time he was pursuing his double jeopardy claim because the denial of such a credit under § 18-98d (a) (1) (B) would have impermissibly burdened the assertion of a constitutional right, and, accordingly, to avoid invalidation of § 18-98d, this court adopted, by way of judicial gloss, a requirement that a person serving a term of imprisonment who exercises his constitutional right to pursue a double jeopardy claim on a charge for which the sentence may run concurrently shall be entitled, under § 18-98d, to a corresponding reduction in any sentence subsequently imposed.

(*Two justices dissenting in one opinion*)

Argued March 30—officially released October 17, 2017

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Oliver*, *J.*, judgment denying the petition, from which the petitioner, on the granting of certification, appealed. *Reversed in part*; *judgment directed*; *further proceedings*.

Judie L. Marshall, with whom, on the brief, was *Walter C. Bansley IV*, for the appellant (petitioner).

Madeline A. Melchionne, assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, and *Terrence M. O'Neill*, assistant attorney general, for the appellee (respondent).

Opinion

EVELEIGH, J. The sole issue in this appeal is whether the calculation of presentence confinement credit should be adjusted for concurrent sentences imposed under one docket number but on different dates. The petitioner, Latone James, appeals from the denial of his amended petition for a writ of habeas corpus, which alleged, inter alia, that the calculation of his presentence confinement credit was incorrect. The respondent, the Commissioner of Correction, claims that it calculated the petitioner's presentence confinement credit pursuant to General Statutes § 18-98d (a) (1)[1] and the framework provided by this court in *Harris* v. *Commissioner of Correction*, 271 Conn. 808, 860 A.2d 715 (2004). We agree with the petitioner and, accordingly, reverse the judgment of the habeas court in part.

The record discloses the following facts and procedural history. The petitioner was arrested and charged,

[1] We note that, although § 18-98d has been amended since the events underlying the petition; see, e.g., Public Acts 2001, No. 01-78; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

under Docket No. CR-95-0235106,[2] with one count of robbery in the first degree in violation of General Statutes (Rev. to 1995) § 53a-134 (a) (2), two counts of assault in the first degree in violation of General Statutes (Rev. to 1995) § 53a-59, and one count of felony murder in violation of General Statutes (Rev. to 1995) § 53a-54c. On March 3, 1995, the petitioner was held in lieu of bond on these charges. Following trial, the jury returned a verdict of guilty on the charge of robbery in the first degree and the trial court declared a mistrial as to the remaining charges. On December 13, 1996, the petitioner was sentenced to twenty years of imprisonment for robbery in the first degree. From the date the trial court imposed bond to the date of sentencing on the robbery conviction, the petitioner was held in the respondent's custody for a total of 651 days. The respondent, accordingly, credited 651 days of presentence confinement to the petitioner's robbery sentence.

The petitioner was retried before a jury on the charge of felony murder under Docket No. CR-95-0235106. See footnote 2 of this opinion. The petitioner had originally moved to dismiss this charge on the ground that retrial violated the prohibition against double jeopardy contained within the fifth amendment to the United States constitution.[3] See footnote 13 of this opinion. The trial court denied that motion, the petitioner appealed, and this court affirmed. *State* v. *James*, 247 Conn. 662, 673–74, 725 A.2d 316 (1999).

[2] We note that, although the suffix changed at various stages during the underlying proceedings, there was only one docket number associated with these charges. As counsel for the respondent conceded at trial on the habeas petition, the change in suffix is not relevant to the questions presented in this appeal.

[3] "The double jeopardy clause of the fifth amendment to the United States constitution provides: [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . . This constitutional provision is applicable to the states through the due process clause of the fourteenth amendment." (Internal quotation marks omitted.) *State* v. *Padua*, 273 Conn. 138, 172 n.39, 869 A.2d 192 (2005).

On August 5, 1999, while the petitioner was imprisoned for robbery, the jury returned a verdict of guilty on the felony murder charge. On August 13, 1999, the petitioner was sentenced to fifty years of imprisonment for felony murder, to run concurrently with his prior robbery sentence. The petitioner spent 973 days in the respondent's custody from the date he was sentenced for robbery to the date sentenced for felony murder. In total, the petitioner spent 1624 days in the respondent's custody from the date of he was held in lieu of bond on Docket No. CR95-0235106 to the date he was sentenced for felony murder.

The respondent did not apply any presentence confinement credit to the petitioner's felony murder sentence, except for one day of credit pursuant to § 18-98d (a) (2) (B).[4] The petitioner filed a petition for writ of habeas corpus challenging, inter alia, the respondent's method of calculation. Specifically, the petitioner claimed that the 651 days of credit that had been applied to the robbery sentence should be transferred to the felony murder sentence. The petitioner further claimed that the 973 days he spent imprisoned for the robbery sentence should be credited to his felony murder sentence. After hearing testimony, the habeas court denied the petition. This appeal followed.[5]

[4] General Statutes § 18-98d (a) (2) (B) provides: "Any person convicted of any offense and sentenced prior to October 1, 2001, to a term of imprisonment, who was confined in a correctional facility for such offense on October 1, 2001, shall be presumed to have been confined to a police station or courthouse lockup in connection with such offense because such person was unable to obtain bail or was denied bail and shall, unless otherwise ordered by a court, earn a reduction of such person's sentence in accordance with the provisions of subdivision (1) of this subsection of one day."

[5] The habeas court denied the petition for a writ of habeas corpus and then granted the petition for certification to appeal pursuant to General Statutes § 52-470 (g). The petitioner subsequently appealed from the judgment of the habeas 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.

The respondent asserts that the 651 days of presentence confinement credit are not applicable to the felony murder sentence. The respondent relies on the language of § 18-98d (a) (1) and this court's decision in *Harris*, wherein this court concluded that presentence confinement credit can be applied only once and cannot be used to reduce a concurrent sentence that is imposed at a later date. *Harris* v. *Commissioner of Correction*, supra, 271 Conn. 822–23. The respondent also claims that the 973 days the petitioner spent incarcerated during the retrial on the felony murder charge could not be claimed as presentence confinement credit because § 18-98d (a) (1) (B) limits application of the credit to those people whose sole reason for being confined is the "existence of a mittimus, an inability to obtain bail or the denial of bail . . . ." Because the petitioner was confined not due to any of those reasons, but because he was serving a sentence for robbery, the respondent claims that § 18-98d (a) (1) does not apply.

We begin our analysis with a discussion of the appropriate standard of review. "Although a habeas court's findings of fact are reviewed under a clearly erroneous standard of review, questions of law are subject to plenary review." *Tyson* v. *Commissioner of Correction*, 261 Conn. 806, 816, 808 A.2d 653 (2002), cert. denied, 538 U.S. 1005, 123 S. Ct. 1914, 155 L. Ed. 2d 836 (2003); see also *Kaddah* v. *Commissioner of Correction*, 324 Conn. 548, 559, 153 A.3d 1233 (2017). The parties do not dispute any of the material facts, and we are asked solely to determine the proper construction of § 18-98d (a) (1).

Therefore, this case presents a question of statutory construction, an issue of law over which we exercise plenary review. *Cales* v. *Office of Victim Services*, 319 Conn. 697, 701, 127 A.3d 154 (2015). In determining the meaning of a statute, we look first to the text of the statute and its relationship to other statutes. General Statutes § 1-2z. If the text of the statute is not plain and unambiguous, we may consider extratextual sources of

information such as the statute's "legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and [common-law] principles governing the same general subject matter . . . ." (Internal quotation marks omitted.) *Doe* v. *Boy Scouts of America Corp.*, 323 Conn. 303, 332, 147 A.3d 104 (2016). Our fundamental objective is to ascertain the legislature's intent. Id.

We begin by examining the statutory text. Section 18-98d governs the crediting of presentence confinement time to prisoners. Section 18-98d (a) (1) provides in relevant part: "[a]ny person who is confined to a community correctional center or a correctional institution for an offense committed on or after July 1, 1981, under a mittimus or because such person is unable to obtain bail or is denied bail shall, if subsequently imprisoned, earn a reduction of such person's sentence equal to the number of days which such person spent in such facility from the time such person was placed in presentence confinement to the time such person began serving the term of imprisonment imposed; provided (A) each day of presentence confinement shall be counted only once for the purpose of reducing all sentences imposed after such presentence confinement; and (B) the provisions of this section shall only apply to a person for whom the existence of a mittimus, an inability to obtain bail or the denial of bail is the sole reason for such person's presentence confinement, except that if a person is serving a term of imprisonment at the same time such person is in presentence confinement on another charge and the conviction for such imprisonment is reversed on appeal, such person shall be entitled, in any sentence subsequently imposed, to a reduction based on such presentence confinement in accordance with the provisions of this section. . . ."

Although the petitioner is asserting a general challenge to his presentence confinement credit, the challenge can be split into two separate claims. The first

claim is that the 651 days of presentence confinement credit originally applied to the robbery sentence should be transferred to the felony murder sentence. The second claim is that the 973 days he spent in prison serving his sentence for robbery should be converted to presentence confinement credit and applied to his felony murder sentence. We address each of these claims in turn.

Whether the 651 days the petitioner was confined while awaiting his first trial, and which was applied to his robbery sentence, can also be applied to the felony murder sentence implicates § 18-98d (a) (1) (A). Section 18-98d (a) (1) (A) provides that "each day of presentence confinement shall be counted only once for the purpose of reducing *all sentences imposed* after such presentence confinement . . . ." (Emphasis added.) The plain language of this section, therefore, appears to prohibit the application of the 651 days to the petitioner's sentence for felony murder because it has already been counted for the purpose of reducing his robbery sentence.

The petitioner asserts that if the mistrial had not occurred, "all sentences" for the crimes of robbery and felony murder would have been imposed at once and the 651 days would have been credited toward the sentences for both robbery and felony murder. Because of the mistrial, however, only the robbery sentence was imposed after the petitioner's initial trial, and, by the time he was sentenced for felony murder, the 651 days had already been counted once. The text of § 18-98d does not provide a definition of "all sentences imposed." The use of the term "all" does, however, seem to indicate that the legislature recognized that multiple sentences may follow from one presentence confinement.

We next turn to other related statutes. In the present case, the petitioner's sentences for robbery and felony

murder run concurrently. Therefore, General Statutes § 53a-38 (b) is applicable. That statute provides in relevant part that, "[w]here a person is under more than one definite sentence, the sentences shall be calculated as follows: (1) If the sentences run concurrently, the terms merge in and are satisfied by discharge of the term which has the longest term to run . . . ." General Statutes § 53a-38 (b).

Construing § 18-98d in light of § 53a-38 (b) (1) creates further ambiguity. Specifically, it is not clear if merged concurrent sentences should be treated as one complete sentence, or if the two separate sentences have their respective credits applied and then merge. Under the first interpretation, if the two separate sentences are just one merged sentence, all credit accrued from the start of confinement would be applied to the entire merged sentence. In the present case, it would result in applying the 651 day credit to the petitioner's felony murder sentence because it has the longest term to run. Under the second interpretation, if the sentences are two separate sentences which merge into one, then the respondent must calculate the credit separately for each sentence and then determine the longer of the sentences, but because the credit was used for the first sentence, it would not be available when calculating the second sentence. We conclude that, because § 18-98d (a) (1) is subject to two reasonable interpretations, it is ambiguous. Therefore, in accordance with § 1-2z, we turn to the relevant legislative history.

An examination of the brief legislative history of both § 18-98d and its predecessors, General Statutes §§ 18-97 and 18-98, portrays a general legislative intent to credit prisoners for time served in presentence confinement. Section 18-98d was enacted in 1980 as part of the legislature's attempt to reform the sentencing structure, but there is little history regarding § 18-98d specifically. See generally Conn. Joint Standing Committee Hear-

ings, Judiciary, Pt. 5, 1980 Sess., pp. 1127–1435; see also 23 S. Proc., Pt. 10, 1980 Sess., pp. 3418–32; 23 H.R. Proc., Pt. 14, 1980 Sess., pp. 4294–4356; 23 H.R. Proc., Pt. 24, 1980 Sess., pp. 6997–7006. A series of new legislation, amendments, and repeals were debated, commented on, and eventually enacted pursuant to the sentencing reform, and § 18-98d was one statute among many. See 23 S. Proc., supra, pp. 3428–31, remarks of Senator Salvatore C. DePiano. Section 18-98d is mentioned briefly by Senator DePiano during the Senate Hearings on the bill: "Under the present procedure today, if you are charged with several crimes *and they all have different docket numbers*, every day you wait for trial when you have not made bond, means that you have gotten two or three or four days credit for that one day that you've served and we've eliminated that problem." (Emphasis added.) Id., p. 3429. The legislature specifically placed importance on the different docket numbers associated with various sentences and did not want to give credit for multiple sentences that had different docket numbers. We find these statements are indicative of the legislative intent when § 18-98d was enacted.

Sections 18-97[6] and 18-98,[7] although not operative in the present case, are still persuasive authority in

[6] General Statutes § 18-97 provides: "Any person receiving a fine or a sentence to a correctional institution or a community correctional center for an offense committed prior to July 1, 1981, shall receive credit towards any portion of such fine as is not remitted or any portion of such sentence as to which execution is not suspended for any days spent in custody under a mittimus as a result of any court proceeding for the offense or acts for which such fine or sentence is imposed, provided he shall conform to the rules of the institution. Upon notification from the Commissioner of Correction, the clerk of the court shall enter such credit upon the order in the case of a fine, and upon the mittimus in the case of a sentence and it shall be the duty of the agency or person that held such person under such mittimus to inform the clerk of the court of the proper amount of such credit. In the case of a fine each credit day shall be computed at the rate of ten dollars. In no event shall credit be allowed in excess of the fine or sentence actually imposed."

[7] General Statutes § 18-98 provides: "Any person who has been denied bail or who has been unable to obtain bail and who is subsequently imprisoned

determining the overall intent of granting presentence confinement credit.[8] Section 18-97 addressed presentence confinement credit when a prisoner was held due to a mittimus, and § 18-98 addressed presentence confinement credit due to a denial of bail or inability to obtain bail. Section 18-97 was not discussed at any time in its legislative history; see Conn. Joint Standing Committee Hearings, Judiciary, Pt. 2, 1967 Sess., pp. 554–55, 578–80; 12 S. Proc., Pt. 5, 1967 Sess., p. 2182; 12 H.R. Proc., Pt. 9, 1967 Sess., pp. 3869–73;[9] but has been expanded upon previously by this court in *Delevieleuse* v. *Manson*, 184 Conn. 434, 439 A.2d 1055 (1981).

In *Delevieleuse*, we construed § 18-97 in the petitioner's favor when he tried to apply presentence confinement credit to multiple sentences imposed on the same day. Id., 435–36. The plaintiff had spent 56 days in presentence confinement after being held on a mittimus concerning seven stolen checks. Id., 435. He was sentenced to seven separate sentences of six months for each stolen check. Id. The respondent applied the fifty-six days of presentence confinement credit once for all sentences because there was only one docket number,

for an offense committed prior to July 1, 1981, is entitled to commutation of his sentence by the number of days which he spent in a community correctional center from the time he was denied or was unable to obtain bail to the time he was so imprisoned. The Commissioner of Correction shall, if such person has conformed to the rules of the institution, credit such person with the number of days to which the supervising officer of the correctional center where such person was confined while awaiting trial certifies such person was confined between the denial of bail to him or his inability to obtain bail and his imprisonment."

[8] The substance of § 18-97 and 18-98, while still operative for crimes committed prior to July 1, 1981, formed the basis for § 18-98d, which applies to crimes committed on or after July 1, 1981. See *Payton* v. *Albert*, 209 Conn. 23, 30, 547 A.2d 1 (1988), overruled in part on other grounds by *Rivera* v. *Commissioner of Correction*, 254 Conn. 214, 756 A.2d 1264 (2000).

[9] Section 18-97 was enacted as part of a larger bill that created the bail commissioner and current bail bond system that exists in Connecticut. The discussion throughout the hearings involved issues with the bond system and never mentioned § 18-97.

and the plaintiff argued that § 18-97 required that the credit be applied to each sentence, regardless of the docket number. Id., 435–36.

We referenced the enactment of § 18-98d and the comments by Senator DePiano, specifically his reference to separate docket numbers. Id., 440–42 n.4. The legislative intent, which we could discern from Senator DePiano's statements, was to move away from the system of awarding multiple credits and to limit the amount of presentence confinement credit granted. Id. Despite Senator DePiano's comments, we said that "[t]he purpose of § 18-97 is to give recognition to the period of presentence time served and to permit the prisoner, in effect, to commence serving his sentence from the time he was compelled to remain in custody due to a mittimus." (Internal quotation marks omitted.) Id., 438.

Section 18-98, unlike § 18-97, is discussed thoroughly in the legislative hearings surrounding its enactment. See Conn. Joint Standing Committee Hearings, Corrections, 1967 Sess., p. 5; 12 S. Proc., supra, pp. 2125–26; 12 H.R. Proc., Pt. 7, 1967 Sess., pp. 3095–98. There was overwhelming approval of the bill, as many of the senators and representatives viewed the existing system as inherently unfair, especially to indigent prisoners. See 12 S. Proc., supra, p. 2126; 12 H.R. Proc., Pt. 7, 1967 Sess., pp. 3095–98. Senator George Gunther said in support of the bill, "I was amazed in visiting our jail cells throughout the state, that we have cases of hold overs sitting in jail as long as a year, and then to find out that they could be brought into court, sentenced and have to serve an additional [five] or [ten], [fifteen] or [twenty] days. I think this is long overdue, it is another asset in our entire corrections program in the state of Connecticut." 12 S. Proc., supra, p. 2126. Representative James J. Kennelly also observed how the bill was "a human bill," because it gave credit to prisoners who were

imprisoned for weeks or months awaiting trial. 12 H.R. Proc., Pt. 7, 1967 Sess., p. 3096.

The intent behind § 18-98, then, was to ensure that prisoners were given credit for time served awaiting trial, without any desire to further penalize prisoners who were unable to make bond or were denied bond. There is nothing in the legislative history to indicate that the primary purpose of the statute changed with the enactment of § 18-98d. To the contrary, it seems reasonable that the legislature wished to grant presentence confinement credit to prisoners who were awaiting trial in order to permit those prisoners to serve their sentences from the time they were compelled to remain in custody.

A review of the legislative history reveals no intent by the legislature to treat prisoners in the petitioner's position differently, or somehow not to give them credit for time spent in confinement. Specifically, nothing in the legislative history indicates that the legislature intended to deny prisoners credit for time they spent confined for the sole reason that a mistrial had resulted in sentencing on different days. Put a different way, there is no evidence that the legislature intended to penalize prisoners when the state's failure to prove their guilt beyond a reasonable doubt gives rise to a mistrial and separates concurrent sentences. Indeed, we reject such an interpretation because it leads to an absurd result. See *Allen* v. *Commissioner of Revenue Services*, 324 Conn. 292, 311, 152 A.3d 488 (2016) (finding well established proposition that "those who promulgate statutes . . . do not intend . . . absurd consequences or bizarre results" [internal quotation marks omitted]), cert. denied, U.S. , 137 S. Ct. 2217, 198 L. Ed. 2d 659 (2017).

On the basis of the language of § 18-98d, the legislative history surrounding its enactment, and its per-

ceived intent in conjunction with the effect it has on the present case, we conclude that the statute requires the transfer of the petitioner's presentence confinement credit of 651 days to the later imposed sentence for felony murder.

The respondent asserts that this court's decision in *Harris* v. *Commissioner of Correction*, supra, 271 Conn. 822–23, requires that the 651 day presentence confinement credit not be applied to the petitioner's sentence for felony murder. In *Harris*, this court refused to permit the transfer of presentence confinement credits to a later imposed sentence that was to run concurrently with an earlier sentence. Id., 809–10. In that case, the petitioner, Randy Harris, was arrested for various charges and held in presentence confinement for 780 days. Id., 811–12. While in prison awaiting sentencing on these charges, Harris was charged with certain separate offenses. Id. His total presentence confinement for the later charges was 751 days, which overlapped with the presentence confinement time associated with the earlier charges. Id. When Harris was sentenced on the earlier charges, the respondent applied a presentence confinement credit of 780 days. Id., 813. Harris subsequently received a sentence on the later charges that was to run concurrently with his earlier sentence. Id., 812. The respondent did not apply any presentence confinement credit to his sentence for the later charges because that credit had already been used on the earlier charges and, according to the respondent, the use of the credit was barred by the plain language of § 18-98d (a) (1) (A). Id., 813. Each sentence imposed was for a different incident, on a different date, and under a different docket number. Id., 811–13.

This court concluded that the respondent's method of calculating the presentence confinement credit was correct. Id., 829. In doing so, we distinguished this

court's earlier ruling in *Payton* v. *Albert*, 209 Conn. 23, 547 A.2d 1 (1988), overruled in part on other grounds by *Rivera* v. *Commissioner of Correction*, 254 Conn. 214, 255 n.44, 756 A.2d 1264 (2000). *Harris* v. *Commissioner of Correction*, supra, 271 Conn. 822–23. This court distinguished the circumstances where concurrent sentences were imposed on the same day such as in *Payton*, and the circumstances where the concurrent sentences were imposed on different days. Id. Particularly, this court observed that, when sentences are imposed on the same date, the credit had not been officially applied to any particular sentence and was unused. Id., 823. The credit could then be applied to whichever sentence will result in the longest term of imprisonment pursuant to § 53a-38 (b). Id. We reasoned that, where sentences are imposed on different days, the credit has already been used on the earlier sentence and is no longer available for the later imposed sentence. Id.

In doing so, this court reasoned that "[t]he merger process does not alter the fact that concurrent sentences remain separate terms of imprisonment which the legislature has permitted to be served at one time." (Internal quotation marks omitted.) Id., 819. Therefore, this court concluded that concurrent sentences imposed on different days must be treated separately for purposes of allocating presentence confinement credit. Id., 820.

In reaching this conclusion, this court relied on several policy reasons for the different treatment of concurrent sentences imposed on the same day as opposed to concurrent sentences imposed on different days. Specifically, this court reasoned as follows: "Indeed, to the extent that the two groups are treated differently, the disparity is likely to have the salutary effect of encouraging defendants to enter pleas with respect to other pending charges and to disclose criminal activities for

which charges have not yet been filed so that all outstanding matters may be resolved in a single proceeding. The respondent's methodology also may help to conserve scarce judicial resources and reduce the administrative burden on the state by encouraging defendants involved in multiple proceedings to seek a transfer of all pending actions to a single courthouse for sentencing purposes. Sentencing judges cannot be expected to have knowledge of every recent sentence imposed on a defendant and, therefore, the transfer of all pending actions to a single location would provide the sentencing judge with a better understanding of the defendant's criminal history in order to determine a fair and equitable sentence." Id., 835–36.

The policy considerations that informed this court's decision in *Harris* are inapplicable to the present case. The first reason, that it would encourage defendants to disclose criminal matters to consolidate cases and dispose of them in a single proceeding, does not apply to this appeal. Here, the case would have been disposed all on the same day if the state had not failed to sustain its evidentiary burden, resulting in a mistrial. This fact negates any concern regarding the consolidation of cases. The second reason, to encourage defendants to transfer all pending actions to a single court for sentencing, is irrelevant to the present case because the criminal trials did take place in one court but on different dates due to the mistrial. The third reason, that it allows a sentencing judge to have all information available to properly sentence the defendant, is similarly irrelevant because the sentencing court here should have had the same procedural history available to it. This was all one case; the robbery was the predicate to the petitioner's conviction for felony murder.

Harris is, therefore, distinguishable from the present case. In *Harris*, the presentence confinement credit had been accruing at the same time for two completely

separate charges that were prosecuted separately. Id., 811–12. In the present case, however, presentence confinement credit was not accruing for two separate prosecutions but for one prosecution for felony murder that included the predicate lesser included offenses of robbery and assault. If the mistrial had not occurred, there would have been one credit applied to a total sentence for felony murder. Therefore, we conclude that the reasoning of *Harris* is inapplicable to the present case.[10]

We conclude that § 18-98d requires the transfer of credits from an earlier imposed sentence to a later one when the two sentences merge into one effective sentence under one docket number. Accordingly, we conclude that the respondent should have applied the 651 days of presentence confinement credit to the petitioner's sentence for felony murder.

The petitioner also claims that he should receive credit for the 973 days spent while imprisoned for robbery prior to being sentenced for felony murder, including the time he was pursuing his double jeopardy appeal. The respondent counters that § 18-98d (a) (1) (B) precludes the petitioner from receiving credit toward his felony murder sentence for any days after

[10] The respondent urges us to follow our line of decisions in prior cases involving § 18-98d, including *Payton* and *Harris*. These cases are, however, factually distinguishable from the present case and do not address the specific problem of separate sentences imposed on different days under one docket number for a continuing prosecution for felony murder. In each case cited by the respondent, the charges were predicated on different events on different dates and were specifically under different docket numbers. See *Washington* v. *Commissioner of Correction*, 287 Conn. 792, 818–23, 950 A.2d 1220 (2008); *Hunter* v. *Commissioner of Correction*, 271 Conn. 856, 860, 860 A.2d 700 (2004); *Cox* v. *Commissioner of Correction*, 271 Conn. 844, 846, 860 A.2d 708 (2004); *Harris* v. *Commissioner of Correction*, supra, 271 Conn. 811; *Payton* v. *Albert*, supra, 209 Conn. 23. None of these cases deals with the situation currently before this court, namely, an ongoing prosecution under one docket number where sentences were imposed on different dates due to a mistrial.

he was sentenced for robbery. For the reasons which follow, we agree, in part, with the petitioner.

The petitioner's claim requires us to interpret § 18-98d (a) (1) (B). Section § 18-98d (a) (1) (B) provides that "the provisions of this section shall only apply to a person for whom the existence of a mittimus, an inability to obtain bail or the denial of bail is the sole reason for such person's presentence confinement, except that if a person is serving a term of imprisonment at the same time such person is in presentence confinement on another charge and the conviction for such imprisonment is reversed on appeal, such person shall be entitled, in any sentence subsequently imposed, to a reduction based on such presentence confinement in accordance with the provisions of this section." The plain language of § 18-98d (a) (1) (B) indicates that if a person is being held for any reason other than being held on a mittimus, inability to obtain bail or denial of bail, then that person cannot receive presentence confinement credit for that period of time.

After oral argument in this court, we issued an order directing the parties to file supplemental briefs addressing the following issue: "Does the well established principle that this court should try, whenever possible, to construe statutes to avoid a constitutional infirmity, but may not do so by rewriting the statute or eschewing its plain language . . . lead to a different construction of . . . § 18-98d than that advanced by the [respondent]?" See *Walsh* v. *Jodoin*, 283 Conn. 187, 199, 925 A.2d 1086 (2007); see also *Boyd* v. *Lantz*, 487 F. Supp. 2d 3 (D. Conn. 2007). In his supplemental brief, the respondent asserts that allowing the petitioner to receive presentence confinement credit in the present case would undermine the meaning and clear intent of

the legislature.[11] In his supplemental brief, the petitioner claims that this court should construe § 18-98d consistent with *Boyd* v. *Lantz*, supra, 3, and that such a construction would be consistent with the plain language of the statute and the legislative intent.[12]

In the present case, the significant delay between the petitioner's sentencing for the robbery conviction in 1995 and his subsequent sentencing on felony murder in 1999 was caused by his decision to challenge the reprosecution on the ground that it violated the prohibition against double jeopardy contained within the fifth amendment to the United States constitution. See footnote 3 of this opinion. "It is well established that this court has a duty to construe statutes, whenever possible, to avoid constitutional infirmities . . . . [W]hen called [on] to interpret a statute, we will search for an effective and constitutional construction that reasonably accords with the legislature's underlying intent. . . . This principle directs us to search for a judicial gloss . . . that will effect the legislature's will in a manner consistent with constitutional safeguards." (Citations omitted; internal quotation marks omitted.) *State* v. *Cook*, 287 Conn. 237, 245, 947 A.2d 307 (2008).

[11] The respondent also asserts that "an important distinction between the [petitioner in *Boyd*] and the petitioner here is that the [petitioner in *Boyd*] actually served over two years of his forty-five year sentence for murder before his sentence was vacated and his double jeopardy challenge was raised." The respondent does not, however, explain why this factual distinction is relevant. Indeed, the petitioner in *Boyd*, like the petitioner in the present case, sought "credit for the duration of his double jeopardy challenge." *Boyd* v. *Lantz*, supra, 487 F. Supp. 2d 7. Therefore, we conclude that the fact that the petitioner in *Boyd* had served some of his sentence before the opportunity arose to bring a double jeopardy challenge is irrelevant to whether he would receive credit for the period during his double jeopardy challenge.

[12] To the extent that the petitioner attempts to raise a constitutional challenge for the first time in his supplemental brief, because we conclude that the petitioner is entitled to presentence confinement credit for the period he was pursuing his double jeopardy appeal, we need not reach that issue.

In our search for the constitutional construction of § 18-98d, we find the analysis of the United States District Court for the District of Connecticut in *Boyd* v. *Lantz*, supra, 487 F. Supp. 2d 3, persuasive. Indeed, as this court recognized in the petitioner's underlying criminal appeal; *State* v. *James*, supra, 247 Conn. 672; the procedural history of *Boyd* and that in the present case are very similar.

In *Boyd*, the United States District Court for the District of Connecticut set forth the following relevant facts and procedural history at issue in that case. "[The petitioner, Terrence Boyd, was] first arrested and placed in custody on December 15, 1986. Following a jury trial in the Connecticut Superior Court, he was convicted of burglary, larceny, and felony murder. On January 21, 1988, he was sentenced to forty-five years of incarceration for felony murder, fifteen years for burglary, and five years for larceny, with the sentences to run concurrently. On March 6, 1990, the Connecticut Supreme Court vacated Boyd's felony murder conviction. He remained incarcerated on the burglary and larceny convictions. The state brought a new felony murder charge against Boyd, which he challenged pretrial on double jeopardy grounds in state court. After losing his final appeal in state court, he filed a federal habeas petition in the [United States] District Court for the District of Connecticut that reiterated his double jeopardy claim. The district court denied Boyd's petition and the Second Circuit affirmed that decision. . . . On October 7, 1996, the [United States] Supreme Court denied certiorari to his habeas petition." (Citation omitted; footnotes omitted.) *Boyd* v. *Lantz*, supra, 487 F. Supp. 2d 5–6.

In calculating the presentence confinement credit that Boyd was to receive for time served to reduce a second felony murder sentence following retrial, applying § 18-98d, the respondent excluded the period

"from March 7, 1990, the day after his first felony murder conviction was vacated, to January 3, 1997, the date Boyd finished serving his sentence for burglary." Id., 6. Boyd challenged the respondent's denial of credit for the time he was serving his sentence for burglary while pursuing his challenge to reprosecution for felony murder through a state habeas petition. Id. The habeas court denied the petition, the Appellate Court affirmed, and this court denied certiorari. Id., 7; see also *Boyd* v. *Commissioner of Correction*, 84 Conn. App. 22, 851 A.2d 1209 (2004), cert. denied, 271 Conn. 929, 859 A.2d 583 (2004); *Boyd* v. *Warden*, Superior Court, Judicial District of Tolland, Docket No. CV-00-0003130-S (November 15, 2002) (33 Conn. L. Rptr. 399).

In affirming the habeas court's denial of Boyd's petition, the Appellate Court relied on *Steve* v. *Commissioner of Correction*, 39 Conn. App. 455, 469, 665 A.2d 168, cert. denied, 235 Conn. 929, 667 A.2d 555 (1995). The Appellate Court reasoned that *Steve* required the respondent to credit Boyd for time served while he challenged his initial felony murder conviction but did not require the respondent to credit Boyd for the time he was challenging the retrial on double jeopardy grounds. *Boyd* v. *Commissioner of Correction*, supra, 84 Conn. App. 29. The Appellate Court concluded that Boyd's double jeopardy challenge was a "collateral . . . attack after the underlying conviction was clearly vacated and [Boyd] was no longer incarcerated on that conviction . . . ." Id., 30. Therefore, the Appellate Court concluded that, because Boyd was challenging his reprosecution, not his former conviction, *Steve* and § 18-98d prohibited him from receiving "double credit" for the time served while pursuing his double jeopardy challenge. Id., 29.

Thereafter, Boyd filed a writ of habeas corpus in federal court claiming that the respondent violated his due process rights by applying § 18-98d to deny him

credit toward his felony murder sentence for the time he was incarcerated on his larceny and burglary convictions, but was challenging his reprosecution for felony murder. *Boyd* v. *Lantz*, supra, 487 F. Supp. 2d 7. Specifically, Boyd claimed that the application of § 18-98d to him unconstitutionally burdened his right to bring a preconviction double jeopardy challenge to his reprosecution. Id.

The United States District Court for the District of Connecticut analyzed Boyd's claim under the test established in *Joyner* v. *Dumpson*, 712 F.2d 770 (2d Cir. 1983). The court concluded that a fundamental right was at stake because the double jeopardy clause "protects a criminal defendant's right to challenge a prosecution in advance of trial." *Boyd* v. *Lantz*, supra, 487 F. Supp. 2d 11. The court further reasoned that, because the application of § 18-98d "to a defendant in Boyd's position will result in a substantially longer period of incarceration should the defendant choose to exercise his double jeopardy rights . . . the statute, as applied in this narrow factual context, burdens such a defendant's fundamental due process right to challenge his [reprosecution]. See *United States* v. *Goodwin*, 457 U.S. 368, 372, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982) ('[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic [sort]'); *North Carolina* v. *Pearce*, 395 U.S. 711, 724, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969) ('the imposition of . . . a punishment penalizing those who choose to exercise constitutional rights would be patently unconstitutional' . . .); *United States* v. *Jackson*, 390 U.S. 570, 583, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968) ('Congress cannot impose . . . a penalty in a manner that needlessly penalizes the assertion of a constitutional right. . . . A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitu-

tional right.'); *Griffin* v. *California*, 380 U.S. 609, 614, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) (holding unconstitutional, in the context of the [f]ifth [a]mendment privilege against self-incrimination, 'a penalty imposed by courts for exercising a constitutional privilege' because '[i]t cuts down on the privilege by making its assertion costly')." *Boyd* v. *Lantz*, supra, 11–12. The court also concluded that "this burden on double jeopardy rights is not justified by a sufficiently compelling government interest" and that, "[w]hile the general validity of Connecticut's interest in preventing 'double counting' is undisputed, the record does not provide sufficient justification for the burden imposed on Boyd's exercise of this particular fundamental right. Unlike many other fundamental constitutional rights that may be fully exercised and vindicated [postconviction], the aspect of the double jeopardy right that prohibits [reprosecution] and allows for interlocutory appeals of the denial of that claim is what makes this case different." Id., 12–13.

On the basis of the court's well reasoned opinion in *Boyd* v. *Lantz*, supra, 487 F. Supp. 2d 3, we conclude that interpreting § 18-98d so as to deny the petitioner in the present case presentence confinement credit for the time he was pursuing his double jeopardy appeal would render the application of that statute to him unconstitutional. Accordingly, to avoid invalidation of § 18-98d, we adopt, by way of judicial gloss, a requirement that if a person serving a term of imprisonment exercises his or her constitutional right to pursue a double jeopardy claim on a charge for which the sentence may run concurrently, that person shall be entitled, in any sentence subsequently imposed, to a reduction based on such presentence confinement in accordance with the provisions of § 18-98d. See *Roth* v. *Weston*, 259 Conn. 202, 233, 789 A.2d 431 (2002) ("[o]rdinarily, [i]f literal construction of a statute raises serious constitutional questions, we are obligated to

search for a construction that will accomplish the legislature's purpose without risking the statute's invalidity'' [internal quotation marks omitted]).

This judicial gloss is consistent with the legislative purpose behind § 18-98d. Indeed, the plain language of § 18-98d demonstrates that the legislature understood that a person's right to pursue an appeal must be recognized. Section 18-98d (a) (1) (B) also contemplates circumstances where time in prison could be converted to presentence confinement credit. If someone is appealing their conviction while serving their sentence and the appeal is successful, subparagraph (B) states: ''such person shall be entitled, in any sentence subsequently imposed, to a reduction based on such presentence confinement in accordance with the provisions of this section.'' In enacting § 18-98d, the legislature considered that there are circumstances where a person would be released from his or her sentence due to errors and that such individuals should be credited with the time spent imprisoned. The legislature contemplated circumstances where periods of incarceration pursuant to a criminal sentence could be converted to presentence confinement credit.

Accordingly, we conclude that the petitioner is entitled to presentence confinement credit from the date he filed the motion to dismiss on ground of double jeopardy through the date that this court affirmed the judgment of the trial court on that motion, February 16, 1999.[13] As stated previously in this opinion, the petitioner is also entitled to presentence confinement credit from the date he was held in lieu of bond on the underlying charges, March 3, 1995, through the date of his sentencing for robbery, December 13, 1996.

[13] We note that the date of the petitioner's motion to dismiss in the underlying criminal proceedings is not apparent on the face of the present record. The length of this credit, therefore, is to be determined by the habeas court on remand.

The judgment of the habeas court is reversed with respect to the issue of presentence confinement credit and the case is remanded with direction to grant the petition for a writ of habeas corpus as to that issue and to order the respondent to credit the petitioner's sentence in accordance with the preceding paragraph.

In this opinion ROGERS, C. J., and PALMER, McDONALD and ROBINSON, Js., concurred.

ESPINOSA, J., with whom VERTEFEUILLE, J., joins, dissenting. I disagree with the majority that General Statutes § 18-98d is ambiguous. Section 18-98d (a) (1) (A) plainly and unambiguously provides that the respondent, the Commissioner of Correction, shall count each day of presentence confinement "*only once* for the purpose of reducing all sentences imposed after such presentence confinement . . . ." (Emphasis added.) At the time that the petitioner, Latone James, was sentenced following his conviction of felony murder, the respondent already had given him credit for his 651 days of presentence confinement. Nothing in the language of § 18-98d required the respondent to transfer the credit for that presentence confinement to the petitioner's sentence for felony murder, and the petitioner points to no such language. I also disagree with the majority that the plain language of § 18-98d (a) (1) (B), which expressly is inapplicable to provide the petitioner with *presentence* confinement credit for a period of imprisonment that he served *after he was already a sentenced prisoner*, is unconstitutional as applied to the petitioner. The sole authority on which the majority relies for its conclusion that the plain and unambiguous language of § 18-98d (a) (1) (B) violates the petitioner's right to substantive due process, *Boyd* v. *Lantz*, 487 F. Supp. 2d 3 (D. Conn. 2007), is inapposite. Accordingly, I respectfully dissent.

Because I do not dispute the majority's summary of the applicable facts, I need not repeat them in this dissent. At issue are two periods of confinement for which the petitioner seeks credit toward his fifty year sentence for felony murder: (1) the 651 days during which the petitioner was confined prior to being sentenced to twenty years incarceration for his conviction of robbery in the first degree in violation of General Statutes § 53a-134 (a) (2); and, (2) the 973 days of imprisonment that the petitioner had served of that twenty year sentence, prior to the date of his sentencing to fifty years incarceration for his conviction of felony murder in violation of General Statutes § 53a-54c. I address each period of confinement in turn.

The respondent interpreted § 18-98d to preclude the application of the petitioner's 651 days of presentence confinement to his sentence for felony murder because those days had already been applied to reduce his sentence on his conviction of robbery. The plain and unambiguous language of § 18-98d supports the respondent's decision. Section 18-98d (a) (1) (A) provides in relevant part: "Any person who is confined to a community correctional center or a correctional institution . . . under a mittimus or because such person is unable to obtain bail or is denied bail shall, if subsequently imprisoned, earn a reduction of such person's sentence equal to the number of days which such person spent in such facility from the time such person was placed in presentence confinement to the time such person began serving the term of imprisonment imposed; provided . . . each day of presentence confinement shall be counted only once for the purpose of reducing all sentences imposed after such presentence confinement . . . ."

The key statutory language at issue is the phrase "each day . . . shall be counted only once for the purpose of reducing all sentences imposed . . . ." General

Statutes § 18-98d (a) (1) (A). The plain meaning of this statutory language is that any person who is sentenced will receive one, and only one, credit for any presentence confinement—not one credit for "each" sentence, but one credit for "all" sentences. The provision in General Statutes § 53a-38 (b) (1), that concurrent sentences merge "and are satisfied by discharge of the term which has the longest term to run," does not inject any ambiguity into the meaning of "all sentences." Because this court previously has interpreted precisely these two phrases, when reading these two statutes together, we do not now interpret this statutory language on a clean slate. It is well established that, "in our construction of statutes, this court's starting point, when we already have interpreted the statute in question, is our prior construction of that statute. . . . This approach is consistent both with the principle of stare decisis and the principle that our prior decisions interpreting a statute are not treated as extratextual sources for purposes of construing that statute and may be consulted as part of our reading of the statutory text." (Citation omitted; internal quotation marks omitted.) *Velecela* v. *All Habitat Services, LLC*, 322 Conn. 335, 338, 141 A.3d 778 (2016).

In *Harris* v. *Commissioner of Correction*, 271 Conn. 808, 823, 860 A.2d 715 (2004), this court construed the language of § 18-98d (a) (1) (A), holding that "when concurrent sentences are imposed on different dates, the presentence confinement days accrued simultaneously on more than one docket are utilized fully on the date that they are applied to the first sentence. Hence, they cannot be counted a second time to accelerate the discharge date of any subsequent sentence without violating the language of § 18-98d (a) (1) (A)." As to the interplay between § 18-98d (a) (1) (A) and § 53a-38 (b) (1), the court in *Harris* observed that "[t]he merger process does not alter the fact that concurrent senten-

ces remain separate terms of imprisonment which the legislature has permitted to be served at one time." (Internal quotation marks omitted.) Id., 819. Pursuant to our prior interpretation of § 18-98d (a) (1) (A) in *Harris*, therefore, the plain language of the statute *precludes* the application of presentence confinement credit that has been applied to one sentence to any subsequent sentence, even if that subsequent sentence is to run concurrently with the first sentence. Although *Harris* involved concurrent sentences on more than one docket, nothing in the opinion suggested that the meaning of § 18-98d (a) (1) (A), read together with § 53a-38 (b) (1), would somehow be different when the concurrent sentences that were imposed on different dates shared the same docket number. Accordingly, pursuant to the plain language of § 18-98d (a) (1) (A), I would hold that the 651 days of presentence confinement that the respondent had applied to the petitioner's sentence for robbery was unavailable to be applied to the sentence for felony murder.

As to the 973 days during which the petitioner was confined following his sentencing for his robbery conviction, the statutory language could not be more clear. Section 18-98d (a) (1) (B) provides in relevant part: "[T]he provisions of this section shall only apply to a person for whom the existence of a mittimus, an inability to obtain bail or the denial of bail is the sole reason for such person's presentence confinement, except that if a person is serving a term of imprisonment at the same time such person is in presentence confinement on another charge and the conviction for such imprisonment is reversed on appeal, such person shall be entitled, in any sentence subsequently imposed, to a reduction based on such presentence confinement in accordance with the provisions of this section. . . ." It is undisputed that the petitioner was serving his sentence for robbery during the 973 days for which he now

seeks credit toward his sentence for felony murder. The plain language of § 18-98d (a) (1) (B) makes it clear that the statute does not apply in this context. The inclusion of an exception for imprisonment time that has resulted from a conviction that is reversed on appeal, and the absence of any such exception for an unsuccessful attempt to prohibit the state from reprosecuting a charge that has resulted in a mistrial, makes the language even more clear. If the legislature had intended to make an exception for circumstances such as those in the present case, it could have done so, but it did not.

The majority concludes that, notwithstanding the plain language of the statute, it is necessary to place a judicial gloss on § 18-98d (a) (1) (B) in order to render it constitutional. Specifically, the majority relies on *Boyd* v. *Lantz*, supra, 487 F. Supp. 2d 5–6, 13, for the proposition that, because the petitioner had raised a double jeopardy challenge to the state's reprosecution of the felony murder charge, the failure to apply a portion of the 973 days of imprisonment on the robbery sentence to his felony murder sentence unconstitutionally penalizes him for exercising his double jeopardy rights. Significantly, in *Boyd*, the United States District Court for the District of Connecticut held only that § 18-98d (a) (1) (B) was unconstitutional *as applied* to the petitioner in that federal habeas action. Boyd had been convicted of burglary, larceny and felony murder. Id., 5. On appeal to this court, his felony murder conviction was vacated; *State* v. *Boyd*, 214 Conn. 132, 570 A.2d 1125 (1990); but he remained incarcerated on the burglary and larceny convictions. *Boyd* v. *Lantz*, supra, 5. The state then brought a new felony murder charge against him, which he unsuccessfully challenged on double jeopardy grounds. Id. Ultimately, he pleaded guilty to felony murder, and was sentenced to twenty-five years incarceration on that conviction. Id., 6. The

respondent did not give Boyd credit for the period of his confinement that fell between the day after his first felony murder conviction was vacated and the day that he finished serving his sentences for burglary and larceny. Id. The District Court held that because "the application of [§ 18-98d] to a defendant in Boyd's position will result in a substantially longer period of incarceration should the defendant choose to exercise his double jeopardy rights . . . the statute, as applied in this *narrow factual context*, burdens such a defendant's fundamental due process right to challenge his reprosecution." (Emphasis added; footnote omitted.) Id., 11. The facts of the present case are distinguishable. Whereas Boyd's conviction of felony murder had been vacated following a successful appeal, there was no conviction in the present case. Instead, the state sought to reprosecute following a mistrial on the felony murder charge. Accordingly, the facts of the present case are distinguishable from *Boyd* v. *Lantz*, supra, 3, and that case is inapplicable.

Accordingly, I respectfully dissent.

ORDERS

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STATE OF CONNECTICUT *v.* KIPP MENDEZ WIGGINS

The defendant's petition for certification to appeal from the Appellate Court, 159 Conn. App. 598 (AC 36951), is denied.

Robert L. O'Brien, assigned counsel, in support of the petition.

Nancy L. Chupak, senior assistant state's attorney, in opposition

Decided October 4, 2017

STATE OF CONNECTICUT *v.* MARY J. AMES

The defendant's petition for certification to appeal from the Appellate Court, 171 Conn. App. 486 (AC 38397), is denied.

Lauren Weisfeld, chief of legal services, in support of the petition.

Mitchell S. Brody, senior assistant state's attorney, in opposition.

Decided October 4, 2017

AMERICAN FIRST FEDERAL, INC. *v.* SHELDON M. GORDON ET AL.

The defendants' petition for certification to appeal from the Appellate Court, 173 Conn. App. 573 (AC 38217/AC 38365), is denied.

ROGERS, C. J., did not participate in the consideration of or decision on this petition.

Aaron A. Romney and *Patrick R. Linsey*, in support of the petition.

David T. Martin, *William N. Wright* and *Jonathan P. Vuotto*, pro hac vice, in opposition.

Decided October 4, 2017

TIMOTHY TOWNSEND, JR. *v.* ANITA HARDY ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 173 Conn. App. 779 (AC 38262), is denied.

D'AURIA, J., did not participate in the consideration of or decision on this petition.

Timothy Townsend Jr., self-represented, in support of the petition.

Decided October 4, 2017

STATE OF CONNECTICUT *v.* GERALDO TORRES

The defendant's petition for certification to appeal from the Appellate Court, 173 Conn. App. 901 (AC 38859), is denied.

Lauren Weisfeld, chief of legal services, in support of the petition.

Toni M. Smith-Rosario, senior assistant state's attorney, in opposition.

Decided October 4, 2017

STATE OF CONNECTICUT *v.* STACY SMITH

The defendant's petition for certification to appeal from the Appellate Court, 174 Conn. App. 172 (AC 37632), is denied.

Daniel M. Erwin, assigned counsel, and *Kevin M. Smith*, assigned counsel, in support of the petition.

Nancy L. Walker, deputy assistant state's attorney, in opposition

Decided October 4, 2017

THE RESERVE REALTY, LLC, ET AL. *v.* WINDEMERE RESERVE, LLC, ET AL.

The plaintiffs' petition for certification to appeal from the Appellate Court, 174 Conn. App. 130 (AC 38167), is granted, limited to the following question:

"In concluding that the purchase and sale agreements forming the basis of the plaintiffs' claim for real estate brokerage fees constituted a tying arrangement in violation of the Connecticut Antitrust Act, General Statutes § 35-24 et seq., did the Appellate Court properly rely on

State v. *Hossan-Maxwell, Inc.*, 181 Conn. 655, 436 A.2d 284 (1980)?"

Daniel E. Casagrande, in support of petition.

J. Christopher Rooney and *Brian A. Daley*, in opposition.

Decided October 4, 2017

THE RESERVE REALTY, LLC, ET AL. *v.* BLT RESERVE, LLC, ET AL.

The plaintiffs' petition for certification to appeal from the Appellate Court, 174 Conn. App. 150 (AC 38440), is granted, limited to the following question:

"Did the Appellate Court properly affirm the judgment discharging the plaintiffs' broker's lien on the basis of its conclusion in *Reserve Realty, LLC* v. *Windemere Reserve, LLC*, 174 Conn. App. 130, 165 A.3d 162 (2017)?"

Daniel E. Casagrande, in support of petition.

J. Christopher Rooney and *Brian A. Daley*, in opposition.

Decided October 4, 2017

THE RESERVE REALTY, LLC, ET AL. *v.* WINDEMERE RESERVE, LLC, ET AL.

The plaintiffs' petition for certification to appeal from the Appellate Court, 174 Conn. App. 153 (AC 38442), is granted, limited to the following question:

"Did the Appellate Court properly affirm the judgment discharging the plaintiffs' broker's lien on the basis of its conclusion in *Reserve Realty, LLC* v. *Winde-*

mere Reserve, LLC, 174 Conn. App. 130, 165 A.3d 162 (2017)?"

Daniel E. Casagrande, in support of petition.

J. Christopher Rooney and *Brian A. Daley*, in opposition.

Decided October 4, 2017

STATE OF CONNECTICUT *v.* JOSE RONALD JOSEPH

The defendant's petition for certification to appeal from the Appellate Court, 174 Conn. App. 260 (AC 38473), is denied.

Allison M. Near, assigned counsel, in support of the petition.

Matthew A. Weiner, assistant state's attorney, in opposition.

Decided October 4, 2017

RONALD F. BOZELKO *v.* ALFRED D'ALBERO ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court (AC 40055) is denied.

Ronald F. Bozelko, self-represented, in support of the petition.

Decided October 4, 2017

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CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* KATHERINE LEE STONICK
(AC 39853)

Sheldon, Elgo and Beach, Js.

Syllabus

The defendant was charged with the crimes of larceny in the sixth degree and illegal use of a credit card. Thereafter, the state entered a nolle prosequi on the charges. The defendant asked that the charges be dismissed on the ground of actual innocence. The court noted the nolle proequi over the defendant's objection and demand for dismissal without requiring the state to make certain representations concerning those charges as required by statute (§ 54-56b), and the defendant appealed to this court. *Held* that the trial court violated § 54-56b by noting the nolle over the defendant's objection without ruling or her demand for dismissal or requiring the state to represent to the court, with respect to the charges, that any material witness had died, disappeared or become disabled, or that material evidence had disappeared or had been destroyed and that a further investigation was necessary.

Argued September 14—officially released October 12, 2017*

Procedural History

Information charging the defendant with the crimes of larceny in the sixth degree and illegal use of a credit

* October 12, 2017, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

card, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the prosecutor entered a nolle prosequi as to the charges, which the court, *Hernandez*, *J.*, accepted over the defendant's objection, and the defendant appealed to this court. *Reversed; further proceedings.*

A. Ryan McGuigan, with whom, on the brief, was *Pamela LeBlanc*, for the appellant (defendant).

Ronald G. Weller, senior assistant state's attorney, with whom, on the brief, were *Richard J. Colangelo, Jr.*, state's attorney, and *Suzanne M. Vieux*, supervisory assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. The defendant, Katherine Lee Stonick, appeals from the judgment of the trial court noting a nolle prosequi to charges then pending against her of larceny in in the sixth degree in violation of General Statutes § 53a-125b and illegal use of a credit card in violation of General Statutes § 53a-128d without ruling on her request that the charges be dismissed the pursuant to General Statutes § 54-56b. The nolled charges against the defendant stemmed from an incident that allegedly occurred on August 17, 2016, in which the defendant, while allegedly out on a date with the complainant, was accused of using the complainant's debit card, without his knowledge or permission, to purchase a $300 gift card to the restaurant at which they were dining.

On November 14, 2016, the state entered a nolle on the pending charges, upon which the defendant immediately asked that the charges be dismissed on the ground of "actual innocence." The court asked the defendant if she would concede that there had been probable cause for her arrest. Defense counsel responded on her behalf that she would not so concede, whereupon the

court ended the proceeding by stating: "A nolle is noted for the record." This appeal followed.

The defendant argues, and the state concedes, that the court erred in noting the nolle over the objection of the defendant without ruling on her request for a dismissal of the nolled charges or requiring the state to make certain representations concerning those charges pursuant to § 54-56b. That statute provides that once a defendant objects to the entry of a nolle and demands a dismissal, the state may enter the nolle only "upon a representation to the court by the prosecuting official that a material witness has died, disappeared or become disabled or that material evidence has disappeared or has been destroyed and that a further investigation is therefore necessary." When the court noted the nolle in the absence of any such representation by the state, it did so in violation of § 54-56b.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion on the defendant's objection to the state's nolle and her demand that the nolled charges be dismissed.

DAVID H. FAILE, JR. *v.* TOWN OF STRATFORD PAUL A. LANGE *v.* TOWN OF STRATFORD N759ZD, LLC *v.* TOWN OF STRATFORD (AC 38912)

DiPentima, C. J., and Mullins and Westbrook, Js.

Syllabus

The plaintiffs, F, L, and N Co., owners of aircraft hangars at an airport, filed four appeals from the decisions of the Board of Assessment Appeals of the defendant town of Stratford denying their appeals from the town's assessments of the hangars, in which they had claimed that the town's valuations were excessive. The trial court sent notice to the parties of a pretrial settlement conference, which required, inter alia, that the parties have an attorney with ultimate authority to settle the case attend the conference, and the attendance of each plaintiff or entity that would

be testifying. F and G, the attorney representing the plaintiffs, as well as the town's attorney, were present at the pretrial conference, but L was absent due to his hospitalization a few days prior. The settlement conference took place in chambers, off the record, but afterward the court went on the record to consider the town's motions for nonsuit, which were based on the plaintiffs' failure to have someone present at the pretrial conference with authority to settle the matters. Although G repeatedly claimed that he had the ultimate authority to settle the matters, the court chastised G for appearing at the settlement conference without having such authority, stated its belief that L, who was an attorney, had the ultimate authority to settle the matters in one of the appeals, and found that certain paper copies of documents were not brought to the conference as required by the court's notice. Upon questioning G with respect to the appeal involving N Co., G stated that, on the basis of a strict reading of the language of the court's orders, he did not have ultimate authority as required by the notice. Accordingly, the court granted the town's motions for judgments of nonsuit. The plaintiffs thereafter filed motions to open the judgments of nonsuit, which the trial court denied, and this joint appeal by the plaintiffs followed. On appeal, the parties disagreed as to the applicable standard of review of the trial court's judgments of nonsuit. The plaintiffs claimed that this court should apply a more nuanced abuse of discretion standard as set forth in *Millbrook Owners Assn., Inc.* v. *Hamilton Standard* (257 Conn. 1), while the town argued that the more deferential general abuse of discretion standard applied. *Held*:

1. Even if this court applied the traditionally more deferential abuse of discretion standard, the trial court abused its discretion in rendering the judgments of nonsuit against F, the trial court's findings that F violated its order by not having someone with ultimate authority to settle the matters present at the pretrial settlement conference, and by failing to bring to the conference every physical piece of paper he would offer into evidence at trial having been clearly erroneous: F and his attorney were present at the conference, and F, as the owner of his hangars, had the right to refuse to settle, and his willingness or unwillingness to settle the matter for some amount that the court may have thought was reasonable did not violate the court's order; furthermore, because G had electronic copies of the documents that would be used at trial on his laptop computer, which he brought to court, G and F complied with the court's order, which did not state that the parties needed every physical piece of paper that would be offered into evidence.
2. Although N Co. failed to establish clear error in the trial court's finding that G did not have ultimate authority to settle N Co.'s tax appeals in light of G's concession that, under a strict reading of the court's order, he did not have that authority, even under the broader traditional abuse of discretion standard, the court improperly rendered judgments of nonsuit against N Co.; L, the principal of N Co. and the person whom

the trial court found was vested with the ultimate authority to settle N Co.'s tax appeals, was not in attendance at the pretrial conference because he was hospitalized, the court made no findings of a wilful disregard of its orders or of contemptuous behavior on the part of either G or L, and a dismissal or a nonsuit as a sanction for the failure of L to attend when he was ill and in the hospital did not serve justice or in any way vindicate the legitimate interests of the town and the court.

Argued March 9—officially released October 17, 2017

Procedural History

Appeals from the decisions of the defendant's Board of Assessment Appeals, brought to the Superior Court in the judicial district of Fairfield and transferred to the judicial district of New Britain, where the court, *Hon. George Levine*, judge trial referee, rendered a judgment of nonsuit as to all the appeals; thereafter, the court denied the plaintiffs' motions to open the judgments of nonsuit, and the plaintiffs appealed to this court. *Reversed*; *further proceedings*.

Paul M. Grocki, for the appellants (plaintiffs).

Bryan L. LeClerc, for the appellee (defendant).

Opinion

MULLINS, J. In this joint tax appeal, the plaintiffs, David H. Faile, Jr., Paul A. Lange, and N759ZD, LLC (LLC), appeal from the judgments of nonsuit, rendered by the trial court, in favor of the defendant, the town of Stratford (town). They also appeal from the court's denial of their motions to open the nonsuits. On appeal, the plaintiffs claim that the court's findings that they violated its orders were clearly erroneous, and that, even if we assume, arguendo, that they did violate the orders, the court abused its discretion in rending judgments of nonsuit. We agree with the plaintiffs.[1] Therefore, we reverse the judgments of the trial court.

[1] Because we agree that the judgments of nonsuit were inappropriate in each of these matters, we need not consider whether the trial court properly denied the motions to open the judgments of nonsuit.

The following facts, garnered from the record, inform our review. At the time this action was commenced, the plaintiffs owned aircraft hangars, known as T-Hangars (hangars), located at Sikorsky Memorial Airport in Stratford. The hangars were located on land that was leased from the city of Bridgeport. Faile owned two hangars, A-9 and B-11; the LLC owned one hangar, A-3. Lange is the principal of the LLC and a member of the law firm, Law Offices of Paul A. Lange, LLC, which is counsel of record for the plaintiffs in this case.[2]

The town assessed and taxed the hangars on the grand lists for 2008 and 2009. The plaintiffs appealed the assessments and their taxes to the Board of Assessment Appeals of the town (board), alleging, in relevant part, that the valuations were excessive. After each appeal was denied by the board, the plaintiffs filed appeals in our Superior Court.[3] Initially, the appeals were stayed pending the Supreme Court's decision in *Stratford* v. *Jacobelli*, 317 Conn. 863, 865–66, 120 A.3d 500 (2015) (concluding that hangars are taxable real property rather than personal property). Once the stay was lifted, the court, on October 1, 2015, sent notice to the parties of a pretrial settlement conference. The court assigned that conference for November 3, 2015.

The notice provided in relevant part: "This case is assigned for pretrial on [November 3, 2015] at 10 a.m. . . . The following must attend:

[2] Although hangar A-3 was owned by the LLC for purposes of both the 2009 and 2010 taxes, the town billed Lange in his individual capacity for the taxes owed for 2009. The importance of this matter, however, is not an issue in this appeal. For convenience, we refer to the tax appeals involving hangar A-3 as the LLC's appeal except where relevant.

[3] In CV-09-4025677-S, Faile appealed from the 2009 decision of the board; in CV-10-6006946-S, Faile appealed from the 2010 decision of the board. In CV-09-4037511-S, Lange appealed from the 2009 decision of the board. See footnote 2 of this opinion. In CV-10-6007416-S, the LLC appealed from the 2010 decision of the board. All of these cases were consolidated for one pretrial at the trial court.

"1) The attorney who will try the case, unless otherwise ordered by Judge [George] Levine;

"2) The attorney who has ultimate authority to make a recommendation to the client, if different from the attorney described in #1 above.

"If plaintiff is a person(s), the plaintiff(s) must attend. The assessor must attend. Any appraiser retained must attend but need not complete an appraisal report for pretrial. If plaintiff is a corporation or other type of legal entity, a principal who has ultimate authority to negotiate a settlement must be present. 'Ultimate authority' means the ability to resolve the case by withdrawing it without any change in assessment, if persuaded it is in plaintiff's best interests, without checking with anyone else. Someone with authority to negotiate a settlement at a preestablished figure does not have 'ultimate authority.' A person familiar with the finances and management of the subject property must attend.

"If this date is inconvenient, please select other dates with all counsel/pro se parties and e-file a motion for continuance with proposed dates.

"Failure to comply with this order may result in sanctions, including a judgment of nonsuit or default. If no principal can attend, the parties should contact the court."

On November 4, 2015, the court issued another order, which provided in relevant part:

"By agreement of the parties, the . . . matter has been scheduled for another pretrial conference, to be conducted on [December 2, 2015] . . . .

"All terms of the original pretrial order remain in effect with the following modifications:

"1) The following must attend: Each plaintiff and/or entity and every person who will be called to testify at trial.

"2) Counsel for all parties must bring every piece of paper which will be offered in evidence.

"3) Counsel for each party must be prepared to state all the testimony to which each witness is expected to testify, on a count by count basis and on a year by year basis.

"4) Failure of any plaintiffs to appear will result in a judgment of nonsuit.

"Failure to comply with these terms may result in sanctions, including nonsuit or default."

On November 18 and 19, 2015, the plaintiffs filed motions for continuance of that settlement conference on the ground that discovery was outstanding and the plaintiffs had noticed, but not yet taken, the deposition of the town's tax assessor; the court denied the motions on the same days they were filed. On November 25, 2015, the town filed a motion for extension of time, requesting that the court give it a thirty day extension to respond to the plaintiffs' discovery requests. There is no indication in the record that the court acted on the town's motion.

On Wednesday, December 2, 2015, the parties appeared for the settlement conference. Lange, however, was absent due to his hospitalization on Sunday, November 29, 2015, just a few days before. Attorney Paul Grocki, an attorney with the Law Offices of Paul A. Lange, LLC, was present on behalf of the plaintiffs. Faile also was present. Appearing on behalf of the town was Byran LeClerc. The settlement conference was held in chambers, off the record, but afterward, the court went on the record to consider the town's motions for nonsuit.

During the hearing, the court separately addressed each of the plaintiffs' appeals, with the bulk of the discussion occurring in the first matter, CV-09-4025677-S, which is Faile's appeal from the 2009 decision of the board. LeClerc stated that the town was moving "for nonsuit based upon the plaintiff's failure to have someone present at this morning's pretrial with authority to settle this matter."

Grocki first explained to the court that he had filed a motion for a continuance approximately two weeks earlier due to outstanding discovery, which the court had denied. The court asked Grocki if he had been given the ultimate authority to settle this matter. Grocki responded that he had been given such authority. He further noted that Faile also was present at the settlement conference, and that Faile, certainly, had authority to settle his own cases. Grocki acknowledged that Faile wanted to do whatever Lange recommended, but that, ultimately, the parties were taking the advice of counsel, namely Grocki. Grocki explained to the court that the parties just "couldn't come to an agreement" regarding settlement. He acknowledged that his clients would not settle for a property tax fair market assessment of more than $9000.

The court chastised Grocki for appearing at the settlement conference without having the "ultimate authority" as set forth in the pretrial notices. Grocki argued, however, that he did have the ultimate authority and that Faile, himself, also had been present at the settlement conference. The court asked Grocki why he had not notified the court that Lange would not be present before the parties convened the settlement conference.[4] Grocki explained that Lange was hospitalized on the Sunday before the pretrial conference, and that they did not know how long he would remain in the hospital.

[4] We note that Lange was not a party to either of Faile's appeals.

When they realized that he would not be released in time for the settlement conference, it was too late to notify the court. The court then told Grocki that "the purpose of the language contained in the pretrial notice [was] to make certain that people with unfettered authority [were there] to negotiate a settlement, and further [that it was] required that the attorney, who ha[d] the closest relationship—or . . . who ha[d] ultimate authority to make a recommendation to the client must be [there]. Now that clearly is Mr. Lange. Is that correct?" Grocki replied that Lange was an attorney but that Lange, in fact, was not the attorney for these matters.

The court continued to confront Grocki, asking whether Lange actually had the ultimate authority to settle all of these matters, rather than Grocki. Grocki continued to tell the court that he, Grocki, was the attorney for all of the plaintiffs, that Lange was not the attorney for these matters. Grocki further explained that he had the ultimate authority to settle all of these matters, but that the parties would not settle for more than a $9000 fair market assessment.

Despite Grocki's protestations, the court stated that it believed Lange had the ultimate authority to settle Faile's appeal from the 2009 decision of the board, and, because Lange was not present, despite his hospitalization, "it was impossible . . . to make a good faith effort at a resolution of this case." The court then granted the town's motion for nonsuit in CV-09-4025677-S.

The court then considered CV-10-6006946-S, Faile's appeal from the 2010 decision of the board. The court asked LeClerc if he wanted to make a motion. LeClerc responded that he was moving for a nonsuit "based upon [Faile's] failure to have someone present at this morning's pretrial with ultimate authority to settle this matter, and also for not having all documents that will

be entered into evidence, specifically the document evidencing one of the three airplane hangars had been sold."

Grocki asked the court if it wanted him to reiterate all of the arguments that he set forth for the previous matter. The court asked if they would be the same, and Grocki replied in the affirmative. The court then asked Grocki if he had brought the papers related to the sale of the hangar, and Grocki stated that he had electronic versions of everything with him, which he readily could access on his computer. The court chastised Grocki for not bringing "every piece of paper [he] intend[ed] to offer into evidence." The court then stated that it was granting the motion for nonsuit in CV-10-6006946-S on the same basis as it had granted the motion in CV-09-4025677-S, and in addition that paper copies of documents were not brought to the conference.

Next, the court heard the town's motion for nonsuit in CV-09-4037511-S, Lange's appeal from 2009 decision of the board. See footnote 2 of this opinion. The court asked the parties if everything that was said previously also applied to this motion, and the parties replied in the affirmative. LeClerc then stated that the town was moving on the ground that the plaintiff had failed "to have someone present with ultimate authority to settle this matter at today's pretrial." The court asked Grocki if he had been authorized to settle "this case for a fair market value assessment of not more than $9000?" Grocki said yes, but there were other terms as well. He also reiterated that he had the ultimate authority to settle this matter, but that there was a bottom line, an amount Lange would not go above for a fair market assessed value.

The court continued to ask Grocki if he believed he had the "ultimate authority" to settle these matters as set forth in the court's orders. Grocki continued to insist

that he did have such authority and that the plaintiffs had complied with the orders of the court because he did not need "to check with anyone else in terms of . . . resolving the matter." Grocki argued that the fact that the parties had established a bottom line did not mean that he was without ultimate authority. The court responded that it found Grocki's insistence "incomprehensible." The court then granted the motion for nonsuit in CV-09-4037511-S.

Finally, the court considered CV-10-6007416-S, the LLC's appeal from the 2010 decision of the board. The town moved for nonsuit in this case on the ground that the LLC failed "to have someone present with ultimate authority to settle this matter at [that day's] pretrial." The court asked Grocki to identify the principal of the LLC, and Grocki responded that it was Lange. It asked if Lange was present, and Grocki responded that he was not present. Grocki also stated that he would mirror his prior arguments that he had the ultimate authority to settle this matter. The court then asked Grocki once again if he believed he was in compliance with the court's orders in the pretrial notice. Grocki began that "based on [his] interpretation of the circumstances," but the court then interrupted Grocki and stated, in part, that Grocki was not "called upon to interpret the circumstances of a pretrial notice." Grocki asked to look at the order again. Shortly thereafter, the court said: "Let's go off the record."

Upon resuming the on-the-record hearing, the court asked Grocki whether he had complied with the terms of the pretrial notice. Grocki then stated that, on the basis of a strict reading of the language in the court's orders, he did not enjoy ultimate authority as required by the notice. Grocki was also offered to amend his remarks regarding his authority in the CV-09-4037511-S case, which he did, to reflect the discussion on the

record in the CV-10-6007416-S case. The court then granted the motion for a nonsuit in CV-10-6007416-S.

The plaintiffs, twenty days following the court's judgments, filed motions to open the judgments of nonsuit. Grocki argued in the hearing on those motions that he did have the ultimate authority to settle the matters at the settlement conference. Grocki further argued that, to the extent that the court did not agree that he had such authority because it concluded that Lange had the ultimate authority, any failure to comply was due to Lange's hospitalization, which, he argued, established good cause for any alleged noncompliance. The court denied the motions. This joint appeal followed. Although we will consider the appeals for Faile and the LLC separately, we first discuss our standard of review, which the parties dispute.

The plaintiffs contend that we should apply the more nuanced standard set forth in *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, 257 Conn. 1, 17–18, 776 A.2d 1115 (2001), while the town contends that we should apply the more deferential general abuse of discretion standard. After a thorough analysis of *Millbrook* and its related cases, although we are persuaded that *Millbrook* should apply in instances such as this, we conclude that, under either the more nuanced *Millbrook* standard or under the deferential general abuse of discretion standard, the court abused its discretion in rendering judgments of nonsuit in these matters.

We start by setting forth a brief overview of *Millbrook*. In that case, the plaintiff failed to respond to the defendants' request that it disclose the opinions of two witnesses who were expected to testify at trial. Id., 6. The defendants thereafter moved to compel disclosure, and, in response, the trial court ordered the plaintiff to disclose those opinions. Id. Thereafter, the plaintiff decided that those witnesses would not testify at trial,

but that they only would be used to help prepare for litigation. Id., 6–7; see also Practice Book (2001) §§ 13-4 (2) and 13-4 (4). After other procedural events, the defendants filed a motion to dismiss on the ground that the plaintiff had failed to disclose the witnesses pursuant to Practice Book (2001) § 13-4 (4), which concerns experts who will be called to testify at trial. Id., 8. The plaintiff objected on the ground that the witnesses would not be called at trial. Id. The court heard the motion to dismiss, and entered a conditional dismissal. Id., 9. The plaintiff attempted to comply with the conditions, but, apparently, did not do so successfully, and the defendants renewed their motion to dismiss, pursuant to Practice Book § 13-14, which the court, ultimately, granted. Id., 9, 13–14.

On appeal, our Supreme Court opined that the trial court could have dismissed the plaintiff's case for failure to comply on two different bases. First, the trial court could have dismissed the case as a sanction pursuant to Practice Book § 13-14, which provides sanctions for, inter alia, failing to comply with discovery orders. Id., 14. Second, our Supreme Court opined that the trial court "could have seen that same failure [to comply with the court's order] as justifying the sanction of dismissal under the court's inherent sanctioning power." Id.

Ultimately, however, our Supreme Court ruled that it made no difference to its analysis under which grant of authority the trial court had acted, because the propriety of the trial court's exercise of its authority under either or both grants of authority was considered under the same standard on appeal: "[A] court may, either under its inherent power to impose sanctions in order to compel observance of its rules and orders, or under the provisions of § 13-14, impose sanctions, including the sanction of dismissal. In this connection, we agree with the defendants that, in the present case, the court

was acting under either—or both—grants of authority. It is not necessary, however, to determine which grant of authority it acted under, because the standards for gauging the propriety of its action are the same under either." Id., 14–15.

The court then stated in relevant part: "Traditionally, we have reviewed the action of the trial court in imposing sanctions for failure to comply with its orders regarding discovery under a broad abuse of discretion standard. . . . The factors to be considered by the court include: (1) whether noncompliance was caused by inability, rather than wilfulness, bad faith or other fault; (2) whether and to what extent noncompliance caused prejudice to the other party, including the importance of the information sought to that party's case; and (3) which sanction would, under the circumstances of the case, be an appropriate judicial response to the noncomplying party's conduct. . . . As with any discretionary action of the trial court, appellate review requires every reasonable presumption in favor of the action, and the ultimate issue for us is whether the trial court could have reasonably concluded as it did. . . . In reviewing a claim that the court has abused this discretion, great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness. . . . The determinative question for an appellate court is not whether it would have imposed a similar sanction but whether the trial court could reasonably conclude as it did given the facts presented. Never will the case on appeal look as it does to a [trial court] . . . faced with the need to impose reasonable bounds and order on discovery. . . .

"At the same time, however, we also have stated: [D]iscretion imports something more than leeway in decision-making. . . . It means a legal discretion, to be exercised in conformity with the spirit of the law

and in a manner to subserve and not to impede or defeat the ends of substantial justice. . . . In addition, the court's discretion should be exercised mindful of the policy preference to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his day in court. . . . The design of the rules of practice is both to facilitate business and to advance justice; they will be interpreted liberally in any case where it shall be manifest that a strict adherence to them will work surprise or injustice. . . . Rules are a means to justice, and not an end in themselves. . . . Our practice does not favor the termination of proceedings without a determination of the merits of the controversy where that can be brought about with due regard to necessary rules of procedure. . . . Therefore, although dismissal of an action is not an abuse of discretion where a party shows a deliberate, contumacious or unwarranted disregard for the court's authority . . . the court should be reluctant to employ the sanction of dismissal except as a last resort. . . . [T]he sanction of dismissal should be imposed only as a last resort, and where it would be the only reasonable remedy available to vindicate the legitimate interests of the other party and the court. . . . It is inherent in these principles that the articulation by the court of the conditions with which the party must comply be made with reasonable clarity.

"Upon reflection, we conclude that the broad abuse of discretion standard that we have been employing for the imposition of sanctions for violation of discovery orders, and for our appellate review thereof, is inaccurate, because it masks several different questions that in fact are involved in the question of when a court is justified in imposing such sanctions. We therefore now take the opportunity to clarify that standard by articulating those specific questions. In order for a trial court's order of sanctions for violation of a discovery order to

withstand scrutiny, three requirements must be met." (Citations omitted; internal quotation marks omitted.) Id., 15–17.

Our Supreme Court then proceeded to set forth the three factors that must be employed when determining whether the trial court properly exercised its discretion in ordering sanctions for the violation of a discovery order under its inherent authority and/or pursuant to Practice Book § 13-14. "First, the order to be complied with must be reasonably clear. In this connection, however, we also state that even an order that does not meet this standard may form the basis of a sanction if the record establishes that, notwithstanding the lack of such clarity, the party sanctioned in fact understood the trial court's intended meaning. This requirement poses a legal question that we will review de novo.

"Second, the record must establish that the order was in fact violated. This requirement poses a question of fact that we will review using a clearly erroneous standard of review.

"Third, the sanction imposed must be proportional to the violation. This requirement poses a question of the discretion of the trial court that we will review for abuse of that discretion." Id., 17–18.

In the present case, the plaintiffs argue that the *Millbrook* standard should be applied to our review of the sanctions of nonsuit in this case. The town argues that *Millbrook* applies only to review of discovery sanctions and the failure to file a certificate of closed pleadings, and that the traditional abuse of discretion standard applies in this case. We conclude that, although *Millbrook* sets forth a standard that appears different in form and is more nuanced than the traditional abuse of discretion standard; see *Yeager* v. *Alvarez*, 302 Conn. 772, 784, 31 A.3d 794 (2011) (*Millbrook* provides "more nuanced analysis" than traditional abuse of discretion

standard, which "masks several different questions that in fact are involved in the question of when a court is justified in imposing . . . sanctions" [internal quotation marks omitted]); both standards are quite similar. See also *Ridgaway* v. *Mount Vernon Fire Ins. Co.*, 165 Conn. App. 737, 755–56, 140 A.3d 321 (applying *Millbrook* test to determine whether trial court abused discretion in rendering judgment of nonsuit for noncompliance with court order not involving discovery), cert. granted, 322 Conn. 908, 140 A.3d 978 (2016); see generally, *D'Ascanio* v. *Toyota Industries Corp.*, 309 Conn. 663, 683–84, 72 A.3d 1019 (2013) (after trial court effectively rendered judgment of dismissal as sanction for expert witness' action, Supreme Court reversed judgment and, although not specifically employing *Millbrook* test, concluded that trial court had "abundance of options at its disposal" other than dismissal—thereby assessing proportionality of court's sanction to actual violation).

Even if we were to conclude, however, that the proportionality prong of the *Millbrook* factors substantively is different from the deference afforded to the trial court's decision by application of the traditional abuse of discretion standard; see generally *Anderson* v. *Commissioner of Correction*, 158 Conn. App. 585, 595 n.9, 119 A.3d 1237 (holding that court abused its discretion, but declining to apply "narrow" *Millbrook* standard to habeas court's imposition of sanction of dismissal with prejudice), cert. denied, 319 Conn. 927, 125 A.3d 202 (2015); we, nevertheless, would conclude that the first two factors of the *Millbrook* test are necessary to any case in which a reviewing court is called upon to assess whether the trial court abused its discretion in rendering a judgment of nonsuit for violations of the court's order.

As to the necessary, although generally unstated, first factor, our long-standing precedent is well defined: "An

order of the court must be sufficiently clear and specific to allow a party to determine with reasonable certainty what it is required to do. See *Dept. of Health Services* v. *Commission on Human Rights & Opportunities*, 198 Conn. 479, 488–89, 503 A.2d 1151 (1986); *Adams* v. *Vaill*, 158 Conn. 478, 485–86, 262 A.2d 169 (1969); *Castonguay* v. *Plourde*, 46 Conn. App. 251, 268, 699 A.2d 226, cert. denied, 243 Conn. 931, 701 A.2d 660 (1997); *Contegni* v. *Payne*, 18 Conn. App. 47, 59, 557 A.2d 122, cert. denied, 211 Conn. 806, 559 A.2d 1140 (1989); *Dingwell* v. *Litchfield*, 4 Conn. App. 621, 625, 496 A.2d 213 (1985)." *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 257 Conn. 38 (*Vertefeuille, J.*, concurring in part and dissenting in part).

"The construction of an order is a question of law over which we exercise plenary review." *Gianetti* v. *Gerardi*, 122 Conn. App. 126, 130, 998 A.2d 807 (2010). "As a general rule, [orders and] judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the [order or] judgment. . . . The interpretation of [an order or] judgment may involve the circumstances surrounding [its] making. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The [order or] judgment should admit of a consistent construction as a whole." (Internal quotation marks omitted.) *State* v. *Denya*, 294 Conn. 516, 529, 986 A.2d 260 (2010).

As to the necessary, although generally unstated, second factor, our law is equally well-defined: Pursuant to Practice Book § 17-19, the trial court may enter a nonsuit or default "[i]f a party *fails to comply with an order* of a judicial authority or a citation to appear or fails without proper excuse to appear in person or by counsel for trial . . . ." (Emphasis added.) Under the plain and unambiguous language of the rule, before a

nonsuit or default can be entered for a party's failure to comply with an order of the court, there necessarily must be a finding of *a failure to comply* made by the trial court. See *Housing Authority* v. *Weitz*, 163 Conn. App. 778, 782–83, 134 A.3d 749 (2016) (reversing court's default against defendant who did not appear personally for trial, but whose attorney did appear, because civil parties are "[permitted] to appear through counsel"; therefore, court's finding that defendant failed to appear and entry of default was erroneous).

If an appellate court is called upon to review the findings of the trial court "we apply our clearly erroneous standard, which is the well settled standard for reviewing a trial court's factual findings. . . . A factual finding is clearly erroneous when it is not supported by any evidence in the record or when there is evidence to support it, but the reviewing court is left with the definite and firm conviction that a mistake has been made." (Internal quotation marks omitted.) *Richards* v. *Richards*, 78 Conn. App. 734, 742, 829 A.2d 60, cert. denied, 266 Conn. 922, 835 A.2d 473 (2003).

As to the third prong of the *Millbrook* test, namely, whether the sanction imposed is proportional to the violation; *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 257 Conn. 18; the parties disagree on whether a proportionality analysis should be employed when reviewing the propriety of a trial court's nonsuit due to a nondiscovery related violation. The plaintiffs argue that *Millbrook* should be applied and that the nonsuits in this case were not proportional to the violation. The town argues that the proportionality prong should not be employed and that we must apply the traditional broad abuse of discretion standard.

In this particular case, we conclude that even if we apply the traditionally more deferential abuse of discretion standard, the trial court abused its discretion in

rendering judgments of nonsuit in these matters. "In reviewing a claim that [the] discretion [of the trial court] has been abused, the unquestioned rule is that great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness. . . . [T]he ultimate issue is whether the court could reasonably conclude as it did." (Internal quotation marks omitted.) *Allstate Ins. Co.* v. *Mottolese*, 261 Conn. 521, 529, 803 A.2d 311 (2002); see also *Herrick* v. *Monkey Farm Cafe, LLC*, 163 Conn. App. 45, 50, 134 A.3d 643 (2016). We now consider the merits of the plaintiffs' claims.

I

On appeal, Faile claims that the court improperly rendered judgments of nonsuit against him. Specifically, Faile argues that, although he heeded the advice of counsel, namely, Grocki, he was present himself at the settlement conference. Indeed, there was no dispute that Faile owned his hangars. Therefore, he contends, it is indisputable that there was a person with "ultimate authority" present. He further argues that he has a "right to determine whether and upon what terms to settle his cases." Accordingly, he argues, it is indisputable that he did not violate the court's order by failing to have someone with ultimate authority present at the settlement conference.[5]

As to the court's ruling in CV-10-6006946-S that Grocki violated the court's order by failing to have every *physical piece of paper* that he would offer into evidence if the matter were tried, Faile argues that "[t]here is no substantive difference between bringing an electronic copy of each piece of paper versus bringing the printed-out piece of paper. Thus, [Grocki] complied with the order." Therefore, Faile argues, the court's findings that he and/or Grocki were in violation of the court's orders

[5] Faile does not challenge the clarity of the court's relevant orders.

were clearly erroneous. Accordingly, he argues, the court erred in rendering judgments of nonsuit. Furthermore, Faile argues, even if "this somehow constitutes a violation of the order, it [did] not warrant the harsh, last resort sanction of a judgment of nonsuit" in CV-10-6006946-S.

Although the town does not dispute that Faile was present at the pretrial conference, it argues that Faile essentially had delegated his authority to Lange, who was not present. Furthermore, the town argues Grocki did not have ultimate authority to settle these matters because he was not authorized to settle unless the fair market assessment value was $9000 or less. Accordingly, it contends that the court properly rendered a judgment of nonsuit.[6] We agree with Faile that the court's finding of two violations of its orders was clearly erroneous, and that the court, therefore, abused its discretion in rendering judgments of nonsuit against him.

The primary basis for the court's entry of nonsuits against Faile was the court's finding that Faile was in violation of its order by failing to have a person with "ultimate authority" present at the pretrial conference. The fact of the matter is that not only was Faile's counsel present at that pretrial conference, Faile, himself, was present at that conference. We agree with Faile's assertion that simply because a party has a bottom line and stands firm in his or her position does not mean that the party does not have ultimate authority to settle the case. No party can be mandated to settle a case. See *Allstate Ins. Co.* v. *Mottolese*, supra, 261 Conn. 531. Indeed, an aggrieved taxpayer who appeals from a decision of a board of assessment appeals ultimately has a right to a trial de novo. See *Chestnut Point Realty, LLC*

[6] The town does not address the court's ruling that Grocki also violated its order by not bringing in every physical piece of paper that he would offer into evidence.

v. *East Windsor*, 324 Conn. 528, 533, 153 A.3d 636 (2017) (taxpayer's right to appeal municipal property tax assessment, like other administrative appeals, derives from statute); *Breezy Knoll Assn., Inc.* v. *Morris*, 286 Conn. 766, 776, 946 A.2d 215 (2008) ("[i]f a taxpayer is found to be aggrieved by the decision of the board of [assessment appeals], the court tries the matter de novo and the ultimate question is the ascertainment of the true and actual value of the applicant's property" [internal quotation marks omitted]).

"Public policy favors and encourages the voluntary settlement of civil suits. . . . We view with disfavor, however, all pressure tactics, whether employed directly or indirectly, to coerce settlement by litigants, their counsel and their insurers. The failure to concur with what a trial court may consider an appropriate settlement should not result in the imposition of any retributive sanctions upon a litigant, his or her counsel or his or her insurer. As our sister state, New York, has recognized, [t]he function of courts is to provide litigants with an opportunity to air their differences at an impartial trial according to law. . . . [The court should not be able] to exert undue pressure on litigants to oblige them to settle their controversies without their day in court." (Citation omitted; internal quotation marks omitted.) *Allstate Ins. Co.* v. *Mottolese*, supra, 261 Conn. 531.

In *Mottolese*, a case wherein the insurer actually refused to participate meaningfully in the settlement conference, our Supreme Court further explained: "Although we sympathize with the trial court's concern that merely attending a pretrial conference while refusing, at the same time, to participate meaningfully in the negotiation or settlement process is not within the spirit of the settlement process, the plaintiff's refusal, on the basis of a validly exercised right to a trial de novo . . . does not fall within the parameters of sanctionable

behavior under [Practice Book] § 14-13. *To conclude otherwise would undermine the insured's . . . right to a trial . . .*" (Emphasis added.) Id., 532.

After reviewing the record in this case, we conclude that the court's finding that Faile violated its order by not having someone with ultimate authority to settle the matter present at the pretrial conference was clearly erroneous. Faile, himself, was present for the conference, and, as the owner of his hangars, his willingness or unwillingness to settle the matter for some amount that the court may have thought reasonable did not violate the court's order. To be sure, it was *his right* to settle or not to settle the matters. Furthermore, his attorney also was present. Faile had every right to refuse to settle. See id., 531–32. His decision to exercise that right is not a violation of the court's order.

As to the court's additional basis for finding a violation of its order, namely, that Grocki failed to bring to the pretrial conference "every physical piece of paper" he would offer into evidence in the event of a trial, we also conclude that the court's finding was clearly erroneous. The order of the court was that "counsel for all parties must bring every piece of paper which will be offered in evidence." Grocki told the court that he had all available evidence on his laptop computer, which was with him at court.[7] The court's order did not state that the parties needed every *physical* piece of paper. There was no mention in its order that the court expected actual physical pieces of paper. We conclude that by having electronic copies of the documents available, Grocki and Faile complied with the court's order, and the court's finding that this was a violation of its order was clearly erroneous.

[7] We note that the plaintiffs had filed a motion for continuance of the pretrial conference on the basis that discovery still had not been completed, which motion the court had denied.

Because Faile had ultimate authority to settle his tax appeal, or not settle his tax appeal, as the case may be, and his attorney had with him at the pretrial conference the documentary evidence available in electronic form, we conclude that the court's findings that its orders were violated was clearly erroneous. Accordingly, the court abused its discretion when it rendered judgments of nonsuit against Faile.

II

The LLC claims that the court abused its discretion in rendering judgments of nonsuit against it. The LLC argues that its attorney, Grocki, did have ultimate authority. Therefore, it argues, the court's finding to the contrary was clearly erroneous.[8] In the event that we agree with the trial court that Grocki did not have ultimate authority, the LLC argues that, under either the proportionality prong of *Millbrook* or under the broad general abuse of discretion standard, the court, nevertheless, abused its discretion in rendering judgments of nonsuit. In the alternative, the LLC also argues that Lange was prevented by illness and hospitalization from attending the conference, which establishes the good cause required to open the judgments of nonsuit, and, therefore, the court improperly denied its motion to open.[9]

The town argues that Grocki did not have ultimate authority to settle these matters because he was not authorized to settle unless the fair market assessment value was $9000 or less. Accordingly, it contends that the court properly rendered judgments of nonsuit. The town also argues that, although we should not apply the proportionality prong of *Millbrook*, under either that prong or under the broad traditional abuse of discretion

[8] On appeal, the LLC does not contest the clarity of the court's orders.

[9] See footnote 1 of this opinion.

standard, the court properly rendered judgments of nonsuit.

We conclude that the LLC has failed to establish clear error in the court's finding that Grocki did not have ultimate authority to settle the LLC's tax appeals. We further conclude, however, that even if we apply the broader traditional abuse of discretion standard, the court improperly rendered judgments of nonsuit against the LLC in these matters.

The events as set forth in the transcripts of the hearing, and presented in part I of this option, inform our review. During the hearings, Grocki reiterated consistently that he had the ultimate authority to settle these matters, but that the parties and he, as counsel, agreed that they would not settle for an assessment of more than $9000. When the court considered the motion for nonsuit in CV-10-6007416-S, it went off the record. Upon resuming the hearing, Grocki "conceded" that, under a strict reading of the court's order, he did not have ultimate authority to settle the matter.

Specifically, the following colloquy occurred during the hearing in CV-10-6007416-S: "[Attorney LeClerc]: The town would move for a nonsuit based upon the [LLC's] failure to have someone present with ultimate authority to settle this matter at today's pretrial.

"The Court: All right. Mr. Grocki, is there a principal—or who is the principal in—

"[Attorney Grocki]: In the LLC, Your Honor? . . . That's Paul Lange.

"The Court: Okay. Is he here?

"[Attorney Grocki]: He is not, Your Honor.

"The Court: Okay. And you have some authority from him?

"[Attorney Grocki]: Correct.

"The Court: And that authority is limited to what?

"[Attorney Grocki]: Nine thousand dollars.

"The Court: And you can't negotiate a settlement at a figure above that. Is that correct?

"[Attorney Grocki]: Correct, Your Honor. Unless—yes. Correct. . . .

"The Court: Do you . . . contend that you have complied with the pretrial notice?

"[Attorney Grocki]: Your Honor, for the reasons we just discuss[ed] . . . I mirror . . . what was—

"The Court: I'm sorry. I want to be very clear on what you're saying.

"[Attorney Grocki]: Yeah. Well, Your Honor, I guess, and I think, based on my interpretation of the circumstances, again, I—

"The Court: Excuse me.

"[Attorney Grocki]: —I think—

"The Court: I don't know what you're talking about. You're interpretation of the circumstances. You're not called upon to interpret the circumstances of a pretrial notice. You are merely being asked a very direct yes or no question. . . . Have you complied with the terms of the pretrial notice?

"[Attorney Grocki]: And, Your Honor, I'm sorry. Do you mind if I take the paper from you one more time?

"The Court: Not at all.

"[Attorney Grocki]: Is it okay, just to be certain?

"The Court: Let's go off the record.

"[Attorney Grocki]: Okay.

(Off record.)

"The Court: Let me have those papers.

"[Attorney Grocki]: Sure.

"The Court: Mr. Grocki, you've now had an opportunity to read and reread the terms of the pretrial notice. Now, in light of the fact that the pretrial notice states someone with authority to negotiate a settlement at a preestablished figure does not have ultimate authority, and in spite of the fact that someone with ultimate authority is required to be here on behalf of a corporation or other type of legal entity, are you representing to me that on the face of this pretrial notice, you have complied with its terms?

"[Attorney Grocki]: Your Honor, after—I, I took another look at it, after taking it from Your Honor, and it looks like, based on the strict language of the, of the pretrial order, that it has not been complied with.

"The Court: Okay. Now, in light of that, do you want to go back to the argument on Mr. LeClerc's motion in the previous case, that is . . . *Paul Lange* v. *Town of Stratford* . . . [CV-09-4037511-S]. . . . In light of what [you have] just said, do you want to amend your remarks on the argument—your remarks in the argument on the motion for nonsuit made by Mr. LeClerc in the case I have just cited?

"[Attorney Grocki]: Yes, Your Honor. I'd like it to reflect what we just discussed in . . . the final docket number with the LLC.

"The Court: That is that you did not—you do not enjoy ultimate authority as required by the pretrial notice?

"[Attorney Grocki]: Yes, Your Honor, based on the strict language—

"The Court: And, therefore, you have failed to comply with the pretrial notice?

"[Attorney Grocki]: Correct, Your Honor.

"The Court: All right. Well, on that ground, the motion for nonsuit is granted."

Although we are somewhat troubled by the colloquy throughout the hearings, leading to this "concession," it, nonetheless, was determined by the trial court to be a concession that Grocki did not have ultimate authority to settle, and thus failed to comply with the pretrial notice. Accordingly, the LLC has not met its burden of establishing clear error in this finding. This, however, does not end our inquiry.

"In reviewing a claim that the court has abused [its] discretion, great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness . . . ." (Internal quotation marks omitted.) *Herrick* v. *Monkey Farm Cafe, LLC*, supra, 163 Conn. App. 50. "[D]iscretion imports something more than leeway in decision-making. . . . It means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. . . . *State* v. *Martin*, 201 Conn. 74, 88, 513 A.2d 116 (1986). . . . *Gateway Co.* v. *DiNoia*, 232 Conn. 223, 239, 654 A.2d 342 (1995). In addition, the court's discretion should be exercised mindful of the policy preference to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his day in court. *Snow* v. *Calise*, 174 Conn. 567, 574, 392 A.2d 440 (1978). The design of the rules of practice is both to facilitate business and to advance justice; they will be interpreted liberally in any case where it shall be manifest that a strict adherence to them will work surprise or injustice. . . . Rules are a means to justice, and not an end in themselves. . . . *In re Dodson*, 214 Conn. 344, 363, 572 A.2d 328, cert. denied, 498 U.S. 896, 111 S. Ct. 247, 112 L. Ed. 2d 205

(1990). Our practice does not favor the termination of proceedings without a determination of the merits of the controversy where that can be brought about with due regard to necessary rules of procedure. *Johnson* v. *Zoning Board of Appeals*, 166 Conn. 102, 111, 347 A.2d 53 (1974). . . . *Coppola* v. *Coppola*, 243 Conn. 657, 665–66, 707 A.2d 281 (1998). Therefore, although dismissal of an action is not an abuse of discretion where a party shows a deliberate, contumacious or unwarranted disregard for the court's authority; *Fox* v. *First Bank*, 198 Conn. 34, 39, 501 A.2d 747 (1985); see also *Pavlinko* v. *Yale-New Haven Hospital*, [192 Conn. 138, 145, 470 A.2d 246 (1984)] (dismissal proper where party's disobedience intentional, sufficient need for information sought is shown, and disobedient party not inclined to change position); the court should be reluctant to employ the sanction of dismissal except as a last resort. *Fox* v. *First Bank*, supra, 39. [T]he sanction of dismissal should be imposed only as a last resort, and where it would be the only reasonable remedy available to vindicate the legitimate interests of the other party and the court. *Pietraroia* v. *Northeast Utilities*, 254 Conn. 60, 75, 756 A.2d 845 (2000)." (Internal quotation marks omitted.) *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 257 Conn. 16–17; see also *Herrick* v. *Monkey Farm Cafe, LLC*, supra, 50–51.

Here, Lange, the principal of the LLC and the person whom the trial court found was vested with the ultimate authority to settle the LLC's tax appeals, was not in attendance at the pretrial conference because he was hospitalized. Grocki had been given, if not ultimate authority, at least limited authority to settle the LLC's tax appeals. The court made no findings of a wilful disregard of its orders or of contemptuous behavior on the part of either Grocki or Lange. Although the court appeared frustrated that Lange was not present, no one disputed that he was hospitalized and unable to attend

the conference. A dismissal or a nonsuit as a sanction for the failure of Lange to attend when he was ill and in the hospital does not serve justice or in any way "vindicate the legitimate interests of the other party and the court." (Internal quotation marks omitted.) *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 257 Conn. 17. Under the facts of this case, we conclude that the court abused its broad discretion in rendering judgments of nonsuit against the LLC.

The judgments are reversed and the matters are remanded for further proceedings.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* MATTHEW ALLEN HALL-DAVIS
(AC 39619)

Sheldon, Prescott and Bishop, Js.

Syllabus

Convicted of the crimes of murder, conspiracy to commit murder and criminal possession of a firearm in connection with the shooting death of the victim, the defendant appealed. The victim was the pregnant girlfriend of the defendant's friend, B, who told the defendant that he wanted him to kill the victim. The defendant claimed that, after he told B several times that he could not go through with the plan, B was angry and threatened him with a gun. Thereafter, the defendant allegedly changed the plan and decided to shoot B instead of the victim, but when he shot into a vehicle in which the victim and B were sitting, the bullet struck and killed the victim. On appeal, the defendant claimed, inter alia, that the trial court improperly failed to instruct the jury on defense of others, contending that he was entitled to such an instruction because the evidence demonstrated that he was trying to protect the victim from B. *Held*:

1. The trial court properly declined to instruct the jury on the defendant's theory of defense of others: when viewed in the light most favorable to the defendant, the evidence, including that B expressed his desire to have the victim killed, solicited the defendant to kill the victim, was angry that the defendant was hesitant to do so, threatened to kill the defendant and the victim if the defendant did not kill the victim, and may have had his own gun while he was parked in the car with the

victim, may have been sufficient to show that the defendant subjectively believed that the victim was at imminent risk of having great bodily harm inflicted on her by B, but was insufficient to satisfy the defendant's slight burden of demonstrating that it would have been objectively reasonable for him to believe that, at the time he fired the gun, the victim was at imminent risk of having such harm inflicted on her by B, as the evidence demonstrated that the defendant engaged in a preemptive strike against B, which is not justified under a defense of others theory; moreover, the evidence was insufficient to establish that B fired a gun from within the car and thereby subjected the victim to imminent danger of great bodily harm, and, even if B did have a gun, there was no evidence to suggest that he was using or about to use deadly physical force or about to inflict great bodily harm on the victim.

2. The defendant could not prevail on his unpreserved claim that the trial court improperly restricted defense counsel from arguing defense of others and renunciation of criminal purpose during closing argument, and thereby violated the defendant's constitutional right to the effective assistance of counsel: although the record was adequate for review and the claim was of constitutional magnitude, the defendant failed to demonstrate that the alleged constitutional violation existed and deprived him of a fair trial, as defense counsel, who was precluded from discussing her legal theories of the case, was not precluded from arguing facts elicited at trial and made arguments that supported the defendant's theory of defense of others and highlighted the defendant's renunciation without specifically mentioning that word; moreover, the defendant was not entitled to relief under the plain error doctrine, he having failed to show that the court's restriction on defense counsel's closing argument was so obviously erroneous that it affected the fairness or integrity of or public confidence in the judicial proceedings.

3. The defendant's unpreserved claim that the trial court gave the jury a faulty and misleading instruction on conspiracy was unavailing, the defendant having waived his right to challenge that instruction on appeal because he had a meaningful opportunity to review it but failed to object.

Argued April 27—officially released October 17, 2017

Procedural History

Substitute information charging the defendant with the crimes of murder, conspiracy to commit murder and criminal possession of a firearm, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Bentivegna*, *J.*; verdict and judgment of guilty, from which the defendant appealed. *Affirmed.*

Pamela S. Nagy, assistant public defender, for the appellant (defendant).

Nancy L. Chupak, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Donna Mambrino*, senior assistant state's attorney, for the appellee (state).

Opinion

BISHOP, J. The defendant, Matthew Allen Hall-Davis, appeals from the judgment of conviction, rendered after a jury trial, of murder in violation of General Statutes § 53a-54a (a), conspiracy to commit murder in violation of General Statutes §§ 53a-48 (a) and 53a-54a (a), and criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1). On appeal, he argues that the trial court (1) erred by refusing to give the jury an instruction on defense of others, (2) improperly restricted his closing argument, and (3) gave the jury a faulty and misleading instruction on conspiracy. We affirm the judgment of the trial court.[1]

The jury reasonably could have found the following facts. The charges against the defendant stemmed from a shooting that occurred at approximately 1 a.m. on April 29, 2013, on Magnolia Street in Hartford in which the victim, Shamari Jenkins, was killed. The defendant and the victim's boyfriend,[2] Carlton Bryan, were "[b]est friends" and had known each other for about ten years. The defendant had been living with Bryan in April, 2013. The victim was nineteen weeks pregnant with Bryan's baby at the time of her death. Bryan then also had another girlfriend, who was described as his "preferred

[1] The defendant originally appealed to our Supreme Court pursuant to General Statutes § 51-199 (b) (3). The appeal subsequently was transferred to this court pursuant to Practice Book § 65-1.

[2] At various times during trial, the victim was referred to as Bryan's girlfriend, his "[p]art-time girlfriend," his "side girlfriend," and his "jump-off," which is a term for a person used for sex.

girlfriend," with whom he had a child. In January, 2013, Bryan asked the victim to have an abortion, to which she initially agreed. She later changed her mind, however, which upset Bryan because her pregnancy was interfering with his relationship with his other girlfriend. At the end of March, 2013, or in early April, 2013, Bryan mentioned to the defendant that he "wanted to do something about" the victim, but the defendant thought that Bryan was "just acting stupid."

On the morning of April 28, 2013,[3] the defendant and Bryan went to the victim's house, where she made breakfast and they stayed for a barbeque. The defendant and Bryan had been drinking alcohol all morning, and they continued to do so at the barbeque. At some point during the day, the defendant heard Bryan and the victim arguing. Bryan was acting "over the top" and "belligerent." The defendant and Bryan left and went to Bryan's house where they continued to drink alcohol. The victim later came to Bryan's house, and she and Bryan left in her car and parked outside of 149–151 Magnolia Street, near the intersection with Mather Street. The defendant also left the house and drove Bryan's car to Magnolia Street, where his cousin and brother lived, and happened upon Bryan and the victim. Here, the defendant pulled in front of the victim's car, and Bryan got in.

While the defendant and Bryan were sitting in Bryan's car, Bryan told the defendant that he had "had enough of [the victim]." Bryan looked at the defendant with a "dead stare" and pulled out a .44 caliber revolver. He told the defendant that the victim "[had to] go before a certain month" and asked the defendant to "do this for" him. Bryan gave the defendant a ski mask, gloves,

[3] In his testimony, the defendant stated that these events happened during the morning of April 29, 2013, but it is clear from his testimony that this was a mistake and that he was actually talking about April 28, 2013.

and the gun, and told him to park the car on Enfield Street, one block from Magnolia Street, put on the mask and gloves, and come through "the cut," a pedestrian passageway between Enfield Street and Magnolia Street, and "empty the revolver" in the driver's side door of the victim's car.

The defendant drove to Enfield Street, where he parked the car and "sat there for a minute" thinking of "ways . . . [to] brush [Bryan] off or get out of it." "[A]fter a while," he got out of the car and sat by a tree near the cut for about five minutes. Then he sat under a window thinking about ways to get out of killing the victim. He left the gun, mask, and gloves by the tree, and drove Bryan's car back to Magnolia Street, where he told Bryan that he saw someone outside and could not go through with the plan. After Bryan determined that there was no one else in the vicinity, the defendant drove back to Enfield Street and sat in the car, after which he returned to the tree to retrieve the gun, mask, and gloves, and "just sat there" until he decided to leave it all there again, got back into the car and drove back to Magnolia Street for a second time. The defendant told Bryan that he could not go through with the plan, but Bryan was "bugging" and "dead serious at that point."

The defendant then drove back to Enfield Street where he once again picked up the gun, mask, and gloves, but still could not go through with the plan. He drove back to Magnolia Street for a third time, where Bryan was "furious" with him. He and Bryan were in the car for roughly a minute and a half when Bryan pulled out of his pocket a nine millimeter gun and told the defendant, "[i]t's you or her," and then got out of the car and returned to the victim's car. The victim remained in her car on Magnolia Street during these encounters.

The defendant sat in Bryan's car "for a minute" on Magnolia Street and then decided that he would change the plan and shoot Bryan instead of the victim. He claimed that he then drove back to Enfield Street and "sat there again for a little bit" before returning to the tree to retrieve the gun, mask, and gloves. He then decided to change the plan further and, instead of going to Magnolia Street through the cut, he would go around the buildings and approach the victim's car from behind, thinking that Bryan would not expect that. The defendant stood behind a car that was parked on Magnolia Street and was "trying to get up the nerve" to shoot Bryan, and then "jumped up and . . . started . . . to jog around the car" when he heard Bryan yell to the victim, "[p]ull off. Pull off. Pull off." At the same time that Bryan leaned over to grab the steering wheel, the defendant shot the gun into the passenger side of the back window as the car was pulling away from the curb. The bullet went through the passenger side of the rear window of the car, through the right side of the driver's seat, into the back of the victim's right shoulder and lodged in her heart. As this occurred, the car accelerated through the intersection of Magnolia Street and Mather Street, crashing into stairs in front of 137 Magnolia Street. The defendant fled back to Enfield Street and drove off in Bryan's car. Emergency services personnel arrived, and the victim was taken to a hospital where she was pronounced dead.

Bryan initially told Hartford police on the scene that an unidentified person had shot into the car as the victim was driving away. Later at the hospital, Bryan told Hartford police Detective Reginald Early that an unidentified person had come up to the car and attempted to rob them, and shot once into the car while the victim was trying to drive away. He later changed his story again and identified the person who attempted to rob them as a man with a "street name" of "Low,"

someone he knew from prison. Early thereafter investigated "Low" and determined that he had an alibi for the time of the shooting.

On April 29, 2013, the defendant went to the Hartford police station to speak with Early about the victim's death because Bryan had told the defendant that Early wanted to speak with him, which was untrue. The defendant told Early that Bryan had relayed to him that the victim was shot during an attempted robbery, but that Bryan could not identify the shooter. The defendant was not a suspect at that point.

On May 23, 2013, the defendant was arrested in connection with a robbery that took place at J B Expo in Manchester on May 11, 2013, after Early called the Manchester police and identified the defendant as the person with a gun in surveillance footage.[4] On May 25, 2013, the defendant's friend, Kingsley Minto, was also arrested for the robbery and told Manchester police in confessing to his involvement that the defendant had hidden the gun used in the robbery in Henry Park in Vernon, wrapped in a white shopping bag. Minto also testified that the defendant threw a shell casing out of the car window on the way from the robbery and said it was the shell casing from the victim's shooting. Subsequently, Manchester police recovered the gun, a Ruger .44 caliber revolver, in Henry Park.

On May 29, 2013, Early and another Hartford police detective interviewed the defendant at the Hartford Correctional Center, where he confessed to killing the victim, at Bryan's request, with the gun that was found in Henry Park. The defendant told Early that Bryan felt like the victim was "ruining his life" by having their baby and had asked the defendant to kill her for him.

[4] Early testified that he received information about the robbery from Bryan and the defendant's cousin, Everett Walker, and then spoke with Manchester police, but did not testify as to the content of the information he was given.

The defendant told Early that he could not go through with the plan and intended to shoot Bryan instead of the victim. The defendant was charged with the victim's murder.

By information dated January 8, 2015, the state charged the defendant with murder in violation of § 53a-54a (a),[5] conspiracy to commit murder in violation of §§ 53a-48 (a)[6] and 53a-54 (a), and criminal possession of a firearm in violation of § 53a-217 (a) (1).[7] The five day evidentiary portion of the jury trial, at which the defendant testified, took place between January 30 and February 9, 2015. On February 10, 2015, the court, *Bentivegna*, *J.*, held a charge conference with counsel to discuss proposed jury instructions. At the conference, the defendant asked that the jury be instructed on defense of others and renunciation of criminal purpose, a request that the court denied.[8] On February 11, 2015, the jury returned a guilty verdict on all three counts.[9]

[5] General Statutes § 53a-54a (a) provides in relevant part: "A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person . . . ."

[6] General Statutes § 53a-48 (a) provides: "A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy."

[7] General Statutes § 53a-217 (a) provides in relevant part: "A person is guilty of criminal possession of a firearm . . . (1) when such person possesses a firearm . . . and . . . has been convicted of a felony committed prior to, on or after October 1, 2013 . . . ."

[8] The defendant also initially asked that the jury be instructed on self-defense, but decided not to pursue that request at the charging conference.

[9] The court charged the jury on transferred intent. The court stated: "The evidence in this case raises the issue of transferred intent. The principle of transferred intent was created to apply to the situation of an accused who intended to kill a certain person and by mistake killed another. His intent is transposed from the person to whom it was directed to the person actually killed. It is not necessary for a conviction of murder that the state prove that the defendant intended to kill the person whom he did in fact kill. It is sufficient if the state proves that, acting with the intent to kill a person, he in fact killed a person."

The defendant was sentenced on May 1, 2015, to fifty years incarceration on the charge of murder; twenty years incarceration on the charge of conspiracy to commit murder, to run consecutively to the first sentence; and five years incarceration on the charge of criminal possession of a firearm, to run concurrently with the first two sentences, for a total effective sentence of seventy years incarceration. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant claims first that the court erred in refusing to give the jury an instruction on defense of others. Specifically, he asserts that he provided ample evidence at trial that he was trying to protect the victim from Bryan, and, therefore, his due process right to present a defense was violated by the court's refusal to instruct the jury on defense of others.[10] We are not persuaded.

[10] As part of his argument that the court should have given the jury a defense of others instruction, the defendant claims that the court "did not view the evidence in a light most favorable to [the] defendant. Had it done so, it would have realized there was sufficient evidence to raise a reasonable doubt that [the] defendant acted in defense of [the victim], and that he reasonably believed deadly force was necessary to defend [the victim] against the imminent use of deadly force by [Bryan]."

Essentially, the defendant argues that because the court did not find in his favor on this issue, it *must* have used the incorrect standard. This argument is unavailing, as there is evidence that the court did, in fact, view the evidence in the light most favorable to the defendant in denying his request for the instruction. First, the defendant reminded the court of the correct standard during argument requesting the instruction. Second, the court stated that it was relying primarily on three cases in making its decision, all of which provided the appropriate standard: *State* v. *Bryan*, 307 Conn. 823, 836, 60 A.3d 246 (2013); *State* v. *Lewis*, 220 Conn. 602, 619, 600 A.2d 1330 (1991); and *State* v. *Singleton*, 292 Conn. 734, 746, 974 A.2d 679 (2009). Third, the court specifically stated that it waited to make its decision until after the defendant testified and evidence was concluded. Accordingly, there is no merit to the defendant's contention that the court applied the wrong standard.

The following additional facts are relevant to our resolution of this claim. The defendant testified that when Bryan asked him, on April 28, 2013, to kill the victim, he thought Bryan was "tripping" and that he was just "drunk [and] high," but also that Bryan seemed "clearheaded" and was "describing things like he knew what he wanted." He testified that Bryan was "mad" and that he had "never seen that side of" Bryan before. When he told Bryan that he could not go through with the plan, Bryan was "bugging" and "dead serious . . . ." The defendant testified that after Bryan took out the nine millimeter gun and threatened him, "[a]t that point, I pretty much knew, either—I'm not going to say he was going to do something, but something was going to happen. . . . I pretty much knew he was set on killing [the victim]." He further testified that at that point he "just knew . . . he was going to kill me or [the victim] or, if not, both of us . . . . I knew too much. . . . I'm not going to say he was going to do it himself, but he was either going to kill her or he was going to kill me."

The defendant testified that he "didn't see any options" because this was "a duel to the death with a gun in [his] face" and that he "wasn't thinking right." He further testified that Bryan "threatened [his] life," and he felt like he had "nowhere to go after that" because he lived with Bryan and Bryan knew all of his friends. The defendant said, "I just—my mind was just: shoot [Bryan]." When asked on direct examination why he did not go home or go to his girlfriend's house, the defendant testified that he "could've probably left," but then, Bryan "would've been looking for me after that. . . . I could only take him for what he said; he was going to kill me." He further testified, "if not [the victim], it was going to be me." Additionally, he testified that in the moment, he "didn't want nothing to happen to" the victim, but also that he was not trying "to protect

her a hundred percent" because he "wanted to help her" but also "wanted to protect [himself]."

After the victim's funeral, the defendant asked Minto if he knew who shot the victim, to which Minto responded that he thought it was Bryan. The defendant then confessed to Minto and told him that it was Bryan's idea, but that he changed the plan, however, and accidentally shot the victim as he was trying to shoot Bryan. Minto testified that the defendant did not tell him that Bryan pulled out a gun, and that, as far as Minto knew, the defendant was the only person there with a gun that night. Minto testified further that he knew Bryan to be "almost perpetually" and "constantly" in possession of a firearm, but "[n]ot always."

Everett Walker, the defendant's "distant cousin," also testified that he had seen Bryan with the .44 caliber gun on previous occasions and that Bryan also "might've had something smaller . . . ." When police arrived on the scene on April 29, 2013, Bryan was patted down and there was no firearm recovered. Additionally, the defendant's written statement did not include any claim that Bryan had a gun that night or that Bryan threatened to kill him if he did not shoot the victim. The defendant testified that he did tell the police that Bryan threatened him with a gun that night.

Walker testified that he saw Bryan on Enfield Street on the night of April 28, 2013, and that Bryan was "mad about [the victim] being pregnant and he didn't want it . . . . [H]e [was] talking about [how] he wanted to kill her . . . ." He further testified that Bryan asked him to tell the police that he saw someone running away toward Enfield Street after the shooting. Walker testified that, while he was at his house on Magnolia Street, he heard "a few shots." He testified on direct examination that he heard "two shots," but testified on cross-examination that he believed it was one gunshot,

although he was "not really sure," but thinks it was one shot "because [he] only heard that one distinct sound, but like a deep boom" and that's "all [he] heard." He said that after he heard the shot or shots, he got low to the ground and then looked out of the window and saw Bryan steering the car, crash into steps down the street, and jump out. He did not see anyone running away from the scene and never told the police that he did.

In addition to Walker's testimony that he told the police that he heard two gunshots, the state presented evidence from Hartford police Detective Candace Hendrix, who testified about a "defect, some type of damage," on the passenger side of the victim's car. She testified that there was a hole in the A-pillar of the passenger side, which is the part of the car between the window and the windshield. Hendrix labeled the defect "BH-2," or "bullet hole 2," though she testified that she did not, in fact, know whether it was a bullet hole. She testified that there were no plastic fragments below the defect, and that she took off the dashboard but did not find a bullet or any fragments inside that would have indicated that it was caused by a bullet. She testified further that even if the defect was created by a bullet, it could not have been created by the fatal bullet that was fired by the defendant, and she could not say either when or how the defect was made.

At the charge conference, the defendant requested that the jury be instructed on defense of others. In support of this argument, defense counsel highlighted the following portions of the defendant's testimony: Bryan was "drunk, belligerent and over the top" on April 28, 2013, and had gotten into an argument with the victim earlier in the day; Bryan was in possession of a second, smaller gun other than the .44 caliber that he had given to the defendant; Bryan told the defendant that the victim was ruining his life; Bryan was acting

that day in a manner that the defendant had never seen before; and Bryan was "bugging out and furious" when the defendant told him that he could not go through with killing the victim, pulling out the smaller gun and saying "it's either you or it's her . . . ." Defense counsel further highlighted, as support for a defense of others instruction, Minto's testimony that Bryan previously had discussed wanting to kill the victim and that when Minto heard that the victim was shot, he assumed that Bryan had shot her. Defense counsel also highlighted Walker's testimony that Bryan asked him to be a lookout and to tell the police that he saw someone running away from the car after he heard gunshots, and Minto's testimony that he had seen Bryan with a small gun on previous occasions. Defense counsel argued that on the basis of the testimony of the defendant, Minto, and Walker, there was sufficient evidence that "something was going to happen that night" and that it would happen imminently, which would "raise reasonable doubt in the mind of a rational juror . . . ." The state opposed the defendant's request and argued that the evidence was "lacking in objective reasonability of imminent danger . . . ."

The court denied the defendant's request for three reasons. First, the court opined that "public policy principles weigh against giving [a defense of others] instruction in this particular case." Second, the court opined that there was "a lack of evidence to support the defendant's contention that at the time he fired the firearm, it was objectively reasonable for him to believe that it was necessary to do so in order to defend [the victim]." The court further highlighted the fact that the evidence reflected that Bryan's plan "was to make it appear that someone else had murdered [the victim], not that he had murdered" her, that there was no evidence of a nine millimeter handgun that Bryan allegedly had that night, and that "[t]he most that can be inferred is that

[the victim] and the defendant might have been endangered at some point in the future . . . ."[11] The court opined that the only way the jury reasonably could find that Bryan was using or was about to use deadly force against the victim was by "resorting to impermissible speculation." Last, the court opined that this was a "classic example of preemptive strike," which defense of others does not encompass. In so finding, the court highlighted the lack of evidence that the victim was in imminent danger of deadly physical force by Bryan, the fact that the defendant went back and forth between Enfield Street and Magnolia Street multiple times before shooting, and the fact that the defendant approached the vehicle from behind. On the basis of those three reasons, the court denied the defendant's request to instruct the jury on defense of others.

We begin our analysis by setting forth our standard of review. "[T]he fair opportunity to establish a defense is a fundamental element of due process of law . . . . This fundamental constitutional right includes proper jury instructions on the elements of [defense of others] so that the jury may ascertain whether the state has met its burden of proving beyond a reasonable doubt that the [crime] was not justified. . . . Thus, [i]f the defendant asserts [defense of others] 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 [an] . . . instruction [on defense of others]." (Citations omitted; internal quotation marks omitted.) *State* v. *Bryan*, 307 Conn. 823, 832, 60 A.3d 246 (2013).

[11] In response, defense counsel argued that there was objective evidence that Bryan pulled out a firearm because there was the hole in the A-pillar of the car that the police had labeled "bullet hole [number] 2." The court replied that "that infers there was more than one shot fired, and that's not necessarily consistent with the evidence, either." Defense counsel further argued that there was evidence of a second gunshot because Walker testified that in his original statement to the police, he said that he heard two gunshots. The court noted that argument and moved on.

"[I]n reviewing the trial court's rejection of the defendant's request for a jury charge on [defense of others], we . . . adopt the version of the facts most favorable to the defendant which the evidence would reasonably support." (Internal quotation marks omitted.) Id., 836; see also *State* v. *Lewis*, 220 Conn. 602, 619, 600 A.2d 1330 (1991).

We next look at the relevant legal principles surrounding defense of others. General Statutes § 53a-19 (a) codifies defense of others and provides in relevant part: "[A] person is justified in using reasonable physical force upon another person to defend . . . a third person from what he reasonably believes to be the use or imminent use of physical force, and he may use such degree of force which he reasonably believes to be necessary for such purpose; except that deadly physical force may not be used unless the actor reasonably believes that such other person is (1) using or about to use deadly physical force, or (2) inflicting or about to inflict great bodily harm."

"The defense of others, like self-defense, is a justification defense. These defenses operate to exempt from punishment otherwise criminal conduct when the harm from such conduct is deemed to be outweighed by the need to avoid an even greater harm or to further a greater societal interest. . . . Thus, conduct that is found to be justified is, under the circumstances, not criminal. . . . All justification defenses share a similar internal structure: special triggering circumstances permit a necessary and proportional response. . . . One common formulation of the necessity requirement gives the actor the right to act when such force is necessary to defend himself [or a third person]. But this formulation fails to highlight the two essential parts of the necessity requirement . . . force should be permitted only (1) when necessary and (2) to the extent necessary. The actor should not be permitted to use force when

such force would be equally as effective at a later time and the actor suffers no harm or risk by waiting. . . . Accordingly, neither self-defense, nor the defense of others, encompass[es] a preemptive strike." (Citations omitted; internal quotation marks omitted.) *State* v. *Bryan*, supra, 307 Conn. 832–33.

In asserting a claim of defense of others, the defendant has only the burden of production, meaning that "he merely is required to introduce sufficient evidence to warrant presenting his claim of [defense of others] to the jury." (Internal quotation marks omitted.) Id., 834. "[T]he evidence adduced by the defendant must be sufficient [if credited by the jury] to raise a reasonable doubt in the mind of a rational juror as to whether the defendant acted in [defense of another]." (Internal quotation marks omitted.) Id. The burden of production on the defendant is "slight" and "may be satisfied if there is any foundation in the evidence [for the defendant's claim], no matter how weak or incredible"; (internal quotation marks omitted); and in producing evidence, the defendant "may rely on evidence adduced either by himself or by the state to meet this evidentiary threshold." (Emphasis omitted; internal quotation marks omitted.) Id. "[O]nce a defendant identifies sufficient evidence in the record to support a requested jury charge, he is entitled thereto as a matter of law, even if his own testimony, or another of his theories of defense, flatly contradicts the cited evidence." Id., 834–35.

Although the defendant's burden may be slight, "[b]efore the jury is given an instruction on [defense of others] . . . there must be some evidentiary foundation for it. A jury instruction on [defense of others] is not available to a defendant merely for the asking. . . . However low the evidentiary standard may be, it is nonetheless a threshold the defendant must cross." (Internal quotation marks omitted.) *State* v. *Montanez*, 277 Conn. 735, 750, 894 A.2d 928 (2006). "Although it

is the jury's right to draw logical deductions and make reasonable inferences from the facts proven . . . it may not resort to mere conjecture and speculation." (Internal quotation marks omitted.) *State* v. *Bryan*, supra, 307 Conn. 835; see also *State* v. *Montanez*, supra, 750 ("[t]he defendant may not ask the court to boost him over the sill upon speculation and conjecture" [internal quotation marks omitted]). Additionally, "in order to submit a defense of others defense to the jury, a defendant must introduce evidence that the defendant reasonably believed [the attacker's] unlawful violence to be imminent or immediate. . . . Under § 53a-19 (a), a person can, under appropriate circumstances, justifiably exercise repeated deadly force if he reasonably believes both that [the] attacker is using or about to use deadly force against [a third person] and that deadly force is necessary to repel such attack. . . . The Connecticut test for the degree of force in . . . [defense of others] is a subjective-objective one. The jury must view the situation from the perspective of the defendant. Section 53a-19 (a) requires, however, that the defendant's belief ultimately must be found to be reasonable." (Internal quotation marks omitted.) *State* v. *Bryan*, supra, 835–36.

On the basis of our thorough review of the record, we conclude that the defendant did not cross the low evidentiary threshold to entitle him to a charge on the defense of others and, accordingly, we conclude that the trial court properly refused to instruct the jury on that theory. Adopting the version of the facts most favorable to the defendant, the jury could have reasonably concluded that Bryan had expressed previously his desire to have the victim killed, that he solicited the defendant to kill the victim, that he was angry that the defendant was hesitant to do so, that he threatened the defendant and the victim if the defendant did not kill the victim, and that Bryan had a gun in his possession

on that night. This evidence, if credited, could possibly be sufficient to show that the defendant subjectively believed that the victim was at imminent risk of great bodily harm from Bryan, even though there is evidence that this belief was unreasonable.

Regardless of whether the defendant had the subjective belief that the victim was in imminent risk of harm, the evidence, however, was insufficient to support the defendant's contention that his perception of imminent danger to the victim was *objectively reasonable at the time he fired the gun* so as to justify his claimed belief that it was necessary to do so in order to defend the victim. In short, the evidence does not support a finding that the victim was at imminent risk of great bodily harm from Bryan when she was shot by the defendant. Rather, the evidence was probative of the fact that, after much indecision, the defendant engaged in a preemptive strike against Bryan, an act which is not justified under a defense of others theory. Id., 833.

In support of his claim that his belief of the imminent risk of grave harm to the victim was reasonable, the defendant suggests that there was evidence that Bryan fired a gun from within the victim's car. As support for this contention, he highlights the fact that Walker originally told the police that he heard two gunshots that night and that there was a defect in the car, which the police labeled "bullet hole 2." See footnote 11 of this opinion. Hendrix testified, however, that she did not recover a bullet from within the car, there were no physical indicators that the defect actually was created by a bullet, and that even if the defect had been created by a bullet, she could not say when it was made. Thus, this evidence is wholly insufficient, even when viewed in the defendant's favor, to establish that Bryan fired a gun from within the victim's car, placing her in imminent danger of great physical harm inflicted by Bryan. The only way a jury could come to such a conclusion

would be through impermissible conjecture and speculation.

Even if we assume that Bryan did have a second gun that night, which is supported only by the defendant's own testimony, there was no evidence to suggest that Bryan was "using or about to use deadly physical force, or . . . inflicting or about to inflict great bodily harm" upon the victim. General Statutes § 53a-19 (a). There was no evidence that Bryan was pointing the gun at the victim or even that he had it in his hand at the time the defendant fired the gun. Further, there was no evidence that Bryan made any furtive movements to retrieve a weapon. In fact, the defendant testified that at the time he fired the gun at the car, Bryan was leaning over toward the victim, grabbing the steering wheel to help direct the car. Additionally, Bryan was yelling at the victim to drive away, which undermines the defendant's argument that he believed Bryan was about to inflict great bodily harm upon her, as she could not have driven the car away if she was seriously injured.

Additionally, the defendant testified that he went back and forth between Magnolia Street and Enfield Street three times before shooting the gun. Even after Bryan allegedly brandished a nine millimeter gun at the defendant before retreating back to the victim's car, where the victim was sitting, the defendant sat in Bryan's car on Magnolia Street "for a minute" before returning to Enfield Street, where he "sat there again for a little bit," then stood behind a parked car while "trying to get up the nerve" to shoot Bryan. In the time between the alleged confrontation with the nine millimeter and the shooting of the victim, the defendant did not seek assistance for the victim from a third party or from the police, even though the Hartford police station was less than five minutes from that location. The fact that the defendant left the victim alone with Bryan, when the defendant knew Bryan was armed,

undercuts the notion that one could reasonably believe that the victim was at imminent risk of great bodily harm from Bryan.[12] In short, the defendant's actions in coming and going to and from the scene several times before the shooting erodes any basis for determining that a reasonable person, under these circumstances, could conclude that the victim was in imminent danger of great bodily harm from Bryan at the moment the defendant fired into the vehicle.

Viewed in the light most favorable to the defendant, evidence that Bryan was angry at the time, may have had a gun, was looking to have the victim killed, and threatened to kill the defendant and the victim if the defendant did not kill her, was nevertheless insufficient to satisfy even the slight burden placed on the defendant to show that it would have been objectively reasonable for him to believe that the victim was at imminent risk of having grave bodily harm inflicted upon her by Bryan. At most, the jury could have inferred from such evidence that the victim might be endangered at some point in the future. Thus, no reasonable jury could have found the defendant's belief that the victim was at risk of imminent harm from Bryan at the time the defendant fired the gun to be objectively reasonable. "Viewed in the light most favorable to the defendant, the evidence was insufficient to raise a reasonable doubt in the mind of a rational juror as to whether the defendant acted in [the victim's] defense." *State* v. *Bryan*, supra, 307 Conn. 838–39. Accordingly, the trial court properly refused to instruct the jury as requested on the defendant's defense of others theory.

[12] The evidence suggests further that Bryan's plan was to have the victim killed before she became seven months pregnant so that the fetus was not "liable as another body." At the time of her death, the victim was nineteen weeks, almost five months, pregnant. Though this does not necessarily prove that Bryan would have waited two more months to plan the victim's murder, it is illustrative evidence to further undermine the defendant's argument that the victim was in imminent harm.

II

The defendant claims next that the trial court improperly restricted defense counsel from arguing defense of others and renunciation in closing arguments, thereby violating his right to the effective assistance of counsel under the sixth amendment to the United States constitution. The defendant concedes that this claim is unpreserved, but, nevertheless, seeks review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), and the plain error doctrine. See Practice Book § 60-5.

"[A] defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail. The appellate tribunal is free, therefore, to respond to the defendant's claim by focusing on whichever condition is most relevant in the particular circumstances." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40. "The defendant bears the responsibility for providing a record that is adequate for review of his claim of constitutional error. . . . The defendant also bears the responsibility of demonstrating that his claim is indeed a violation of a fundamental constitutional right. . . . Finally, if we are persuaded that the merits of the defendant's claim should be addressed, we will review it and arrive at a conclusion as to whether the alleged constitutional violation . . . exists and whether it . . .

deprived the defendant of a fair trial." (Citations omitted.) Id., 240–41.

In the present case, we conclude that the defendant's claim meets the first two prongs of the *Golding* test, as the record is adequate to review the alleged claim of error, and the claim is of constitutional magnitude alleging the violation of a fundamental right. See *State* v. *Arline*, 223 Conn. 52, 63, 612 A.2d 755 (1992) ("The right to the assistance of counsel ensures an opportunity to participate fully and fairly in the adversary fact-finding process. . . . The opportunity for the defense to make a closing argument in a criminal trial has been held to be a basic element of the adversary process and, therefore, constitutionally protected under the sixth and fourteenth amendments." [Citation omitted; internal quotation marks omitted.]). Accordingly, the claim is reviewable. We further conclude, however, that the defendant has failed to demonstrate that the alleged constitutional violation exists and deprived him of a fair trial.

The following additional facts are relevant to our resolution of this claim. During the February 10, 2015 charge conference, the defendant filed a request to charge, asking that the court give the jury an instruction on renunciation of criminal purpose as a defense to conspiracy. The court refused to give such an instruction, stating "that there [did] not exist a foundation in the evidence that the defendant took the requisite steps prior to the commission of the offense to deprive his complicity of its effectiveness . . . ."[13] In addition, the defendant asked the court to instruct the jury on the defense of others claim. As discussed in part I of this opinion, the court correctly denied that request. After the court reviewed the entirety of the jury instructions

[13] The defendant does not challenge this decision on appeal.

with the parties, the state requested that defense counsel be precluded from arguing defense of others or renunciation in her closing argument. The court agreed, stating: "I understand that the defense has objected to the court's decisions regarding the request to charge . . . but during closing argument, the parties should not make any arguments relating to defense of others and renunciation. It's not in the case, at this point." Defense counsel did not object to the court's ruling.

Although never using the terms "defense of others" or "renunciation," defense counsel nonetheless argued facts that related to those two theories in her closing argument. Defense counsel argued: "[T]he truth has been told since the very beginning of this case. It would have been simpler and cleaner and nicer for [the defendant] if he could've said: well, yeah, I saw [Bryan] pointing that gun at [the victim]. Or, better: I saw [Bryan] shoot that gun from inside that car. Or: I heard that shot." She also mentioned several more times that there was testimony that two gunshots had been fired that night. She also argued that "one of [the defendant's] stated objectives was to try to protect [the victim]. . . . You can only infer that he was really trying to kill [Bryan] . . . . But we don't have a freeze-frame video component in this case where we can just stop the action and say: yes, [Bryan] has a [nine millimeter gun] and, yes, he's pointed it out because . . . he saw [the defendant] coming up. Or: yes, [Bryan] has a [nine millimeter gun]. He realizes [the defendant] isn't going to kill [the victim] for him, and so he's pointing the [nine millimeter gun] at [the victim]. We don't have the video cameras. That, unfortunately, is life." Additionally, defense counsel commented: "[I]f [the defendant] wanted to see [the victim] dead, he didn't have to do this routine of coming up from behind these cars. He could have walked out of that cut . . . and done what [Bryan] asked him to do, which is unload the [.44 caliber

revolver] in the driver's side door of the vehicle, into her. That's not what happened." Further, she argued that "to be a murderer, you would have to know exactly, exactly what [the defendant's] intent was and exactly what [Bryan] was doing at the time."

After closing arguments, the state objected to portions of defense counsel's argument, claiming that she had violated the court's order not to discuss defense of others and renunciation. Defense counsel replied: "I was talking about the evidence when I was saying [he was] there to protect [the victim] or [he was] there to protect himself. [The court] ruled essentially that . . . the evidence did not support any of those defenses, so I didn't say the defenses. I just said what the evidence was. . . . I talked about the evidence instead of the defenses." The court overruled the state's objection and stated that it did not think defense counsel had breached the court's order.

On appeal, the defendant argues that the court improperly restricted his closing argument by disallowing defense counsel from arguing defense of others and renunciation, thereby violating his right to the effective assistance of counsel under the sixth amendment. We are not persuaded.

"In general, the scope of final argument lies within the sound discretion of the court . . . subject to appropriate constitutional limitations. . . . It is within the discretion of the trial court to limit the scope of final argument to prevent comment on facts that are not properly in evidence, to prevent the jury from considering matters in the realm of speculation and to prevent the jury from being influenced by improper matter that might prejudice its deliberations. . . . While we are sensitive to the discretion of the trial court in limiting argument to the actual issues of the case, tight control over argument is undesirable when counsel is precluded

from raising a significant issue." (Citations omitted; internal quotation marks omitted.) *State* v. *Arline*, supra, 223 Conn. 59–60. "Counsel may comment upon facts properly in evidence and upon reasonable inferences drawn from them. . . . Counsel may not, however, comment on or suggest an inference from facts not in evidence." (Citation omitted; emphasis omitted; internal quotation marks omitted.) Id., 58.

In arguing that the court erred in limiting his closing argument, the defendant relies on our Supreme Court's holding in *Arline* and states that the facts in that case are "nearly identical" to the facts in the present case. The defendant's reliance on *Arline*, however, is misplaced. In *Arline*, the court precluded defense counsel from referring during closing argument "to any charges against the complainant that had been nolled or disposed of subsequent to the alleged sexual assault or to any civil claim that the complainant might pursue with respect to the alleged sexual assault." *State* v. *Arline*, supra, 223 Conn. 57. The defendant in *Arline* argued that those facts "supported an inference that the complainant's testimony had been motivated by these potential benefits" which he would have used, in closing, to challenge the complainant's credibility. Id., 58. Our Supreme Court found error in that case because the trial court restricted defense counsel from commenting on those facts which were properly in evidence. Id., 63–64.

Here, unlike in *Arline*, defense counsel was precluded from discussing her *legal theories* of the case that the court had already ruled were unsupported by the evidence. The court did not preclude defense counsel from arguing facts elicited at trial, but precluded her from arguing that those facts supported the legal theory that the defendant shot the victim in trying to protect her from Bryan, or that the defendant renounced his participation in the conspiracy. Indeed,

when the state objected to portions of defense counsel's closing argument, defense counsel argued, "I was talking about the evidence when I was saying [he was] there to protect [the victim] or [he was] there to protect himself. [The court] ruled essentially that . . . the evidence did not support any of those defenses, so I didn't say the defenses. I just said what the evidence was. . . . I talked about the *evidence* instead of the *defenses*." (Emphasis added.)

It is clear from her statements in closing arguments, as well as in her argument opposing the state's objection to her closing argument, that defense counsel understood the distinction between arguing the facts in evidence and arguing the precluded theories of defense of others and renunciation. As to the claim of defense of others, defense counsel argued that the defendant was trying to protect the victim from Bryan, that there were two gunshots that night, and that the case would have been much cleaner if the defendant had testified that Bryan had a gun and was pointing it at the victim, which all speaks to his theory of defense of others. Additionally, defense counsel highlighted the defendant's renunciation, without specifically saying the word, when she argued that the defendant could have done what Bryan asked him to do that night, but did not. She argued that in order for the defendant to be a murderer, the jury would need to know his intent and Bryan's actions. Implicit in that argument is that the defendant's intent was to change the plan and shoot Bryan, not the victim, which is the crux of the defendant's renunciation argument. Also implicit in that argument is the contention that Bryan's actions placed the victim in imminent harm that night, and, therefore, that the defendant was justified in shooting at Bryan to defend her. Given this, defense counsel understood the distinction and knew that under the court's ruling she could, and indeed did, comment on the *facts properly*

in evidence, without taking the next step to discuss defense of others and renunciation, which the court already had ruled were unsupported by the evidence. Accordingly, the defendant cannot show that "the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial"; *State* v. *Golding*, supra, 213 Conn. 240; and, thus, this claim fails to satisfy the third prong of *Golding*.

The defendant asserts, in the alternative, that his claim is reviewable under the plain error doctrine. "This doctrine, codified at Practice Book § 60-5, is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved, are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. [T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy. . . . In addition, the plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly. . . . Implicit in this very demanding standard is the notion . . . that invocation of the plain error doctrine is reserved for occasions requiring the reversal of the judgment under review. . . . [Thus, a defendant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is both so clear and so harmful that a failure to reverse the judgment would result in manifest injustice." (Citations omitted; internal quotation marks

omitted.) *State* v. *Myers*, 290 Conn. 278, 289, 963 A.2d 11 (2009).

Upon review of the entire record, we conclude that plain error relief is unwarranted. The defendant has failed to show that the court's limited restriction on his closing argument "was so obviously erroneous that it affected the fairness or integrity of or public confidence in the judicial proceedings." *State* v. *Thompson*, 71 Conn. App. 8, 14, 799 A.2d 1126 (2002). Further, the defendant has failed to show that "this is one of those extraordinary situations where not granting the requested relief will result in manifest injustice." Id. Accordingly, the court did not abuse its discretion in limiting the defendant's closing argument.

III

Last, the defendant claims that the court gave the jury a faulty and misleading instruction on conspiracy, and seeks to have his conviction of conspiracy to commit murder reversed on that basis. Specifically, the defendant claims that the court "failed to instruct that [the] defendant had to specifically intend to enter into an agreement to commit murder." The defendant concedes that this claim is unpreserved, but, nevertheless, seeks review pursuant to *State* v. *Golding*, supra, 213 Conn. 239–40. We conclude that the defendant has waived any challenge to the relevant jury instruction, pursuant to *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011), and, therefore, is not entitled to *Golding* review.

The following additional facts are relevant to our resolution of this claim. At the February 10, 2015 charge conference, the court noted that it had provided defense counsel and the state with two different drafts of the proposed jury instructions, one on February 5, 2015, and the second on February 10, 2015. In both drafts, the subsection regarding the "agreement" element of conspiracy to commit murder provided, inter alia: "The

first element is that there was an agreement between two or more persons. It is not necessary for the state to prove that there was a formal or express agreement between them. It is sufficient to show that the parties *knowingly engaged* in a mutual plan to do a criminal act. . . . [T]he first element that the state must prove beyond a reasonable doubt is that the defendant *entered into an agreement* with at least one other person to engage in conduct constituting murder." (Emphasis added.) In addition, in summarizing the elements of conspiracy to commit murder, the two drafts provided: "In summary, the state must prove beyond a reasonable doubt that . . . the defendant *specifically intended* to cause the death of another person." (Emphasis added.) The language used in the drafts came from the model jury instructions on the Judicial Branch website at the time of the conference. Neither the defendant nor the state objected to the use of any of this language.

The state did object to a different portion of the proposed conspiracy charge, arguing that it was unnecessary to include language that the state need not show that the defendant directly communicated with his coconspirators, or that they even knew each other's names, as this was irrelevant under the facts of the present case. The defense agreed with the state. After agreeing to take that language out, the court then stated: "Okay. All right. So that looks good. All right. Any other issues with count two language?" Neither party indicated that it had any further changes to count two, and the court moved on to discuss the proposed language for count three of the information, which charged the defendant with criminal possession of a firearm.

The following day, February 11, 2015, the court instructed the jury and used the conspiracy language that it had provided in the draft instructions, including the previously mentioned language in the subsection on agreement, as well as the language in the summary paragraph. After the court read the entirety of the instructions to the jury, the defendant renewed his

objections made during the charge conference, none of which were in regard to the conspiracy count, and he did not make any additional objections.

On appeal, the defendant argues that the court's instruction to the jury on count two, conspiracy to commit murder, was "faulty and misleading." Specifically, he argues that the use of the language regarding the agreement element as well as the language in the summarizing paragraph was in error because the court failed to instruct the jury that the defendant had to "specifically intend to enter into an agreement to commit murder." We conclude that the defendant has waived this claim.

"It is well established in Connecticut that unpreserved claims of improper jury instructions are reviewable under *Golding* unless they have been induced or implicitly waived. . . . 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 affected by action of counsel . . . [including] the right of a defendant to proper jury instructions. . . . Connecticut courts have consistently held that when a party fails to raise in the trial court the constitutional claim presented on appeal and affirmatively acquiesces to the trial court's order, that party waives any such claim [under *Golding*]. . . . [W]hen the trial court provides counsel with a copy of the proposed jury instructions, allows a meaningful opportunity for their review, solicits comments from counsel regarding changes or modifications and counsel affirmatively accepts the instructions proposed or given, the defendant may be deemed to have knowledge of any potential flaws therein and to have waived implicitly the constitutional right to challenge the instructions on direct appeal. . . . [C]ounsel's discussion of unrelated parts of the jury

charge at an on-the-record charge conference . . . demonstrate[s] that counsel was sufficiently familiar with the instructions to identify those portions of the instructions with which [she] disagreed. [T]o the extent that [she] selectively discussed certain portions of the instructions but not others, one may presume that [she] had knowledge of the portions that [she] did not discuss and found them to be proper, thus waiving the defendant's right to challenge them on direct appeal." (Citations omitted; internal quotation marks omitted.) *State* v. *Herring*, 151 Conn. App. 154, 169–70, 94 A.3d 688 (2014), aff'd, 323 Conn. 526, 147 A.3d 653 (2016), citing *State* v. *Kitchens*, supra, 299 Conn. 447. Our Supreme Court has stated that it is sufficient to show that defense counsel had a meaningful opportunity to review the proposed instructions if she was given the opportunity to review them overnight. See *State* v. *Webster*, 308 Conn. 43, 63, 60 A.3d 259 (2013).

In the present case, defense counsel was provided a first draft of the instructions on February 5, 2015, four days prior to the charge conference and, accordingly, had a meaningful opportunity to review the proposed jury instructions at issue. Additionally, defense counsel discussed and objected to other portions of the jury instructions at the charge conference, and, therefore, it is presumed that she had knowledge of the language in question, even though she did not discuss explicitly that portion of the proposed instructions during the charge conference. See *State* v. *Herring*, supra, 151 Conn. App. 170. We conclude that the defendant had a meaningful opportunity to review the jury instruction at issue, failed to object to that instruction, and, therefore, waived his right to challenge the instruction on appeal.[14]

[14] The defendant argues in his reply brief that his claim cannot be waived pursuant to *Kitchens* because the model jury instructions were revised on March 4, 2015, after he was convicted, to include language regarding a defendant's specific intent to enter into an agreement. The defendant argues, therefore, that this "substantive change" to the model jury instructions

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JOSE RIVERA (AC 40218)

DiPentima, C. J., and Mullins and Pellegrino, Js.

Syllabus

The defendant, who previously had been convicted of, inter alia, the crime of murder and sentenced to a mandatory minimum term of twenty-five years of incarceration without the possibility of parole stemming from his role in a shooting when he was seventeen years old, appealed to this court, claiming that the trial court improperly dismissed his motion to correct an illegal sentence for lack of subject matter jurisdiction. The

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should apply retroactively to pending cases, just as "substantive changes to the law" would. This argument is unavailing.

The preamble to the model jury instructions expressly provides: "This collection of jury instructions . . . *is intended as a guide* for judges and attorneys . . . . The use of these instructions in entirely discretionary and their publication by the Judicial Branch is *not a guarantee of their legal sufficiency*." (Emphasis added.) Connecticut Criminal Jury Instructions (4th Ed. 2008) preamble, available at http://www.jud.ct.gov/ji/Criminal/Criminal.pdf (last visited October 11, 2017) (copy contained in the file of this case in the Appellate Court clerk's office). Accordingly, if defense counsel believed that the statement of law provided in the jury instructions was incorrect, she was obligated to object to its use, which she did not.

In fact, defense counsel did object at the charge conference to another portion of the proposed instructions, regardless of the fact that it was from the model jury instructions. In discussing the proposed instructions on count one, murder, defense counsel objected to the language in the draft which provided: "This means that the defendant's conduct was the proximate cause of the decedent's death. You must find it proved beyond a reasonable doubt that [the victim] died as a result of the actions of the defendant." Defense counsel argued that the court "[states] that sentence as if [the court is] making a conclusion for the jury. It's confusing and I'm objecting to [the] language." The court stated that it was using the language from the model jury instructions to which defense counsel replied, "I still have the same problem with it even though it's the model jury instructions. . . . So, I am objecting." The court noted the objection and used the language as proposed in its instructions. Defense counsel knew, therefore, that regardless of the origin of the language used by the court in the proposed instructions, she was obligated to object if she felt it was a misstatement of law.

defendant claimed that his sentence was unconstitutional under the eighth amendment to the United States constitution, as interpreted by *Miller* v. *Alabama* (567 U.S. 460), which requires a sentencing court to consider a juvenile offender's youth and attendant characteristics as mitigating factors prior to sentencing a juvenile homicide offender to life without the possibility of parole or its functional equivalent. He also claimed that his mandatory minimum sentence of twenty-five years violated article first, §§ 8 and 9, of the state constitution, in that it prevented the court from sentencing a juvenile on a charge of murder to less than twenty-five years of incarceration upon due consideration to the factors outlined in *Miller*. During the pendency of the defendant's appeal, No. 15-84, § 1, of the 2015 Public Acts (P.A. 15-84, now codified at § 54-125a [f]) was enacted, pursuant to which the defendant became eligible for parole. Also, after this appeal was filed, our Supreme Court decided *State* v. *Delgado* (323 Conn. 801), in which it held that the eighth amendment to the United States constitution, as interpreted by *Miller*, does not prohibit a court from imposing a sentence of life imprisonment with the opportunity for parole for a juvenile homicide offender, or require the court to consider the mitigating factors of youth before imposing such a sentence, and that an allegation that the court failed to consider youth related factors before imposing a sentence of life with parole was not sufficient to establish a jurisdictional basis for correcting a sentence. *Held*:

1. The trial court properly dismissed the defendant's motion to correct an illegal sentence for lack of subject matter jurisdiction; although the defendant initially was sentenced as a juvenile to twenty-five years of incarceration without the possibility of parole for a homicide offense, he is now eligible for parole pursuant to § 54-125a (f), and, therefore, pursuant to *Delgado*, because the sentencing court was not required to consider the mitigating factors of youth before imposing such a sentence, the defendant's motion to correct failed to state a colorable claim that his sentence of twenty-five years of incarceration was illegal or imposed in an illegal manner, and the trial court lacked subject matter jurisdiction to consider the merits of the motion to correct.

2. The defendant could not prevail on his claim that a mandatory minimum sentence of twenty-five years of incarceration without the possibility of parole imposed on a juvenile homicide offender was unconstitutional under article first, §§ 8 and 9, of our state constitution, as the factors set forth in *State* v. *Geisler* (222 Conn. 672) to be considered in defining the scope and parameters of the state constitution did not support the defendant's state constitutional claim: the mandatory minimum sentence of twenty-five years of incarceration imposed on a juvenile offender did not constitute cruel and unusual punishment under federal precedent, as it was not excessive and disproportionate or arbitrary or discriminatory, the sentencing court was not required to consider the youth related

mitigating factors under *Miller*, as those factors apply only to life sentences without the possibility of parole or their functional equivalent and the defendant was eligible for parole, the historical considerations underlying this state's constitutional history provided no direction in determining whether the defendant's sentence was prohibited under article first, §§ 8 and 9, of the state constitution, the text of which did not give juveniles any specific special status or protections, recent decisions by this state's appellate courts weighed against the defendant's claim, as did persuasive precedent from our sister states, and § 54-125a (f), which confers special protection on juveniles who were under the age of eighteen at the time they committed their offenses, reflects current sociological and economic norms as to youth related sentencing considerations, which also weighed against the defendant; accordingly, the mandatory minimum sentence of twenty-five years of incarceration imposed on the defendant, as a juvenile homicide offender, did not violate the state constitution.

3. This court declined to reach the merits of the defendant's unpreserved claim that the trial court committed constitutional error when it improperly accepted his waiver, through counsel, of his right to a presentence investigation report without canvassing him prior to permitting the waiver, this court having previously concluded that review of an unpreserved claim pursuant to *State* v. *Golding* (213 Conn. 233) is not warranted where, as here, the defendant, on appeal, raises a challenge to the legality of his sentence that was not presented in his underlying motion to correct an illegal sentence.

Argued May 15—officially released October 17, 2017

Procedural History

Substitute information charging the defendant with the crimes of murder and conspiracy to commit murder, brought to the Superior Court in the judicial district of Hartford, where the defendant was presented to the court, *Clifford*, *J.*, on a plea of guilty; judgment of guilty; thereafter, the court, *Alexander*, *J.*, dismissed the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Affirmed.*

W. Theodore Koch III, assigned counsel, for the appellant (defendant).

Michele C. Lukban, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's

attorney, *Melissa E. Patterson*, assistant state's attorney, and *Thomas R. Garcia*, former senior assistant state's attorney, for the appellee (state).

Opinion

DiPENTIMA, C. J. The defendant, Jose Rivera, appeals from the judgment of the trial court dismissing his motion to correct an illegal sentence. We are asked to determine whether our state constitution affords greater protection to juvenile homicide offenders than that provided under the federal constitution. On appeal, the defendant claims that (1) the court erred in dismissing the motion to correct an illegal sentence on the ground that it lacked subject matter jurisdiction, (2) the court erred in dismissing the motion to correct an illegal sentence because the mandatory minimum sentence of twenty-five years of incarceration without the possibility of parole imposed on a juvenile homicide offender is unconstitutional under article first, §§ 8 and 9, of the Connecticut constitution, as it prevented the court from sentencing juveniles to less than twenty-five years of incarceration upon due consideration of the *Miller* factors[1] and (3) the court committed constitutional error when it accepted the defendant's waiver, through counsel, without a canvass, of his right to a presentence investigation report. We disagree with the defendant and, accordingly, affirm the judgment of the trial court dismissing the motion to correct an illegal sentence.

The following facts and procedural history are relevant to the present appeal. On April 5, 1997, the defendant and an accomplice participated in a shooting that

[1] The *Miller* factors refer to the sentencing court's obligation to consider a juvenile's age and circumstances related to age at an individualized sentencing hearing as mitigating factors before imposing a sentence of life imprisonment without parole. See *Miller* v. *Alabama*, 567 U.S. 460, 479–80, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

resulted in the death of Harry Morales. The defendant was seventeen years old at the time of the shooting.

On June 3, 1999, when the defendant was nineteen years old, he pleaded guilty to murder in violation of General Statutes § 53a-54a and conspiracy to commit murder in violation of General Statutes §§ 53a-48 (a) and 53a-54a. He also pleaded guilty under a different docket number to assault in the first degree in violation of General Statutes § 53a-59 (a) (1).[2] The court, *Clifford*, *J.*, sentenced the defendant to the mandatory minimum of twenty-five years of incarceration on the charge of murder, twenty years of incarceration on the charge of conspiracy to commit murder and ten years of incarceration, five of which were the mandatory minimum, on the charge of assault in the first degree, with all sentences to be served concurrently. The total effective sentence imposed by the court was twenty-five years of incarceration. At the time the defendant was sentenced, he was not eligible for parole pursuant to General Statutes § 54-125a (b) (1), which provides in relevant part that "[n]o person convicted of [murder], which was committed on or after July 1, 1981, shall be eligible for parole . . . ."[3]

On October 1, 2014, the defendant filed a motion to correct an illegal sentence pursuant to Practice Book

[2] The defendant pleaded guilty pursuant to the *Alford* doctrine to the crimes of murder in violation of § 53a-54a, conspiracy to commit murder in violation of §§ 53a-48 (a) and 53a-54a, and, in a different docket number, assault in the first degree in violation of § 53a-59 (a) (1). See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). The sentences on only the conviction of murder and conspiracy to commit murder are at issue in this appeal.

[3] Although the defendant originally was sentenced to twenty-five years of incarceration without the possibility of parole, with the subsequent passage of No. 15-84 of the 2015 Public Acts (now codified in part in § 54-125a), the defendant, according to the state, was scheduled to be released on parole on May 21, 2017.

§ 43-22.[4] In his motion, the defendant claimed that his sentence of twenty-five years of incarceration was imposed in an illegal manner because it violated the eighth amendment to the United States constitution as interpreted by *Miller* v. *Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012),[5] and *Graham* v. *Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).[6] Oral argument was heard on October 16, 2014.

On February 11, 2015, the trial court, *Alexander*, *J.*, issued a memorandum of decision dismissing the defendant's motion to correct an illegal sentence because it lacked subject matter jurisdiction over the motion. This appeal followed.

After the appeal was filed and briefed, our Supreme Court issued decisions in *State* v. *Delgado*, 323 Conn. 801, 151 A.3d 345 (2016), and *State* v. *Boyd*, 323 Conn. 816, 151 A.3d 355 (2016). The parties were asked to be prepared to address at oral argument the impact of *Delgado* and *Boyd* on the present appeal.[7]

[4] Practice Book § 43-22 provides: "The judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner."

[5] *Miller* requires "that a sentencing court consider the defendant's chronological age and its hallmark features as a mitigating factor prior to sentencing a juvenile offender to life without parole or its functional equivalent." (Internal quotation marks omitted.) *State* v. *Williams-Bey*, 167 Conn. App. 744, 751 n.3, 144 A.3d 467 (2016), modified in part on other grounds after reconsideration, 173 Conn. App. 64, 164 A.3d 31, cert. granted on other grounds, 326 Conn. 920, A.3d (2017).

[6] *Graham* requires that "a juvenile offender serving a life sentence or its functional equivalent is entitled to some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (Internal quotation marks omitted.) *State* v. *Williams-Bey*, 167 Conn. App. 744, 751 n.3, 144 A.3d 467 (2016), modified in part on other grounds after reconsideration, 173 Conn. App. 64, 164 A.3d 31, cert. granted on other grounds, 326 Conn. 920, A.3d (2017).

[7] The decision in *Boyd* relied upon the reasoning in *Delgado*, and, therefore, we address only *Delgado*.

I

The defendant first claims that the trial court erred in dismissing the motion to correct an illegal sentence on the ground that it lacked subject matter jurisdiction. We conclude that our Supreme Court's holding in *State* v. *Delgado*, supra, 323 Conn. 801, is dispositive of the defendant's claim, and, accordingly, we agree with the trial court's dismissal of the defendant's motion to correct.

We begin by setting forth our well established standard of review and legal principles that govern our resolution of this claim. "We apply plenary review in addressing this question of law. . . . The subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal. . . . At issue is whether the defendant has raised a colorable claim within the scope of Practice Book § 43-22 that would, if the merits of the claim were reached and decided in the defendant's favor, require correction of a sentence. . . . In the absence of a colorable claim requiring correction, the trial court has no jurisdiction to modify the sentence." (Citations omitted; internal quotation marks omitted.) Id., 810.

In *Delgado*, the defendant, who was sentenced in 1996 to sixty-five years of incarceration without the possibility of parole for crimes he committed at the age of sixteen, appealed from the judgment of the trial court dismissing his motion to correct an illegal sentence. The issue before the Supreme Court was whether the sentencing court had failed to consider youth related mitigating factors and imposed the equivalent of a life sentence without the possibility of parole in violation of the eighth amendment. Id., 802–804, 809. Our Supreme Court first noted that "[f]ollowing the enactment of No. 15-84 of the 2015 Public Acts (P.A. 15-84), now codified

in part in General Statutes § 54-125a (f) . . . the defendant is now eligible for parole and can no longer claim that he is serving a sentence of life imprisonment, or its equivalent, without parole."[8] *State* v. *Delgado*, supra, 323 Conn. 810.

The court next explained that "[t]he eighth amendment [to the United States constitution], as interpreted by *Miller*, does not prohibit a court from imposing a sentence of life imprisonment with the opportunity for parole for a juvenile homicide offender, nor does it require the court to consider the mitigating factors of

[8] "Section 1 of No. 15-84 of the 2015 Public Acts, codified at General Statutes [§ 54-125a], provides in relevant part: (f) (1) Notwithstanding the provisions of subsections (a) to (e), inclusive, of this section, a person convicted of one or more crimes committed while such person was under eighteen years of age, who is incarcerated on or after October 1, 2015, and who received a definite sentence or total effective sentence of more than ten years for such crime or crimes prior to, on or after October 1, 2015, may be allowed to go at large on parole in the discretion of the panel of the Board of Pardons and Paroles for the institution in which such person is confined, provided (A) if such person is serving a sentence of fifty years or less, such person shall be eligible for parole after serving sixty per cent of the sentence or twelve years, whichever is greater, or (B) if such person is serving a sentence of more than fifty years, such person shall be eligible for parole after serving thirty years. Nothing in this subsection shall limit a person's eligibility for parole release under the provisions of subsections (a) to (e), inclusive, of this section if such person would be eligible for parole release at an earlier date under any of such provisions.

"(2) The board shall apply the parole eligibility rules of this subsection only with respect to the sentence for a crime or crimes committed while a person was under eighteen years of age. . . .

"(3) Whenever a person becomes eligible for parole release pursuant to this subsection, the board shall hold a hearing to determine such person's suitability for parole release. . . .

***

"(5) After such hearing, the board shall articulate for the record its decision and the reasons for its decision. If the board determines that continued confinement is necessary, the board may reassess such person's suitability for a new parole hearing at a later date to be determined at the discretion of the board, but not earlier than two years after the date of its decision.

"(6) The decision of the board under this subsection shall not be subject to appeal." (Internal quotation marks omitted.) *State* v. *Delgado*, supra, 323 Conn. 803 n.1.

youth before imposing such a sentence. . . . Rather, under *Miller*, a sentencing court's obligation to consider youth related mitigating factors is limited to cases in which the court imposes a sentence of life, or its equivalent, *without* parole." (Citation omitted; emphasis altered.) Id., 810–11. The court went on to state that "[b]ecause *Miller* and [*State* v. *Riley*, 315 Conn. 637, 110 A.3d 1205 (2015), cert. denied, U.S. , 136 S. Ct. 1361, 194 L. Ed. 2d 376 (2016)], do not require a trial court to consider any particular mitigating factors associated with a juvenile's young age before imposing a sentence that includes an opportunity for parole, the defendant can no longer allege, after the passage of P.A. 15-84, that his sentence was imposed in an illegal manner on the ground that the trial court failed to take these factors into account. Such an allegation is an essential predicate to the trial court's jurisdiction to correct the sentence. An allegation that the court failed to consider youth related factors before imposing a sentence of life *with parole* is not sufficient to establish a jurisdictional basis for correcting a sentence. . . . We therefore conclude that the defendant has not raised a colorable claim of invalidity that, if decided in his favor, would require resentencing." (Citations omitted; emphasis in original.) Id., 812–13.

As in *Delgado*, although the defendant here initially was sentenced as a juvenile to twenty-five years of incarceration without the possibility of parole for a homicide offense, he is now eligible for parole pursuant to § 54-125a (f). As explained in *Delgado*, the sentencing court was not required to consider the mitigating factors of youth before imposing such a sentence. Because the defendant's motion to correct fails to state a colorable claim that his sentence of twenty-five years of incarceration was illegal or imposed in an illegal manner, the trial court does not have subject matter jurisdiction to consider the merits of the motion. See *State* v. *McClean*,

173 Conn. App. 62, 64, 164 A.3d 35 (2017) (concluding: "[u]pon reconsideration, we are constrained by *Delgado* to conclude that the trial court properly dismissed the defendant's motion to correct an illegal sentence and that its judgment should be affirmed"); *State* v. *Martin*, 172 Conn. App. 904, 158 A.3d 448 (2017) (same); see also *State* v. *Parker*, 173 Conn. App. 901, 159 A.3d 1203 (2017) (same). The court, therefore, properly dismissed the motion to correct an illegal sentence. See *State* v. *Ellis*, 174 Conn. App. 14, 17–18, 164 A.3d 829 (2017) ("Following the enactment of P.A. 15-84 . . . the defendant is now eligible for parole and can no longer claim that he is serving a sentence of life imprisonment, or its equivalent, without parole. The eighth amendment, as interpreted by *Miller*, does not prohibit a court from imposing a sentence of life imprisonment *with* the opportunity for parole for a juvenile homicide offender, nor does it require the court to consider the mitigating factors of youth before imposing such a sentence. . . . [Thus] the court properly dismissed the defendant's motion to correct an illegal sentence." [Citations omitted; emphasis in original; internal quotation marks omitted.]).[9]

II

The defendant's second claim is that the court erred in dismissing his motion to correct an illegal sentence because a mandatory minimum sentence of twenty-five years of incarceration without the possibility of parole imposed on a juvenile homicide offender is unconstitutional under article first, §§ 8 and 9, of the Connecticut

[9] In *Ellis*, this court, following *Delgado*, concluded that despite the defendant's originally having faced "the possibility of eighty-one and one-half years incarceration with a mandatory minimum sentence of twenty-five years" when he was sentenced; *State* v. *Ellis*, supra, 174 Conn. App. 16 n.2; he became parole eligible with the recent enactment of P.A. 15-84, which is now codified in part in § 54-125a (f), and could no longer claim that he was serving a sentence of life imprisonment, or its equivalent, without parole. Id., 17.

constitution, as it bars the court from sentencing juveniles to less than twenty-five years of incarceration upon due consideration of the *Miller* mitigating factors of youth. The state responds by arguing that because *Miller* did not apply to the sentencing procedures in this case, there was no violation of the state constitution. We agree with the state.

The following standard of review and applicable legal principles are relevant to this claim. "Our review of the defendant's constitutional claims is plenary." *State* v. *Williams-Bey*, 167 Conn. App. 744, 763–64, 144 A.3d 467 (2016), modified in part on other grounds after reconsideration, 173 Conn. App. 64, 164 A.3d 31, cert. granted on other grounds, 326 Conn. 920, A.3d (2017);[10] see also *State* v. *Taylor G.*, 315 Conn. 734, 741, 110 A.3d 338 (2015) (challenge to "[t]he constitutionality of a statute presents a question of law over which our review is plenary" [internal quotation marks omitted]). "It is well established that federal constitutional law establishes a minimum national standard for the exercise of individual rights and does not inhibit state governments from affording higher levels of protection for such rights. . . . In several cases, our Supreme Court has concluded that the state constitution provides

[10] On July 10, 2017, our Supreme Court granted the defendant's petitions for certification to appeal from this court's decisions in *State* v. *Williams-Bey*, supra, 167 Conn. App. 744, and *State* v. *Williams-Bey*, 173 Conn. App. 64, 164 A.3d 31 (2017), limited to the following two questions:

"1. Under the Connecticut constitution, article first, §§ 8 and 9, are all juveniles entitled to a sentencing proceeding at which the court expressly considers the youth related factors required by the United States constitution for cases involving juveniles who have been sentenced to life imprisonment without possibility of release? See *Miller* v. *Alabama*, [supra, 567 U.S. 460 (2012)]?

"2. If the answer to the first question is in the affirmative and a sentencing court does not comply with the sentencing requirements under the Connecticut constitution, does parole eligibility under General Statutes § 54-125a (f) adequately remedy any state constitutional violation?" *State* v. *Williams-Bey*, 326 Conn. 920, 921, A.3d (2017).

broader protection of individual rights than does the federal constitution. . . . It is by now well established that the constitution of Connecticut prohibits cruel and unusual punishments under the auspices of the dual due process provisions contained in article first, §§ 8 and 9. Those due process protections take as their hallmark principles of fundamental fairness rooted in our state's unique common law, statutory, and constitutional traditions. . . . Although neither provision of the state constitution expressly references cruel or unusual punishments, it is settled constitutional doctrine that both of our due process clauses prohibit governmental infliction of cruel and unusual punishments." (Citations omitted; internal quotation marks omitted.) *State* v. *Williams-Bey*, supra, 768–69, quoting *State* v. *Santiago*, 318 Conn. 1, 16–17, 122 A.3d 1, reconsideration denied, 319 Conn. 912, 124 A.3d 496, stay denied, 319 Conn. 935, 125 A.3d 520 (2015). We must determine whether the Connecticut constitution prohibits, as cruel and unusual, the imposition on a juvenile of the mandatory minimum sentence of twenty-five years of incarceration for the charge of murder. We conclude that it does not.

"In ascertaining the contours of the protections afforded under our state constitution, we utilize a multifactor approach that we first adopted in *State* v. *Geisler*, 222 Conn. 672, 684–85, 610 A.2d 1225 (1992)." *State* v. *Santiago*, 319 Conn. 935, 937 n.3, 125 A.3d 520 (2015). "In *State* v. *Geisler*, [supra, 672], we identified six nonexclusive tools of analysis to be considered, to the extent applicable, whenever we are called on as a matter of first impression to define the scope and parameters of the state constitution: (1) persuasive relevant federal precedents; (2) historical insights into the intent of our constitutional forebears; (3) the operative constitutional text; (4) related Connecticut precedents;

(5) persuasive precedents of other states; and (6) contemporary understandings of applicable economic and sociological norms, or, as otherwise described, relevant public policies. . . . These factors, which we consider in turn, inform our application of the established state constitutional standards—standards that, as we explain hereinafter, derive from United States Supreme Court precedent concerning the eighth amendment—to the defendant's claims in the present case." (Citations omitted.) *State* v. *Santiago*, supra, 318 Conn. 17–18.

A

Federal Precedent

As to the first *Geisler* factor, the mandatory minimum sentence of twenty-five years of incarceration imposed on a juvenile homicide offender does not constitute a cruel and unusual punishment under federal precedent. "The eighth amendment to the federal constitution establishes the minimum standards for what constitutes impermissibly cruel and unusual punishment. . . . Specifically, the United States Supreme Court has indicated that at least three types of punishment may be deemed unconstitutionally cruel: (1) inherently barbaric punishments; (2) excessive and disproportionate punishments; and (3) arbitrary or discriminatory punishments." (Citation omitted; footnote omitted.) Id., 18–19.

1

Inherently Barbaric Punishments

The first type of punishment that the United States Supreme Court has recognized as violating the eighth amendment includes the imposition of an inherently barbaric punishment. The prohibition against an inherently barbaric punishment "is directed toward manifestly and unnecessarily cruel punishments, such as

torture and other wanton infliction of physical pain." Id., 20; see also *Graham* v. *Florida*, supra, 560 U.S. 59.

In the present case, the defendant does not argue that the imposition of a mandatory minimum sentence of twenty-five years of incarceration on a juvenile was an inherently barbaric punishment. We therefore proceed to determine whether his sentence constitutes an excessive and disproportionate punishment and/or an arbitrary or discriminatory punishment

2

Excessive and Disproportionate Punishments

The second type of punishment that the United States Supreme Court has recognized as violating the eighth amendment is one that is excessive and disproportionate. Specifically, "the eighth amendment mandates that punishment be proportioned and graduated to the offense of conviction." *State* v. *Santiago*, supra, 318 Conn. 20. "Although the unique aspects of adolescence had long been recognized in the [United States] Supreme Court's jurisprudence, it was not until the trilogy of *Roper* [v. *Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)], *Graham*, and *Miller* that the court held that youth and its attendant characteristics have constitutional significance for purposes of assessing proportionate punishment under the eighth amendment." (Footnote omitted.) *State* v. *Riley*, supra, 315 Conn. 644–45.

In *Roper* v. *Simmons*, supra, 543 U.S. 578, the United States Supreme Court held that the eighth and fourteenth amendments prohibit the imposition of the death penalty on juvenile offenders. As our Supreme Court explained in *Riley*: "Because of a juvenile's diminished culpability, the court [in *Roper*] concluded that the two penological justifications for the death penalty, retribution and deterrence, applied with lesser force to them

than to adults. . . . The court suggested that, [t]o the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person." (Citation omitted; internal quotation marks omitted.) *State* v. *Riley*, supra, 315 Conn. 646.

In *Graham* v. *Florida*, supra, 560 U.S. 82, the court held that the eighth amendment prohibits the sentence of life without the possibility of parole for juvenile nonhomicide offenders. The court reasoned that the juvenile nonhomicide offender has a "twice diminished moral culpability" when compared to an adult homicide offender. Id., 69. The court in *Graham* further noted: "What the [s]tate must do, however, is give defendants like [Terrance Jamar] Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. . . . The [e]ighth [a]mendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid [s]tates from making the judgment at the outset that those offenders never will be fit to reenter society." Id., 75.

"[I]n *Miller* v. *Alabama*, [supra, 567 U.S. 469–70], the court held that the eighth amendment prohibits mandatory sentencing schemes that mandate life in prison without the possibility of parole for juvenile homicide offenders, although a sentence of life imprisonment *without* the possibility of parole may be deemed appropriate following consideration of the child's age related characteristics and the circumstances of the crime." (Emphasis added; internal quotation marks omitted.) *Dumas* v. *Commissioner of Correction*, 168 Conn. App. 130, 136, 145 A.3d 355, cert. denied, 324 Conn. 901, 151 A.3d 1288 (2016). The court in *Miller* "summarized its holding as follows: [T]he

[e]ighth [a]mendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. . . . By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." (Internal quotation marks omitted.) *State* v. *Riley*, supra, 315 Conn. 652.

Most recently, the court determined in *Montgomery* v. *Louisiana*, U.S. , 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016), "that *Miller* applies retroactively upon collateral review to all juvenile offenders serving mandatory life without parole sentences because *Miller* announced a substantive rule of constitutional law. . . . The court also recognized that the substantive rule in *Miller* had procedural components regarding the factors that the judicial authority must consider. It stated that *Miller* requires [the judicial authority] to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence. . . . The court noted that [t]he foundation stone for *Miller*'s analysis was [the] Court's line of precedent holding certain punishments disproportionate when applied to juveniles. . . . The court reiterated that because of children's decreased culpability and greater ability to reform, *Miller* recognized that the distinctive attributes of youth diminish the penological justifications for imposing life without parole on juvenile offenders. . . . *Miller*, then, did more than require [the judicial authority] to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of the distinctive attributes of youth." (Citations omitted; internal quotation marks omitted.) *State* v. *Williams-Bey*, supra, 167 Conn. App. 757–58.

"The United States Supreme Court, however, also recognized in *Montgomery* the practical limitations in

remedying sentences that violated *Miller* upon its retroactive application. Juvenile offenders whose sentences violate *Miller* upon retroactive application did not have the opportunity to demonstrate the mitigating factors of youth at the time of sentencing. The court emphasized that *this violation of Miller could be remedied by affording those juvenile offenders parole eligibility, thus providing, in the context of Graham, a meaningful opportunity for release* . . . . The court also emphasized that [g]iving *Miller* retroactive effect . . . does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. See, e.g., Wyo. Stat. Ann. § 6-10-301 (c) (2013) (juvenile homicide offenders eligible for parole after [twenty-five] years). Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." (Citation omitted; emphasis altered; internal quotation marks omitted.) *State* v. *Williams-Bey*, supra, 167 Conn. App. 758–59. Moreover, the court in *Montgomery* further concluded that juveniles sentenced to life in prison without parole "must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored." *Montgomery* v. *Louisiana*, supra, 136 S. Ct. 736–37.

"These federal cases recognized that [t]he concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the precept of justice that punishment for crime should be graduated and proportioned to [the] offense." (Internal quotation marks

omitted.) *Dumas* v. *Commissioner of Correction*, supra, 168 Conn. App. 136.

In the present case, the defendant relies on *Roper*, *Graham* and *Miller* to support his claim that a mandatory minimum sentence of twenty-five years of incarceration imposed on a juvenile homicide offender is cruel under the eighth amendment to the United States constitution. The defendant further contends that the mandatory minimum sentence of twenty-five years of incarceration amounts to a life sentence under *Miller*.

Applying the recent federal precedent to the present case, we are convinced that the mandatory minimum sentence imposed on the defendant does not rise to the level of a cruel and unusual punishment pursuant to *Roper*, *Graham*, *Miller* and *Montgomery*. Distinguishable from these federal cases, here, the defendant's sentence does not amount to a life sentence, or its functional equivalent, without the possibility for parole. Rather, in the present case, the defendant is parole eligible pursuant to § 54-125a (f). Specifically, although at the time of sentencing, the crime of which the defendant was convicted made him ineligible for parole, in light of the subsequent passage of P.A 15-84 the defendant is parole eligible. Following *Montgomery*, the opportunity for parole eligibility "ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." *Montgomery* v. *Louisiana*, supra, 136 S. Ct. 736. We emphasize that *Miller* applies only to life sentences, or its functional equivalent, without the possibility of parole.

After reviewing the foregoing federal precedent, we conclude that the *Miller* mitigating factors of youth did not apply to the defendant's sentence of twenty-five years of incarceration. Because the defendant is parole

eligible, the defendant is not serving a sentence of life imprisonment, nor its functional equivalent, without the possibility of parole. Therefore, as *Miller* applies only to life sentences, or their functional equivalent, *without the possibility of parole*, the sentencing court here was not required to consider the *Miller* youth related mitigating factors.

Accordingly, in relying on the foregoing federal precedent, we are convinced that the mandatory minimum sentence of twenty-five years *with the possibility of parole* imposed on a juvenile homicide offender does not constitute an excessive and disproportionate punishment under the circumstances of this case.

3

Arbitrary or Discriminatory Punishments

The third type of punishment that the United States Supreme Court has recognized as cruel and unusual under the eighth amendment is a punishment that is "imposed in an arbitrary and unpredictable fashion . . . ." (Internal quotation marks omitted.) *State* v. *Santiago*, supra, 318 Conn. 23. The defendant contends that a determination that his mandatory minimum sentence was unconstitutional, will lead to the elimination of racial discrimination. To support his assertion the defendant relies upon statistical data compiled pertaining to all juvenile offenders serving life without parole in Connecticut. We are not persuaded by the defendant's argument.

In particular, the United States Supreme Court previously has rejected a similar argument involving racial bias that impermissibly tainted sentencing decisions, in the context of capital punishment. In *McCleskey* v. *Kemp*, 481 U.S. 279, 319, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987), the court noted: "The Constitution does not require that a State eliminate any demonstrable

disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system . . . .'' The court explained that the legislatures are ''better qualified to weigh and evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts . . . .'' (Citation omitted; internal quotation marks omitted.) Id. The court further noted that ''[i]t is not the responsibility—or indeed even the right—of this Court to determine the appropriate punishment for particular crimes. It is the legislatures, the elected representatives of the people, that are constituted to respond to the will and consequently the moral values of the people.'' (Internal quotation marks omitted.) Id. After our review of the foregoing legal principles, we conclude that the imposition of a mandatory minimum sentence of twenty-five years of incarceration imposed on a juvenile homicide offender is not an arbitrary or discriminatory punishment.

Therefore, under the federal precedent, the mandatory minimum sentence of twenty-five years of incarceration *with the possibility of parole*[11] imposed on a juvenile homicide offender does not fall within the three types of punishments that the United States Supreme Court has determined to constitute a cruel and unusual punishment in violation of the eighth amendment. Accordingly, the first *Geisler* factor does not support the defendant's claim.

B

State Constitutional History

The second *Geisler* factor, the historical approach, in theory, is neutral. In his brief, the defendant acknowledges that Connecticut is a progressive state. He further

[11] Under the provisions of the effective § 54-125a (f) (1) (A) and (B), juveniles sentenced to more than ten years of incarceration are parole eligible after serving 60 percent of their sentence or twelve years, whichever is greater, if they are serving a sentence of fifty years or less; if they are

explains that at common law, children older than the age of fourteen were treated as adults, which led to the creation of juvenile courts because people were "appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals." (Internal quotation marks omitted.) He then discusses the trilogy of the United States Supreme Court cases of *Roper*, *Graham* and *Miller*, followed by our Supreme Court's decisions in *Riley* and *Casiano* v. *Commissioner of Correction*, 317 Conn. 52, 115 A.3d 1031 (2015), cert. denied sub nom. *Semple* v. *Casiano*, U.S. , 136 S. Ct. 1364, 194 L. Ed. 2d 376 (2016), and explains that these decisions reflect our evolving standards of decency in the prohibition against cruel and unusual punishment.

In turn, the state, citing *State* v. *Jose C.*, Superior Court, judicial district of New Haven, Docket No. CR-6421185 (March 21, 1996) (16 Conn. L. Rptr. 419, 425), aff'd sub nom. *State* v. *Angel C.*, 245 Conn. 93, 715 A.2d 652 (1998), points out that "[a]t the time of the adoption of its 1818 constitution, Connecticut followed the common law and treated fourteen and fifteen year olds as adults when charged with a felony offense. It was not until 1921 that Connecticut established by statute a juvenile justice system." (Internal quotation marks omitted.) *State* v. *Williams-Bey*, supra, 167 Conn. App. 777. These historical considerations provide no direction in answering the specific question of whether the mandatory minimum sentence of twenty-five years of incarceration imposed upon a juvenile for a homicide offense is prohibited under article first, §§ 8 and 9, of the Connecticut constitution. This *Geisler* factor is, therefore, neutral.

serving a sentence of more than fifty years, they are parole eligible after serving thirty years.

C

Constitutional Text

In regard to the third *Geisler* factor, we conclude that the relevant constitutional textual approach is neutral. "It is by now well established that the constitution of Connecticut prohibits cruel and unusual punishments under the auspices of the dual due process provisions contained in article first, §§ 8 and 9. Those due process protections take as their hallmark principles of fundamental fairness rooted in our state's unique common law, statutory, and constitutional traditions. Although neither provision of the state constitution expressly references cruel or unusual punishments, it is settled constitutional doctrine that both of our due process clauses prohibit governmental infliction of cruel and unusual punishments." *State* v. *Santiago*, supra, 318 Conn. 16–17. Notably, "[a]rticle first, §§ 8 and 9, of the Connecticut constitution [does] not contain any language specifically applying to juveniles." *State* v. *Williams-Bey*, supra, 167 Conn. App. 769. In other words, the text of these constitutional provisions does not give juveniles any specific special status or protections. Id. Rather, the text of the Connecticut constitution makes no differentiation between juveniles and adults. See id. Thus, the third *Geisler* factor is neutral.

D

Connecticut Precedents

The fourth *Geisler* factor, the relevant Connecticut precedents, weighs against the defendant's claim. "Specifically, we recognized that, under the state constitution, whether a challenged punishment is cruel and unusual is to be judged according to the evolving standards of human decency . . . and that those standards are reflected not only in constitutional and legislative text, but also in our history and in the teachings of the

jurisprudence of our sister states as well as that of the federal courts." (Citations omitted; internal quotation marks omitted.) *State* v. *Santiago*, supra, 318 Conn. 42.

The most recent and relevant Connecticut precedents on juvenile sentencing are set forth in *State* v. *Delgado*, supra, 323 Conn. 810–11; *Casiano* v. *Commissioner of Correction*, supra, 317 Conn. 62; *State* v. *Taylor G.*, supra, 315 Conn. 738; *State* v. *Riley*, supra, 315 Conn. 652; and *State* v. *Logan*, 160 Conn. App. 282, 291–93, 125 A.3d 581 (2015), cert. denied, 321 Conn. 906, 135 A.3d 279 (2016).

As discussed in part I of this opinion, our Supreme Court in *Delgado* concluded that once our state legislature affords a juvenile homicide offender the opportunity for parole, *Miller* no longer applies. See *State* v. *Delgado*, supra, 323 Conn. 810–11. Specifically, the court noted: "Following the enactment of P.A. 15-84, however, the defendant is now eligible for parole and can no longer claim that he is serving a sentence of life imprisonment, or its equivalent, without parole. The eighth amendment as interpreted by *Miller*, does not prohibit a court from imposing a sentence of life imprisonment *with* the opportunity for parole on a juvenile homicide offender, nor does it require the court to consider the mitigating factors of youth before imposing such a sentence. . . . Rather, under *Miller*, a sentencing court's obligation to consider youth related mitigating factors is limited to cases in which the court imposes a sentence of life, or its [functional] equivalent, *without* parole." (Citation omitted; emphasis in original.) Id. The court further concluded: "This conclusion is consistent with the law in other jurisdictions that have considered this issue and have concluded that *Miller* simply does not apply when a juvenile's sentence provides an opportunity for parole; that is, a sentencing court has no

constitutionally founded obligation to consider any specific youth related factors under such circumstances."[12] Id., 811.

"In *State* v. *Taylor G.*, [supra, 315 Conn. 738, 741], the defendant was fourteen and fifteen years old when he committed nonhomicide offenses for which the trial court imposed a total effective sentence of ten years imprisonment followed by three years of special parole. Our Supreme Court concluded that the ten and five year mandatory minimum sentences [that the defendant would serve concurrently], under which the defendant is likely to be released before he reaches the age of thirty, do not approach what the [United States Supreme Court] described in *Roper*, *Graham* and *Miller* as the two harshest penalties. . . . The court reasoned that [a]lthough the deprivation of liberty for any amount of time, including a single year, is not insignificant, *Roper*, *Graham* and *Miller* cannot be read to mean that

[12] "See *Fisher* v. *Haynes*, United States District Court, Docket No. [C15-5747BHS], 2016 WL 5719398 (W.D. Wn. September 30, 2016) (defendant sentenced to life imprisonment with parole was not entitled to relief under *Miller*); *People* v. *Cornejo*, 3 Cal. App. 5th 36, 67–68, 207 Cal. Rptr. 3d 366 (2016) (after legislation afforded defendant opportunity for parole, sentence imposed by trial court was no longer sentence of life without parole or functional equivalent and no *Miller* claim arises, and same rationale applied to both mandatory and discretionary sentences); *State* v. *Tran*, 138 Haw. 298, 307, 378 P.3d 1014 (2016) (United States Supreme Court's statements in *Montgomery* make clear that *Miller* does not require individualized sentencing or consideration of the mitigating factors of youth in every case involving a juvenile offender, but only [when] a sentence of life imprisonment without parole is imposed on a juvenile offender); *State* v. *Cardeilhac*, 293 Neb. 200, 218, 876 N.W.2d 876 (2016) (*Miller* did not apply when defendant's sentence afforded opportunity for parole); *State* v. *Lasane*, New Jersey Superior Court, Appellate Division, Docket No. 06-02-00365 (September 28, 2016) (*Miller* does not apply to juvenile offender who retains prospect of parole within lifetime); *State* v. *Terrell*, Ohio Court of Appeals, Docket No. 103248 (June 23, 2016) (declining to extend *Miller* to cases in which parole is afforded), appeal denied, Ohio Supreme Court, Docket No. 2016-Ohio-7854 (November 23, 2016); see also *State* v. *Williams-Bey*, supra, 167 Conn. App. 772." (Internal quotation marks omitted.) *State* v. *Delgado*, supra, 323 Conn. 811–12 n.7.

all mandatory deprivations of liberty are of potentially constitutional magnitude, and that the defendant will be able to work toward his rehabilitation and look forward to release at a relatively young age." (Emphasis omitted; internal quotation marks omitted.) *Dumas* v. *Commissioner of Correction*, supra, 168 Conn. App. 137.

In *State* v. *Riley*, supra, 315 Conn. 653, our Supreme Court characterized *Miller* as "impacting two aspects of sentencing: (1) that a lesser sentence than life without parole must be available for a juvenile offender; and (2) that the sentencer must consider age related evidence as mitigation when deciding whether to irrevocably sentence juvenile offenders to a [term of life imprisonment, or its equivalent, without parole]." Id. Our Supreme Court "therefore concluded that the dictates set forth in *Miller* may be violated even when the sentencing authority has discretion to impose a lesser sentence than life without parole if it fails to give due weight to evidence that *Miller* deemed constitutionally significant before determining that such a severe punishment is appropriate. . . . Because the record in *Riley* [did] not clearly reflect that the court considered and gave mitigating weight to the defendant's youth and its hallmark features when considering whether to impose the functional equivalent to life imprisonment without parole, [the court] concluded that the defendant in *Riley* was entitled to a new sentencing proceeding." (Citation omitted; internal quotation marks omitted.) *State* v. *Delgado*, supra, 323 Conn. 806–807.

The court further explained that *Miller* applies to discretionary sentencing schemes and term of years sentencing schemes that are the functional equivalent of life without parole. *State* v. *Riley*, supra, 315 Conn. 655–57. In addressing what constitutes a functional equivalent of a sentence of life without parole, the court

noted that an aggregate sentence of 100 years of incarceration without the possibility of parole imposed on a juvenile offender "is the functional equivalent to life without the possibility of parole." Id., 642. Because the sentencing court in *Riley* "made no reference to the defendant's age at the time he committed the offenses"; id., 643; when imposing this sentence, our Supreme Court concluded that the defendant's sentence violated *Miller* and therefore remanded the case for resentencing with consideration of the factors identified in *Miller*. Id., 660–61.

"Several months after *Riley* was decided, [the] court concluded that the required sentencing considerations identified in *Miller* applied retroactively in collateral proceedings." *State* v. *Delgado*, supra, 323 Conn. 806–807 (referring to *Casiano* v. *Commissioner of Correction*, supra, 317 Conn. 62). "[I]n *Casiano* v. *Commissioner of Correction*, [supra, 317 Conn. 55], the petitioner was sixteen years old when he committed homicide and nonhomicide offenses for which the trial court imposed a total effective sentence of fifty years imprisonment without the possibility of parole pursuant to a plea agreement. Our Supreme Court determined that *Miller* applies retroactively to cases arising on collateral review, and that a fifty year sentence without the possibility of parole was the functional equivalent of life imprisonment without the possibility of parole and, therefore, subject to the sentencing procedures set forth in *Miller*. . . . The court observed that because the petitioner would be released from prison at the age of sixty-six and the average life expectancy of a male in the United States is seventy-six years, he would only have approximately ten more years to live outside of prison after his release. . . . The court explained that [a] juvenile is typically put behind bars before he has had the chance to exercise the rights and responsibilities of adulthood, such as establishing

a career, marrying, raising a family, or voting. Even assuming the juvenile offender does live to be released, after a half century of incarceration, he will have irreparably lost the opportunity to engage meaningfully in many of these activities and will be left with seriously diminished prospects of his quality of life for the few years he has left. . . . The court concluded that a fifty year term and its grim prospects for any future outside of prison effectively provide a juvenile offender with no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." (Internal quotation marks omitted.) *Dumas* v. *Commissioner of Correction*, supra, 168 Conn. App. 138.

Moreover, in *State* v. *Logan*, supra, 160 Conn. App. 291–93, "this court held that a thirty-one year sentence for murder and conspiracy to commit murder, imposed on a defendant who was seventeen years old at the time of the offenses, was not the equivalent of a life sentence because even if he is not paroled, [he] will be able to work toward rehabilitation, and can look forward to release at an age when he will still have the opportunity to live a meaningful life outside of prison and to become a productive member of society. Although the deprivation of liberty for any amount of time, including a single year, is not insignificant . . . *Miller* cannot be read to mean that all mandatory deprivations of liberty are of potentially constitutional magnitude. . . . The court concluded that thirty-one years was not the equivalent of a life sentence; relief pursuant to *Miller*, then, was unavailable to the defendant . . . ." (Citation omitted; internal quotation marks omitted.) *Dumas* v. *Commissioner of Correction*, supra, 168 Conn. App. 138–39 (sentence of thirty years for first degree manslaughter with firearm committed when juvenile was fourteen years old did not implicate eighth amendment prohibition against cruel and unusual punishment under *Miller*).

In light of the foregoing decisions recently decided by this state's appellate courts, the legislature in 2015

passed P.A. 15-84 (now codified in part in § 54-125a [f]), "to respond to *Miller* and *Graham* by providing increased parole eligibility to juvenile offenders." *State* v. *Williams-Bey*, supra, 167 Conn. App. 777.[13] Pursuant to § 54-125a (f), "all juveniles who are sentenced to more than ten years imprisonment are eligible for parole. *State* v. *Delgado*, supra, 323 Conn. 807. We emphasize that our Supreme Court "has recognized that the fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, *is properly within the province of legislatures, not courts*." (Emphasis added; internal quotation marks omitted.) *State* v. *Riley*, supra, 315 Conn. 661.

Even when a defendant was not eligible for parole pursuant to § 54-125a (f), this court has determined that a sentence of thirty-one years of incarceration imposed

[13] In *State* v. *Williams-Bey*, supra, 167 Conn. App. 744, this court explained: "Under § 54-125a (f), a juvenile offender serving a sentence of greater than ten years incarceration on or after October 1, 2015, will be parole eligible. If the sentence is fifty years incarceration or less, the juvenile becomes parole eligible after serving 60 percent of his or her sentence, or twelve years, whichever is greater. If the sentence is greater than fifty years, the juvenile offender becomes parole eligible after serving thirty years. The statute also requires the parole board to consider whether such person has demonstrated substantial rehabilitation since the date such crime or crimes were committed considering such person's character, background and history, as demonstrated by factors, including, but not limited to . . . the age and circumstances of such person as of the date of the commission of the crime or crimes, whether such person has demonstrated remorse and increased maturity since the date of the commission of the crime or crimes . . . obstacles that such person may have faced as a child or youth in the adult correctional system, the opportunities for rehabilitation in the adult correctional system and the overall degree of such person's rehabilitation considering the nature and circumstances of the crime or crimes. . . . These criteria substantially encompass the mitigating factors of youth referenced in *Miller* and *Riley*. . . . Furthermore, the statute ensures that indigent juvenile offenders will have the right to counsel in obtaining, in the terminology of *Graham*, a meaningful opportunity to obtain release. . . . Overall, the legislature not only gave *Miller* retroactive application, but also effectively eliminated life without the possibility of parole, even as a discretionary sentence, for juvenile offenders in Connecticut." (Citations omitted; internal quotation marks omitted.) Id., 755–57.

on a juvenile homicide offender was not considered the equivalent of a life sentence and did not require the sentencing court to consider the *Miller* mitigating factors of youth. See *State* v. *Logan*, supra, 160 Conn. App. 293. As the defendant in the present case was sentenced to a mandatory minimum of twenty-five years of incarceration, that sentence is less lengthy than the sentence of thirty-one years of incarceration imposed on the juvenile homicide offender in *Logan*. See id., 285; see also *Dumas* v. *Commissioner of Correction*, supra, 168 Conn. App. 139 (thirty year sentence imposed on juvenile did not implicate application of *Miller*). Suffice it to say, the defendant's twenty-five year sentence did not amount to a life sentence, or its functional equivalent, triggering the application of the *Miller* mitigating factors of youth. Therefore, this *Geisler* factor weighs against the defendant.

E

Sister State Precedents

We next address the fifth *Geisler* factor, which reviews precedent from other states. Regarding this factor, the defendant relies on *State* v. *Lyle*, 854 N.W.2d 378 (Iowa 2014). In *Lyle*, the Supreme Court of Iowa determined that "a statute mandating a sentence of incarceration in a prison for juvenile offenders with no opportunity for parole until a minimum period of time has been served is unconstitutional under article I, section 17 of the Iowa constitution."[14] Id., 380. In *Lyle*, the court further noted: "Mandatory sentencing for adults does not result in cruel and unusual punishment but for children it fails to account for too much of what we know is child behavior." Id., 402. The defendant's reliance on *Lyle* is unavailing for two reasons.

[14] Article I, § 17, of the Iowa constitution provides: "Excessive bail shall not be required; excessive fines shall not be imposed, and cruel and unusual punishment shall not be inflicted."

First, our Supreme Court in *Taylor G.*[15] recently rejected the applicability of *Lyle* to our state jurisprudence. *State* v. *Taylor G.*, supra, 315 Conn. 750–51 n.8. In explaining that the dissenting justice's reliance on *Lyle* was misplaced, the majority of the court in *Taylor G.* explained: "[A]lthough [the dissent] relies extensively on a recent Iowa Supreme Court decision holding that mandatory minimum sentences for juvenile offenders are impermissible, [the dissent] omits the fact that the Iowa court chose not to decide the defendant's claim in that case under federal law, as the defendant originally argued, but, rather, under the Iowa constitution after requesting additional briefing from the parties on that issue. . . . [The dissent] also omits the fact that, in interpreting the Iowa constitution, the Iowa Supreme Court relied in part on the state legislature's decision in 2013 to expand the discretion of state courts in juvenile matters by amending Iowa's sentencing statutes to remove mandatory sentencing for juveniles in most cases . . . on other provisions in the Iowa criminal statutes vesting considerable discretion in courts when deciding juvenile matters . . . and on a trilogy of recent juvenile cases decided by the court under the Iowa constitution. . . . Finally, [*the dissent*] *omits the fact that the Iowa court recognized that no other court in the nation has held that its constitution or the* [*f*]*ederal* [*c*]*onstitution prohibits a statutory schema that prescribes a mandatory minimum sentence for a juvenile offender* . . . and that *no* . . . national consensus exists against the imposition of mandatory sentences on juvenile offenders; the practice is common across jurisdictions." (Citations omitted; emphasis altered; internal quotation marks omitted.) Id., 751 n.8. Following the majority in *Taylor G.*, we conclude that the defendant's reliance on *Lyle* is misplaced.

[15] We note that our Supreme Court in *Taylor G.* did not determine this case under the *Geisler* factors because there was no state constitutional claim being challenged therein.

Second, our Supreme Court has also discussed the trends in other jurisdictions pertaining to mandatory minimum sentencing schemes for juvenile offenders. In particular, in *State* v. *Allen*, 289 Conn. 550, 580–81, 958 A.2d 1214 (2008), the court noted: "[W]e also expressly adopted the reasoning of the Delaware Supreme Court, which, in *Wallace* v. *State*, 956 A.2d 630 (Del. 2008), stated in relevant part: Every state provides some mechanism for the imposition of adult sentences on a juvenile offender for at least some sort of crime. In other jurisdictions, there is no evident trend away from imposing serious adult criminal liability [on] juvenile offenders. . . . [I]n forty-nine states, the age at which a first degree murderer can face adult disposition is fourteen years or younger. Forty-two states permit the sentencing of juveniles to life without parole. In twenty-seven of those states, the sentence is mandatory for anyone, child or adult, found guilty of [m]urder in the [f]irst [d]egree. . . . [I]n the past twenty years, courts have consistently rejected [e]ighth [a]mendment claims made by juvenile murderers attacking their life sentences." (Internal quotation marks omitted.) *State* v. *Carrasquillo*, 290 Conn. 209, 218–19, 962 A.2d 772 (2009). In addition, despite the Iowa Supreme Court's elimination in *Lyle* of mandatory minimum sentences for juveniles, numerous state legislatures have maintained mandatory minimum sentences for juvenile offenders sentenced in adult court. See, e.g., Delaware: Del. Code Ann. tit. 11, § 4209A (West Supp. 2016) (twenty-five years minimum mandatory sentence for first degree murder); Louisiana: La. Rev. Stat. Ann. § 15:574.4 E (1) (a) (West Supp. 2017) (juvenile convicted of first or second degree murder parole eligible after thirty-five years); Massachusetts: Mass. Ann. Laws c. 279, § 24 (LexisNexis 2015) (juvenile convicted of first degree murder parole eligible after not less than twenty nor more than thirty years); Nebraska: Neb. Rev. Stat. § 28-105.02 (2016) (mandatory minimum

sentence of forty years of incarceration for murder when offender was under age of eighteen); Nevada: Nev. Rev. Stat. Ann. §§ 176.025 and 200.030 (2015) (juvenile convicted of first degree murder subject to sentence of life with parole after twenty years); Oregon: Or. Rev. Stat. § 163.115 (2015) (if at least fifteen years old at time of crime, juvenile homicide offender parole eligible after twenty-five years); Pennsylvania: 18 Pa. Cons. Stat. Ann. § 1102.1 (a) (1) and (2) (West 2015) (first degree murder; if committed when defendant fifteen years of age or older, subject to life without parole or incarceration for minimum of thirty-five years; if committed when defendant younger than fifteen years of age, subject to life without parole or incarceration for minimum of twenty-five years); Washington: Wash. Rev. Code Ann. § 9.94A.730 (1) (West Cum. Supp. 2017) (any person convicted of crimes committed prior to eighteenth birthday, eligible for sentence review for early release after serving twenty years); West Virginia: W. Va. Code Ann. §§ 61-11-23 (b) and 62-12-13 (c) (LexisNexis Supp. 2017) (juvenile convicted of offense punishable by life imprisonment parole eligible after fifteen years).

Therefore, the persuasive precedent from our sister states weighs against the defendant with respect to the fifth *Geisler* factor.

F

Contemporary Understanding of Applicable Economic and Sociological Norms

The sixth *Geisler* factor involves consideration of the contemporary understandings of applicable economic and sociological norms. "Whether a punishment is disproportionate and excessive is to be judged by the contemporary, evolving standards of decency that mark the progress of a maturing society. . . . In other words, the constitutional guarantee against excessive punishment is not fastened to the obsolete but may acquire

meaning as public opinion becomes enlightened by a humane justice." (Citations omitted; internal quotation marks omitted.) *State* v. *Santiago*, supra, 318 Conn. 46–47. Moreover, "under the governing legal framework, we must look beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society. . . . This is because [t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change." (Internal quotation marks omitted.) Id., 50. Our Supreme Court "and the United States Supreme Court have looked to five objective indicia of society's evolving standards of decency: (1) the historical development of the punishment at issue; (2) legislative enactments; (3) the current practice of prosecutors and sentencing juries; (4) the laws and practices of other jurisdictions; and (5) the opinions and recommendations of professional associations." Id., 52.

As to these "sociological considerations, the laws of Connecticut have changed in several areas throughout our state's history to provide special protections to juveniles. Section 54-125a (f) specifically confers special protection on juveniles, as it applies only to those who were under the age of eighteen at the time they committed their offenses." *State* v. *Williams-Bey*, supra, 167 Conn. App. 777. Specifically, the language of § 54-125a (f) explicitly provides parole eligibility for juvenile offenders. Our legislature specifically enacted § 54-125a (f) "to respond to *Miller* and *Graham* by providing increased parole eligibility to juvenile offenders." Id. This recent legislation reflects the current sociological and economic norms as to youth related sentencing considerations. The sixth *Geisler* factor weighs against the defendant.

For the foregoing reasons, the *Geisler* factors do not support the defendant's state constitutional claim. We, therefore, conclude that the mandatory minimum sentence of twenty-five years of incarceration imposed on a juvenile homicide offender does not violate article first, §§ 8 and 9, of the Connecticut constitution.

III

The defendant's final claim is that the trial court committed constitutional error when it accepted his waiver, through counsel, of his right to a presentence investigation (report). Specifically, the defendant contends that his sentence is illegal because the court failed to canvass him prior to permitting him to waive the report and that this failure compromised his constitutional rights under *Miller*, which raised the report to a level of constitutional magnitude as applied to adolescents. We disagree.

The following facts are relevant to our resolution of this claim. During the plea canvass, the defendant affirmed that he had had enough time to discuss the plea with his attorney and that he was satisfied with the legal advice he had received. The defendant further affirmed that he was entering his pleas voluntarily and by his own free will. In addition, the defendant acknowledged that the minimum exposure for murder, conspiracy to commit murder and assault in the first degree was 100 years of incarceration with a mandatory minimum sentence of thirty years of incarceration. Thereafter, the court, *Clifford*, *J.*, stated: "You know that this matter has been discussed, and you know that I've indicated, based on your plea of guilty on the charge of murder, I would impose a prison sentence of twenty-five years; do you understand that?" The defendant responded: "Yes, Your Honor."

After canvassing the defendant and accepting the pleas, the court stated that it would waive the report.

In response, defense counsel stated: "Yes, Your Honor, in light of the fact that the court has indicated what the sentence will be, there's no reason to bring him back in eight weeks; he can be sentenced today." The court then asked the defendant if he had anything that he wanted to say, to which he responded in the negative.

In accordance with the agreement, the court sentenced the defendant to twenty-five years of incarceration on the charge of murder, twenty years of incarceration on the charge of conspiracy to commit murder and, ten years of incarceration, five of which were the mandatory minimum, on the charge of assault in the first degree, with all sentences to be served concurrently. The total effective sentence imposed by the court was twenty-five years of incarceration.

We begin by noting that it is not disputed that the defendant did not raise his claim about the presentence investigation report before the trial court or in his motion to correct an illegal sentence, and therefore, he seeks review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). In *Golding*, our Supreme Court held that "[a] defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Mark*, 170 Conn. App. 254, 264, 154 A.3d 572, cert. denied, 324 Conn. 926, 155 A.3d 1269 (2017); see also *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015)

(modifying third prong of *Golding* by eliminating word "clearly" before words "exists" and "deprived").

We conclude that review under *State* v. *Golding*, supra, 213 Conn. 239–40, is unwarranted. This court previously has concluded that *Golding* review is not warranted where a defendant, on appeal, raises a challenge to the legality of his sentence that was not presented in his underlying motion to correct. See *State* v. *Starks*, 121 Conn. App. 581, 591–92, 997 A.2d 546 (2010) (where defendant failed to raise claim in motion to correct illegal sentence, *Golding* review of unpreserved claim unavailable due to trial court's exclusive judicial authority and superior position to consider motion to correct illegal sentence and fact that defendant retains "the right, at any time, to file a motion to correct an illegal sentence" to pursue unpreserved claim). Our reason for this determination rests on the notion that the judicial authority to consider a motion to correct an illegal sentence lies with the trial court and not with an appellate court. Id., 591; see *Cobham* v. *Commissioner of Correction*, 258 Conn. 30, 38 n.13, 779 A.2d 80 (2001) ("[t]oday we clarify the meaning of 'judicial authority' in [Practice Book] § 43-22 . . . to mean solely the trial court"). Specifically, in *Starks*, this court noted that "[t]he judicial authority may *at any time* correct an illegal sentence . . . . Our Supreme Court has interpreted the term 'judicial authority,' as used in Practice Book § 43-22, to refer to the trial court, not the appellate courts of this state." (Citation omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Starks*, supra, 591–92. "Furthermore, the defendant has the right, at any time, to file a motion to correct an illegal sentence and raise the [waiver of the report] claim before the trial court. . . . Given the present circumstances, in which the defendant may seek and obtain any appropriate redress before the trial court, we are not persuaded that . . . review of the claim

under *Golding* . . . is warranted . . . .'' Id., 592; see also *State* v. *Baker*, 168 Conn. App. 19, 21 n.6, 145 A.3d 955 (''[t]his court previously has recognized that [i]t is not appropriate to review an unpreserved claim [pertaining to a motion to correct] an illegal sentence for the first time on appeal'' [internal quotation marks omitted]), cert. denied, 323 Conn. 932, 150 A.3d 232 (2016). Accordingly, we decline to reach the merits of the defendant's claim as to the presentence investigation report.[16]

The judgment is affirmed.

In this opinion the other judges concurred.

[16] We note that with respect to this claim, the defendant argues that General Statutes § 54-91g (b) prohibits the waiver of a presentence investigation or report as to a juvenile convicted of a class A or B felony, which applied to his conviction. We disagree. The text of P.A. 15-84, § 2, codified as amended at § 54-91g, does not support such an assertion.

Our Supreme Court addressed the issue of retroactivity in the context of § 54-91g in *State* v. *Delgado*, supra, 323 Conn. 801, where it noted: ''There are ten sections in P.A. 15-84, four of which specify that they are [e]ffective October 1, 2015, and applicable to any person convicted prior to, on or after said date. . . . P.A. 15-84, §§ 6 through 9. In contrast, P.A. 15-84, § 2, provides it is [e]ffective October 1, 2015, indicating that the legislature did not intend for this section to apply retroactively. Moreover, there is nothing in the text of General Statutes (Supp. 2016) § 54-91g or the legislative history of P.A. 15-84 to suggest that the legislature intended that all juveniles convicted of a class A or B felony who were sentenced without consideration of the age related mitigating factors identified in *Miller* would be resentenced.'' (Citations omitted; internal quotation marks omitted.) *State* v. *Delgado*, supra, 323 Conn. 814.

Rather, ''the pertinent legislative history clarifies that the legislature did not intend for this provision to apply retroactively. The limited discussion on this topic occurred before the Judiciary Committee. Attorney Robert Farr, a member of the working group of the Connecticut Sentencing Commission, which helped craft the proposed legislative language, discussed how the legislation would affect previously sentenced individuals. See Conn. Joint Standing Committee Hearings, Judiciary, Pt. 2, 2015 Sess., pp. 949, 955–56. He first mentioned this court's decision in *Riley*, in which the defendant in that case had been sentenced to 100 years in prison and then resentenced, and noted that, under the proposed legislation, instead of having to worry about resentencing what would have happened is in [thirty] years, [twenty-one] years from now there will be a parole hearing and then that parole hearing would decide whether [the defendant in *Riley*] was going to be—get another parole hearing . . . . So it gave some resolution to this which

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DiPentima, C. J., and Mullins and Pellegrino, Js.

Syllabus

The defendant, who previously had been convicted of the crime of murder and sentenced to a mandatory minimum term of twenty-five years of incarceration without the possibility of parole stemming from his role in a shooting when he was seventeen years old, appealed to this court, claiming that the trial court improperly dismissed his motion to correct an illegal sentence for lack of subject matter jurisdiction. The defendant claimed, inter alia, that the sentence of twenty-five years of incarceration for murder imposed upon a juvenile violated the prohibition in the eighth amendment against cruel and unusual punishment, and article first, §§ 8 and 9, of the state constitution, because there was no meaningful opportunity for him to obtain release through parole based on demonstrated maturity and rehabilitation prior to the expiration of his term of incarceration. *Held* that the defendant's claims having been fully addressed and rejected by this court in the companion case of *State* v. *Rivera* (177 Conn. App. 242), which involved the same underlying facts and issues on appeal, that decision was dispositive of the defendant's claim, and, accordingly, the trial court's judgment was affirmed; moreover, although the defendant in *Rivera* was granted parole and the defendant in the present case was not, the defendant in the present case was eligible for parole pursuant to statute (§ 54-125a [f]), and, thus, he could no longer claim that he was serving a sentence of life imprisonment, or its functional equivalent, without the possibility for parole.

Argued May 15—officially released October 17, 2017

Procedural History

Substitute information charging the defendant with the crimes of murder and felony murder, brought to the Superior Court in the judicial district of Hartford, where the defendant was presented to the court, *Solomon*, *J.*, on a plea of guilty to the charge of murder; thereafter, the state entered a nolle prosequi as to the

was consistent we believe with the federal—with the [United States] Supreme Court cases." (Internal quotation marks omitted.) *State* v. *Delgado*, supra, 814–15 n.9.

charge of felony murder; subsequently, the court rendered judgment in accordance with the plea; thereafter, the court, *Alexander*, *J.*, dismissed the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Affirmed.*

W. Theodore Koch III, assigned counsel, for the appellant (defendant).

Melissa E. Patterson, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, *Michele C. Lukban* and *Richard J. Rubino*, senior assistant state's attorneys, and *Dennis J. O'Connor*, former supervisory assistant state's attorney, for the appellee (state).

Opinion

DiPENTIMA, C. J. The defendant, Robert Hathaway, appeals from the judgment of the trial court dismissing his motion to correct an illegal sentence. On appeal, the defendant claims that (1) the court erred in dismissing the motion to correct an illegal sentence on the ground that it lacked subject matter jurisdiction, (2) the court erred in dismissing the motion to correct an illegal sentence because the mandatory minimum sentence of twenty-five years of incarceration without the possibility of parole for murder is unconstitutional under article first, §§ 8 and 9, of the state constitution, as applied to juvenile offenders in that it bars courts from sentencing juveniles to less than twenty-five years upon due considerations of the *Miller* factors,[1] and (3) the court committed constitutional error when it accepted the defendant's waiver, through counsel, of his right to a presentence investigation report. We

[1] The *Miller* factors refer to the sentencing court's obligation to consider a juvenile's age and circumstances related to age at an individualized sentencing hearing as mitigating factors before imposing a sentence of life imprisonment without parole. See *Miller* v. *Alabama*, 567 U.S. 460, 479–80, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

addressed these precise issues in *State* v. *Rivera*, 177 Conn. App. 242, A.3d (2017), also released today, and our resolution of the defendant's appeal is controlled by our decision in that case. We affirm the judgment of the trial court dismissing the motion to correct an illegal sentence.

The following facts and procedural history are relevant to the present appeal. On or about May 23, 2001, the defendant, who was seventeen years old, shot and killed the victim, Fletcher Fitzgerald. Shortly thereafter, the defendant was arrested and charged with murder in violation of General Statutes § 53a-54a (a) and felony murder in violation of General Statutes § 53a-54c. On April 16, 2003, when the defendant was nineteen years old, he pleaded guilty under the *Alford* doctrine[2] to the charge of murder. On June 13, 2003, the state and the defendant waived the presentence investigation report, and, in accordance with the plea agreement, the trial court, *Solomon*, *J.*, sentenced the defendant to twenty-five years of incarceration on the murder charge, which constituted the statutory mandatory minimum. In addition, as part of the disposition, the state entered a nolle prosequi as to the felony murder count.

On November 28, 2013, the defendant filed a pro se motion to correct an illegal sentence. In that motion, the defendant claimed that the sentence of twenty-five years of incarceration without the possibility of parole for murder imposed upon a juvenile violates the prohibition against cruel and unusual punishments in the eighth amendment of the United States constitution and the due process clauses of article first, §§ 8 and 9, of the state constitution. The court stated in its memorandum of decision: "Specifically, [the defendant] assert[ed] that his sentence, as imposed, violates the principles

[2] See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

underpinning *Miller* v. *Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), and *Graham* v. *Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), because there is no meaningful opportunity for him to obtain release through parole based on demonstrated maturity and rehabilitation prior to the expiration of his term of incarceration." The court further stated: "On April 1, 2014, the public defender's office filed a motion to correct [an] illegal disposition and a brief in support thereof on behalf of the defendant. The court heard oral argument on the matter on April 2, 2014."

On July 23, 2014, the trial court, *Alexander*, *J.*, issued a memorandum of decision dismissing the defendant's motion to correct an illegal sentence because it lacked subject matter jurisdiction over the motion. This appeal followed.

On appeal, the defendant makes three claims that are identical to those made in *State* v. *Rivera*, supra, 177 Conn. App. 242. The only noteworthy difference between the present case and *Rivera* is the fact that, after a parole hearing pursuant to General Statutes § 54-125a (f), the defendant in *Rivera* was granted parole and the defendant here was not.[3] Despite that difference, we emphasize that both defendants were eligible for parole pursuant to § 54-125a (f).[4] Thus, even though the

[3] "Furthermore, *Montgomery* [v. *Louisiana*, U.S. , 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016)] requires that those whose sentences violated *Miller* be given a meaningful opportunity for release; it does not require that all juvenile offenders be released with no further supervision by the criminal justice system. Whether juvenile offenders who are granted release pursuant to § 54-125a (f) return to prison or not is to be determined by their subsequent behavior." (Emphasis omitted.) *State* v. *Williams-Bey*, 167 Conn. App. 744, 780 n.25, 144 A.3d 467 (2016), modified in part on other grounds after reconsideration, 173 Conn. App. 64, 164 A.3d 31, cert. granted on other grounds, 326 Conn. 920, A.3d (2017).

[4] As the United States Supreme Court explained in *Montgomery* v. *Louisiana*, U.S. , 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016): "Extending parole eligibility to juvenile offenders does not impose an onerous burden on the States, nor does it disturb the finality of state convictions. Those prisoners

defendant in the present case was not granted parole, with the enactment of § 1 of No. 15-84 of the 2015 Public Acts, now codified at § 54-125a (f), he can no longer claim that he is serving a sentence of life imprisonment, or its functional equivalent, without the possibility for parole. Accordingly, we conclude that the present action is disposed of by our decision in *Rivera*.

The judgment is affirmed.

In this opinion the other judges concurred.

BRANDON V. SMITH *v.* TOWN OF REDDING ET AL. (AC 38704)

Sheldon, Mullins and Sullivan, Js.

Syllabus

The plaintiff, who had sustained injuries when he fell off of a municipal retaining wall, sought to recover damages for absolute public nuisance, claiming that the defendant town had created a nuisance by causing the retaining wall to be constructed without a fence on top of it, which, in turn, caused his fall and resulting injuries. Prior to trial, the plaintiff filed a motion in limine, seeking a preliminary ruling as to the admissibility of evidence that, subsequent to his fall, the town had constructed a fence on top of the wall and that the Department of Transportation had ordered the installation of the fence. In response, the trial court issued an order ruling that evidence of any subsequent remedial measures as to the retaining wall was inadmissible. Following a trial, the jury returned a verdict in favor of the town, determining that the plaintiff had failed to prove that the retaining wall was inherently dangerous. Thereafter, the trial court denied the plaintiff's motion to set aside the verdict and rendered judgment in accordance with the verdict, from which the plaintiff appealed to this court. *Held*:

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who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded to those who demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Williams-Bey*, 167 Conn. App. 744, 758–59, 144 A.3d 467 (2016), modified in part on other grounds after reconsideration, 173 Conn. App. 64, 164 A.3d 31, cert. granted on other grounds, 326 Conn. 920, A.3d (2017).

1. The record was inadequate to review the plaintiff's claim that the trial court abused its discretion by excluding evidence regarding the construction of the fence on the retaining wall after the plaintiff's fall; the plaintiff failed to provide this court with various transcripts of the trial proceedings, and without a complete record of the trial, this court did not know whether the plaintiff presented other evidence that the retaining wall without the fence was inherently dangerous, and could not analyze fully whether the trial court's exclusion of evidence of subsequent remedial measures to the retaining wall had affected the jury's verdict or whether the plaintiff had been harmed by the trial court's ruling.
2. This court declined to review the plaintiff's claim that the trial court improperly failed to instruct the jury on the town's zoning regulations as a safety standard; the record indicated that the trial court did not address or decide this claim, and, therefore, the plaintiff failed to preserve it for appeal.

Argued May 30—officially released October 17, 2017

Procedural History

Action to recover damages for public nuisance, brought to the Superior Court in the judicial district of Fairfield, where the court, *Radcliffe*, *J.*, granted the motion to strike filed by the defendant M. Rondano, Inc.; thereafter, the court, *Radcliffe*, *J.*, granted the motion for summary judgment filed by the defendant BL Companies, Inc.; subsequently, the complaint was withdrawn as to the defendant M. Rondano, Inc.; thereafter, the court, *Kamp*, *J.*, issued an order regarding the admissibility of certain evidence; subsequently, the court, *Kamp*, *J.*, denied the plaintiff's motion to reargue; thereafter, the matter was tried to the jury before *Kamp*, *J.*; verdict for the named defendant; subsequently, the court, *Kamp*, *J.*, denied the plaintiff's motion to set aside the verdict and rendered judgment in accordance with the verdict, from which the plaintiff appealed to this court. *Affirmed.*

A. Reynolds Gordon, with whom was *Frank A. DeNicola, Jr.*, for the appellant (plaintiff).

Thomas R. Gerarde, with whom was *Emily E. Holland*, for the appellee (named defendant).

Opinion

SULLIVAN, J. In this absolute public nuisance action, the plaintiff, Brandon V. Smith, appeals following a jury trial from the judgment of the trial court rendered in favor of the defendant town of Redding.[1] On appeal, the plaintiff claims that the trial court improperly failed: (1) to admit evidence of involuntary subsequent remedial measures; and (2) to instruct the jury on the Redding Zoning Regulations. We affirm the judgment of the trial court.

On the basis of the record provided, the jury reasonably could have found the following facts. After consuming alcoholic drinks over the course of an evening at a couple of establishments in Redding, the plaintiff departed the Lumberyard Pub around 2 a.m. on September 17, 2011.[2] Departing the pub, the plaintiff walked across the parking lot in front of the pub to the exit onto the street. On the edge of the parking lot was a wooden guardrail and, on the other side of the guardrail, there was a landscaped area atop a retaining wall. The retaining wall began on a plane level with the ground, and the ground then sloped down along the length of the wall. On the night of his fall, the plaintiff stepped onto the wall at ground level and walked the length of the wall before falling off, landing on his head and shoulder.

[1] The plaintiff served his complaint against the defendants, the town of Redding, M. Rondano, Inc. (Rondano), and BL Companies, Inc. (BL Companies). On December 5, 2014, the court rendered summary judgment in favor of BL Companies on the plaintiff's claims against it. Additionally, on July 21, 2015, the plaintiff withdrew his claim against Rondano. Although the town brought a cross claim against Rondano, the court bifurcated that claim to be resolved after the trial between the plaintiff and the town. This appeal is from the trial on the plaintiff's claim of absolute public nuisance against the town. Consequently, Rondano and BL Companies are not parties to this appeal and, therefore, all references to the defendant herein are to the town of Redding.

[2] The parties agree that the plaintiff's fall occurred on September 17, 2011.

The retaining wall had been constructed as part of the defendant's federally funded streetscape project in the Georgetown section of the town. The defendant hired BL Companies, Inc., to design the project and J. Rondano, Inc., to construct it. As designed and constructed, the retaining wall was without a fence atop the wall.

On December 27, 2011, the plaintiff commenced this action against the defendant. See footnote 1 of this opinion. He then amended his complaint several times. In his substituted complaint filed on April 15, 2015, the plaintiff alleged that the defendant caused the retaining wall to be built without a fence, that such wall constituted an absolute public nuisance, and that this caused his fall and resulting injuries. Following a jury trial, the jury returned a verdict in favor of the defendant on November 12, 2015, determining in its interrogatories that the plaintiff failed to prove that the retaining wall was inherently dangerous, in that it had a natural tendency to inflict injury on person or property. The plaintiff filed a motion to set aside the verdict, which the court denied on December 22, 2015. Thereafter, the court rendered judgment in favor of the defendant, and this appeal followed. Additional facts will be set forth as necessary to the resolution of this appeal.

I

The plaintiff claims that the trial court abused its discretion when it failed to admit evidence of a fence that the defendant had built atop the retaining wall subsequent to his fall. Although he acknowledges that our courts have not recognized such an exception to the exclusion of evidence of subsequent remedial measures, he argues that the fence was built involuntarily, and, thus, the bar to evidence of subsequent remedial measures is inapplicable. Without deciding whether such evidence *could be* admitted, we conclude that we

are unable to review the plaintiff's claim because the record before this court does not allow us to evaluate whether the trial court's ruling harmed him.

As a preliminary matter, we set forth the standard for public nuisance liability as expressed by our Supreme Court. "Our prior decisions have established that in order to prevail on a claim of nuisance, a plaintiff must prove that: (1) the condition complained of had a natural tendency to create danger and inflict injury upon person or property; (2) the danger created was a continuing one; (3) the use of the land was unreasonable or unlawful; [and] (4) the existence of the nuisance was [the] proximate cause of the plaintiffs' injuries and damages. . . . [W]here absolute public nuisance is alleged, the plaintiff's burden includes two other elements of proof: (1) that the condition or conduct complained of interfered with a right common to the general public . . . and (2) that the alleged nuisance was absolute, that is, that the defendants' intentional conduct, rather than their negligence, caused the condition deemed to be a nuisance." (Citations omitted; internal quotation marks omitted.) *State* v. *Tippetts-Abbett-McCarthy-Stratton*, 204 Conn. 177, 183, 527 A.2d 688 (1987).

The following additional procedural facts are relevant to this claim. On September 15, 2015, the plaintiff filed a motion in limine seeking, inter alia, a preliminary ruling as to the admissibility of evidence of a fence constructed atop the retaining wall in April, 2015. Specifically, the plaintiff sought to introduce evidence at trial that the Department of Transportation (department) ordered the installation of the fence. He also sought to introduce into evidence photographs of the fence. The plaintiff argued, inter alia, that the exclusionary rule regarding evidence of subsequent remedial measures; see § 4-7 of the Connecticut Code of Evidence;[3] did not apply because it excludes evidence of

[3] Section 4-7 (a) of the Connecticut Code of Evidence provides in relevant part: "[E]vidence of measures taken after an event, which if taken before

voluntary remedial measures but, in this case, construction of the fence was required from the start of the project and was involuntarily built. In an October 14, 2015 order, the court determined that evidence of any subsequent remedial measures as to the retaining wall was inadmissible.

In his motion to set aside the verdict, the plaintiff again raised the issue of the admissibility of evidence of the subsequently built fence, citing arguments made in prior briefs and oral arguments before the court, as a ground to set aside the verdict. The court denied the plaintiff's motion, concluding that any evidence of the fence was inadmissible under § 4-7 of the Connecticut Code of Evidence.

"[Our appellate courts] review the trial court's decision to admit [or exclude] evidence, if premised on a correct view of the law . . . for an abuse of discretion. . . . Under the abuse of discretion standard, [w]e [must] make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did." (Citation omitted; internal quotation marks omitted.) *Filippelli* v. *Saint Mary's Hospital*, 319 Conn. 113, 119, 124 A.3d 501 (2015). Nevertheless, "[b]efore a party is entitled to a new trial because of an erroneous evidentiary ruling, he or she has the burden of demonstrating that the error was harmful. . . . [A]n evidentiary impropriety in a civil case is harmless only if we have a fair assurance

the event would have made injury or damage less likely to result, is inadmissible to prove negligence or culpable conduct in connection with the event. Evidence of those measures is admissible when offered to prove controverted issues such as ownership, control or feasibility of precautionary measures."

that it did not affect the jury's verdict. . . . A determination of harm requires us to evaluate the effect of the evidentiary impropriety in the context of the totality of the evidence adduced at trial." (Internal quotation marks omitted.) *Filippelli* v. *Saint Mary's Hospital*, supra, 119.

We conclude that even if we assumed, arguendo, an exception for involuntary measures to the rule against the admission of evidence of subsequent remedial measures, the record before this court would not allow us to analyze whether the plaintiff was harmed by the exclusion of such evidence in this case. When an appellant requests that the court reverse the judgment of the trial court on the basis of an allegedly improper evidentiary ruling, a complete record is particularly important for a reviewing court to consider the extent of the harm suffered, if any. See *Desrosiers* v. *Henne*, 283 Conn. 361, 367–69, 926 A.2d 1024 (2007) (declining to review evidentiary claim where defendant provided only excerpts of trial transcripts because it was impossible for reviewing court to determine whether alleged impropriety was harmful); *Ryan Transportation, Inc.* v. *M & G Associates*, 266 Conn. 520, 531, 832 A.2d 1180 (2003) (declining to review evidentiary claim where plaintiff did not provide transcript of witness testimony, stating, "even if we assume, arguendo, that the challenged evidentiary ruling was improper, we have no way of discerning whether any such impropriety was harmful in the broader context of the entire trial"); *Chester* v. *Manis*, 150 Conn. App. 57, 62–63, 89 A.3d 1034 (2014) (declining to review evidentiary claim because incomplete record left court unable to determine if "alleged impropriety would likely have affected the result of the trial"); *Quaranta* v. *King*, 133 Conn. App. 565, 569–70, 36 A.3d 264 (2012) (declining to review plaintiff's evidentiary claim where plaintiff provided only partial transcript of proceedings).

A review of our appellate record in the present case reveals that the plaintiff ordered and delivered a paper copy and an electronic copy of the following six transcripts: (1) the October 14, 2015 argument on the plaintiff's motions in limine; (2) the October 27, 2015 argument on the motion to reargue regarding subsequent remedial measures; (3) the October 30, 2015 direct examination and cross-examination of lay witness Aimee Pardee; (4) the November 3, 2015 direct examination and cross-examination of lay witness Priti Bhardwaj; (5) the November 12, 2015 argument on exceptions to the jury charge; and (6) the December 14, 2015 argument on the motion to set aside the verdict. Additionally, the plaintiff's appendix includes a single page transcript described as an excerpt of the October 30, 2015 testimony of Natalie Ketcham.

We know for certain that we were not provided with the full testimony of Ketcham, the plaintiff's expert, Richard A. Ziegler, and the plaintiff, or with counsels' closing arguments. Additionally, we know that we were not provided with any testimony from Timothy Wilson or Matthew Cleary, engineers from the department. A lengthy period passed between jury selection and the jury's verdict, suggesting a trial that covered a couple of weeks. Additionally, we are left to speculate about who else testified and the scope and content of their testimony regarding the dangerousness or safety of the retaining wall without a fence. For example, the defendant disclosed an expert, but we do not know whether he testified or the content of his testimony relevant to this issue.

It is the appellant's burden to provide a complete record on appeal. Practice Book § 61-10. He also is responsible for establishing that the allegedly improper evidentiary ruling of the trial court harmed him. See *Connecticut Light & Power Co.* v. *Gilmore*, 289 Conn. 88, 128, 956 A.2d 1145 (2008) ("Even when a trial court's

evidentiary ruling is deemed to be improper, we must determine whether that ruling was so harmful as to require a new trial. . . . In other words, an evidentiary ruling will result in a new trial only if the ruling was both wrong and harmful." [Internal quotation marks omitted.]). We conclude that the plaintiff has not carried his burden under the circumstances of this case.

On the record before this court, we are unable to determine whether the trial court's evidentiary ruling affected the jury's verdict. Even if we assume, arguendo, that the court improperly excluded the evidence regarding the department's order to construct a fence atop the restraining wall, we are unable to assess fully the impact of this ruling. The jury's verdict was based upon its conclusion that the plaintiff failed to prove that the wall without a fence was inherently dangerous in that it had a natural tendency to inflict injury on person or property. Although the department's order may have carried some added weight with the jury, the plaintiff was able to argue that the department's bridge design manual called for a fence and that the department called for a fence during the design of the wall. The bridge design manual, the state building code, and The BOCA National Building Code (14th Ed. 1999) were admitted into evidence. Without the testimony of other witnesses, including the plaintiff's expert and at least two state engineers, and counsel's closing arguments, we are unaware of the extent to which the plaintiff was able to present other evidence that the wall without a fence was inherently dangerous. Accordingly, we are unable to analyze whether the other evidence in the case would have given us the fair assurance that the exclusion of the evidence of subsequent remedial measures did not affect the jury's verdict in order to determine whether the plaintiff was harmed by the trial court's ruling.

II

The plaintiff also claims that the trial court improperly failed to instruct the jury on the Redding Zoning

Regulations (zoning regulations).[4] He asserts that the zoning regulations were relevant evidence that the retaining wall was inherently dangerous without a fence. First, he argues that the zoning regulations, which included safety as one of its purposes, applied to the construction of the wall. Second, he asserts that, even if the zoning regulations did not apply to the wall, they established a safety standard, which the court should have instructed the jury to consider when determining whether the wall was inherently dangerous.[5] We conclude that the plaintiff has failed to preserve his claim for appeal.

The record does not reveal a request to charge regarding inherent danger and the zoning regulations, or the safety standards allegedly evinced by those regulations. Although the plaintiff filed a written request to charge and a supplemental request to charge, those requests did not address the issue of inherent danger as it relates to the zoning regulations, and we have not been provided with a record of the charge conference.

[4] The plaintiff also appears to claim that the court abused its discretion in excluding the zoning regulations from evidence. The record includes, however, the zoning regulations in their entirety as exhibit 20 and excerpts thereof were admitted as exhibit 20a; both exhibits were marked as full exhibits. Corroborating the admission of these exhibits, the limited recorded provided; see part I of this opinion; includes a trial transcript of the plaintiff's attorney requesting exhibits 20 and 20a, reading from the zoning regulations, and questioning the defendant's zoning enforcement officer on the regulations. Our examination of the limited record and the parties' appellate arguments, does not provide any indication that the court limited the admissibility of the regulations or limited the plaintiff's ability to argue their relevance.

[5] The jury's verdict was based on its conclusion that the plaintiff had failed to demonstrate that the wall was inherently dangerous. We interpret the plaintiff's arguments that the construction of the wall without a fence violated the zoning regulations to go to evidence of inherent dangerousness. As far as the plaintiff argues that the purported violation had some independent import, this is irrelevant because the jury did not reach the third element of a cause of action for nuisance, which requires that "the use of the land was unreasonable or unlawful . . . ." (Internal quotation marks omitted.) *State* v. *Tippetts-Abbett-McCarthy-Stratton*, supra, 204 Conn. 183.

Additionally, the plaintiff, in his exception to the charge, also did not raise these specific issues. After the court delivered its instructions, it asked the parties whether they wanted to take exceptions to the charge. The plaintiff took exception, stating in relevant part: "Yes, Your Honor. First, Your Honor's failure to charge on the Redding zoning violation, making it a violation to have within the town of Redding a retaining wall more than four feet tall with no fence." This exception, as stated, was insufficient to put the court on notice of the nature of the claimed instructional error, as the plaintiff did not state any grounds for the exception. See generally *Herrera* v. *Madrak*, 58 Conn. App. 320, 323, 752 A.2d 1161 (2000).

Our review of the record provided reveals that the first time the plaintiff raised his claim that the court should have instructed the jury on the zoning regulations as evidence that the wall, as constructed, constituted an inherently dangerous condition was in his motion to set aside the verdict. The plaintiff set forth essentially the same argument in his memorandum of law in support of his motion to set aside as he does before this court on appeal. Specifically, as to the wall's inherent dangerousness, he first argued to the trial court that the zoning regulations applied under General Statutes § 13a-80d[6] because the wall and the surrounding project were in a state right-of-way and the defendant was a tenant or lessee of the state. He cited evidence from the trial to support this claim. Alternatively, he argued that the zoning regulations were admissible as a safety standard to address the inherent danger, even if the regulations did not apply to the wall. On December 14, 2015, the court heard oral arguments on the motion.

[6] General Statutes § 13a-80d provides: "The use of any space on, over or below any state highway right-of-way leased by the Commissioner of Transportation to a lessee shall conform with zoning regulations and ordinances of the local government in which the land is located or as modified by a variance pursuant to legal process."

In its memorandum of decision, however, the court framed the plaintiff's argument as follows: "The second ground upon which the plaintiff seeks to set aside the verdict is . . . the court's failure to instruct the jury that the retaining wall was unlawful in that it violated the . . . zoning regulations." After setting forth the evidence presented at trial, the court concluded that the evidence did not support a charge to the jury concerning the application of the zoning regulations.

Practice Book § 16-20 provides in relevant part: "An appellate court shall not be bound to consider error as to the giving of, or the failure to give, an instruction unless the matter is covered by a written request to charge or exception has been taken by the party appealing immediately after the charge is delivered. Counsel taking the exception shall state distinctly the matter objected to and the ground of objection. . . ." "It is fundamental [however] that claims of error must be distinctly raised and decided in the trial court before they are reviewed on appeal. As a result, Connecticut appellate courts will not address issues not decided by the trial court." (Internal quotation marks omitted.) *Tompkins* v. *Freedom of Information Commission*, 136 Conn. App. 496, 511, 46 A.3d 291 (2012); see also *Crest Pontiac Cadillac, Inc.* v. *Hadley*, 239 Conn. 437, 444 n.10, 685 A.2d 670 (1996) (claims "neither addressed nor decided" by trial court not properly before appellate tribunal).

In the present case, we have no record that indicates that the court ever addressed the claim that the plaintiff is making on appeal, namely, that the court should have instructed the jury on the zoning regulations as a safety standard. The court's decision on the motion to set aside the verdict addressed the applicability of the zoning regulations to the third element of nuisance, unreasonable or unlawful use, rather than the first element, inherent danger. Because the trial court did not address or

decide the plaintiff's claim regarding the zoning regulations as a safety standard, we decline to address it.

The judgment is affirmed.

In this opinion the other judges concurred.

THE BANK OF NEW YORK MELLON, TRUSTEE *v.* JEFFREY J. MAURO ET AL. (AC 38970)

Lavine, Sheldon and Harper, Js.

Syllabus

The plaintiff bank sought to foreclose a mortgage on certain of the defendants' real property. The trial court referred the parties to the foreclosure mediation program, and the mediator issued a final report indicating that the defendants did not appear for a scheduled mediation, and that time had expired. The mediator referred the matter for further proceedings back to the trial court, which granted in part the plaintiff's motion to strike the defendants' special defenses and counterclaims. In August, 2015, the defendants filed their operative five count counterclaim, which reasserted claims for negligent, reckless and intentional misrepresentation, as well as claims for violations of the Connecticut Unfair Trade Practices Act (§ 42-110a et seq.) and the federal Truth in Lending Act (15 U.S.C. § 1601 et seq.). Subsequently, the court granted the plaintiff's motion for summary judgment as to liability on the complaint, and as to the five counterclaims. In addressing the motion for summary judgment as to the counterclaims, the court ruled that the counterclaims failed as a matter of law because they pertained to the plaintiff's conduct during mediation, which occurred years after the execution of the mortgage and the defendants' default. The court also concluded that the counterclaims that pertained to the conduct of A Co., the plaintiff's predecessor in interest to the note and mortgage, were directed at the wrong party and were barred by the applicable statutes of limitations. Thereafter, the defendants appealed to this court, which dismissed the appeal in part. Subsequently, the trial court granted the plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon, and the defendants filed an amended appeal. *Held*:

1. The trial court did not err in granting the plaintiff's motion for a judgment of strict foreclosure with respect to the property on the basis of its determination that there were no genuine issues of material fact and that the plaintiff was entitled to summary judgment as a matter of law as to liability on its foreclosure complaint: at the time of the granting

of the plaintiff's motion for summary judgment, the trial court found that the plaintiff had established a prima facie case for foreclosure, the defendants' operative pleading contained no special defenses to foreclosure, and the defendants' affidavits in opposition to the plaintiff's motion for summary judgment failed to create a genuine issue of material fact as to any of the essential elements of the plaintiff's prima facie case, namely, whether the plaintiff was the holder of the note, the defendants defaulted on the loan, or the plaintiff had satisfied the necessary preconditions to foreclosure; moreover, the defendants' claim that a genuine issue of material fact existed as to whether their counterclaims had a reasonable nexus to the making, validity or enforcement of the mortgage and note was unavailing, as the validity or invalidity of the counterclaims was irrelevant to whether the plaintiff was entitled to prevail in its primary action and, thus, to have summary judgment rendered in its favor in that action.

2. The trial court properly rendered judgment in favor of the plaintiff on all five counts of the defendants' operative counterclaim: that court properly concluded that, to the extent that the defendants' counterclaims were based on alleged misdealings with the defendants by the plaintiff's predecessor, A Co., which was not a party to this foreclosure action, those counterclaims failed as a matter of law because there was no evidence of record that the plaintiff expressly assumed the liabilities of A Co. when it took the mortgage from A Co. by assignment, and, with respect to the counterclaims that pertained to the plaintiff's conduct during the mediation that occurred years after the execution of the mortgage and the defendants' default, the trial court did not abuse its discretion in determining that those counterclaims failed the transaction test of the applicable rule of practice (§ 10-10), as they did not have a reasonable nexus to the making, validity and enforcement of the mortgage and note; moreover, because the plaintiff's motion for summary judgment expressly sought the dismissal of the defendants' counterclaims on that ground, and both parties analyzed that portion of the plaintiff's motion for summary judgment as a motion to strike the defendants' counterclaims, this court treated the portion of the plaintiff's motion for summary judgment that sought the dismissal of the counterclaims for improper joinder as a properly presented motion to strike, the trial court's judgment in favor of the plaintiff on the defendants' counterclaims had to be construed as a final judgment of dismissal for improper joinder, rather than a final judgment on the merits of the defendants' substantive claims, and it was proper for the plaintiff to use a motion for summary judgment as a means of testing whether the counterclaims satisfied the transaction test of § 10-10.

Argued May 23—officially released October 17, 2017

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant et al., and for other

relief, brought to the Superior Court in the judicial district of Middlesex, where the named defendant et al. filed a counterclaim and special defenses; thereafter, the court, *Domnarski*, *J.*, granted in part the plaintiff's motion to strike the counterclaim and special defenses; subsequently, the court, *Aurigemma*, *J.*, granted the plaintiff's motion for summary judgment as to liability on the complaint and as to the counterclaim, and the named defendant et al. appealed to this court; thereafter, this court dismissed the appeal in part; subsequently, the court, *Aurigemma*, *J.*, granted the plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon, and the named defendant et al. filed an amended appeal. *Affirmed.*

Kenneth A. Votre, for the appellants (named defendant et al.).

Zachary Grendi, with whom, on the brief, was *Pierre-Yves Kolakowski*, for the appellee (plaintiff).

Opinion

SHELDON, J. In this mortgage foreclosure action, the defendants,[1] Jeffrey J. Mauro and Renee A. Mauro, appeal from the judgment rendered by the trial court, *Aurigemma*, *J.*, in favor of the plaintiff, The Bank of New York Mellon,[2] on: the plaintiff's claim for strict foreclosure as to the defendants' mortgaged property in Killingworth, Connecticut; and the defendants' counterclaims against the plaintiff, seeking damages and equitable relief based upon alleged misrepresentations

[1] In its complaint, the plaintiff named Yale-New Haven Hospital, Inc., as a judgment lienholder on the property for an amount of $1500. Yale-New Haven Hospital, Inc., was defaulted in this action for failure to appear. Thus, all future references to the defendants in this decision are exclusively to Jeffrey Mauro and Renee Mauro.

[2] The plaintiff in this action is acting as trustee for the Certificateholders of the CWALT, Inc., Alternative Loan Trust 2006–43CB, Mortgage Pass-Through Certificates, Series 2006–43CB.

to them and other alleged misdealings with them concerning the note and mortgage here at issue, both by the plaintiff and by the original lender, America's Wholesale Lender (AWL), which was the plaintiff's predecessor in interest to the note and mortgage. As to the plaintiff's claim for strict foreclosure, the defendants argue that the court erred in basing its judgment for the plaintiff upon its prior, erroneous decision rendering summary judgment for the plaintiff as to the defendants' liability for foreclosure in this action, assertedly without sufficient evidence to establish the absence of any genuine issues of material fact on that issue. As to their counterclaims against the plaintiff, the defendants argue that, to the extent that such counterclaims are based upon the plaintiff's own alleged misdealings with them rather than those of AWL, the court erred in rendering summary judgment for the plaintiff by: (1) ruling that such counterclaims, so narrowed, were not properly pleaded in this action because they have no reasonable nexus to the making, validity, or enforcement of the subject note and mortgage; (2) ruling that one such counterclaim was barred by the applicable statute of limitations; and (3) failing to follow the prior ruling of a different judicial authority, in partially denying a motion to strike, that certain such counterclaims were legally sufficient to state claims upon which relief could be granted. We disagree with the defendants on each of their claims, and thus affirm the judgment of the trial court in its entirety.

The record reveals the following facts and procedural history. On November 29, 2006, Jeffrey Mauro executed an "interest only fixed rate" note in favor of AWL, in the principal amount of $350,000. To secure that note, the defendants executed an open-ended mortgage in favor of Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for AWL, on their property located at 330 Roast Meat Hill Road in Killingworth. Under the

terms of the note, Jeffrey Mauro was obligated to make monthly payments of $1968.75 for the first ten years of the loan, and increased monthly payments of $2661.27 thereafter, until his entire indebtedness under the note was paid in full.

Jeffrey Mauro received a notice of default, dated September 16, 2009, advising him that, as of September 16, 2009, he had missed several months of payments on the note, totaling $5769.17. He was instructed in the notice to cure the default by October 16, 2009, and informed that if he failed to do so, his obligation to make payments of principal, interest, costs and fees required under the note would be accelerated and foreclosure proceedings would be brought against him as to the mortgaged property. Ultimately, Jeffrey Mauro was unable to cure the default by the date specified in the notice of default.

On July 25, 2011, AWL, as the holder of the note, endorsed the note in blank and transferred physical possession of it to the plaintiff. Concurrently with this transfer, MERS, as nominee for AWL, executed an assignment of the mortgage in favor of the plaintiff. Accordingly, by August, 2011, the plaintiff was both the holder of the note and the assignee of the mortgage.

On June 24, 2013, the plaintiff commenced this action by serving the defendants with legal process returnable to the Superior Court for the judicial district of Middlesex.[3] In its complaint, the plaintiff sought foreclosure of the mortgage, immediate possession of the mortgaged property, and reasonable attorney's fees and costs. By that time, the total remaining principal balance on the note was approximately $348,685.68, and Jeffrey Mauro's total indebtedness to the plaintiff thereunder, which also included unpaid interest, late charges and

[3] In its complaint, both Jeffrey and Renee Mauro were listed as the defendants to the plaintiff's foreclosure claim.

costs, was greater. Thereafter, on July 22, 2013, Jeffrey Mauro submitted to the plaintiff a request for foreclosure mediation pursuant to General Statutes §§ 49-31k through 49-31o. That request was granted by the court on July 26, 2013, after which a foreclosure mediation was conducted during the months of August and October, 2013. On November 22, 2013, the foreclosure mediator filed a final report with the court, in which she noted that the "defendant[4] did not appear for the [October 11, 2013] mediation, and time has expired." (Footnote added.) Accordingly, the mediator referred the matter back to the court for further proceedings.

On January 21, 2014, the defendants filed their answer to the plaintiff's complaint, along with seven special defenses and five counterclaims. The special defenses and counterclaims were later amended on December 2, 2014. In their amended pleading, the defendants asserted four special defenses to the plaintiff's claim for foreclosure, specifically: that AWL had "misrepresented the terms of the loan"; that the plaintiff itself had "failed to act in good faith during the [foreclosure] mediation"; that AWL had violated state and federal law by "failing to comply with specific disclosure requirements" during the loan initiation process; and that the mortgage, as originally negotiated by AWL, was the product of fraud, misrepresentations and violations of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., therefore barring the plaintiff from foreclosing on the property. In their six counterclaims,

[4] Although the foreclosure mediator's report did not list Renee Mauro as a participant in those proceedings, Mauro later submitted an affidavit in opposition to the plaintiff's motion for summary judgment, averring that she had participated in the mediation in an effort to obtain a modification of the note and, further, that she was a party to whom the plaintiff made several misrepresentations as to its willingness and ability to modify the terms of the note prior to initiating this foreclosure action. The plaintiff does not dispute that contention, instead referring consistently to the *defendants* when describing the participants in the foreclosure mediation.

the defendants asserted claims for breach of contract, negligent misrepresentation, reckless misrepresentation, intentional misrepresentation, violation of CUTPA and violation of the Truth in Lending Act (TILA), 15 U.S.C. § 1601 et seq.

On December 17, 2014, the plaintiff filed a motion to strike the defendants' special defenses and counterclaims, which the trial court, *Domnarski*, *J.*, granted in part and denied in part on April 17, 2015. In striking each of the defendants' four special defenses, the court ruled that such special defenses were improper because they were predicated upon the conduct of a nonparty, AWL, and/or they were not related to the making, validity or enforcement of the note or mortgage. In striking counts one, five and six of the defendants' counterclaims, the court ruled that: (1) the first counterclaim, alleging breach of contract, failed to allege the existence of a written agreement between the parties, and thus was barred by the statute of frauds; (2) the fifth counterclaim, alleging a violation of CUTPA, was based solely upon alleged misdealings with the defendants by a nonparty, AWL, for which the plaintiff could not be held liable without expressly assuming such liability; and (3) the sixth counterclaim, alleging a violation of TILA, had been pleaded improperly without the court's permission. The court denied the plaintiff's motion to strike, however, as to the defendants' second, third and fourth counterclaims, which alleged, respectively, negligent, reckless and intentional misrepresentation by both AWL and the plaintiff. In denying the motion to strike as to those counterclaims, the court held that, although the plaintiff could not be held liable for AWL's alleged misdealings with the defendants unless the plaintiff expressly assumed such liability, which had not been alleged, the challenged counterclaims also contained allegations that the plaintiff itself had made material

misrepresentations to the defendants during the foreclosure mediation, which allegations stated claims upon which relief could be granted. Notably, the plaintiff did not challenge the defendants' amended counterclaims, as it had challenged their amended special defenses, on the ground that they were improperly pleaded because they were not related to the making, validity or enforcement of the note or mortgage.

On August 14, 2015, the defendants submitted a request for leave to file yet another amended counterclaim, along with their now operative, five count counterclaim. In the first three counts of their operative counterclaim, the defendants reasserted claims against the plaintiff of negligent, reckless and intentional misrepresentation based upon: AWL's alleged misrepresentations to them concerning the terms of the loan, the interest rate on the loan, and their right to rescind the loan; and the plaintiff's own, allegedly deceitful conduct toward them during the foreclosure mediation, more particularly, giving them multiple false assurances that the terms of the note would be modified to avoid foreclosure on the property, when the plaintiff had no intention to agree to such modifications. In the fourth count of the operative counterclaim, the defendants alleged that the plaintiff had violated CUTPA during the foreclosure mediation by making material misrepresentations of fact as to the status of the loan and "wrongfully [beginning] foreclosure proceedings against [them] by misapplying and miscrediting [their] payments, creating a default in the loan in order to proceed with the foreclosure." Finally, in the fifth count of the operative counterclaim, the defendants alleged that the plaintiff was liable to them under TILA, because: at the time of the loan's execution, AWL had misrepresented to them both the terms of the loan and the suitability of the loan for them; and later, during the foreclosure mediation, the

plaintiff itself had failed to provide them "with an accurate and truthful rate of calculation for their mortgage."

Thereafter, on October 7, 2015, the plaintiff filed its answer and special defenses to the defendants' operative counterclaim. The plaintiff asserted in that pleading that, to the extent that the defendants' counterclaims were based upon alleged misdealings with them by a nonparty, AWL, the plaintiff was not liable for such misdealings and, in the alternative, because any such misdealings had occurred in 2006, those portions of the counterclaims were barred by applicable statutes of limitations. Lastly, the plaintiff asserted that, to the extent that the defendants' counterclaims were based upon the plaintiff's own alleged misdealings with them during the 2013 foreclosure mediation, those claims were "not sufficiently related to the making, validity or enforcement of the note and mortgage" to permit their assertion as counterclaims in this action.

The following month, the plaintiff filed a motion for summary judgment. In support of its motion, insofar as it sought summary judgment on the issue of the defendants' liability for foreclosure, the plaintiff asserted that it had established a prima facie case for foreclosure by showing that there was no genuine issue of material fact: that the plaintiff was the holder of the note; that the defendants had defaulted under the express terms of the note; and that the plaintiff had satisfied "any conditions precedent to foreclosure, as established by the note and mortgage . . . ." Insofar as the plaintiff sought summary judgment on the defendants' operative counterclaims, the plaintiff argued that "the defendants' counterclaims should be dismissed with prejudice because they are . . . time barred, relate to conduct by other parties for which [the] plaintiff is not responsible, or are unrelated to the making, validity or enforcement of the note and mortgage." On the final ground of unrelatedness to the making, validity

or enforcement of the note and mortgage, the plaintiff argued that the defendants' counterclaims should be dismissed because they "all . . . fail the 'transaction test' propounded in Practice Book § 10-10 and . . . [the] defendants would not benefit from an opportunity to replead their counterclaims yet again, which they have already done four times previously." (Emphasis omitted.)

In opposition to the motion for summary judgment, the defendants argued, inter alia, that summary judgment was improper because: (1) in partially denying the plaintiff's earlier motion to strike, Judge Domnarski had established, as the law of the case, that the defendants' counterclaims for negligent, reckless and intentional misrepresentation were legally sufficient to state claims upon which relief could be granted; (2) there was a genuine issue of material fact as to whether the defendants' counterclaims had a reasonable nexus to the making, validity or enforcement of the mortgage and note; and (3) the defendants' counterclaim under TILA was not time barred because it was not based upon the initial execution of the mortgage by AWL, but instead upon the plaintiff's deceptive conduct during the 2013 foreclosure mediation, which had taken place less than three years before this action was commenced.[5]

[5] The defendants misconstrue the scope of the court's ruling on this issue. In the plaintiff's motion for summary judgment, it argued that "[the] defendants' *preclosing allegations* against [the] plaintiff's predecessor must also fail because all such claims are time barred. The note and mortgage were executed on November 29, 2006. [The] defendants did not assert any [CUTPA or TILA] claims against [the plaintiff] for [AWL's] *preorigination conduct* until January 21, 2014 . . . . [The] defendants' claims concerning the conduct of [AWL] are time barred." (Emphasis added.) In granting the plaintiff's motion for summary judgment on the defendants' counterclaims, the court held: "The plaintiff argues that the defendants' *preclosing* allegations must also fail because they are time barred. The court agrees. . . . The defendants did not [assert] any claims against the plaintiff or the plaintiff's predecessor concerning *preorigination conduct* until January 21, 2014, over seven years after the date of any alleged misrepresentation. Whether framed as a

On February 19, 2016, the court issued its memorandum of decision, rendering summary judgment in favor of the plaintiff both as to the defendants' liability for foreclosure in this action and on the defendants' operative counterclaims. In its decision, the court held that the plaintiff had established a prima facie case as to its foreclosure claim, which the defendants had "presented no evidence to rebut." Thereafter, in addressing the plaintiff's motion for summary judgment as to the defendants' counterclaims, the court noted that, "[o]ther than conduct that occurred prior to the time the note and mortgage were executed, the allegations in the counterclaims complain about the plaintiff's conduct which occurred in postdefault mortgage modification negotiations." The court thus concluded that the challenged counterclaims were "virtually indistinguishable" from those ruled improper in *U.S. Bank National Assn.* v. *Sorrentino*, 158 Conn. App. 84, 95–96, 118 A.3d 607, cert. denied, 319 Conn. 951, 125 A.3d 530 (2015), because here, as in *Sorrentino*, the challenged counterclaims "pertain[ed] to the plaintiff's conduct during mediation, which occurred years after the execution of the mortgage and the defendants' default." The court thus ruled that "[the defendants'] counterclaims all fail as a matter of law. The counterclaims which pertain to the plaintiff's conduct which allegedly occurred during the postdefault mediation process cannot [survive]

[violation] of [CUTPA] . . . negligent or reckless misrepresentation, fraud or a violation of [TILA], the violations are time barred. . . . The counterclaims which pertain to the plaintiff's conduct that allegedly occurred during the postdefault mediation process cannot defeat a foreclosure action under [*U.S. Bank National Assn.* v. *Sorrentino*, 158 Conn. App. 84, 118 A.3d 607, cert. denied, 319 Conn. 951, 125 A.3d 530 (2015)]." (Emphasis added.) Accordingly, the court's statute of limitations analysis was confined to those portions of the defendants' counterclaims concerning AWL's alleged misconduct at or before the execution of the note; insofar as the counterclaims were based on the plaintiff's postdefault conduct, the court ruled only that those counterclaims were not properly joined in this action pursuant to Practice Book § 10-10.

under *Sorrentino* . . . . The counterclaims which pertain to the conduct of the plaintiff's predecessor are directed at the wrong party and are barred by the applicable statutes of limitations . . . . For the foregoing reasons, summary judgment enters in favor of the plaintiff as to liability only and judgment enters in favor of the plaintiff on the defendants' counterclaims."

Thereafter, on April 7, 2016, the plaintiff filed a motion for judgment of strict foreclosure. On April 25, 2016, the court entered a judgment of strict foreclosure, awarding the plaintiff $572,331.79, a sum representing the entire remaining unpaid principal balance on the loan, plus accrued interest, late charges, and reasonable attorney's fees. The court then designated May 31, 2016, as the applicable law day. The defendants subsequently filed the present appeal.[6] Additional facts will be set forth as necessary.

I

The defendants' first claim on appeal is that the court erred in granting the plaintiff's motion for strict foreclosure with respect to the property. More specifically, the defendants assert that the court erred in basing its ruling on that motion upon the prior granting of the plaintiff's motion for summary judgment on the issue of their liability for foreclosure, because there assertedly were genuine issues of material fact on that issue that should have precluded the court from rendering summary judgment thereon. We are not persuaded.

[6] On March 9, 2016, after the court had granted the plaintiff's motion for summary judgment on the issue of the defendants' liability, but before the granting of its subsequent motion for strict foreclosure, the defendants filed their original appeal in this matter. Thereafter, on April 6, 2016, the court granted the plaintiff's motion to dismiss that portion of the defendants' appeal which challenged the court's ruling as to the defendants' liability for foreclosure for lack of subject matter jurisdiction due to lack of a final judgment. After the court granted the plaintiff's motion for strict foreclosure, the defendants filed an amended appeal in this matter.

"In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all material facts, which, under applicable principles of substantive law, entitle him to judgment as a matter of law. . . . Because the burden of proof is on the movant, the trial court must view the evidence in the light most favorable to the nonmoving party. . . .

"Of course, [o]nce the moving party has met its burden [of production] . . . the opposing party [to survive summary judgment] must present evidence that demonstrates the existence of some disputed factual issue." (Citations omitted; internal quotation marks omitted.) *Maltas* v. *Maltas*, 298 Conn. 354, 365–66, 2 A.3d 902 (2010). It is well settled that "a court may properly grant summary judgment as to liability in a foreclosure action if the complaint and supporting affidavits establish an undisputed prima facie case and the defendant fails to assert any legally sufficient special defense." *GMAC Mortgage, LLC* v. *Ford*, 144 Conn. App. 165, 176, 73 A.3d 742 (2013).

As discussed in the preceding paragraphs, the court, *Domnarski, J.*, had previously granted the plaintiff's motion to strike the defendants' four special defenses to the plaintiff's foreclosure action. Neither those nor any other special defenses to the plaintiff's foreclosure claim were ever repleaded thereafter. Thus, at the time the court, *Aurigemma, J.*, rendered summary judgment in favor of the plaintiff on the issue of the defendants' liability, the defendants' operative pleading contained no special defenses to foreclosure, but only the operative counterclaims described in the preceding paragraphs. In granting the plaintiff's motion for summary judgment as to the defendants' liability for foreclosure, the court held that the plaintiff had established a prima

facie case for foreclosure because it had presented documentary evidence and affidavits establishing that: (1) the plaintiff was in physical possession of the note prior to filing the present action; (2) the defendants had defaulted on their loan by 2009; and (3) the plaintiff had satisfied all necessary conditions to seek foreclosure under the terms of the note by timely mailing the defendants the notice of default. The court further noted that the defendants had failed to put forth any evidence creating a genuine issue of material fact as to any such essential element, and held that the allegations in the defendants' counterclaims "[were] not proper grounds for a defense to a foreclosure action."

The defendants now assert that their affidavits in opposition to the plaintiff's motion for summary judgment created a genuine issue of material fact that should have precluded the court from rendering summary judgment in favor of the plaintiff in the primary foreclosure action. More specifically, the defendants point to the following assertions within their affidavits: (1) "[We] elected not to seek other financing or to seek family assistance to resolve [our] loan situation because [we] believed [that] the [plaintiff] would do what [it] told [us it] would do, and reinstate [our] loan"; (2) "the [plaintiff] promised to modify our mortgage, and then failed to do so after we had provided all the requested information, which directly resulted in this foreclosure action"; and (3) "in addition, the [plaintiff] wrongfully began foreclosure proceedings against [us] by misapplying and miscrediting our payments, which wrongfully . . . created a default in the loan in order to proceed with the foreclosure."

The contents of those affidavits, however, do not create a genuine issue as to any of the essential elements of the plaintiff's prima facie case, namely, whether it was the holder of the note, the defendants defaulted

on the loan, or the plaintiff satisfied the necessary preconditions to foreclosure. Nor do such allegations support any special defense to foreclosure for, as previously noted, no such special defense was then pending. Instead, the contents of the defendants' affidavits provide—at most—factual support for their counterclaims against the plaintiff for misrepresentation, fraud, and violations of CUTPA and TILA. Curiously, the defendants attempt to overcome this fatal deficiency by arguing that there is "a genuine issue of material fact . . . as to whether [their] counterclaims have a reasonable nexus to the making, validity, or enforcement of the mortgage and note" and, *on that ground*, they claim that the court erred in granting the plaintiff's motion for summary judgment as to their liability for foreclosure and its subsequent motion for a judgment of strict foreclosure.

The validity or invalidity of a counterclaim, however—either substantively, as a claim upon which relief can be granted on its merits, or procedurally, as a claim that can properly be brought as a counterclaim in the context of the plaintiff's primary action—is completely irrelevant to whether the plaintiff is entitled to prevail in its primary action, and thus to have summary judgment rendered in its favor in that action. See 49 C.J.S. 357, Judgments § 304 (2009) ("The mere assertion of counterclaims does not prevent the granting of summary judgment on the complaint when the counterclaims are sufficiently separable from the plaintiff's causes of action. Likewise, the mere assertion of . . . a counterclaim that does not itself meet the criteria for summary judgment . . . will not preclude summary judgment on the complaint." [Footnotes omitted.]). In the absence of evidence demonstrating the existence of a genuine issue of material fact as to any essential element of the plaintiff's prima facie case; *GMAC Mortgage, LLC* v. *Ford*, supra, 144 Conn. App. 176; or, in the alternative,

as to any recognized special defense—and here there is none—the defendants' claim of error as to the granting of the plaintiff's motion for summary judgment on the issue of their liability for foreclosure is completely devoid of merit, and must therefore be rejected. Cf. *Haaser* v. *A. C. Lehmann Co.*, 130 Conn. 219, 220, 33 A.2d 135 (1943) ("a defense to the complaint cannot be supplied by the affirmative allegations of a cross-complaint"), citing *Erwin M. Jennings Co.* v. *DiGenova*, 107 Conn. 491, 495, 141 A. 866 (1928) (a defense to an action should be pleaded as a special defense, not as a counterclaim or a cross complaint).

II

The defendants' final claim is that the trial court erred in rendering judgment in favor of the plaintiff on all five counts of their operative counterclaim. With respect to counts one, two and three of the operative counterclaim, sounding, respectively, in negligent, reckless and intentional misrepresentation, the defendants argue that the court misinterpreted and misapplied the *Sorrentino* case, and thus abused its discretion in holding that those claims failed the transaction test of Practice Book § 10-10. Moreover, although they concede that "a mortgagor is precluded from bringing counterclaims against an assignee of a note and mortgage if such assignee has not expressly assumed the liabilities of the original assignor," they argue, in the alternative, that Judge Aurigemma erred in rendering judgment for the plaintiff on those three counterclaims in light of Judge Domnarski's previous ruling that the allegations of those counterclaims for misrepresentation were legally sufficient to survive the plaintiff's motion to strike. (Internal quotation marks omitted.) Lastly, with respect to count five of their operative counterclaim, alleging a violation of TILA, the defendants argue that the court improperly concluded that the claim therein pleaded was barred by the statute of limitations.

The plaintiff disagrees, contending that the court properly rendered judgment in its favor on all of the defendants' counterclaims. In support of its position, the plaintiff first distinguishes between those allegations in the counterclaims that are based upon AWL's alleged misdealings with the defendants at or before the time that the note was executed, and those allegations that are based upon the plaintiff's own alleged misdealings with the defendants during the foreclosure mediation several years later. To the extent that such counterclaims are based upon AWL's alleged misdealings with the defendants, the plaintiff argues that the trial court properly held that those claims fail as a matter of law because they are based upon the conduct of a nonparty, for which it could not be held liable without expressly assuming such liability, and, in the alternative, that such claims are barred by applicable statutes of limitations. To the extent that such claims are based upon allegations of the plaintiff's own alleged misdealings with the defendants during the foreclosure mediation, the plaintiff argues, under *Sorrentino*, that the court correctly held that such claims must be dismissed because they have no reasonable nexus to the making, validity or enforcement of the note, and thus they were not properly pleaded as counterclaims in this action.

We agree with the trial court that, to the extent that the defendants' counterclaims are based upon alleged misdealings with the defendants by AWL, a nonparty to this foreclosure action, those counterclaims all fail as a matter of law because there is no evidence of record that the plaintiff expressly assumed the liabilities of the original lender, AWL, when it took the mortgage from AWL by assignment. *Hartford* v. *McKeever*, 314 Conn. 255, 258–59, 101 A.3d 229 (2014); *Bank of America, N.A.* v. *Aubut*, 167 Conn. App. 347, 370, 143 A.3d 638 (2016). The defendants do not claim to the

contrary. Instead, in their reply brief, they narrow their challenge to the trial court's rendering of summary judgment for the plaintiff on their counterclaims to those portions of the counterclaims that are based upon the plaintiff's own alleged misdealings with the defendants during the foreclosure mediation. In light of this narrowing of the defendants' challenge, we need not address the court's alternative basis for rendering summary judgment in favor of the plaintiff on those parts of the defendants' counterclaims that were based upon alleged misdealings with them by AWL, more particularly, the plaintiff's challenges to such claims under applicable statutes of limitations.[7] See *Gold* v. *Rowland*, 325 Conn. 146, 150 n.1, 156 A.3d 477 (2017).

Accordingly, the only remaining issue to be decided is whether the court properly held that the allegations of the defendants' counterclaims, to the extent they are based upon the plaintiff's own alleged misdealings with the defendants during the foreclosure mediation, failed the transaction test of Practice Book § 10-10. In so doing, we address this claim solely on its merits, rejecting the defendants' alternative law of the case claim because we conclude such claim is unavailing both in fact and in law.[8] For the following reasons, we

[7] As discussed in the preceding paragraphs, the court's statute of limitations analysis was limited only to the defendants' allegations concerning AWL's conduct at or before the execution of the note at issue. See footnote 5 of this opinion. To the extent that the defendants' TILA claim is predicated on the plaintiff's alleged misconduct during the foreclosure mediation, the court ruled only that such allegations failed the transaction test of Practice Book § 10-10. Therefore, we decline to address the merits of this claim.

[8] In essence, the defendants argue that, pursuant to the law of the case doctrine, Judge Aurigemma should have adhered to Judge Domnarski's ruling on the plaintiff's motion to strike their counterclaims for misrepresentation and declined to rule on whether to dismiss portions of the counterclaims that were predicated on AWL's alleged misconduct. We are unpersuaded.

"The law of the case doctrine provides that [w]here a matter has previously been ruled upon interlocutorily, the court in a subsequent proceeding in the case may treat that decision as the law of the case, if it is of the opinion that the issue was correctly decided, in the absence of some new

conclude that the court properly determined that such counterclaims did not satisfy the transaction test of § 10-10, and thus that they were properly dismissed from this action. We further conclude that, in granting the plaintiff's motion for summary judgment seeking, inter alia, the dismissal of such counterclaims, the court's "judgment . . . in favor of the plaintiff on the defendants' counterclaims" must be construed as a final judgment of dismissal for improper joinder, rather than a final judgment on the merits of the defendants' substantive claims.[9]

or overriding circumstance. . . . A judge [however] is not bound to follow the decisions of another judge made at an earlier stage of the proceedings, and if the same point is again raised he has the same right to reconsider the question as if he had himself made the original decision." (Citation omitted; internal quotation marks omitted.) *Henderson* v. *Lagoudis*, 148 Conn. App. 330, 338–39, 85 A.3d 53 (2014); see also *Breen* v. *Phelps*, 186 Conn. 86, 99, 439 A.2d 1066 (1982) ("The law of the case is not written in stone but is a flexible principle of many facets . . . . In essence it expresses the practice of judges generally to refuse to reopen what has been decided and is not a limitation on their power." [Citation omitted.]).

We find no merit to the defendants' argument that the law of the case doctrine applies in this matter. First, the defendants provide no support for their proposition that, in ruling on a motion for summary judgment, a court is bound by another judge's ruling on a party's motion to strike. Second, even if the law of the case doctrine precluded such reconsideration—which it does not—Judge Domnarski expressly noted that the plaintiff, as assignee of the note, was not liable for the alleged misconduct of the original lender, AWL. The defendants concede this very point in their reply brief to this court. Third, Judge Domnarski made no ruling as to whether these counterclaims were properly joined pursuant to the transaction test of Practice Book § 10-10. Thus, even if we were to apply the law of the case doctrine with such weight and rigidity as the defendants propose, we would still find no basis for concluding either that Judge Domnarski made a prior inconsistent ruling on this issue, or that Judge Aurigemma was precluded from considering, on a motion for summary judgment, whether, as a matter of law, the plaintiff could be held liable for misrepresentations made by its predecessor in interest to the note and mortgage.

[9] Insofar as the plaintiff requested that these counterclaims be dismissed with prejudice, we acknowledge that the court's ruling precluded the defendants from repleading their counterclaims in the present action. We do not, however, interpret the court's judgment as precluding the defendants from pleading their counterclaims in a separate action.

As a preliminary matter, we note that our standard of review depends on the nature of the court's ruling, and therefore we must characterize properly the nature of the court's judgment on the defendants' counterclaims before reaching the merits of the defendants' claims on appeal. "We begin with certain basic principles that distinguish the procedural devices of a motion for summary judgment and a motion to strike. Practice Book [§ 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact." (Internal quotation marks omitted.) *American Progressive Life & Health Ins. Co. of New York* v. *Better Benefits, LLC*, 292 Conn. 111, 119, 971 A.2d 17 (2009). "The rules governing summary judgment are equally applicable to counterclaims. Practice Book § 17-44." *U.S. Bank National Assn.* v. *Sorrentino*, supra, 158 Conn. App. 93.

In contrast, a motion to strike, pursuant to Practice Book § 10-39 (a), "shall be used whenever any party wishes to contest . . . the legal sufficiency of the allegations of any . . . counterclaim[10] . . . to state a

[10] "[A] counterclaim is a cause of action existing in favor of the defendant against the plaintiff and on which the defendant might have secured affirmative relief had he sued the plaintiff in a separate action." (Internal quotation marks omitted.) *JP Morgan Chase Bank, Trustee* v. *Rodrigues*, 109 Conn. App. 125, 131, 952 A.2d 56 (2008).

claim upon which relief can be granted . . . .'' (Footnote added.) It is well settled that a court may grant a party's motion to strike a counterclaim, in whole or in part, when such counterclaim is improperly joined with the plaintiff's primary action in contravention of Practice Book § 10-10. See, e.g., *JP Morgan Chase Bank, Trustee* v. *Rodrigues*, 109 Conn. App. 125, 132–33, 952 A.2d 56 (2008) (Affirming motion to strike defendants' counterclaim for emotional distress because its allegations ''related to the conduct of the plaintiff that occurred after the execution of the mortgage note . . . . The disparity between the subject matter of the plaintiff's [foreclosure action] and that of the defendants' counterclaim warranted the . . . conclusion that the counterclaim did not arise from the same transaction.''); see also *South Windsor Cemetery Assn., Inc.* v. *Lindquist*, 114 Conn. App. 540, 545–46, 970 A.2d 760, cert. denied, 293 Conn. 932, 981 A.2d 1076 (2009). Pursuant to Practice Book § 10-10, ''any defendant may file counterclaims against any plaintiff and cross claims against any codefendant *provided that each such counterclaim and cross claim arises out of the transaction or one of the transactions which is the subject of the plaintiff's complaint* . . . .'' (Emphasis added.) ''[A] proper application of Practice Book § 10-10 in a foreclosure context requires consideration of whether a counterclaim has some reasonable nexus to . . . the making, validity or enforcement of the mortgage and note.'' *U.S. Bank National Assn.* v. *Sorrentino*, supra, 158 Conn. App. 96.

Although, by their nature, these motions serve different purposes and are governed by different rules of procedure, our case law clearly recognizes that a litigant may use a motion for summary judgment to challenge the legal sufficiency of a party's counterclaims. See, e.g., id., 94–95; see also *Haynes* v. *Yale-New Haven Hospital*, 243 Conn. 17, 32 n.17, 699 A.2d 964 (1997);

Southbridge Associates, LLC v. *Garofalo*, 53 Conn. App. 11, 17–19, 728 A.2d 1114, cert. denied, 249 Conn. 919, 733 A.2d 229 (1999); cf. *Sethi* v. *Yagildere*, 136 Conn. App. 767, 770 n.6, 47 A.3d 892, cert. denied, 307 Conn. 905, 53 A.3d 220 (2012). Accordingly, we have recognized that where "both the substance of the motion [for summary judgment] and the trial court's ruling on the motion demonstrate that it is more accurately described as a motion to strike . . . we shall address [the] motion for summary judgment as if it were a properly presented motion to strike."[11] (Internal quotation marks omitted.) *Santorso* v. *Bristol Hospital*, 308 Conn. 338, 351–52, 63 A.3d 940 (2013), quoting *Aetna Casualty & Surety Co.* v. *Jones*, 220 Conn. 285, 293, 596 A.2d 414 (1991).

Here, the plaintiff's motion for summary judgment expressly sought the *dismissal* of the defendants' counterclaims because, inter alia, they were "unrelated to the making, validity or enforcement of the note and mortgage." The plaintiff thus sought dismissal of the defendants' counterclaims, in part, because they were improperly joined in this action pursuant to Practice Book § 10-10. In their memorandum of law opposing the plaintiff's motion for summary judgment, the defendants argued, inter alia, that there was a genuine issue of material fact as to whether the counterclaims had a reasonable nexus to the making, validity and enforcement of the note and mortgage. Moreover, in rendering judgment in favor of the plaintiff as to the defendants' counterclaims, the court held, inter alia, that those counterclaims were improperly joined in this action

[11] Our courts have also recognized, however, that "[t]here is a substantial difference between [the effects of] a motion for summary judgment and a motion to strike. The granting of a defendant's motion for summary judgment puts the plaintiff out of court . . . . The granting of a motion to strike allows the plaintiff to replead his or her case." (Citation omitted.) *Rivera* v. *Double A Transportation, Inc.*, 248 Conn. 21, 38 n.3, 727 A.2d 204 (1999) (*Berdon, J.*, concurring and dissenting).

because they were predicated on the plaintiff's postdefault conduct during the parties' foreclosure mediation which, under *Sorrentino*, has no reasonable nexus to the making, validity or enforcement of the note and mortgage. Clearly, therefore, both the parties and the court analyzed this portion of the plaintiff's motion for summary judgment as a motion to strike the defendants' counterclaims. We thus elect to treat that portion of the plaintiff's motion for summary judgment, in which it sought dismissal of the defendants' counterclaims for improper joinder under § 10-10, as a properly presented motion to strike. See *Santorso* v. *Bristol Hospital*, supra, 308 Conn. 351–52.

The standard of review in an appeal challenging a trial court's granting of a motion to strike is well established. "A motion to strike challenges the legal sufficiency of a pleading . . . and, consequently, requires no factual findings by the trial court. As a result, our review of the court's ruling is plenary. . . . We take the facts to be those alleged in the [pleading] that has been stricken and we construe the [pleading] in the manner most favorable to sustaining its legal sufficiency." (Internal quotation marks omitted.) Id., 349. As discussed in the preceding paragraphs, however, the court in this case determined that the defendants' counterclaims failed the transaction test pursuant to Practice Book § 10-10. It is well settled that "[t]he transaction test is one of practicality, and the trial court's determination as to whether that test has been met ought not be disturbed except for an abuse of discretion." (Internal quotation marks omitted.) *JP Morgan Chase Bank, Trustee* v. *Rodrigues*, supra, 109 Conn. App. 131–32. Thus, we consider whether the trial court abused its discretion in determining that the defendants' counterclaims failed the transaction test of § 10-10.

In the present case, the defendants argue that the court should not have rendered judgment on their counterclaims because the conduct alleged in support of

those counterclaims had a reasonable nexus to the enforcement of the note. More specifically, the defendants claim that "the conduct on the part of the foreclosing party that is complained of by [the defendants] . . . encompasses actions taken by the [plaintiff] regarding possible loan modifications that would [have allowed Jeffrey] Mauro to cure [the] delinquency. This is directly related to the enforcement of the note . . . [because the] only purpose behind the statements was enforcement of the obligation." We are not persuaded.

In *Sorrentino*, as in this case, a lender sought foreclosure on a parcel of real property after the borrowers defaulted on their loan. *U.S. Bank National Assn.* v. *Sorrentino*, supra, 158 Conn. App. 87. After the lender initiated foreclosure on the property, the lender and borrower entered into a foreclosure mediation. Id., 88. That mediation was unsuccessful, however, and thus the matter was referred back to the court. Id. Thereafter, the borrowers filed both an answer to the complaint and counterclaims against the lender, alleging, inter alia, that: the lender had made assurances that the loan would be modified to avoid foreclosure; the borrowers continually provided documents to assist in the modification process; the lender's promise to modify the loan was a "sham"; and the lender "continued to string [the borrowers] along, either expressly or impliedly representing that [the borrowers] would be eligible for a loan modification." Id., 88–90. The lender subsequently moved for summary judgment as to both the borrowers' liability in the primary foreclosure action and "the propriety of the [borrowers'] counterclaims and special defenses." Id., 90. The trial court granted the lender's motion for summary judgment as to both issues, and the borrowers subsequently appealed that determination. Id.

On appeal in *Sorrentino*, this court held, inter alia: "Our review of the allegations underlying the defendants' mediation counterclaims shows that, even when

viewed in a light most favorable to the defendants as the nonmoving party, all the allegations underlying those counterclaims are addressed to the plaintiff's improper conduct during the foreclosure mediation program. That program did not begin until after the execution of the note and mortgage, and after the foreclosure action was commenced, and, thus, does not reasonably relate to the making, validity or enforcement of the note or mortgage. . . . Moreover, the defendants have not posited how the factual allegations underlying the counterclaims have any reasonable nexus to the making, validity or enforcement of the mortgage or note, nor can we discern one. . . . Even if the defendants were provided with an opportunity to replead, we conclude as a matter of law that no permissible corrections could transform the counterclaims so that they comply with the transaction test set forth in Practice Book § 10-10." (Citation omitted.) Id., 97.

After reviewing the pleadings in this case, we conclude that the trial court did not abuse its discretion in determining that the defendants' counterclaims did not have a reasonable nexus to the making, validity and enforcement of the note. Indeed, the trial court correctly determined that "the defendants' counterclaims concerning the plaintiff's conduct during mediation/mortgage modification are virtually indistinguishable from those of the defendant[s] in *Sorrentino*. They pertain to the plaintiff's conduct during [the mediation], which occurred years after the execution of the mortgage and the defendants' default." We agree with the court's interpretation of the counterclaims at issue, and thus we conclude that the court did not abuse its discretion in rendering judgment *dismissing those counterclaims* because, in accordance with our decision in *Sorrentino*, they were improperly joined in this action pursuant to the transaction test of Practice Book § 10-10.

The *Sorrentino* court's decision affirming the trial court's rendering of summary judgment in the case before it is not to the contrary. In *Sorrentino*, the court noted, inter alia, that: "In its memorandum in support of summary judgment, the plaintiff argued to the court that . . . the defendants' mediation counterclaims . . . were not part of the same transaction that is the subject of the foreclosure complaint and [thus] were improper. We view those arguments as directly challenging whether the counterclaims were properly joined pursuant to the transaction test set forth in Practice Book § 10-10 and, thus, their legal sufficiency. . . . The defendants never argued that it was improper for the court to consider the plaintiff's insufficiency arguments in adjudicating the motion for summary judgment or that the plaintiff had waived its right to challenge the joinder of the counterclaims by failing to file a motion to strike. Accordingly, none of those issues is before us on appeal." *U.S. Bank National Assn.* v. *Sorrentino*, supra, 158 Conn. App. 96. In light of the fact that the *Sorrentino* court left open the question of whether it was proper "for the court to consider the plaintiff's insufficiency arguments in adjudicating the motion for summary judgment," we conclude that a litigant may use a motion for summary judgment as a means of testing whether a party's counterclaims satisfy the transaction test of § 10-10. We further clarify that, where a court determines that the counterclaims at issue fail the transaction test of § 10-10, the appropriate remedy is not a final judgment on the merits of those counterclaims, but rather a judgment dismissing those counterclaims on the ground of improper joinder with the plaintiff's primary action, without prejudice to the defendants' right to replead that claim, unless it is otherwise barred, in a separate action.

The judgment is affirmed and the case is remanded for the purpose of setting new law days.

In this opinion the other judges concurred.

JEFFREY WILLIAMS *v.* COMMISSIONER OF CORRECTION (AC 39049)

Sheldon, Mullins and Sullivan, Js.

Syllabus

The petitioner sought a writ of habeas corpus, claiming, inter alia, that his trial counsel provided ineffective assistance by failing to challenge the state's medical evidence by consulting and calling as a witness a medical expert with experience evaluating medical evidence in child sexual abuse cases to rebut certain testimony offered by the state's expert witness, M. The habeas court rendered judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Held*:

1. The habeas court properly rejected the petitioner's claim that his trial counsel was ineffective in failing to consult and call a rebuttal medical expert witness: the record did not reveal any definitive finding by the habeas court that trial counsel failed to consult with a medical expert in preparation for the medical testimony of M, and because nothing in the habeas court's subordinate factual findings or in the evidence adduced at the habeas trial required, as a matter of law, the conclusion that trial counsel did not consult with an expert prior to cross-examining M, this court would not assume the existence of such a fact on appeal; moreover, the habeas court properly concluded that the petitioner had failed to show that his trial counsel was deficient in failing to present testimony from an expert witness to rebut M's testimony, as there was nothing in the record that prior to trial, the petitioner's trial counsel knew about an expert who disagreed with M's opinion, trial counsel was not required to track down each and every potential witness lead, and it as not for this court to second-guess trial counsel's strategy for confronting M.

2. The petitioner could not prevail on his claim that the habeas court improperly determined that he had failed to prove that his trial counsel performed deficiently by failing to present the testimony of a neurosurgeon who had performed back surgery on the petitioner to establish that the petitioner was incapable of physically or sexually abusing the victim, the petitioner having failed to rebut the presumption that trial counsel's decision not to pursue such a theory by calling that witness was based on reasonable professional judgment; that court found that trial counsel had discussed the potential defense of physical incapability with the petitioner but reasonably could have concluded that it was not an adequate defense to the charged crimes, that such a defense would not have been helpful because the jury was not likely to believe it, and that evidence regarding the petitioner's surgery and subsequent recovery would not have been helpful to the theory of defense at trial, which

was that the victim had fabricated the allegations to avoid being returned to her mother's care.

Argued May 30—officially released October 17, 2017

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Oliver*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

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

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Rebecca A. Barry*, assistant state's attorney, for the appellee (respondent).

Opinion

MULLINS, J. The petitioner, Jeffrey Williams, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. He claims that the court improperly concluded that he failed to prove that his trial attorney provided ineffective assistance of counsel by failing (1) to challenge the state's medical evidence by consulting and calling as a witness a medical expert with experience evaluating medical evidence in child sexual abuse cases, and (2) to present the testimony of John Strugar, a neurosurgeon, who performed back surgery on the petitioner in August, 1999. We affirm the judgment of the habeas court.

This court's decision in the petitioner's direct appeal sets forth the following relevant facts, which the jury in the petitioner's criminal trial reasonably could have found, and procedural history. "Between the spring of

1997 and mid-October, 1999, the victim[1] and her three younger sisters lived with their mother, who was the [petitioner's] girlfriend, her uncle and the [petitioner] at various residences in the city of New Haven. The victim was approximately eight years old when the [petitioner] began to abuse her. The [petitioner] beat her about once a week for a variety of reasons. In November, 1997, the [petitioner] knocked the victim to the floor, causing a spiral fracture of her left humerus. The victim was taken to a hospital, but her mother instructed her and her sisters to attribute the injury to the victim's having fallen off her bed. On another occasion, the [petitioner] banged the victim's head on a sink, breaking one of her teeth. When the victim told her mother of the broken tooth, her mother instructed her to go outside and play. The [petitioner] struck the victim with a wooden paddle and on one occasion gave her a black eye. The victim's mother put makeup on the bruise to cover it. The victim's teacher, however, noticed the makeup and bruise. At another time, the school personnel discovered a hickey on the victim's neck. The victim had told her mother that the [petitioner] had given her the hickey. The [petitioner] convinced her mother that someone else had given the victim a hickey and then beat the victim.

"Sometime between August and October, 1999, the [petitioner] placed the victim in a situation that was likely to injure her health. When the victim did not comply with the [petitioner's] instructions, he made her put her head out a window and then he poured water over her head. He made her stay there until it was time to go to school.

"At night, the [petitioner] would awaken the victim and take her to his room where he told her to rub his

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

back.[2] Initially, the [petitioner] lay face down but would turn over and instruct the victim to rub his lower body. The [petitioner] took the victim's hand and placed it on his penis, at first outside of his boxer shorts and then inside. The [petitioner's] sexual abuse progressed beyond back-rubs and having the victim touch his penis. The [petitioner] began to grope the victim's vagina, buttocks, thighs and undeveloped chest. On three or four occasions, the [petitioner] forced his penis into the victim's vagina.[3] If the victim asked the [petitioner] to stop, he would tell her not to tell him what to do. The victim bled after the first and second rapes and told her mother, who told her she was having her menstrual period. Although the victim reported the abuse to her grandfather, he refused to believe her. Consequently, the victim did not report the continuing abuse for fear that no one would believe her. The victim eventually disclosed the [petitioner's] sexual abuse to her cousin but implored her not to tell anyone.

"In early 2001, the victim, her sisters and mother moved to a homeless shelter in Waterbury, after which the victim and her sisters were removed from their mother's custody by the department of children and families (department). The victim was placed in a foster home. While the victim and her foster mother were watching a television movie about sexual abuse, the victim ran from the room crying. Because the victim was so overcome with emotion, her foster mother waited until the next day to discuss the subject with her. During the conversation, the victim confided that

[2] "The victim's mother was employed at night." *State* v. *Williams*, 102 Conn. App. 168, 171 n.3, 926 A.2d 7, cert. denied, 284 Conn. 906, 931 A.2d 267 (2007).

[3] "A colored drawing by the victim depicting the [petitioner] on top of her in a bed and the [petitioner's] penis in her vagina was placed into evidence. The victim was depicted crying, and the [petitioner] was shown with a smirk on his face." *State* v. *Williams*, 102 Conn. App. 168, 171 n.4, 926 A.2d 7, cert. denied, 284 Conn. 906, 931 A.2d 267 (2007).

the [petitioner] had raped her and hurt her private parts. The foster mother reported the complaint to a department social worker.

"Subsequently, the victim was interviewed by a forensic specialist, examined by a pediatric nurse practitioner [Judith Moskal-Kanz, who also served as a forensic medical examiner for child sexual abuse and child abuse] and interviewed by a detective, Michael Hunter. [Moskal-Kanz] found a furrow running through the victim's hymen, an injury consistent with penile penetration. Hunter also interviewed the [petitioner] and recorded his statement. According to the [petitioner], subsequent to his having back surgery, he slept in a hospital bed in the living room where he awoke one night to find the victim stroking his penis. The [petitioner] so informed the victim's mother, who beat the victim. One month later, the [petitioner] again awoke and found the victim fondling his penis. He again reported the incident to the victim's mother who administered 'a whupping.' In his statement, the [petitioner] acknowledged having spanked the victim but denied that he ever punched her, hit her, broke her arm or had sexual intercourse with her.

"The [petitioner] was arrested and charged on December 5, 2002. The state filed a twelve count long form information. The theory of defense was that the victim lied about the abuse to avoid being returned to the care of her mother." (Footnotes in original.) *State* v. *Williams*, 102 Conn. App. 168, 170–73, 181, 926 A.2d 7, cert. denied, 284 Conn. 906, 931 A.2d 267 (2007). As part of its case-in-chief, "the state called . . . Moskal-Kanz . . . as a witness. Moskal-Kanz testified . . . that scarring on the victim's hymen was consistent with penile penetration and consistent with the victim's description of the intercourse the defendant had forced on her." Id., 181.

The jury found the petitioner guilty of all counts charged, namely, two counts of sexual assault in the third degree in violation of General Statutes § 53a-72a (a) (1), seven counts of risk of injury to a child in violation of General Statutes (Rev. to 1997 and 1999) §§ 53-21 (1) and (2), and three counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2). Id., 170. The petitioner was sentenced to thirty-five years imprisonment. Id. This court upheld his conviction on direct appeal. Id., 209.

The petitioner filed an amended petition for a writ of habeas corpus on May 13, 2015. Relevant to this appeal, the petitioner alleged that his trial attorney, Michael Moscowitz, rendered ineffective assistance of counsel by (1) failing to consult with and call as a witness a medical expert with experience evaluating medical evidence in child sexual abuse cases for the purpose of refuting Moskal-Kanz' testimony that her colposcopic examination of the victim revealed trauma to the victim's hymen consistent with sexual abuse, and (2) failing to present testimony from Strugar regarding the petitioner's August, 1999 back surgery and subsequent incapacitation.

Following a three day trial, the habeas court issued a memorandum of decision on March 3, 2016, denying the petition for a writ of habeas corpus. As to both alleged bases for ineffective assistance, the habeas court found that the petitioner had failed to meet his burden of demonstrating that Moscowitz' performance was objectively unreasonable. Following a grant of a petition for certification to appeal, this appeal followed. Additional facts and procedural history will be set forth where necessary.

As a preliminary matter, we set forth our standard of review and the applicable legal principles. "The habeas court is afforded broad discretion in making its factual

findings, and those findings will not be disturbed unless they are clearly erroneous. . . . Historical facts constitute a recital of external events and the credibility of their narrators. . . . Accordingly, [t]he habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review. . . ." (Internal quotation marks omitted.) *Thomas* v. *Commissioner of Correction*, 141 Conn. App. 465, 470, 62 A.3d 534, cert. denied, 308 Conn. 939, 66 A.3d 881 (2013).

"To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . Although a petitioner can succeed only if he satisfies both prongs, a reviewing court can find against a petitioner on either ground." (Citations omitted; internal quotation marks omitted.) *Breton* v. *Commissioner of Correction*, 325 Conn. 640, 668–69, 159 A.3d 1112 (2017).

"[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Strickland* v. *Washington*, supra, 466 U.S. 688. "[J]udicial scrutiny of counsel's performance must

be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." (Internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 679, 51 A.3d 948 (2012).

"[E]ffective assistance of counsel imposes an obligation [on] the attorney to investigate all surrounding circumstances of the case and to explore all avenues that may potentially lead to facts relevant to the defense of the case." (Internal quotation marks omitted.) Id., 680. "Nevertheless, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; [but] strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." (Internal quotation marks omitted.) Id.

"The reasonableness of an investigation must be evaluated not through hindsight but from the perspective of the attorney when he was conducting it." *State* v. *Talton*, 197 Conn. 280, 297–98, 497 A.2d 35 (1985). Trial counsel "need not track down each and every lead

or personally investigate every evidentiary possibility before choosing a defense and developing it. . . .'' (Internal quotation marks omitted.) *Ricks* v. *Commissioner of Correction*, 98 Conn. App. 497, 502, 909 A.2d 567 (2006), cert. denied, 281 Conn. 907, 916 A.2d 49 (2007). Accordingly, the habeas court cannot second-guess trial counsel's decision not to investigate or call certain witnesses when ''counsel learns of the substance of the witness' testimony and determines that calling that witness is unnecessary or potentially harmful to the case . . . .'' *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 681–82.

Mindful of these principles, we turn to the petitioner's claims on appeal.

I

The petitioner first claims that the habeas court improperly determined that he failed to prove that Moscowitz rendered ineffective assistance by failing to consult with—and, ultimately, call as a witness—a medical expert in order to challenge Moskal-Kanz' testimony that her colposcopic examination of the victim revealed injuries consistent with sexual abuse. We disagree.

The following additional facts are relevant to this claim. As previously set forth, Moskal-Kanz testified at the petitioner's criminal trial that her colposcopic examination of the victim revealed scarring or furrowing on the victim's hymen consistent with sexual abuse. *State* v. *Williams*, supra, 102 Conn. App. 181. At the petitioner's habeas trial, Jennifer Canter, a child abuse pediatrician, testified that she had examined the victim's colposcopy photographs and determined, contrary to Moskal-Kanz, that the victim had an ''absolutely normal exam,'' a ''normal'' hymen that exhibited ''no scar or furrowing,'' and that there was ''no affirmative evidence of laceration.''

The habeas court, however, found that the petitioner failed to demonstrate that Moscowitz performed deficiently by failing to consult or call as a witness an expert for purposes of challenging Moskal-Kanz' testimony at the petitioner's criminal trial. The habeas court stated: "Regarding the sexual abuse and medical findings [of Moskal-Kanz], [Moscowitz] testified credibly to consulting with medical experts in practically every case he has tried with medical findings of trauma, although he could not specifically recall consulting with a medical expert in this case. [Moscowitz] had access to all of the relevant medical information in the case as part of the discovery process. He testified credibly that if, in his consultation with a medical expert, the consultant opined that the findings were 'normal,' he would either have the witness take the stand in his case-in-chief or use the information to cross-examine the state's witness." Accordingly, the habeas court found: "It is clear . . . that . . . Moscowitz' performance in . . . either relying on his experience and/or consulting with a medical expert was not objectively unreasonable or constitutionally deficient. It would be the very definition of the kind of second-guessing disfavored in the law to allow the petitioner to substitute both the strategic judgments and the newly discovered medical expert [Canter] . . . for that of [Moscowitz]."

The petitioner claims that the habeas court improperly concluded that he failed to demonstrate that Moscowitz performed deficiently by "failing to consult with and present [as a witness] a medical expert" to challenge Moskal-Kanz' testimony. We disagree.

The petitioner's claim on appeal is based largely upon a mischaracterization of the record. He grounds his claim that Moscowitz performed deficiently on the factual assertion that Moscowitz "fail[ed] to consult with . . . a medical expert" and took Moskal-Kanz' testimony "at face value." Our review of the habeas court's

memorandum of decision, however, does not reveal any finding that Moscowitz failed to consult with a medical expert in preparation for Moskal-Kanz' testimony. It, instead, reveals that the habeas court credited Moscowitz' testimony that, although he consulted with medical experts in "practically every case" he has tried in which the state presented medical evidence trauma, he could not recall specifically whether he used one to assess Moskal-Kanz' testimony that the victim's hymen exhibited signs of sexual abuse. Indeed, the habeas court found that Moscowitz was not deficient for "*either* relying on his experience *and/or* consulting with a medical expert," indicating that it had not made a definitive finding as to whether Moscowitz consulted an expert in the petitioner's case, as opposed to relying on his own experience cross-examining the state's medical witnesses in other cases. (Emphasis added.) Accordingly, the petitioner's claim that Moscowitz performed deficiently by failing to consult with an expert in preparation for Moskal-Kanz' testimony must fail because there is no factual basis for it in the record.[4]

It appears that the petitioner attempts to avoid this fatal gap in the record by two methods. First, he asserts that "[r]easonable inferences to be drawn from the record indicate that [Moscowitz] did not consult with a medical expert in preparing for the petitioner's criminal trial." It is well settled, however, that "it is not the function of this court . . . to make factual findings . . . . Conclusions of fact may be drawn on appeal only where the subordinate facts found [by the trial court] make such a conclusion *inevitable as a matter of law* . . . or where the undisputed facts or uncontroverted evidence and testimony in the record make the factual

[4] We also note that, to the extent that the habeas court's memorandum of decision is ambiguous regarding whether it found that Moscowitz had not consulted with an expert witness, the petitioner failed to move for an articulation pursuant to Practice Book § 66-5.

conclusion *so obvious as to be inherent in the trial court's decision*." (Emphasis added; internal quotation marks omitted.) *State* v. *Shashaty*, 251 Conn. 768, 783, 742 A.2d 786 (1999), cert. denied, 529 U.S. 1094, 120 S. Ct. 1734, 146 L. Ed. 2d 653 (2000). Nothing either in the habeas court's subordinate factual findings or in the evidence adduced at the habeas trial *requires*, as a matter of law, the conclusion that Moscowitz did not consult with an expert prior to cross-examining Moskal-Kanz. We, therefore, cannot assume the existence of such a fact on appeal.[5]

Second, the petitioner argues in the alternative that, even if the habeas court did not find that Moscowitz *had not* consulted with an expert, it also did not find that he *had*. Because, however, it is the petitioner's burden to prove the factual basis for his ineffective assistance claim; see *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 679; and not the respondent's burden to prove a negative, the fact that the habeas court did not find that Moscowitz consulted an expert does not help the petitioner. There was no evidence adduced at the habeas trial affirmatively establishing that Moscowitz did not consult an expert. That Moscowitz could not remember specifically his method for preparing for Moskal-Kanz' testimony, which had occurred

[5] At oral argument before this court, the petitioner argued for the first time that the court's failure to find specifically that Moscowitz did not consult a medical expert about the subject of Moskal-Kanz' testimony was clearly erroneous. We disagree. Moscowitz testified at the habeas trial that he consulted with expert witnesses in "practically every case" in which the state presented medical evidence of trauma, but that he could not remember specifically if he did so in the petitioner's case. There was no other affirmative evidence presented that the petitioner did not consult an expert. Therefore, to the extent the habeas court found that the petitioner failed to prove that Moscowitz did not consult an expert, that finding is supported by the record and, therefore, is not clearly erroneous. See *State* v. *Gutierrez*, 132 Conn. App. 233, 239, 31 A.3d 412 (2011) ("[a] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with thedefiniteandfirmconvictionthat a mistake has been committed" [internal quotation marks omitted]).

many years prior to the habeas trial—and thus could not rule out the possibility that he relied on his experience and cross-examined Moskal-Kanz without help from an expert, as he did in some cases—does not overcome the strong presumption of constitutionally effective counsel. As the United States Court of Appeals for the Second Circuit has observed, "[t]ime inevitably fogs the memory of busy attorneys. That inevitability does not reverse the *Strickland* presumption of effective performance. Without evidence establishing that counsel's strategy arose from the vagaries of ignorance, inattention or ineptitude . . . *Strickland*'s strong presumption must stand." (Citation omitted; internal quotation marks omitted.) *Greiner* v. *Wells*, 417 F.3d 305, 326 (2d Cir. 2005), cert. denied sub nom. *Wells* v. *Ercole*, 546 U.S. 1184, 126 S. Ct. 1363, 164 L. Ed. 2d 72 (2006). Accordingly, the petitioner's claim that Moscowitz performed deficiently because he failed to consult an expert witness must fail.

We also agree with the habeas court that the petitioner failed to meet his burden of establishing that Moscowitz performed deficiently by failing to present testimony from an expert witness at the petitioner's criminal trial in order to refute Moskal-Kanz' testimony. Although Canter testified at the habeas trial that her examination of the victim's colposcopic photographs showed no signs of abnormalities, there are no findings in the habeas court's memorandum of decision that, prior to trial, Moscowitz knew about an expert who, like Canter, disagreed with Moskal-Kanz' opinion.

To the contrary, the habeas court credited Moscowitz' testimony that, had he consulted with a medical expert who believed that the victim's hymen was "normal," he would have either called that expert as a witness at trial or used the information to cross-examine Moskal-Kanz. This finding, together with the fact that

Moscowitz did not call, or otherwise use the information provided by, an expert to refute Moskal-Kanz' testimony regarding the results of the victim's colposcopic examination, leads us to the conclusion that Moscowitz had not encountered such an expert prior to the petitioner's criminal trial. Although Moscowitz could have undertaken a search in hopes of finding such an expert, the constitution does not require trial lawyers to "track down each and every lead or personally investigate every evidentiary possibility before choosing a defense and developing it." (Internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 683. Moscowitz testified that his strategy for confronting Moskal-Kanz instead was to establish the possibility that the trauma to the victim's hymen could have been caused by something other than penile penetration; we cannot second-guess that strategy here. Accordingly, the habeas court properly rejected this ineffective assistance claim.

II

The petitioner next claims that the court improperly determined that he failed to prove that Moscowitz performed deficiently by failing to present the testimony of Strugar, the petitioner's neurosurgeon who performed back surgery on the petitioner in August, 1999, to establish that he was incapable of physically or sexually abusing the victim. We are not persuaded.

Regarding the failure to call allegedly exculpatory witnesses, "counsel will be deemed ineffective only when it is shown that a defendant has informed his attorney of the existence of the witness and that the attorney, without a reasonable investigation and without adequate explanation, failed to call the witness at trial." (Internal quotation marks omitted.) *Ampero* v. *Commissioner of Correction*, 171 Conn. App. 670, 685, 157 A.3d 1192 (2017). Our cases recognize that a habeas

court cannot second-guess counsel's decision not to call certain witnesses or pursue potential defenses when he "learns of the substance of the witness' testimony and determines that calling that witness is unnecessary or potentially harmful to the case . . . ." *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 681–82; see, e.g., *Mozell* v. *Commissioner of Correction*, 291 Conn. 62, 79, 967 A.2d 41 (2009) (counsel not deficient when decision not to call witness "was entirely consistent with . . . theory of defense"); *Thompson* v. *Commissioner of Correction*, 131 Conn. App. 671, 694–96, 27 A.3d 86 (decision not to interview and present two witnesses did not render pretrial investigation inadequate because counsel determined that testimony would have been unhelpful to theory of defense), cert. denied, 303 Conn. 902, 31 A.3d 1177 (2011); see also *Strickland* v. *Washington*, supra, 466 U.S. 691 ("when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable").

In the present case, the habeas court found that Moscowitz had discussed the potential defense of physical incapability with the petitioner but concluded that, in light of other facts known to him, such a defense "would not have been helpful as the [jury] was not likely to believe it."[6] The habeas court credited Moscowitz' testimony that, despite any diminished physical capability,

[6] The habeas court's memorandum of decision provides in relevant part: "[Moscowitz] testified [at the habeas trial] that he and the petitioner discussed the petitioner's back surgery in the course of trial preparation as well as the petitioner's theory that he was not physically capable of committing the assaults based on his back problems. [Moscowitz] specifically testified that the petitioner's preferred theory of defense would be severely damaged at trial based on potential evidence that the petitioner would wake the children up in the nighttime hours to rub his back. [Moscowitz] aptly described this potential evidence as 'not good.' [Moscowitz] further testified to the weakness of this potential defense theory based on evidence that the petitioner was not bedridden at all, instead being sufficiently ambulatory to be out looking for drugs with the victim's mother during the relevant

the petitioner was not incapacitated or bedridden during the relevant time period, but, indeed, was sufficiently ambulatory to go out and search for drugs with the victim's mother.[7] The habeas court also credited Moscowitz' testimony that the petitioner's purported physical incapacity was not an adequate defense to the charged crimes because it did not account for other evidence that the state was going to present, such as that the petitioner frequently woke the children during the night to rub his back. The theory of defense at trial was instead that the victim fabricated the assaults to avoid being returned to her mother's care. As such, Moscowitz reasonably could have concluded that evidence regarding the petitioner's surgery and subsequent recovery plainly would not have been helpful to that theory of defense. Accordingly, the habeas court properly concluded that the petitioner had failed to rebut the presumption that Moscowitz' decision not to pursue the defense of physical incapacity by calling Strugar as a witness was based on reasonable professional judgment. See *Thompson* v. *Commissioner of Correction*, supra, 131 Conn. App. 691–92.

time period. Based on the foregoing, [Moscowitz] reached the conclusion that evidence suggesting that the petitioner was physically incapable of committing the offense[s] would not have been helpful as the [jury] was not likely to believe it."

[7] The proposition that the petitioner lacked the physical capability of committing the charged crimes was especially dubious in light of Strugar's testimony at the habeas trial. He testified that the petitioner was a "large muscular person" of around 271 pounds. He further testified that, following his surgery in August, 1999, the petitioner experienced six to eight weeks of "relative incapacity" that included pain and stiffness, lifting restrictions, and limited range of motion. Strugar further testified, however, that, by early September, 1999, the petitioner's pain had "decreased remarkably." The habeas court credited Strugar's testimony that, at that time, he recommended that the petitioner "get . . . out of bed" and start "exercising his muscles." The habeas court further found that records from a September 27, 1999 visit indicated that the petitioner was "healing appropriately." Strugar also testified that, in October, 1999, there was "no objective reason" why the petitioner could not lift 120 pounds, and that the petitioner had "excellent strength in the legs" and could walk for two or three blocks before having

The judgment is affirmed.

In this opinion the other judges concurred.

JERMAINE LITTLE *v.* COMMISSIONER OF CORRECTION (AC 38597)

Lavine, Alvord and Beach, Js.

Syllabus

The petitioner, who had been convicted, on a plea of guilty, of the crime of kidnapping in the first degree, sought a writ of habeas corpus, claiming, inter alia, that his plea was invalid because, at the time he pleaded guilty, he was not aware of the additional element of intent, which was enunciated by our Supreme Court in *State* v. *Salamon* (287 Conn. 509) four years after his conviction. Specifically, he claimed that he did not know or understand that, as set forth in *Salamon*, to be guilty of kidnapping in the first degree, he had to intend to prevent the victim's liberation for a longer period of time or to a greater degree than that which was necessary to commit a separate crime. At trial, the petitioner had pleaded guilty to kidnapping pursuant to a negotiated plea agreement, after which the state nolled charges against him of burglary in the first degree and robbery in the first degree. The habeas court rendered judgment denying the habeas petition in part and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. On appeal, he claimed that *Salamon* should be applied retroactively to his case because there is no differentiation between a conviction obtained after a trial or by way of a guilty plea, and there was a risk that his conviction did not comport with the due process requirements for guilty pleas. *Held*:

1. The habeas court abused its discretion in denying the petition for certification to appeal as to the petitioner's claim that *Salamon* should apply retroactively to his conviction; the impact of *Salamon* on collateral attacks on final judgments in cases in which the petitioner pleaded guilty to only the crime of kidnapping has not yet been addressed by any appellate court of this state and, thus, the question raised by the petitioner was adequate to deserve encouragement to proceed further, and this court resolved that issue in a manner different from the way it was resolved by the habeas court.
2. The petitioner could not prevail on his claim that his guilty plea violated his right to due process and, thus, was invalid because it was not made

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to rest. Finally, Strugar testified that the petitioner's arms "were never an issue. They were always strong."

knowingly, intelligently and voluntarily in light of the reinterpretation in *Salamon* of the kidnapping statutes: because there was no binding precedent as to whether *Salamon* should be applied retroactively to collateral attacks on a kidnapping conviction when the defendant pleaded guilty to only that charge pursuant to a plea agreement, in deciding that issue this court adopted the rule and reasoning of the plurality opinion in *Luurtsema* v. *Commissioner of Correction* (299 Conn. 740), which adopted a general presumption that *Salamon* applies retroactively in habeas corpus proceedings, but left open the possibility that there could be situations in which the traditional rationales underlying the writ of habeas corpus may not favor retroactive application; moreover, traditional rationales underlying the writ of habeas corpus did not favor applying *Salamon* retroactively in the present case, as there was no risk that the petitioner stood convicted of an act that the law did not make criminal or that he faced a punishment that the law could not impose on him, and the state relied sufficiently to its detriment on our Supreme Court's interpretation of our kidnapping statutes prior to *Salamon* when constructing the terms of the petitioner's plea agreement such that applying *Salamon* retroactively in the present case would be inappropriate.

3. The petitioner's claim that, because his guilty plea was invalid and his conviction had to be vacated, he was entitled to the presumption of innocence and, thus, was actually innocent of the kidnapping charge, was not reviewable; although the petitioner raised a claim in his second habeas petition that he was actually innocent of the kidnapping charge because he did not intend to prevent the victim's liberation for a longer period of time or to a greater degree than that which was necessary to commit a separate crime, his petition for certification to appeal raised only a generic claim that he was actually innocent, and the claim on appeal was never distinctly raised before the habeas court, which, therefore, could not have ruled on it in a manner adverse to the petitioner.

Argued May 30—officially released October 17, 2017

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Fuger*, *J.*; judgment denying the petition in part; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Affirmed.*

Naomi T. Fetterman, assigned counsel, for the appellant (petitioner).

Rita M. Shair, senior assistant state's attorney, with whom were *Kevin D. Lawlor*, state's attorney, and, on the brief, *Jo Anne Sulik*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

ALVORD, J. The petitioner, Jermaine Little, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his second petition for a writ of habeas corpus (second habeas petition). He claims that the habeas court (1) abused its discretion by denying his petition for certification to appeal; (2) improperly concluded that his guilty plea to kidnapping in the first degree was knowing, intelligent, and voluntary in light of our Supreme Court's subsequent reinterpretation of our kidnapping statutes in *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008); and (3) improperly concluded that he was not actually innocent of kidnapping in the first degree. We conclude that the habeas court abused its discretion by denying the petition for certification to appeal, but that the habeas court properly denied the petitioner's second habeas petition. Accordingly, we affirm the judgment of the habeas court.

The following factual and procedural history is relevant to this appeal. On September 9, 2003, the petitioner and three other men abducted the victim, Jerry Brown, at gunpoint as he left his business in Bridgeport. *Little* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-06-4000949-S, 2008 WL 4415754, *1 (September 15, 2008) (*Little I*). The men drove up to Brown in a white Mazda minivan. Id. Three of the men exited the minivan, forced Brown into his own car, and demanded his money, threatening to kill him if he did not comply. Id. When Brown said that his money was at his house, they drove with Brown to his house in Shelton. Id. While en route, the minivan pulled alongside

Brown's car, and the driver motioned the men in Brown's car to call him, which they did, using Brown's cell phone. Id. When they arrived at Brown's house, the men removed approximately $25,000 to $28,000 in cash, checks, and jewelry from the safe in his bedroom. Id.

Brown reported the incident to the police, provided a written statement describing the events and his abductors, and identified the petitioner from a photographic array as the driver of the minivan and the fourth person to enter his house. Id., *3 and n.1. The subsequent investigation revealed that the phone number that Brown's abductors had called with his phone while driving to his house was the petitioner's phone number and that the petitioner was known to drive a white Mazda minivan. Id., *3. Detectives then interviewed the petitioner concerning his involvement in the Brown abduction and robbery. In a signed incident report, Detective Richard S. Yeomans reported that the petitioner "admitted to being involved in the [k]idnapping and [r]obbery . . . . He stated [Kyle] Glenn, [James] Freelove, and [Kevin] Harrison went into the house with Brown while he waited outside in his vehicle." Yeomans further reported that Freelove had "admitted to being involved with the kidnapping and robbery of Jerry Brown in Shelton. He further stated Jermaine Little, Kevin Harrison and Isaac Peoples were the other participants in the kidnapping and robbery. Freelove stated he and Harrison were in Beardsley Terrace when Little pulled up to them and asked if they wanted to do a 'job' with him. Freelove stated Little then went [to] pick up Peoples. . . . Peoples and Little were armed with semi automatic handguns." Freelove explained that, after they abducted Brown, he, Harrison and Peoples drove with Brown in Brown's car while the petitioner followed them in his van. Freelove "stated when they arrived at Brown's house they all went into the house including Little."

The petitioner subsequently was charged in state court with kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (B),[1] burglary in the first degree in violation of General Statutes § 53a-101, and robbery in the first degree in violation of General Statutes § 53a-134 (state case).[2] The petitioner was further charged in federal court with being a felon in possession of a firearm in violation of 18 U.S.C. § 922 (g) (1) (federal case).[3] *Little* v. *United States*, Docket No. 3:05-CV-1674 (MRK), 2006 WL 2361723, *1 (D. Conn. August 15, 2006). During this time, the petitioner also had an ongoing state narcotics case, for which he received a sentence of eight years of imprisonment while the state and federal cases remained pending.

Although "[t]he petitioner initially pleaded not guilty and consistently exhibited an intent to take the case to

[1] General Statutes § 53a-92 provides in relevant part: "(a) A person is guilty of kidnapping in the first degree when he abducts another person and . . . (2) he restrains the person abducted with intent to . . . (B) accomplish or advance the commission of a felony . . . ."

[2] In the appendix to his brief, the petitioner provided the docket sheet for his criminal case, which states that he was initially charged with burglary in the first degree, robbery in the first degree, larceny in the first degree in violation of General Statutes § 53a-122, and kidnapping in the first degree with a firearm in violation of General Statutes § 53a-92a.

The docketing sheet was not admitted into evidence at the second habeas trial. On the basis of the allegations in the criminal case, however, it appears that the petitioner could have been charged with larceny in the first degree. See General Statutes (Rev. to 2003) § 53a-122 (a) ("[a] person is guilty of larceny in the first degree when he commits larceny, as defined in section 53a-119, and . . . [2] the value of the property . . . exceeds ten thousand dollars").

The petitioner's trial counsel also testified at the first habeas trial that the petitioner was initially charged with kidnapping in the first degree with a firearm, and a transcript of the first habeas trial was admitted into evidence at the second habeas trial. The first habeas court further found that "[t]he evidence clearly reveals that the petitioner was present, with a firearm, in Brown's home when the robbery took place." *Little I*, supra, 2008 WL 4415754, *3.

[3] The petitioner pleaded guilty in federal court to being a felon in possession of a firearm, but the record does not reflect whether any additional federal charges were pending against the petitioner before he pleaded guilty

trial"; *Little I*, supra, 2008 WL 4415754, *2; he ultimately decided to plead guilty pursuant to separate written plea agreements with the state and the federal government. Under the terms of those agreements, the petitioner agreed to plead guilty to kidnapping in the first degree in the state case and to being a felon in possession of a firearm in the federal case. In exchange, the state and the federal government agreed to recommend to their respective sentencing courts a sentence of fifteen years and eight months of imprisonment, and to request that the state and federal sentences run concurrently. The parties further agreed that it would be left to the discretion of the sentencing courts whether to run those sentences concurrently with or consecutively to the eight year sentence that the petitioner had begun serving in the narcotics case.

On November 29, 2004, the petitioner pleaded guilty in federal court to being a felon in possession of a firearm. *Little* v. *United States*, supra, 2006 WL 2361723, *1. On December 22, 2004, the petitioner pleaded guilty to kidnapping in the first degree. At the beginning of the plea hearing, the prosecutor informed the court, *Carroll*, *J.*, that the petitioner was pleading guilty pursuant to a written plea agreement, and she briefly explained the terms of that agreement. The prosecutor then informed the court that "counsel is telling me [that the petitioner] again is making clear he wishes to reject the state's offer. And if that's so, I'm just going to ask that the court make full inquiry so that we don't later have a collateral proceeding claiming that his lawyer didn't inform him or that he wasn't aware of these things." The prosecutor expressed her surprise that the petitioner would repudiate the plea agreement. She observed that the petitioner was currently exposed to a maximum term of imprisonment of sixty-five years

or what the petitioner's sentencing exposure was under the United States Sentencing Guidelines.

in the state case, that his sentencing exposure would increase if the state charged him with conspiracy,[4] and that, if the petitioner rejected the plea agreement, the state could seek a sentence of more than fifteen years and eight months imprisonment.

The court briefly canvassed the petitioner to ensure that he understood the terms of his plea agreement, that he did not have to plead guilty, and that it was his decision alone whether to plead guilty. After discussing the matter with trial counsel, the petitioner represented, through trial counsel, that he was ready to plead guilty. The petitioner pleaded guilty to kidnapping in the first degree,[5] and the prosecutor recited the factual basis

[4] Evidence was presented at the first and second habeas trials that the petitioner was further exposed to enhanced penalties as a persistent felony offender. See General Statutes (Rev. to 2003) § 53a-40 (f) and (m). Specifically, the petitioner testified at the first habeas trial that he previously pleaded guilty to: (1) sale of narcotics and possession of marijuana in May, 1999; (2) possession of narcotics, two counts of assault in the third degree, and interfering with a police officer in May, 1999; and (3) assault in the second degree in October, 1994. The petitioner also admitted that he previously was convicted of attempted robbery in the first degree after a jury trial.

The petitioner's trial counsel similarly testified at the first habeas trial that the prosecutor in the petitioner's state case "very frequently uses the enhanced penalties of the persistent offender statutes" and that the petitioner "[a]bsolutely . . . would have been subject to that statute's terms." Trial counsel further testified that he believed that the facts of the case would have supported additional substantive criminal charges, including conspiracy. Trial counsel confirmed that when he and the petitioner's federal public defender met with the petitioner, they explained to him not only his sentencing exposure for the pending charge, but also the prospective additional charges and penalties.

[5] The information, as read by the court clerk to the petitioner before he pleaded guilty, made the following relevant allegations: "[The state] accuses Jermaine F. Little of kidnapping in the first degree. Charges that at the cities of Bridgeport and Shelton, on or about the ninth day of September, 2003, commencing at approximately 8:45 p.m. and continuing until approximately 10:34 p.m. at locations known, including 1844 Barnum Avenue, Bridgeport, and 27 Rock Rest Road, Shelton, and locations unknown, the said, Jermaine F. Little did abduct another person and he restrained the person with intent to accomplish or advance the commission of a felony . . . ."

for the guilty plea[6] and reiterated the terms of the plea agreement.

The court next canvassed the petitioner to ensure that his plea was knowing, intelligent, and voluntary. During this canvass, the petitioner confirmed, inter alia, that he understood the terms of his plea agreement; he had had enough time to speak with his attorney about the case; his attorney had explained to him the nature and elements of kidnapping in the first degree; his attorney had reviewed with him all of the state's evidence against him; the prosecutor's recitation of the facts supporting his guilty plea was "essentially correct"; nobody was threatening or forcing him to plead guilty; and he was voluntarily pleading guilty because he was in fact guilty. The court found that the petitioner's plea was knowing, intelligent, and voluntary and accepted it.

The petitioner was subsequently sentenced, in accordance with the terms of his plea agreement, to fifteen years and eight months of imprisonment in the state case and the federal case, and those sentences were run concurrently with each other and with the petitioner's sentence in the narcotics case. The prosecutor in the state case further indicated at the sentencing hearing that she had entered a nolle prosequi with respect to the petitioner's remaining charges of burglary in the first degree and robbery in the first degree.

[6] The prosecutor recited the following facts in support of the petitioner's guilty plea: "On September 9 at about 9 o'clock in the evening, when the victim was closing his store, he was abducted by [the petitioner]. The victim was taken in a car with other parties involved, who are [Harrison], [Freelove], [and Peoples, and] taken to his home in Shelton where they forced entry to his home. When in the home they had him open a safe. At least one or more of them had a gun and they stole a substantial amount of money, jewelry, property from the victim's safe. The police did an excellent job, including tracing cell phone calls where the victim's cell phone was used to call the [petitioner's] relatives, or it may have even been the house that the [petitioner] was living in. It was a very strong case."

On February 3, 2006, the petitioner filed his first petition for a writ of habeas corpus (first habeas petition), in which he alleged various claims of ineffective assistance of trial counsel.

On July 1, 2008, while the first habeas petition remained pending, our Supreme Court decided *State* v. *Salamon*, supra, 287 Conn. 517–18, 531, 542, in which it abrogated thirty years of kidnapping jurisprudence. Specifically, the court held for the first time that to convict a defendant of a kidnapping in conjunction with another crime, the state must prove that the defendant "intend[ed] to prevent the victim's liberation for a longer period of time or to a greater degree than that which is necessary to commit the other crime." Id., 542.

On September 15, 2008, the first habeas court, *A. Santos*, *J.*, denied the first habeas petition. *Little I*, supra, 2008 WL 4415754, *1. The first habeas court, in part, rejected the petitioner's claims of ineffective assistance of counsel because it concluded that, even if it presumed that trial counsel rendered deficient performance during the pleading process, the petitioner failed to prove prejudice. Id., *3. The first habeas court observed: "The evidence clearly reveals that the petitioner was present, with a firearm, in Brown's home when the robbery took place. It also reveals that the petitioner drove the rest of the kidnappers to Brown's workplace to set up the kidnapping and robbery. . . . In the absence of any compelling contrary evidence, this court cannot say that the petitioner would have been likely to be successful had he chosen to go to trial. Furthermore, the petitioner faced additional charges and, if he had chosen to go to trial, would have been exposed to a total possible sentence of sixty-five years. It is highly unlikely that he would have obtained a more favorable result than the fifteen years and eight months he received under the plea agreement. There would also be no guarantee that the sentence would

be set up to run concurrently with the federal sentence he faced, as the plea agreement provided. . . . While it is clear that the petitioner had previously expressed a desire to go to trial, the record also reveals that he made the decision to accept the state's plea offer knowingly, intelligently and voluntarily." (Citations omitted.) Id., *3–4.

On February 22, 2013, the petitioner initiated this second habeas action. On June 9, 2015, the petitioner filed the operative habeas petition. In relevant part, the petitioner alleged in count one that his guilty plea was not knowing, intelligent, and voluntary because "he did not know or understand that in order to be convicted of kidnapping in the first degree under § 53a-92 (a) (2) (B), a criminal defendant needed to intend to restrain the victim for a longer period of time or to a greater degree than that which was necessary to commit or advance the commission of a separate felony" (due process claim). In count four, the petitioner alleged that he was actually innocent of kidnapping in the first degree because he "did not intend to prevent the victim's liberation for a longer period of time or to a greater degree than that which was necessary to commit a separate crime" (actual innocence claim).

On May 2, 2016, a one day trial was held. After hearing the evidence and argument from the parties, the habeas court, *Fuger*, *J.*, issued an oral ruling denying the second habeas petition as it pertained to the petitioner's due process and actual innocence claims.[7] *Little* v. *Warden*, Superior Court, judicial district of Tolland, Docket

[7] The habeas court granted the second habeas petition only as it pertained to one of the petitioner's claims of ineffective assistance of habeas counsel. *Little II*, supra, 2016 WL 2935514, *3. In particular, the petitioner claimed that his first habeas counsel rendered ineffective assistance when he failed to file a timely application for a fee waiver and appointment of counsel for his appeal from the judgment of the first habeas court denying his first habeas petition and his petition for certification to appeal. The habeas court agreed that the petitioner's first habeas counsel rendered ineffective assistance in this respect. The habeas court cautioned, however: "I make

No. CV-13-4005250-S, 2016 WL 2935514, *3 (May 2, 2016) (*Little II*). On October 29, 2015, the habeas court denied the petition for certification to appeal. This appeal followed.

I

The petitioner first claims that the habeas court abused its discretion when it denied his petition for certification to appeal. We agree.

"In *Simms* v. *Warden*, 229 Conn. 178, 187, 640 A.2d 601 (1994), [our Supreme Court] concluded that . . . [General Statutes] § 52-470 (b) prevents a reviewing court from hearing the merits of a habeas appeal following the denial of certification to appeal unless the petitioner establishes that the denial of certification constituted an abuse of discretion by the habeas court. In *Simms* v. *Warden*, 230 Conn. 608, 615–16, 646 A.2d 126 (1994), [our Supreme Court] incorporated the factors adopted by the United States Supreme Court in *Lozada* v. *Deeds*, 498 U.S. 430, 431–32, 111 S. Ct. 860, 112 L. Ed. 2d 956 (1991), as the appropriate standard for determining whether the habeas court abused its

no judgment or prediction as to his ability to succeed; indeed, the petition for certification to appeal was denied. . . . All I'm doing by this action is allowing [the petitioner] to file the application for waiver of fees." Id.

The petitioner's appellate counsel in the present appeal was subsequently appointed to represent him in his appeal from the judgment of the first habeas court. On April 29, 2016, the petitioner's appellate counsel filed an *Anders* brief and a motion for permission to withdraw as counsel, representing that "[u]pon thorough review and examination of the transcripts, information and record in this matter, the undersigned has determined that an appeal in this matter would be frivolous." See *Anders* v. *California*, 386 U.S. 738, 744–45, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967); see, e.g., *Lorthe* v. *Commissioner of Correction*, 103 Conn. App. 662, 674, 931 A.2d 348 (discussing filing of briefs by appointed counsel, pursuant to *Anders*, to inform court that habeas petition or appeal is "wholly frivolous"), cert. denied, 284 Conn. 939, 937 A.2d 696 (2007); see also Practice Book § 23-41 (governing motions to withdraw by appointed counsel in habeas cases). On September 22, 2017, the court, *Westbrook*, *J.*, granted the motion.

discretion in denying certification to appeal. This standard requires the petitioner to demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . . A petitioner who establishes an abuse of discretion through one of the factors listed above must then demonstrate that the judgment of the habeas court should be reversed on its merits. . . . In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. . . .

"The conclusions reached by the trial court in its decision to dismiss [a] habeas petition are matters of law, subject to plenary review. . . . [When] the legal conclusions of the court are challenged, [the reviewing court] must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record. . . . To the extent that factual findings are challenged, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous . . . . [A] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Brewer* v. *Commissioner of Correction*, 162 Conn. App. 8, 12–13, 130 A.3d 882 (2015).

Turning to the petitioner's substantive claims, we have been unable to locate any case in which either this court or our Supreme Court has addressed the

impact of *Salamon* on collateral attacks on final judgments rendered in cases in which the petitioner pleaded guilty to kidnapping.[8] Because such a question has not yet been addressed by any appellate court of this state, we conclude that the petitioner's claims are adequate to deserve encouragement to proceed further. See *Rodriguez* v. *Commissioner of Correction*, 131 Conn. App. 336, 347, 27 A.3d 404 (2011) (concluding that claim deserved encouragement to proceed further when no appellate case had decided precise issue), aff'd on other grounds, 312 Conn. 345, 92 A.3d 944 (2014); *Small* v. *Commissioner of Correction*, 98 Conn. App. 389, 391–92, 909 A.2d 533 (2006), aff'd, 286 Conn. 707, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008). We further conclude that the habeas court abused its discretion by denying the petition for certification to appeal because we have resolved the issues raised by the petitioner in his second habeas petition in a different manner than the habeas court did. Accordingly, the habeas court abused its discretion when it denied the petition for certification to appeal. Nonetheless, we affirm the denial of the second habeas petition on the merits.

II

We next address the petitioner's due process claim. The petitioner claims that his guilty plea is invalid because the record does not demonstrate that at the time he pleaded guilty he understood that to be guilty of kidnapping in the first degree he had to "intend to

[8] In *Robles* v. *Commissioner of Correction*, 169 Conn. App. 751, 752–53, 153 A.3d 29 (2016), cert. denied, 325 Conn. 901, 157 A.3d 1146 (2017), the petitioner claimed that his guilty pleas to, inter alia, kidnapping in the first degree and attempt to commit kidnapping in the first degree, made pursuant to the doctrine of *North Carolina* v. *Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), were not made knowingly, intelligently, and voluntarily in light of our Supreme Court's subsequent holding in *Salamon*. This court declined to review the defendant's claim because he failed to raise it before the habeas court. Id., 753.

prevent the victim's liberation for a longer period of time or to a greater degree than that which is necessary to commit the other crime." (Emphasis omitted; internal quotation marks omitted.)

The petitioner is correct that a guilty plea cannot be considered voluntary in the constitutional sense if the record reflects that a defendant did not receive "real notice of the true nature of the charge against him . . . ." (Internal quotation marks omitted.) *State* v. *Johnson*, 253 Conn. 1, 38, 751 A.2d 298 (2000); accord *Henderson* v. *Morgan*, 426 U.S. 637, 645 n.13, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976) ("A plea may be involuntary either because the accused does not understand the nature of the constitutional protections that he is waiving . . . or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt. Without adequate notice of the nature of the charge against him, or proof that he in fact understood the charge, the plea cannot be voluntary in this latter sense." [Citation omitted.]). Stated another way, if the record reveals that neither the petitioner, nor his counsel, nor the court correctly understood the essential elements of kidnapping in the first degree at the time that the petitioner pleaded guilty, the petitioner's guilty plea would be constitutionally invalid. See *Bousley* v. *United States*, 523 U.S. 614, 618, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998). Moreover, because the accused's clear understanding of the nature of the charge to which he is pleading guilty relates to the very heart of the protections afforded by the constitution, such a misunderstanding of the nature of the charge cannot be harmless. *United State* v. *Bradley*, 381 F.3d 641, 647 (7th Cir. 2004); see *Henderson* v. *Morgan*, supra, 644–45 (even if "the prosecutor had overwhelming evidence of guilt available" and trial counsel's advice to plead guilty was sound and wise, "[the defendant's] plea cannot support a judgment of

guilt unless it was voluntary in a constitutional sense"); see also *Bousley* v. *United States*, supra, 618 ("[w]e have long held that a plea does not qualify as intelligent unless a criminal defendant first receives 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process' "); *State* v. *Childree*, 189 Conn. 114, 119, 454 A.2d 1274 (1983) ("[i]t is axiomatic that unless a plea of guilty is made knowingly and voluntarily, it has been obtained in violation of due process and is therefore voidable").

The petitioner's due process claim depends, however, on whether *Salamon* applies retroactively in his case.[9] That is, the only reason that the petitioner contends his guilty plea is invalid is because he was not aware of the additional element of intent enunciated by our Supreme Court in *Salamon*, four years after his conviction was rendered final. As a result, if we conclude that *Salamon* does not apply retroactively in the petitioner's case, his due process claim necessarily fails as well.

To address this retroactivity issue, it is necessary to review the unusual history and evolution of our kidnapping jurisprudence. "Under our Penal Code, the hallmark of a kidnapping is an abduction, a term that is defined by incorporating and building upon the definition of restraint. . . . In 1977, this court squarely rejected a claim that, when the abduction and restraint of a victim are merely incidental to some other offense, such as sexual assault, that conduct cannot form the basis of a guilty verdict on a charge of kidnapping. See *State* v. *Chetcuti*, 173 Conn. 165, 170–71, 377 A.2d 263 (1977). The court pointed to the fact that our legislature had declined to merge the offense of kidnapping with

[9] Following appellate briefing and oral argument before this court, we sua sponte ordered the parties to file simultaneous supplemental briefs addressing the issue of retroactivity.

sexual assault or with any other felony, as well as its clearly manifested intent in the kidnapping statutes not to impose any time requirement for the restraint or any distance requirement for the asportation. Id. On numerous occasions between that decision and the present petitioner's criminal trial, this court reiterated that position. . . . The court appeared to leave open the possibility that there could be a factual situation in which the asportation or restraint was so miniscule that a conviction of kidnapping would constitute an absurd and unconscionable result that would render the statute unconstitutionally vague as applied. . . . A kidnapping conviction predicated on the movement of the sexual assault victim from one room in her apartment to another, however, was deemed not to constitute such a result." (Citations omitted.) *Hinds* v. *Commissioner of Correction*, 321 Conn. 56, 66–68, 136 A.3d 596 (2016).

In *State* v. *Luurtsema*, 262 Conn. 179, 203–204, 811 A.2d 223 (2002) (*Luurtsema I*), overruled in part by *State* v. *Salamon*, 287 Conn. 509, 513–14, 949 A.2d 1092 (2008), decided two years before the petitioner pleaded guilty, our Supreme Court foreclosed the possibility that there could be a factual situation in which the movement or restraint of the victim was so miniscule that a conviction of kidnapping would constitute an absurd and unconscionable result as a matter of statutory interpretation.[10] In that case, the defendant, Peter Luurtsema, was convicted after a jury trial of kidnapping in the first degree, incidental to an attempted sexual assault and assault, during which he had moved the

[10] Our Supreme Court did not foreclose the possibility that a defendant could mount a successful *constitutional* challenge to his conviction on those grounds. Luurtsema challenged his conviction only on the ground that there was insufficient evidence to support his conviction, not on the ground that the kidnapping statute was unconstitutionally vague as applied to the facts of his case. *Luurtsema I*, supra, 262 Conn. 203–204. As a result, the court stated that it could "neither acknowledge nor reject the merits of such a constitutional claim." Id., 204.

victim from a couch to the floor, forced the victim's legs apart, and manually choked her while attempting to perpetrate the sexual assault. Id., 200, 203. On direct appeal, Luurtsema argued that his movement of the victim was " 'incidental' " to the sexual assault and therefore "falls short of what is required for 'abduction' under the kidnapping statute." *Luurtsema I*, supra, 200. Our Supreme Court rejected Luurtsema's claim, stating that "[Luurtsema's] interpretation of the kidnapping statute is simply not the law in this state." Id., 202. The court reiterated that "all that is required under the statute is that the defendant have abducted the victim and restrained her with the requisite intent. . . . Under the aforementioned definitions [of abduct and restrain], the abduction requirement is satisfied when the defendant restrains the victim with the intent to prevent her liberation through the use of physical force." (Citation omitted.) Id., 201.

Six years later, in *Salamon*, our Supreme Court revisited and reversed this decades long kidnapping jurisprudence. After examining the common law of kidnapping, the history and circumstances surrounding the promulgation of our current kidnapping statutes and the policy objectives animating those statutes, the court concluded: "Our legislature, in replacing a single, broadly worded kidnapping provision with a gradated scheme that distinguishes kidnappings from unlawful restraints by the presence of an intent to prevent a victim's liberation, intended to exclude from the scope of the more serious crime of kidnapping and its accompanying severe penalties those confinements or movements of a victim that are merely incidental to and necessary for the commission of another crime against that victim." *State* v. *Salamon*, supra, 287 Conn. 542. As a result, the court held that to convict a defendant of a kidnapping that was perpetrated in conjunction with another crime, the state must prove that the defendant "intend[ed] to

prevent the victim's liberation for a longer period of time or to a greater degree than that which is necessary to commit the other crime." Id.

Following that decision, Luurtsema filed a habeas petition, challenging the legality of his kidnapping conviction. *Luurtsema* v. *Commissioner of Correction*, 299 Conn. 740, 743, 12 A.3d 817 (2011) (*Luurtsema II*). Pursuant to the joint stipulation of the parties, the habeas court reserved two questions of law to this court, which were subsequently transferred to our Supreme Court: "(1) whether *Salamon* and *Sanseverino*[11] apply retroactively in habeas corpus proceedings; and (2) whether those cases apply in the petitioner's case in particular." (Footnote added.) Id. In a plurality opinion, our Supreme Court answered both reserved questions in the affirmative. Id.

When deciding the retroactivity issue, the threshold question for our Supreme Court was whether *Salamon* represented a change in or a mere clarification of the law. Id., 749 n.11. "If a state court deems its new interpretation to be a change, then the application of the statute to persons who were convicted prior to the

[11] In *State* v. *Sanseverino*, 287 Conn. 608, 949 A.2d 1156 (2008), overruled in part by *State* v. *DeJesus*, 288 Conn. 418, 437, 953 A.2d 45 (2008), superseded in part after reconsideration by *State* v. *Sanseverino*, 291 Conn. 574, 969 A.2d 710 (2009), overruled in part by *State* v. *Payne*, 303 Conn. 538, 548, 34 A.3d 370 (2012), a companion case released on the same day as *Salamon*, our Supreme Court took up a second challenge by a defendant convicted after a jury trial of kidnapping in the first degree for conduct incidental to a series of sexual assaults. Our Supreme Court declined to address the defendant's constitutional claim, applied *Salamon* retroactively; id., 618–20, 624–26; and concluded that the defendant was entitled to a new trial on the basis of the court's failure to instruct the jury in accordance with *Salamon*. *State* v. *Sanseverino*, 291 Conn. 574, 589–90, 969 A.2d 710 (2009). Because the direct appeal in *Sanseverino* was still pending when *Salamon* was decided, however, there was no question that *Salamon* should be applied retroactively in that case. See *State* v. *Sanseverino*, supra, 287 Conn. 620 n.11 ("a rule enunciated in a case presumptively applies retroactively to pending cases").

adoption of the new rule would be decided as a matter of state retroactivity common law. . . . By contrast, if the court deems the new interpretation to be a mere clarification of what the law always has meant, then there is no issue of retroactivity per se. . . . Rather, the issue becomes whether the state has violated the petitioner's due process rights by convicting him under an incorrect interpretation of the law." (Citations omitted.) Id., 749–50 n.11.

The three justice plurality declined to address "the thorny question of whether [*Salamon*] represented the sort of clarification of the law for which the federal constitution *requires* collateral relief"; (emphasis in original) id., 751; by assuming that *Salamon* constituted a change in the law and deciding the retroactivity question as a matter of state common law. Id., 764 n.21. The plurality then rejected any per se rule of full retroactivity; id., 760; and, instead, adopted "a general presumption in favor of full retroactivity for judicial decisions that narrow the scope of liability of a criminal statute." Id., 764. The plurality cautioned that this general presumption "would not necessarily require that relief be granted in cases where continued incarceration would not represent a gross miscarriage of justice, such as where it is clear that the legislature did intend to criminalize the conduct at issue, if perhaps not under the precise label charged. In situations where the criminal justice system has relied on a prior interpretation of the law so that providing retroactive relief would give the petitioner an undeserved windfall, the traditional rationales underlying the writ of habeas corpus may not favor full retroactivity." Id. The plurality observed that "one can conceive of circumstances in which prosecutors rely on a prior interpretation of a statute to such an extent that retroactive application of a different subsequent interpretation might not be warranted." Id.,

767. For example, "[i]f there are cases in which a petitioner was not convicted of the underlying assault, in reliance on a pre-*Salamon* interpretation of § 53a-92 (a) (2) (A), we have left open the possibility that retroactive relief may not be available." Id., 770.

After adopting this general presumption in favor of retroactivity, the plurality addressed whether *Salamon* should be applied retroactively in the petitioner's case. The plurality "agree[d] with [Luurtsema] that, as a matter of state common law, *Salamon* should be afforded fully retroactive effect in his particular case." Id., 751. The plurality reasoned: "This is not a case . . . in which the state, in selecting the crimes with which to charge [Luurtsema], can plausibly be said to have relied to its detriment on the prior interpretation of the kidnapping statutes." Id., 773. "Here, [Luurtsema] was charged with every crime for which he might reasonably have been held liable . . . ." Id., 768. That is, "the record discloses no indication that the state would have charged [Luurtsema] differently had it anticipated the subsequent interpretation of § 53a-92 (a) (2) (A) in *Salamon*." Id. The plurality further stated that it could not discern any evidence from the current record "that [Luurtsema] intended to restrain the victim more than was necessary to effect the underlying assault." Id., 773–74.

Justices Katz, Palmer, and McLachlan each filed concurring opinions in which no other justices joined. Justice Katz "wholly agree[d] with the plurality's thoughtful explanation as to why we should reject the state's call to adopt a per se rule against retroactivity and its equally persuasive rejection of the state's arguments against affording relief to [Luurtsema]." Id., 791 (*Katz, J., concurring*). She did not agree, however, with the plurality's "novel rule of retroactivity under our common-law authority, under which habeas courts may decline to afford relief 'where it is clear that the legislature did

intend to criminalize the conduct at issue, if perhaps not under the precise label charged.' " Id., 775. Instead, she "conclude[d] that *Salamon* clarified the meaning of our kidnapping statutes"; id., 785; and, therefore, the federal due process clause required a per se rule of full retroactivity for *Salamon*. Id., 775. She further "conclude[d] that, even if it were necessary to decide this case under our common-law authority, we should adopt a per se rule that decisions narrowing the interpretation of criminal statutes apply retroactively." Id.

Justice Palmer "agree[d] with much of the plurality opinion and concur[red] in the result that the plurality reache[d]." Id., 797 (*Palmer*, *J.*, *concurring*). He acknowledged that "[t]he plurality may be correct that there is persuasive reason to reject a per se rule, but we need not resolve the issue to decide the present case because, as the plurality also concludes, the petitioner . . . is entitled to full retroactivity regardless of whether we adopt such a rule." Id. Justice Palmer expressed his reservation at deciding "the question of whether to adopt a per se rule in favor of full retroactivity under our common law"; id.; because "this court, in rejecting a per se rule for purposes of our common law, adopts a rule that is contrary to constitutional requirements, a result that should be avoided." Id., 798.

Finally, Justice McLachlan "concur[red] with the plurality reluctantly." Id., 798 (*McLachlan*, *J.*, *concurring*). He concurred reluctantly because, although he "agree[d] with the holding of *Salamon*"; id.; he "disagree[d] with that portion of the analysis [in *Salamon*] in which the court concluded that for more than thirty years, and in innumerable cases, the courts of this state, including this court, have misconstrued our kidnapping statutes." Id., 799. He agreed with the plurality that "[i]n *Salamon*, this court adopted a 'new rule' expressly overruling the law in existence at the time of the petitioner's crime and conviction." Id. He further stated: "To

date the United States Supreme Court has not required 'new' interpretations of statutes to be applied retroactively in criminal cases, and I would not so provide. . . . Although I would prefer to follow our long-standing principle of finality of judgments and would deny the petitioner the relief that he seeks, I am compelled to follow the precedent established by *Salamon*, and, accordingly, concur in the result." Id.

Because *Luurtsema II* was a plurality opinion, when deciding whether *Salamon* should be applied retroactively in the present case, we must first determine its precedential value. Our Supreme Court has instructed that "[w]hen a fragmented [c]ourt decides a case and no single rationale explaining the result enjoys the assent of [a majority of the] [j]ustices, the holding of the [c]ourt may be viewed as the position taken by those [m]embers who concurred in the judgments on the narrowest grounds . . . ." (Internal quotation marks omitted.) *State* v. *Ross*, 272 Conn. 577, 604 n.13, 863 A.2d 654 (2005), quoting *Marks* v. *United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977).

It appears that the only parts of the plurality opinion in *Luurtsema II* that have any precedential value are the court's affirmative answers to the reserved questions of whether *Salamon* applies retroactively in habeas corpus proceedings and to Luurtsema's case in particular. See *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 106–107 and n.3 (*Zarella, J., dissenting*). Those answers are the narrowest grounds on which a majority of the panel clearly agreed.

With respect to the first reserved question, although a majority of the court in *Luurtsema II* agreed that *Salamon* could be applied retroactively in collateral proceedings, there was no clear majority concerning how and to what extent *Salamon* should be applied

retroactively. The three justice plurality adopted a general presumption of full retroactivity, subject to certain limited exceptions, while Justice Katz supported a per se rule in favor of full retroactivity. Neither Justice Palmer nor Justice McLachlan expressly endorsed a particular approach to retroactivity; they concurred only in the result reached by the plurality.

With respect to the second reserved question, the facts of the present case are sufficiently distinguishable from those in *Luurtsema II* such that the court's affirmative answer to the second reserved question also does not control the outcome of the present case. The petitioner was convicted after pleading guilty pursuant to a plea agreement with the state and federal government, and admitting his role in the Brown abduction and robbery. Luurtsema was convicted after a jury trial in which the jury was not instructed that, to find him guilty of kidnapping, it had to find beyond a reasonable doubt that he intended to prevent the victim's liberation for a longer period of time or to a greater degree than that which was necessary to commit the other crime. A majority of the court in *Luurtsema II* further appears to have agreed that this instructional error was not harmless beyond a reasonable doubt in light of the facts and circumstances of Luurtsema's case.

As a result, there is no binding precedent controlling the unique issue presently before us: whether *Salamon* should be applied retroactively to collateral attacks on a kidnapping conviction when the defendant pleaded guilty to that charge, and only that charge, pursuant to a plea agreement. Having given thorough consideration to the various approaches endorsed by the justices in *Luurtsema II*, we find the reasoning of the plurality of the court in *Luurtsema II* to be the most persuasive in the context of *Salamon*. As the United States Supreme Court has observed, one of the reasons that decisions

narrowing the scope of a criminal statute should generally apply retroactively is "because [those decisions] necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." (Internal quotation marks omitted.) *Schriro* v. *Summerlin*, 542 U.S. 348, 352, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004); see also *Luurtsema II*, supra, 299 Conn. 759 (reasoning general presumption of retroactivity appropriate because "considerations of finality simply cannot justify the continued incarceration of someone who did not commit the crime of which he stands convicted" and it would be unjust and amount to judicial usurpation of the legislature to permit defendant to be convicted of "two crimes where the legislature intended only one"). As the present case exemplifies, however, there are situations where the traditional rationales underlying the writ of habeas corpus simply do not favor full retroactivity. Therefore, we adopt the rule and reasoning of the plurality opinion in *Luurtsema II* in deciding the issue presently before us. See *Luurtsema II*, supra, 751, 758–73.

We next consider whether *Salamon* should be applied retroactively to the present case. The petitioner argues that *Salamon* should be applied retroactively because "there is no differentiation between a conviction obtained as a result of a trial or by way of a plea" and because there is a risk that after *Salamon*, his conviction does not comport with the due process requirements for guilty pleas. We are not persuaded.

"Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned." *Blackledge* v. *Allison*, 431 U.S. 63, 71, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977); see also *Statewide Grievance Committee* v. *Whitney*, 227 Conn.

829, 842, 633 A.2d 296 (1993) ("plea discussions [are] not only an essential part of the [administration of criminal justice] but a highly desirable part for many reasons" [internal quotation marks omitted]). The defendant avoids extended pretrial incarceration and the anxieties and uncertainties of a trial. *Blackledge* v. *Allison*, supra, 71. He further gains the certainty of a known and reduced penalty, a speedy disposition of his case, the chance to acknowledge his guilt, and a prompt start in realizing whatever potential there may be for rehabilitation. Id.; *State* v. *Sebben*, 145 Conn. App. 528, 545, 77 A.3d 811, cert. denied, 310 Conn. 958, 82 A.3d 627 (2013), cert. denied, U.S. , 134 S. Ct. 1950, 188 L. Ed. 2d 962 (2014). The state in turn obtains a prompt and largely final disposition of criminal charges with the certainty of a conviction. *Statewide Grievance Committee* v. *Whitney*, 842; *State* v. *Sebben*, supra, 545. "Judges and prosecutors conserve vital and scarce resources. The public is protected from the risks posed by those charged with criminal offenses who are at large on bail while awaiting completion of criminal proceedings." *Blackledge* v. *Allison*, supra, 71.

"These advantages can be secured, however, only if dispositions by guilty plea are accorded a great measure of finality. To allow indiscriminate hearings in . . . postconviction proceedings . . . would eliminate the chief virtues of the plea system—speed, economy, and finality. And there is reason for concern about that prospect. More often than not a prisoner has everything to gain and nothing to lose from filing a collateral attack upon his guilty plea. If he succeeds in vacating the judgment of conviction, retrial may be difficult. If he convinces a court that his plea was induced by an advantageous plea agreement that was violated, he may obtain the benefit of its terms. A collateral attack may also be inspired by a mere desire to be freed temporarily from the confines of the prison. . . .

"Yet arrayed against the interest in finality is the very purpose of the writ of habeas corpus—to safeguard a person's freedom from detention in violation of constitutional guarantees. . . . The writ of habeas corpus has played a great role in the history of human freedom. It has been the judicial method of lifting undue restraints upon personal liberty. . . . And a prisoner in custody after pleading guilty, no less than one tried and convicted by a jury, is entitled to avail himself of the writ in challenging the constitutionality of his custody." (Citations omitted; emphasis omitted; internal quotation marks omitted.) Id., 71–72.

To balance these competing interests of finality and personal freedom from detention in violation of constitutional guarantees, our courts have required a petitioner to "demonstrate a miscarriage of justice or other prejudice and not merely an error which might entitle him to relief on appeal" in order to mount a successful collateral attack on his conviction. (Internal quotation marks omitted.) *Peruccio* v. *Commissioner of Correction*, 107 Conn. App. 66, 71, 943 A.2d 1148, cert. denied, 287 Conn. 920, 951 A.2d 569 (2008) (quoting *Summerville* v. *Warden*, 229 Conn. 397, 419, 641 A.2d 1356 [1994]). "In order to demonstrate such a fundamental unfairness or miscarriage of justice, the petitioner should be required to show that he is burdened by an unreliable conviction." (Internal quotation marks omitted.) *Peruccio* v. *Commissioner of Correction*, supra, 71. These principles apply with equal force to the question of whether *Salamon* should be applied retroactively in the present case. See *Luurtsema II*, supra, 299 Conn. 757 ("[i]n evaluating the rationales that other jurisdictions have proffered for and against giving full retroactive effect to new interpretations of criminal statutes, we deem it axiomatic that the policies governing the availability of habeas relief should reflect the purposes for which the remedy was established"); id.

760 (declining to adopt per se rule of retroactivity "because a review of the diverse contexts in which such challenges have arisen persuades us that there are various situations in which to deny retroactive relief may be neither arbitrary nor unjust"); id., 764 ("[i]n situations where the criminal justice system has relied on a prior interpretation of the law so that providing retroactive relief would give the petitioner an undeserved windfall, the traditional rationales underlying the writ of habeas corpus may not favor full retroactivity").

With these legal principles in mind, we conclude that the traditional rationales underlying the writ of habeas corpus do not favor applying *Salamon* retroactively in the present case. First, there is no risk that the petitioner stands convicted of an act that the law does not make criminal. See *Schriro* v. *Summerlin*, supra, 542 U.S. 352. The criminal conduct the petitioner admitted to engaging in at his plea hearing was extremely serious. See footnotes 5 and 6 of this opinion. The petitioner along with three other individuals abducted Brown at gunpoint from his place of employment in Bridgeport, drove with him to his house in Shelton, forced their way into his house, and stole a substantial amount of money, jewelry, and property from his safe. See footnote 6 of this opinion. The entire nighttime incident lasted from approximately 8:45 p.m. until approximately 10:34 p.m. See footnote 5 of this opinion. The law clearly criminalizes this type of conduct under several statutes, including § 53a-92 (a) (2) (B). This is true even after *Salamon*.

"Although our holding in *Salamon* constituted a significant change with respect to our interpretation of the kidnapping statutes, we emphasized that [o]ur holding does not represent a complete refutation of the principles established by our prior kidnapping jurisprudence. . . . When [the] confinement or movement is merely

incidental to the commission of another crime . . . [it] must have exceeded that which was necessary to commit the other crime. [T]he guiding principle is whether the [confinement or movement] was so much the part of another substantive crime that the substantive crime could not have been committed without such acts . . . . [T]he test . . . to determine whether [the] confinements or movements involved [were] such that kidnapping may also be charged and prosecuted when an offense separate from kidnapping has occurred asks whether the confinement, movement, or detention was merely incidental to the accompanying felony or whether it was significant enough, in and of itself, to warrant independent prosecution." (Internal quotation marks omitted.) *State* v. *O'Brien-Veader*, 318 Conn. 514, 557–58, 122 A.3d 555 (2015).

On the basis of the facts admitted by the petitioner at the plea hearing, it cannot plausibly be argued that the movement and confinement of Brown was merely incidental to the commission of the burglary and robbery. Instead, the movement and confinement of Brown was significant enough to warrant independent prosecution under § 53a-92 (a) (2) (B). That is, although the movement and confinement of Brown during the drive from his place of work in Bridgeport to his house in Shelton might have facilitated the robbery and burglary, the degree to which the petitioner and his companions confined and moved Brown was not *necessary* to commit the robbery and burglary, nor was it *inherent* to those offenses. The court in *Salamon* made clear that when "the victim is moved or confined in a way that has independent criminal significance, that is, the victim was restrained to an extent exceeding that which was necessary to accomplish or complete the other crime"; *State* v. *Salamon*, supra, 287 Conn. 547; a defendant may still be convicted of kidnapping in conjunction with another substantive crime. Id., 547 n.33; see, e.g.,

State v. *Ward*, 306 Conn. 718, 736–39, 51 A.3d 970 (2012) (sufficient evidence of kidnapping when defendant dragged victim at knife-point from kitchen to bedroom where he moved her from bed to floor for sexual assault because that act made victim's "possibility of escape even more remote" and sexual assault was brief part of entire fifteen minute encounter); *State* v. *Hampton*, 293 Conn. 435, 463–64, 988 A.2d 167 (2009) (absence of *Salamon* instruction harmless because defendant drove victim around for approximately three hours before ordering her out of car, sexually assaulting her, and shooting her); *State* v. *Nelson*, 118 Conn. App. 831, 834–35, 861–62, 986 A.2d 311 (absence of *Salamon* instruction harmless because defendant repeatedly had assaulted victim in his apartment, demanding to know location of his money and threatening to kill him, and, afterward, restrained him for several hours while transporting him to several locations), cert. denied, 295 Conn. 911, 989 A.2d 1074 (2010).

Second, there is no risk that the petitioner faces a punishment that the law cannot impose upon him. See *Schriro* v. *Summerlin*, supra, 542 U.S. 352. Kidnapping in the first degree is a class A felony, for which a court may impose a term of imprisonment of "not less than ten years nor more than twenty-five years . . . ." General Statutes (Rev. to 2003) § 53a-35a (3); see also General Statutes § 53a-92 (b). *Salamon* had no impact on this sentencing scheme. As a result, the law clearly authorizes the petitioner's sentence of fifteen years and eight months imprisonment.

Third, and finally, we are mindful that the petitioner pleaded guilty pursuant to a negotiated plea agreement. Specifically, the petitioner agreed to plead guilty to kidnapping in the first degree and to being a felon in possession of a firearm in exchange for the certainty of concurrent sentences of fifteen years and eight months of imprisonment in the state and federal cases,

and the entry of a nolle prosequi on the remaining state charges. The petitioner has received precisely what he bargained for under the terms of that agreement. If *Salamon* is applied retroactively in the present case and the petitioner's conviction is vacated, however, the state will have lost the benefit of its bargain. We recognize that in many cases the state and society's interest in "finality must give way to the demands of liberty and a proper respect for the intent of the legislative branch." *Luurtsema II*, supra, 299 Conn. 766. Nevertheless, we cannot ignore the fact that, unlike in *Luurtsema II*, the state in the present case can plausibly be said to have relied to its detriment on our Supreme Court's prior interpretation of our kidnapping statutes when constructing the terms of the plea agreement. To authorize a term of fifteen years and eight months imprisonment, the petitioner could have pleaded guilty to kidnapping in the first degree, burglary in the first degree, robbery in the first degree, or another appropriate felony offense, e.g., conspiracy to commit one of the aforementioned felonies.[12] Had the state been prescient enough to foresee *Salamon* and thus selected a nonkidnapping offense as the basis for the guilty plea, *Salamon* would be irrelevant and the state would not be faced with the prospect of reconstructing and reprosecuting a fourteen year old case.

In light of these facts and circumstances, we fail to see how not applying *Salamon* retroactively in the

[12] Burglary in the first degree and robbery in the first degree are class B felonies, for which a court may generally impose a term of imprisonment of "not less than one year nor more than twenty years . . . ." General Statutes (Rev. to 2003) § 53a-35a (5); see also General Statutes §§ 53a-101 (c) and 53a-134 (b). If the petitioner were convicted under subsection (a) (1) of the burglary statute or subsection (a) (2) of the robbery statute, however, the court cannot impose a term of imprisonment of less than five years. General Statutes (Rev. to 2003) § 53a-35a (5). Conspiracy is a crime of "the same grade and degree as the most serious offense which . . . is an object of the conspiracy, except that . . . [a] conspiracy to commit a class A felony is a class B felony." General Statutes § 53a-51.

present case would be fundamentally unfair or manifestly unjust. "Plea bargains always entail risks for the parties—risks relating to what evidence would or would not have been admitted at trial, risks relating to how the jury would have assessed the evidence and risks relating to future developments in the law. The salient point is that a plea agreement allocates risk between the two parties as they see fit. If courts disturb the parties' allocation of risk in an agreement, they threaten to damage the parties' ability to ascertain their legal rights when they sit down at the bargaining table and, more problematically for criminal defendants, they threaten to reduce the likelihood that prosecutors will bargain away counts (as the prosecutors did here) with the knowledge that the agreement will be immune from challenge on appeal." *United States* v. *Bradley*, 400 F.3d 459, 464 (6th Cir.), cert. denied, 546 U.S. 862, 126 S. Ct. 145, 163 L. Ed. 2d 144 (2005); accord *United States* v. *Lockett*, 406 F.3d 207, 213 (3d Cir. 2005); see also *Young* v. *United States*, 124 F.3d 794, 798 (7th Cir. 1997) ("If the law allowed the defendant to get off scot free in the event the argument later is shown to be a winner, then the defendant could not get the reduction in the first place. Every plea would become a conditional plea, with the (unstated) condition that the defendant obtains the benefit of favorable legal developments, while the prosecutor is stuck with the original bargain no matter what happens later. That approach destroys the bargain, and the prospect of such an outcome will increase the original sentence." [Emphasis omitted.]), cert. denied, 524 U.S. 928, 118 S. Ct. 2324, 141 L. Ed. 2d 698 (1998).

In sum, we are not persuaded that the traditional rationales underlying the writ of habeas corpus favor full retroactive application of *Salamon* in the present case. There is no risk that the petitioner stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon

him. The state has also relied sufficiently to its detriment on our Supreme Court's prior interpretation of our kidnapping statutes when constructing the terms of the plea agreement such that applying *Salamon* retroactively in the present case would be inappropriate. Accordingly, the petitioner's due process claim, which is predicated on the retroactive application of *Salamon*, necessarily fails.

III

The petitioner's final claim is that because his guilty plea is invalid and his conviction must be vacated, he is once again entitled to a presumption of innocence and, therefore, he is actually innocent of kidnapping in the first degree. We decline to review the petitioner's claim.

"It is well settled that this court is not bound to consider any claimed error unless it appears on the record that the question was distinctly raised at trial and was ruled upon and decided by the court adversely to the appellant's claim. . . . It is equally well settled that a party cannot submit a case to the trial court on one theory and then seek a reversal in the reviewing court on another. . . . To review such a newly articulated claim, would amount to an ambuscade of the [habeas] judge." (Citation omitted; internal quotation marks omitted.) *Peeler* v. *Commissioner of Correction*, 170 Conn. App. 654, 677, 155 A.3d 772, cert. denied, 325 Conn. 901, 157 A.3d 1146 (2017).

In his second habeas petition and before the habeas court, the petitioner claimed that he was actually innocent of kidnapping in the first degree only because he "did not intend to prevent the victim's liberation for a longer period of time or to a greater degree than that which was necessary to commit a separate crime." In his petition for certification to appeal, the petitioner raised only a generic claim that the habeas court "erred

by failing to find that [he] was actually innocent of the crime of kidnapping." Because the petitioner's claim on appeal was never distinctly raised before the habeas court, it could not have been ruled on by the habeas court in a manner adverse to the petitioner. Accordingly, we decline to review this claim for the first time on appeal.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* WILLIAM B. THOMAS (AC 38193)

Alvord, Keller and Bishop, Js.

Syllabus

Convicted of the crimes of sexual assault in the first degree, unlawful restraint in the first degree and false statement in the second degree, the defendant appealed to this court. He claimed, inter alia, that the trial court violated his constitutional rights to confrontation and to present a defense when it ruled that the rape shield statute (§ 54-86f [a]) prohibited him from introducing certain evidence of the victim's prior sexual conduct with two other men, B, and the victim's former boyfriend, R, in the seventy-two hours preceding the alleged sexual assault by the defendant. *Held*:

1. The defendant could not prevail on his unpreserved claim that evidence of the victim's prior sexual conduct with B and R was admissible to impeach her credibility pursuant to certain exceptions to § 54-86f (a), which permit the admission of prior sexual conduct evidence when such evidence is offered by the defendant on the issue of the credibility of the victim, provided that the victim testified on direct examination as to his or her sexual conduct, and the evidence is otherwise so relevant and material to a critical issue in the case that excluding it would violate the defendant's constitutional rights: the defendant acknowledged that the victim never explicitly testified as to her sexual conduct with anyone other than the defendant, and in light of the fact that the victim did not testify, either explicitly or by reasonable inference, about her sexual conduct with anyone other than the defendant, the proffered evidence was not admissible for impeachment purposes under § 54-86f (a) (2), and, therefore, the defendant failed to demonstrate, pursuant to *State* v. *Golding* (213 Conn. 233), that the alleged constitutional violation existed or that it deprived him of a fair trial; moreover, impeaching the

victim's credibility with evidence of her prior sexual conduct, and with an inconsistent statement she had made to a hospital nurse, was not so relevant and material, pursuant to § 54-86f (a) (4), that its exclusion violated the defendant's constitutional rights, as the defendant had impeached the victim with regard to a number of other inconsistent statements she made such that impeachment with the inconsistent statement to the nurse would have been largely duplicative and of marginal value to further undermining the victim's credibility.

2. The record was inadequate to review the defendant's unpreserved claim that evidence of the victim's prior sexual conduct with B should have been admitted, pursuant to § 54-86f (a) (1), to show an alternative source for the scrapes and bruises on the victim's body after the sexual assault at issue, the record having been devoid of information probative of the location and nature of the victim's sexual encounter with B.

3. This court declined to review the defendant's unpreserved claim that he was improperly prohibited from inquiring and presenting evidence about the victim's relationship with B in order to show the victim's motive and bias to lie, which he claimed should have been admitted pursuant to the exception in § 54-86f (a) (4); the defendant likely could have inquired into whether the victim and B had a romantic relationship without implicating the prohibition in § 54-86f (a) of prior sexual conduct evidence, and because any sexual conduct between the victim and B may have been relevant, but was not essential, to that inquiry, the claim was not of constitutional magnitude for purposes of review pursuant to *Golding*.

4. Contrary to the defendant's claim, evidence of the victim's prior sexual conduct with B and R was not probative, pursuant to § 54-86f (a) (1), of whether her vaginal injuries could have been caused by anyone other than the defendant; there was no testimony about a purported makeshift panty liner that the defendant sought to introduce into evidence and it, thus, had no probative value, testimony from a hospital nurse that rough consensual sexual relations could cause vaginal injury was unhelpful to the defendant, who failed to proffer evidence that the victim had had a rough sexual encounter with B or R, the defendant's offer of proof as to the victim's alleged sexual intercourse with R was speculative and inadequate, and evidence that the victim had sexual relations with B in the hours preceding her intercourse with the defendant was not probative of whether someone other than the defendant caused her vaginal injuries.

5. The defendant could not prevail on his claim that the trial court abused its discretion by denying his motion for funds to pay for investigative services for his defense; because the statutes governing public defender services require the Public Defender Services Commission to authorize such expenditures when the commission determines, as a threshold matter, that such services are reasonably necessary to the defense, the trial court did not have the discretion to grant the request, and even if

it did, the defendant failed to make a proper showing that the funds for investigative services were reasonable and necessary to the defense.

6. The defendant's claim that he was denied his right to a fair trial as a result of the prosecutor's allegedly improper remarks during closing argument to the jury was unavailing; the prosecutor's remarks that defense counsel had conducted a "cutting" cross-examination of the victim and "did a great job of testifying," and certain other comments of the prosecutor, were not improper, as they did not amount to an attempt to demean or impugn the integrity of defense counsel, the prosecutor did not appeal to the jurors' emotions or to their sympathies for the victim, and did not refer to facts or documents that were not in evidence, and this court declined to review the defendant's claim that the prosecutor improperly vouched for the victim's credibility, that claim having been inadequately briefed.

Argued May 18—officially released October 17, 2017

Procedural History

Substitute information charging the defendant with the crimes of sexual assault in the first degree, unlawful restraint in the first degree and false statement in the second degree, brought to the Superior Court in the judicial district of Litchfield, where the court, *Ginocchio*, *J.*, denied the defendant's motions for costs related to the defense and to admit certain evidence; thereafter, the matter was tried to the jury; subsequently, the court denied the defendant's motion to open the evidence; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Philip M. Chabot, certified legal intern, with whom was *James B. Streeto*, senior assistant public defender, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom were *Dawn Gallo*, senior assistant state's attorney, and, on the brief, *David S. Shepack*, state's attorney, and for the appellee (state).

Opinion

KELLER, J. The defendant, William B. Thomas, appeals from the judgment of conviction, rendered after

a jury trial, of one count of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1), one count of unlawful restraint in the first degree in violation of General Statutes § 53a-95 (a), and one count of false statement in the second degree in violation of General Statutes (Rev. to 2011) § 53a-157b (a). On appeal, the defendant claims that (1) the trial court violated his constitutional rights to confrontation and to present a defense by excluding evidence of the victim's[1] prior sexual conduct under General Statutes § 54-86f,[2] commonly known as the rape shield statute; (2) the trial court violated his right to due process by denying his pretrial motion for costs to pay for investigative services necessary to his defense; and (3) the state's closing argument was improper and deprived him of a fair trial.[3] We disagree. Accordingly, we affirm the judgment of the court.

The jury reasonably could have found the following facts. The events in question took place on September 2, 2011, and into the early morning hours of September 3, 2011. The victim was nineteen years old at the time. In the early evening of September 2, the victim drove to a Burger King in Torrington. There she met with a friend, Garrett Gomez. Leaving her car at the Burger King, the victim and Gomez traveled in Gomez' car to his residence in Winsted. The victim then bought heroin from Gomez and used two bags worth.

The victim and Gomez next met with another friend, Mike Boyle, at a reservoir in Barkhamsted, where they

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

[2] We note that although § 54-86f has been amended since the events at issue here, that amendment is not relevant to this appeal. For convenience, we refer to the current revision of § 54-86f.

[3] At oral argument, the defendant withdrew his fourth claim, identified in his brief as, "The Trial Court Erred in Failing to Conduct an In Camera Review of Relevant Material for Cross-Examination."

spent time fishing. The victim also used more heroin there. The victim and Boyle then went to Boyle's house, where they ate dinner. At about this time, the victim drank alcohol as well.

At about midnight, Boyle drove the victim to Snapper Magee's, a bar in Torrington. While there, she drank more alcohol. The victim stayed at the bar until it closed. By that time, Boyle had left. The victim therefore needed a ride back to her car at the Burger King.

The defendant was also at Snapper Magee's that night, having walked there after his shift as a cook at a nearby restaurant. At closing time, the defendant was outside in front of the bar. The victim approached the defendant and asked for a ride. The defendant told her that he would help, and the pair walked to the bar's parking lot. The defendant did not have a car in the parking lot.

Once at the lot, between two parked cars, the victim performed oral sex on the defendant, and the defendant digitally penetrated her vagina. It is undisputed that these activities were consensual.

After the sexual encounter took place, the victim was still in need of a ride. At the defendant's direction, the victim and the defendant proceeded to walk down a nearby street. The victim asked the defendant how he would give her a ride. The defendant told her that a friend would do so.

The pair approached a white house where the defendant indicated that the friend was located. The defendant, however, with the victim still following, walked past the house and through an opening in a nearby chain-link fence. On the other side of the fence lay railroad tracks. With the pair standing on the tracks, the defendant began kissing the victim. He then began pushing her head down toward his genitals. With the

victim resisting, the defendant forced her head onto his penis. He then forced her down to the ground and, while straddling her, removed her clothes. The defendant penetrated her vagina, and then her anus, with his penis.

The victim was then able to get away. She grabbed some of her clothes and ran. At some point, she was able to put her shorts on. She continued running, topless, until she reached an entryway to a bank, where she sat, covering her chest with her knees. A bystander called the police, and the victim was transported to Charlotte Hungerford Hospital for treatment.

The defendant was charged with one count of sexual assault in the first degree in violation of § 53a-70 (a) (1), one count of unlawful restraint in the first degree in violation of § 53a-95 (a), and one count of false statement in the second degree in violation of § 53a-157b (a).[4] A three day trial commenced on October 16, 2013. The defendant did not testify. His attorneys argued during closing remarks that the intercourse on the railroad tracks, the conduct underlying the sexual assault and unlawful restraint charges, was consensual. On October 23, 2013, the jury returned a verdict of guilty on all three counts. The court thereafter rendered judgment imposing a total effective sentence of seven years imprisonment, followed by eight years of special parole, with lifetime registration as a sex offender. This appeal followed. Additional facts will be provided in the context of the defendant's claims.

[4] The charge of false statement in the second degree in violation of § 53a-157b (a) was based on representations that the defendant made in two statements to the Torrington police concerning the incident. Specifically, the state presented evidence that the defendant told the police that, after the sexual intercourse on the railroad tracks, the victim put on her bra, pants, and shirt. Evidence was presented at trial that the victim was running topless after the encounter on the railroad tracks, and the state also presented photographs showing the victim's bra lying on the tracks and her shirt lying on a street near the tracks.

I

The defendant first claims that the court violated his constitutional rights to confrontation and to present a defense, as guaranteed by the sixth and fourteenth amendments to the United States constitution, by excluding evidence of the victim's prior sexual conduct under § 54-86f. We disagree.

The following additional facts are relevant to this claim. Several weeks before trial, the defendant filed a "Motion for Evidentiary Hearing Pursuant to [§] 54-86f." In that motion, the defendant represented that the victim "admitted to having sexual relations with her then boyfriend in the hours prior to the alleged sexual relations with the defendant." Without further explanation, the defendant asserted that "[t]his evidence is clearly relevant to the defense of consent." He therefore requested an evidentiary hearing "regarding the admissibility of [the victim's] sexual conduct in the minutes and hours prior to the time when the defendant is accused of sexually assaulting her."

The parties presented oral argument on the motion prior to trial. During that hearing, the state acknowledged that the victim had indicated (in what was later identified as a written statement to the Torrington police) that she had had sexual relations with "another boyfriend" "prior to going out" on the evening in question.[5] The state also told the court that preliminary results of tests conducted on the victim's rape kit showed the presence of two DNA profiles, one from the defendant, the other from an unnamed depositor. The state questioned the relevance of this evidence.

At the hearing, the defendant argued that the victim's prior sexual intercourse with the boyfriend "goes to

[5] Later in the trial, the prosecutor specified that the victim "had apparently been seeing [this boyfriend] for a couple weeks, and she admits that they had had sexual intercourse, and in fact that [the boyfriend] had ejaculated."

[the victim's] credibility in terms of . . . this is a yes, this is a no type of a thing in terms of the consent." The defendant further argued that "[i]t goes to consent. It goes to [the victim's] pattern of practice in terms of what she was doing out that night. . . . It also goes to intoxication and possible alcohol use affecting her credibility."

The court denied the motion, concluding: "My inclination is, I'm not going to allow any testimony as to the other DNA sample. It goes to her sexual contact with a person that's not involved in this case."

The defendant filed another motion for an evidentiary hearing pursuant to § 54-86f two days before trial. In it, the defendant repeated the assertion that the victim had had sexual relations with the aforementioned boyfriend in the hours before the alleged sexual assault. The motion also added new information. It represented that, "[u]pon information and belief, [the victim] may also have engaged in sexual relations with *another man* within twenty-four (24) hours of having engaged in sexual relations with the aforementioned [boyfriend] and the defendant." (Emphasis added.) It then asserted that, when the victim was being treated at the hospital, a nurse, Cheryl Underwood, as part of the evaluation and evidence collection process, asked her whether she had had sexual relations with anyone other than the defendant in the seventy-two hours preceding the alleged sexual assault, and that she had answered no. The motion then added that the victim "acknowledged in her second written statement to the [Torrington police] that she had engaged in intercourse with at least one other person" on the evening of the incident at issue. Accordingly, the defendant argued that the victim's prior sexual conduct with the other individuals was "so relevant and material to the issue of credibility that to deny the defendant the right to introduce evidence

regarding this issue would severely prejudice the defendant and violate his right to a fair trial." (Emphasis omitted.)

The court heard oral argument on the motion on the first day of trial before the presentation of evidence. At that hearing, the defendant provided some additional information. The defendant explained that the "boyfriend" identified in the first motion (later identified as Boyle) was not in fact "dating" the victim, although the defendant still maintained that Boyle had sexual relations with her shortly before the alleged sexual assault. The "real" boyfriend, the defendant contended, was the individual identified in the second motion as having had sexual relations with the victim in the twenty-four hours before she had sexual relations with Boyle and the defendant. This individual was later identified by the state as an individual named Kevin Roberge. The defendant argued that "the reason why [the victim] didn't disclose [that she was with Roberge] is [because] the two of them had been arrested on a domestic incident two months earlier. We believe that there was a protective order in place with respect to [Roberge]; and the fact that these two were together earlier in the day, sexual conduct aside, we believe may have been in violation of the protective order." The defendant also added that the victim's prior sexual relations with Boyle and Roberge may help explain some of the injuries—scrapes and bruises—observed on her at the hospital and by the police after the alleged sexual assault, though he did not explain how.

The court denied the motion, but expressly did not preclude the defendant from questioning the victim about the cause of her injuries so long as the questions did not concern her sexual relations with anyone other than the defendant.

On the first day of trial, the state elicited the following testimony from the victim during its case-in-chief:

"[The Prosecutor]: Did you feel pain as a result of [the alleged sexual assault]?

"[The Victim]: Yes.

"[The Prosecutor]: Could you describe that for the jury?

"[The Victim]: Vaginally, I felt pain and—

"[The Prosecutor]: Were you on birth control at the time?

"[The Victim]: Yes.

"[The Prosecutor]: And as a result of that birth control, did you not have any menstrual bleeding?

"[The Victim]: No.

"[The Prosecutor]: So, that kept you from bleeding.

"[The Victim]: Yes.

"[The Prosecutor]: Did you have any bloody discharge as a result of this incident?

"[The Victim]: Yes.

"[The Prosecutor]: Vaginal discharge?

"[The Victim]: Yes."

When the state's direct examination of the victim concluded, the defendant addressed the court, in the absence of the jury, as follows: "[T]here was some questioning on direct examination regarding any bloody discharge as part of the vaginal examination. And there [were] questions posed regarding whether she was menstruating, and because of medications that's not occurring.

"Then there was a question regarding did the bloody discharge come from this incident. If I'm not allowed to question as to where else that bloody discharge may

have come from, the jury is now stuck with the impression that it had to come from here. There was a question—there were questions posed on direct that open the door as to the source of these injuries, her source of things that were found as part of the sexual assault examination that happened at the hospital. That bloody discharge could have come from other places. And going back to that question about whether there was any intercourse within a seventy-two hour period, that question is clearly—clearly asked for the purposes of determining other potential sources of evidence or injuries.

"And, Your Honor, I respectfully submit if we are foreclosed from this, I believe it directly affects my client's right to a fair trial. . . . I think the door has been opened here, and I believe that that is an area that we must be able to examine."

After further argument by the defendant and the state, the court concluded: "You can ask [the victim] if she had any injuries to her vaginal area on that date, but I'm not going to allow you to get into prior sexual conduct with anybody other than the defendant." On cross-examination, the defendant did not ask the victim whether she had any injuries to her vaginal area prior to the alleged sexual assault. The defendant later explained to the court why he did not pursue that line of inquiry: "I didn't because if her answer was no, I was stuck with that, I wasn't going to be allowed to cross-examine her about the fact that she did have intercourse with other people and there were other sources."

On the second day of trial, the stated rested its case. In his case-in-chief, the defendant first presented the testimony of Underwood, the nurse who had treated the victim at the hospital. At the defendant's request, the court also qualified Underwood to testify as an expert in the field of sexual assault examinations. The

defendant asked Underwood whether, in her examination of the victim, Underwood "note[d] any bloody discharge, vaginal discharge?" Underwood responded in the affirmative. During Underwood's testimony, the following exchange also occurred:

"[Defense Counsel]: In your training and experience, what are certain sources of such a discharge?

"[Underwood]: For a possible sexual assault from trauma.

"[Defense Counsel]: Now, what do you mean by, from trauma?

"[Underwood]: Forced penetration, um, use of objects.

"[Defense Counsel]: Rough sex? . . .

"[Underwood]: [Y]es, it could be as well.

"[Defense Counsel]: So, consensual rough sex may result in trauma, correct?

"[Underwood]: It could.

"[Defense Counsel]: Now, can a bloody discharge also be caused by menstruation?

"[Underwood]: Yes, it can.

"[Defense Counsel]: Can trauma also be caused by digital penetration?

"[Underwood]: Yes."

After Underwood's testimony, the defendant did not make another offer of proof seeking admission of evidence of the victim's prior sexual conduct.

The defendant later presented the direct testimony of Boyle. Boyle testified that he knew the victim from high school, and that, prior to the evening in question,

he had not seen her in "[p]robably over a year." He denied that he was dating her at the time of the incident.

Jury deliberations began on October 18, 2013. On October 23, 2013, with those deliberations ongoing, the defendant filed a motion with the court to open the evidentiary portion of the case. The court heard oral argument on the motion that day. In his argument, the defendant referred to a photograph taken by the Torrington police in connection with the investigation into the alleged sexual assault. The defendant asserted that the photograph depicted "a piece of paper with some stains on it" "folded in the shape of a makeshift panty liner." The defendant reasoned that, if that purported makeshift panty liner was used by the victim and then discarded at the railroad tracks, "that would tend to implicate that [the victim] is not credible regarding the source of the vaginal bleeding and would also bear directly on . . . the innocence of the defendant as to the crimes charged." The defendant stated that he would recall a Torrington police officer who testified in the case, as well as the victim, for questioning about the evidence. In response to questioning by the court, the defendant acknowledged that he had had the photograph "[a]t least thirty days before the trial, perhaps far earlier than that." The court denied the motion, but ordered that "[the] evidence be preserved, that it be brought into the courthouse, and it be put into an envelope and sealed for appellate purposes." Later on the same day, the jury returned its verdict.

Before proceeding to our analysis, we observe the following background on and legal principles related to this state's rape shield statute. Prior to the advent of rape shield laws in the 1970s, "[e]vidence of [a rape complainant's] previous sexual conduct was deemed relevant at common law on the issue of whether the . . . complainant had consented to sexual relations on

the occasion in question—a complete defense, if established, to a charge of forcible rape." (Footnotes omitted.) H. Galvin, "Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade," 70 Minn. L. Rev. 763, 766 (1986). Indeed, Wigmore wrote that "[t]he non-consent of the complainant is [in rape cases] a material element; and the character of the woman as to chastity is of considerable probative value in judging of the likelihood of that consent." 1A J. Wigmore, Evidence (Tillers Rev. 1983) § 62, pp. 1260–61.

Our legislature, by enacting § 54-86f, abrogated that common-law rule. It "has determined that, except in specific instances, and taking the defendant's constitutional rights into account, evidence of prior sexual conduct is to be excluded for policy purposes. Some of these policies include protecting the victim's sexual privacy and shielding her from undue [harassment], encouraging reports of sexual assault, and enabling the victim to testify in court with less fear of embarrassment. . . . Other policies promoted by the law include avoiding prejudice to the victim, jury confusion and waste of time on collateral matters." (Citation omitted.) *State* v. *Cassidy*, 3 Conn. App. 374, 379, 489 A.2d 386, cert. denied, 196 Conn. 803, 492 A.2d 1239 (1985).

Section 54-86f provides in relevant part: "(a) . . . [N]o evidence of the sexual conduct of the victim may be admissible unless such evidence is (1) offered by the defendant on the issue of whether the defendant was, with respect to the victim, the source of semen, disease, pregnancy or injury, or (2) offered by the defendant on the issue of credibility of the victim, provided the victim has testified on direct examination as to his or her sexual conduct, or (3) any evidence of sexual conduct with the defendant offered by the defendant on the issue of consent by the victim, when consent is raised as a defense by the defendant, or (4) otherwise so relevant and material to a critical issue in the case

that excluding it would violate the defendant's constitutional rights. . . ." Further, "[s]uch evidence shall be admissible only after an in camera hearing on a motion to offer such evidence containing an offer of proof. If the proceeding is a trial with a jury, such hearing shall be held in the absence of the jury. If, after a hearing, the court finds that the evidence meets the requirements of this section and that the probative value of the evidence outweighs its prejudicial effect on the victim, the court may grant the motion. . . ." General Statutes § 54-86f (a).

Our Supreme Court has set forth two requirements that must be met before a trial court may admit evidence of a victim's sexual conduct. First, the defendant must show that the evidence is "relevant." See, e.g., *State* v. *Shaw*, 312 Conn. 85, 104–106, 90 A.3d 936 (2014). Generally, " '[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence." Conn. Code Evid. § 4-1. Facts are "material" when they are "directly in issue or . . . probative of matters in issue." C. Tait & E. Prescott, Connecticut Evidence (5th Ed. 2014) § 4.1.3, p. 154.

With respect to evidence potentially falling under the rape shield statute, our Supreme Court has concluded that evidence offered "merely to demonstrate the unchaste character of the victim" is generally not relevant. (Internal quotation marks omitted.) *State* v. *Shaw*, supra, 312 Conn. 104. Rather, the evidence must be "relevant to establish some portion of the theory of defense or rebut some portion of the state's case . . . ." (Internal quotation marks omitted.) Id., 105.

In order to establish the relevance of prior sexual conduct evidence, the defendant must make an offer of proof to the court. Id., 105–106. "Offers of proof are

allegations by the attorney . . . in which he represents to the court that he could prove them if granted an evidentiary hearing." (Internal quotation marks omitted.) Id., 105 n.13. In the context of the rape shield statute, "[a] clear statement of the defendant's theory of relevance is all important in determining whether the evidence is offered for a permissible purpose." *State* v. *Sullivan*, 244 Conn. 640, 647, 712 A.2d 919 (1998).

If the court determines that the proffered evidence is relevant, it then proceeds to the next step of the process by conducting an evidentiary hearing out of the presence of the jury. *State* v. *Shaw*, supra, 312 Conn. 105–106 and 106 n.13; see also General Statutes § 54-86f (a). If, after the evidentiary hearing, "the court finds that the evidence meets the requirements of [§ 54-86f (a)] and that the probative value of the evidence outweighs its prejudicial effect on the victim, the court may grant the motion." *State* v. *Shaw*, supra, 104.

When a trial court improperly excludes evidence in a criminal matter, the defendant's constitutional rights may be implicated. "It is fundamental that the defendant's rights to confront the witnesses against him and to present a defense are guaranteed by the sixth amendment to the United States constitution. . . . In plain terms, the defendant's right to present a defense is the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies. . . . The right of confrontation is the right of an accused in a criminal prosecution to confront the witnesses against him. . . . The primary interest secured by confrontation is the right to cross-examination . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Wright*, 320 Conn. 781, 816–17, 135 A.3d 1 (2016).

Nevertheless, "[i]t is well established that a trial court has broad discretion in ruling on evidentiary matters,

including matters related to relevancy. . . . Accordingly, the trial court's ruling is entitled to every reasonable presumption in its favor . . . and we will disturb the ruling only if the defendant can demonstrate a clear abuse of the court's discretion." (Internal quotation marks omitted.) *State* v. *Shaw*, supra, 312 Conn. 101–102. Further, "[w]e have emphasized in numerous decisions . . . that the confrontation clause does not give the defendant the right to engage in unrestricted cross-examination. . . . A defendant may elicit only relevant evidence through cross-examination. . . . The court determines whether the evidence sought on cross-examination is relevant by determining whether that evidence renders the existence of [other facts] either certain or more probable." (Internal quotation marks omitted.) *State* v. *Crespo*, 303 Conn. 589, 610–11, 35 A.3d 243 (2012).

We now turn to our analysis of the defendant's claim. As previously mentioned, he claims that the court violated his constitutional rights to confrontation and to present a defense by excluding evidence of the victim's prior sexual conduct under the rape shield statute. In support of this claim, the defendant advances several theories of admissibility. To the extent that his claim of error under a particular theory of admissibility was not preserved, the defendant seeks review under *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989). Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable

doubt. In the absence of any one of these conditions, the defendant's claim will fail. The appellate tribunal is free, therefore, to respond to the defendant's claim by focusing on whichever condition is most relevant in the particular circumstances." (Emphasis in original; footnote omitted.) Id., 239–40; see *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015) (modifying *Golding*'s third prong). We analyze each of the defendant's theories of admissibility in the following subparts.

A

We first address the defendant's argument that evidence of the victim's prior sexual conduct with Boyle and, purportedly, also with Roberge, was admissible to impeach her credibility under the second and fourth exceptions to the rape shield statute. Those exceptions permit the admission of prior sexual conduct evidence when such evidence is "offered by the defendant on the issue of credibility of the victim, provided the victim has testified on direct examination as to his or her sexual conduct"; General Statutes § 54-86f (a) (2); and "otherwise so relevant and material to a critical issue in the case that excluding it would violate the defendant's constitutional rights. . . ." General Statutes § 54-86f (a) (4).

We first discuss the defendant's § 54-86f (a) (2) argument. We emphasize that, in order to have evidence admitted under this exception to the rape shield statute, the victim must first have "testified on direct examination as to his or her sexual conduct . . . ." General Statutes § 54-86f (a) (2); see also *State* v. *Njoku*, 163 Conn. App. 134, 154, 133 A.3d 906, cert. denied, 321 Conn. 912, 136 A.3d 644 (2016). The defendant acknowledges that the victim never explicitly testified as to her sexual conduct with anyone other than the defendant, but nevertheless contends that she *indirectly* testified about it because "she did state, with certainty, that the

source of [her] bloody discharge was caused by the defendant," and "this statement can be interpreted to mean that she only had [sexual relations] with one person that day . . . ."

As an initial matter, we observe that the defendant did not distinctly raise this argument, either as an evidentiary or a constitutional matter, before the trial court. Although, following the victim's direct testimony in which she indicated that the defendant caused her vaginal injuries, the defendant sought to have evidence of her prior sexual conduct admitted in order to attempt to show an alternative source for those injuries, the defendant did not argue that the victim's testimony concerning the injuries amounted to an assertion that she had sexual relations with only one person during the twenty-four hours preceding the incident. "Ordinarily, we will not consider a theory of relevance that was not raised before the trial court. . . . The defendant, however, does not bring a purely evidentiary claim, but claims that the exclusion of the evidence deprived him of his right to confrontation and his right to present a defense." (Citation omitted.) *State* v. *Adorno*, 121 Conn. App. 534, 548 n.4, 996 A.2d 746, cert. denied, 297 Conn. 929, 998 A.2d 1196 (2010). The defendant must therefore satisfy the requirements of *State* v. *Golding*, supra, 213 Conn. 239–40, in order to prevail on this argument. See *State* v. *Adorno*, supra, 548 n.4 (proceeding to *Golding* analysis on unpreserved evidentiary claim).

We conclude that the claim fails to satisfy *Golding*'s third prong—that is, that "the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial . . . ." *State* v. *Golding*, supra, 213 Conn. 240. We do not dispute that, in certain cases, even if a sexual assault victim's direct testimony does not explicitly refer to "sexual conduct," inferences that can be drawn from such testimony could open the door to the

admission of prior sexual conduct evidence under § 54-86f (a) (2). Cf. *State* v. *Shaw*, supra, 312 Conn. 107 ("[§] 54-86f encompasses inferential as well as direct evidence of sexual conduct" [internal quotation marks omitted]). But that is not the case here. The victim's testimony that the alleged sexual assault caused her vaginal trauma is not remotely akin to stating that she, in the defendant's words, "only had [sexual relations] with one person that day . . . ." In light of the fact that the victim did not testify, either explicitly or by reasonable inference, about her sexual conduct with anyone other than the defendant, the proffered evidence was not admissible for impeachment purposes under § 54-86f (a) (2). Accordingly, we are not persuaded on the basis of this argument that the alleged constitutional violation exists or that it deprived the defendant of a fair trial.

We next discuss the defendant's argument that evidence of the victim's prior sexual conduct was admissible under the fourth exception to the rape shield statute because impeaching the victim's credibility on that subject was "so relevant and material to a critical issue in the case that excluding it would violate the defendant's constitutional rights. . . ." General Statutes § 54-86f (a) (4). More specifically, the defendant argues that, in light of the fact that the victim had sexual relations with Boyle and, possibly, Roberge, in the seventy-two hours preceding the incident, he should have been permitted to impeach the victim's credibility by presenting both evidence that she had sexual relations with those individuals as well as her statement to Underwood in which she denied having sexual relations with anyone other than the defendant in the three days preceding the alleged sexual assault.[6] The defendant contends that

[6] How precisely the defendant would have presented that evidence to comply with our rules of evidence concerning impeachment of witnesses; see Conn. Code. Evid. § 6-10; is unclear.

this is particularly true because "statements to medical providers are extremely reliable," and anything bearing on the victim's credibility in this "he said, she said" case would necessarily be significant.

As previously mentioned, in his second pretrial motion for an evidentiary hearing pursuant to § 54-86f, the defendant made a similar argument based in part on the fourth exception to the rape shield statute and the sixth amendment to the United States constitution. The court denied that motion. On appeal, however, the defendant relies in part on events in the trial that occurred *after* the court's denial (and which, therefore, the court was necessarily unaware of when it made its ruling) to support his argument that the proffered evidence was admissible under § 54-86f (a) (4) to impeach the victim's credibility. We therefore consider the present constitutional claim to be unpreserved because it is based on a theory of admissibility that was not raised at trial. Accordingly, we review it under *State* v. *Golding*, supra, 213 Conn. 233; see also *State* v. *Adorno*, supra, 121 Conn. App. 548 n.4.

As with the previous argument, we are not persuaded that "the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial . . . ." *State* v. *Golding*, supra, 213 Conn. 240. "In determining whether the cross-examination of [the victim] was unduly restricted it is the *entire* cross-examination which we must examine. . . . [W]e consider the nature of the excluded inquiry, whether the field of inquiry was adequately covered by other questions that were allowed, and the overall quality of the cross-examination viewed in relation to the issues actually litigated at trial." (Citation omitted; internal quotation marks omitted.) *State* v. *Crespo*, supra, 303 Conn. 612. At trial, the defendant impeached the victim with regard to a number of other inconsistent statements that she had made to the police and hospital staff in connection with

the incident.[7] In light of this, impeaching the victim by introducing evidence of the inconsistent statement to Underwood would have been largely duplicative, and therefore of marginal value to further undermining her credibility. We also fail to see how impeaching the victim with regard to her statement to Underwood would be significant apart from its tendency to contradict the victim—it was, of course, the *defendant's* conduct that was at issue in the case. Accordingly, we are not persuaded that the alleged constitutional violation exists or that it deprived the defendant of a fair trial. See *State* v. *Golding*, supra, 240.

B

We next address the defendant's argument that evidence of the victim's prior sexual conduct should have been admitted under § 54-86f (a) (1) in order to show an alternative source for the scrapes and bruises that were observed on the victim's body after the alleged sexual assault. Specifically, the defendant argues: "Because defense counsel was prohibited from inquiring about the previous encounter with Boyle, it is unknown if [the victim] had [sexual relations] with Boyle at the [reservoir] where they were fishing . . .

[7] During cross-examination, the victim admitted that she had, in statements to the police and hospital staff, fabricated several events preceding the sexual assault in part so that she, Gomez, Boyle, and the bar would not be implicated in any of her activities involving heroin or underage drinking. She testified on cross-examination that she had told both the police and hospital staff that a man she met at Burger King had given her alcohol, and that that man had sexually assaulted her. (As previously mentioned, the state presented evidence to support a finding that the victim had actually met the defendant at the bar, and there was no indication that he had given her alcohol.) The victim also admitted on cross-examination that she had lied to hospital staff by denying drug use, and that she had neglected to tell the police about the consensual sexual encounter between her and the defendant in the bar's parking lot. The defendant cross-examined the victim with regard to several other inconsistencies as well. After reviewing the record, we are, therefore, persuaded that the defendant was able to thoroughly cross-examine the victim and impeach her credibility.

or at his home. If [the victim] had [sexual relations] with [Boyle] at the [reservoir], the scrapes and minor injuries on [her] body could also have easily come from such an encounter." (Citation omitted.) We decline to review the merits of this argument.

The following facts are relevant to this issue. As alluded to previously, the victim testified that she went to the Barkhamsted reservoir with Boyle and Gomez after going to Gomez' house. She testified that they spent time fishing there and that she used heroin there as well. The victim also testified that, after leaving the reservoir, but before going to Snapper Magee's, she went to Boyle's house and ate dinner there. During oral argument before the court on his first pretrial motion for an evidentiary hearing pursuant to § 54-86f, the defendant asserted, and the state acknowledged, that in a written statement to the police (not admitted into evidence), the victim disclosed that she and a "boyfriend" (later identified as Boyle) had sexual relations on the day of the alleged sexual assault. At trial, the state entered into evidence photographs taken just after the alleged sexual assault showing scrapes and bruises on different parts of the victim's body.

The defendant did not distinctly raise the present argument, either as an evidentiary or a constitutional matter, at trial. Although, at one point, he baldly asserted that the victim's prior sexual conduct with Boyle and, purportedly, Roberge, may help explain some of the bruises and scrapes shown in the photographs, he never suggested that a sexual encounter involving the victim took place *at the reservoir*. The defendant must therefore satisfy the requirements of *State* v. *Golding*, supra, 213 Conn. 239–40, in order to prevail on this argument.

Of course, had it actually been established that the victim and Boyle had sexual relations *at the reservoir*,

that evidence might have been probative of the provenance of the victim's nonvaginal injuries. As it happens, though, the record discloses only two things relating to this issue: (1) that the victim and Boyle had sexual intercourse, and (2) that at some point on the day they had sexual intercourse, they visited the reservoir.

We conclude that the record is not adequate to review this particular argument. See id., 239. It is well recognized that "[w]hen the constitutional claim is one that is especially fact dependent . . . the failure to preserve the claim before the trial court often results in an inadequate factual record for review, thus leading to the claim's failure on the merits." *State* v. *Elson*, 311 Conn. 726, 750–51, 91 A.3d 862 (2014). The record is devoid of any information probative of the location and nature of the sexual encounter with Boyle—as far as the record discloses, it appears equally likely that the sexual encounter occurred at Boyle's house (where the two had dinner) or at some other location, rather than at the reservoir. Accordingly, this argument fails under the first prong of *State* v. *Golding*, supra, 213 Conn. 239; we therefore decline to reach its merits.

C

We next address the defendant's argument that he was improperly "prohibited from inquiring about [the victim's] relationship with Boyle, both emotion[al] and physical, to show motive and a bias to lie about the sexual assault." The defendant argues that this evidence should have been admitted under the fourth exception to the rape shield statute. See General Statutes § 54-86f (a) ("no evidence of the sexual conduct of the victim may be admissible unless such evidence is . . . (4) otherwise so relevant and material to a critical issue in the case that excluding it would violate the defendant's constitutional rights"). We decline to review the merits of this argument.

The defendant did not raise this particular argument at trial in either its evidentiary or constitutional form. In fact, one of the defendant's theories at trial was that Boyle was *not* the victim's boyfriend—rather, the defendant insisted that Roberge was. Although the defendant suggested to the court that the victim's motive for "lying" to the police about Roberge (how exactly the victim "lied" in this context is unclear) was somehow relevant to the case, he never argued that the victim's relationship with *Boyle* provided a motive to fabricate the alleged sexual assault by the defendant.[8] The defendant must therefore satisfy the requirements of *State* v. *Golding*, supra, 213 Conn. 239–40, in order to prevail on this argument.

On appeal, the defendant argues that the court improperly "disallowed the introduction of [the victim's] relationship with Boyle, both physical and emotional, to [support] the defendant's theory that this accusation was fabricated to hide the consensual encounter with the defendant from Boyle, her then boyfriend." We observe, however, that the defendant was not necessarily prohibited from inquiring into whether the victim and Boyle were "boyfriend and girlfriend" or had some other romantic relationship. Section 54-86f (a) pertains, after all, only to the "*sexual conduct* of the victim . . . ." (Emphasis added.) What the defendant appears to be arguing, essentially, is that the victim liked Boyle romantically, Boyle somehow became aware of her consensual intercourse with the defendant, and then, in an attempt to salvage her romantic

[8] For the first time, in his reply brief, the defendant appears to argue that evidence concerning the victim's relationship with *Roberge* should have been admitted (presumably under the fourth exception to the rape shield statute) to show a motive for the victim to fabricate the sexual assault. "It is a well established principle that arguments cannot be raised for the first time in a reply brief." (Internal quotation marks omitted.) *State* v. *Garvin*, 242 Conn. 296, 312, 699 A.2d 921 (1997). Accordingly, we decline to review the merits of this argument.

relationship with Boyle, the victim fabricated the sexual assault charge against the defendant.[9] The defendant suggests that the victim's having sexual relations with Boyle earlier in the day would be a critical piece of evidence in supporting, or would at least tend to support, this argument. We conclude that this claim is not "of constitutional magnitude alleging the violation of a fundamental right . . . ." *State* v. *Golding*, supra, 213 Conn. 239–40. As stated previously, the defendant could likely have inquired into whether the victim and Boyle had a romantic relationship without implicating the rape shield statute's general prohibition on "sexual conduct" evidence. General Statutes § 54-86f (a). Any sexual conduct between the victim and Boyle may have been relevant, but it was certainly not essential, to this inquiry. "[O]nce identified, unpreserved evidentiary claims masquerading as constitutional claims will be summarily dismissed." *State* v. *Golding*, supra, 241. Accordingly, we decline to review the merits of this argument.

D

Finally, we address the defendant's argument that the court should have admitted evidence of the victim's prior sexual conduct with Boyle and, purportedly, also with Roberge, in order to show an alternative cause of the victim's vaginal injuries. The defendant contends that that evidence was admissible under the first exception to the rape shield statute. Under that exception, "no evidence of the sexual conduct of the victim may be admissible unless such evidence is (1) offered by the defendant on the issue of whether the defendant was, with respect to the victim, the source of semen, disease, pregnancy or injury . . . ." General Statutes

[9] This argument poses its own problems for the defendant because, according to the victim's testimony, Boyle left Snapper Magee's *before* the victim's first interaction with the defendant.

§ 54-86f (a) (1). In the alternative, the defendant argues that such evidence was admissible because the state "opened the door to it."

The following facts are relevant to this argument. As previously mentioned, the victim testified on direct examination during the state's case-in-chief that she had vaginal pain and bloody vaginal discharge as a result of the alleged sexual assault by the defendant. Before cross-examining the victim, the defendant, in the absence of the jury, requested that he be permitted to ask her about her prior sexual conduct on the ground that it was probative of the cause of her vaginal injuries. The court denied that request. On appeal, the defendant's argument relies not only on those facts known to the court at the time that it considered and denied the defendant's request, but also on evidence introduced subsequently. Thus, the particular theory of admissibility that the defendant advances on appeal is different from that considered by the court at trial and, therefore, is unpreserved. Accordingly, we review it under *State* v. *Golding*, supra, 213 Conn. 239–40; see also *State* v. *Adorno*, supra, 121 Conn. App. 548 n.4.

Because we find that the evidence as proffered by the defendant was not relevant to the issue of whether someone else caused the victim's vaginal injuries, the defendant has failed to demonstrate that the alleged constitutional violation exists or that it deprived him of a fair trial. See *State* v. *Golding*, supra, 213 Conn. 240. As previously set forth, " '[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence." Conn. Code Evid. § 4-1. "Although the standard for relevancy is quite low, it is often applied with some rigor." C. Tait & E. Prescott, supra, § 4.1.4, p. 155. "Evidence is irrelevant or too

remote if there is such a want of open and visible connection between the evidentiary and principal facts that, all things considered, the former is not worthy or safe to be admitted in the proof of the latter." (Internal quotation marks omitted.) *State* v. *Bell*, 113 Conn. App. 25, 44–45, 964 A.2d 568, cert. denied, 291 Conn. 914, 969 A.2d 175 (2009). "The determination of relevance must be made according to reason and judicial experience." (Internal quotation marks omitted.) *State* v. *Shehadeh*, 52 Conn. App. 46, 51, 725 A.2d 394 (1999).

To recap, the defendant represented at trial that there was evidence of the following: (1) that the victim and Boyle had sexual intercourse in the hours leading up to the alleged sexual assault; and (2) that the victim and Roberge "may" have had sexual relations in the twenty-four hours before the incident. We also know that the defendant attempted to open the evidence in order to introduce a purported makeshift "panty liner" with "stains" on it (the proposed inference being that it was the victim's, and that it showed that she had bloody vaginal discharge *before* the sexual intercourse with the defendant on the railroad tracks). We also know from the victim's testimony that the defendant digitally penetrated her vagina (with her consent) in the bar's parking lot, and that penile-vaginal and penile-anal intercourse occurred between them on the railroad tracks. Finally, the defendant also introduced expert testimony from Underwood in which she stated that "rough" consensual sexual relations can cause vaginal trauma.

In our view, the preceding evidence is not probative of whether the victim's vaginal injuries could have been caused by anyone other than the defendant. We note first that, for purposes of appellate review, the purported makeshift panty liner has no probative value. As previously mentioned, the defendant sought to introduce this item after the evidentiary portion of the trial.

No testimony was heard concerning it, nor, to our knowledge, was any testing performed on it. We therefore do not know whether (1) the item actually *was* used as a panty liner; (2) if it was, whether the substance on it was blood; and (3) if it both was used as a panty liner *and* was determined to have blood on it, whether it was the victim's blood. "[I]t is well established that this court does not make findings of fact." *Clougherty* v. *Clougherty*, 162 Conn. App. 857, 865–66 n.3, 133 A.3d 886, cert. denied, 320 Conn. 932, 136 A.3d 642 (2016). Accordingly, the alleged makeshift panty liner plays no role in our analysis.

Second, the fact that Underwood testified that "rough" consensual sexual relations can cause vaginal injury is unhelpful to the defendant because he proffered no evidence that the victim and Boyle or the victim and Roberge in fact *had* a "rough" sexual encounter. The defendant appears to suggest on appeal that heroin use is somehow associated with an increased likelihood of having a "rough" sexual encounter, but he provided no evidence in support of that proposition at trial. Thus, he does not draw our attention to any such evidence in the present appeal.

Third, the defendant's offer of proof with respect to the victim's sexual conduct with Roberge (if any) was inadequate. "[A]n offer of proof should contain specific evidence rather than vague assertions and sheer speculation. . . . The offer of proof may be made in the absence of the jury by the testimony of a witness or by a good faith representation by counsel of what the witness would say if questioned." (Citations omitted; internal quotation marks omitted.) *State* v. *Shaw*, supra, 312 Conn. 106 n.13. The defendant's offer of proof with respect to the victim's possible sexual intercourse with Roberge was merely speculative. At trial, the defendant stated that the victim "may" have had sexual intercourse with Roberge in the twenty-four hours preceding

the alleged sexual assault. The defendant did not specify which witness would testify as to the possible sexual intercourse between them, nor did the defendant provide the expected substance of that testimony. Absent any such information, the defendant's proposed inquiry appears to have been nothing more than a fishing expedition. See *State* v. *Martinez*, 106 Conn. App. 517, 544, 942 A.2d 1043 (2008) (*Bishop*, *J.*, dissenting) (The defendant's offer of proof that was made in order to pierce the rape shield statute was inadequate because he "never offered any specific evidence, but rather made reference to two arrest warrant applications containing double and triple hearsay statements without providing the court any basis on which these arrest warrant applications could be made admissible, and he made a vague reference to the possibility of calling some unnamed witnesses with no indication of what any of them would state under oath. . . . [I]t appears from the record that counsel simply wanted to use some of the allegations set forth in the arrest warrant applications as fodder for cross-examination of the victim."), rev'd, 295 Conn. 758, 991 A.2d 1086 (2010). Accordingly, the court was not bound to assume, as part of the defendant's offer of proof, that the victim and Roberge actually had engaged in sexual intercourse.

We are thus left with the fact that the victim had sexual relations with Boyle, which, as previously noted, the state did not dispute. In our view, the fact that the victim had intercourse with another individual in the hours preceding the two instances of intercourse with the defendant is not, without more, probative of whether someone other than the defendant caused the victim's vaginal injuries. See generally *State* v. *Green*, 55 Conn. App. 706, 712, 740 A.2d 450 (1999) ("[T]he defendant presented no evidence whatsoever to support his contention that [vaginal scratches sustained by the victim] could have been caused by consensual

intercourse. . . . [T]he defendant's assertion, without an offer of medical proof that consensual intercourse could cause vaginal scratches . . . is speculative, not probative. . . . The court properly excluded the evidence as irrelevant."), cert. denied, 252 Conn. 920, 744 A.2d 438, cert. denied, 529 U.S. 1136, 120 S. Ct. 2019, 146 L. Ed. 2d 966 (2000); see also *State* v. *Siering*, 35 Conn. App. 173, 177–78, 644 A.2d 958 ("[The defendant] proffered no evidence establishing that, despite her testimony to the contrary, the victim had been injured prior to her encounter with him. Furthermore, he proffered no evidence as to how consensual sexual contact would have caused injuries of the type suffered by the victim; nor did he show how his proffered evidence would tend to demonstrate that he was not the source of the victim's injuries."), cert. denied, 231 Conn. 914, 648 A.2d 158 (1994). In the present case, the defendant did not proffer any evidence that the sexual intercourse that the victim and Boyle engaged in was of a type likely to cause vaginal injury. The defendant could have questioned Underwood about the likelihood that consensual "nonrough" sexual relations would cause bloody vaginal discharge and then incorporated the answer, if favorable to the defendant, into another offer of proof seeking admission of the prior sexual conduct evidence, but the defendant did not do so. See generally *State* v. *Franko*, 199 Conn. 481, 487, 508 A.2d 22 (1986) ("[The trial court] permitted the defendant to conduct a lengthy cross-examination of the treating physician in an attempt to establish the necessary causative link between the victim's prior sexual status and the injuries she received. Nevertheless, despite these multiple opportunities, the defendant totally failed to establish such a link."). Thus, because "the preclusion of irrelevant evidence does not infringe on a defendant's right to confrontation or his right to present a defense"; *State* v. *Adorno*, supra, 121 Conn. App. 548 n.4; we are not

persuaded that the alleged constitutional violation exists or that it deprived the defendant of a fair trial.[10] See *State* v. *Golding*, supra, 213 Conn. 240.

As a final matter, we address the defendant's argument that *State* v. *Shaw*, supra, 312 Conn. 85, is determinative of the present case. In *Shaw*, the defendant was convicted of, inter alia, sexual assault for having vaginal intercourse with his partner's eleven year old daughter. Id., 89. Immediately after the sexual assault, the daughter was evaluated at a hospital. Id., 90. At the defendant's trial, the physician who examined the daughter testified that, at the time of her admittance, the daughter had vaginal tears that had been sustained within the previous seventy-two hours. Id., 92. The defendant sought to introduce evidence that, three days before the alleged sexual assault, the daughter had had sexual intercourse with her fifteen year old brother. Id. The defendant argued that such evidence was relevant and admissible under, inter alia, § 54-86f (a) (1) in order to show that he was not the source of the vaginal injuries. Id., 92–93. The trial court excluded the evidence. Id., 99. On appeal, our Supreme Court concluded that the proffered evidence was relevant and admissible under, inter alia, § 54-86f (a) (1) in order to show an alternative source for the daughter's vaginal injuries. Id., 106–109. *Shaw*, however, is distinguishable from the present case because common sense dictates that there is a greater likelihood that vaginal penetration of an eleven year old child would lead to the vaginal injury that occurred in that case. Without more information, we cannot say

[10] For the same reasons, we reject the defendant's argument that the proffered evidence should have been allowed in because the state "opened the door to" it. Additionally, to the extent that the defendant argues that the proffered evidence should have been admitted under § 54-86f (a) (4) in order to show an alternative source for the victim's vaginal injuries, the foregoing analysis in the body of this opinion disposes of this argument as well.

the same when the case involves an adult woman. Accordingly, *Shaw* is not on point.

For all of the foregoing reasons, we must reject the defendant's claim.

II

The defendant's second claim is that the court violated his right to due process by denying his pretrial motion for costs to pay for investigative services necessary to his defense. We disagree.

The following additional facts are relevant to this claim. On September 19, 2013, several weeks before trial, the defendant filed a "Motion for Costs Related to Defense." In it, the defendant represented that he was indigent. He stated that he had been incarcerated for more than one year, had been without employment or income for more than fourteen months, and "had no real assets" on the date of his incarceration.

The motion further stated that the defendant "seeks to hire an investigator to assist in the trial preparation. The defendant will need to subpoena witnesses to trial and will therefore require the services of a state marshal or process server. Finally, the defendant expects to incur costs for the trial or hearing transcripts, which will be needed for ongoing trial preparation throughout the trial." The defendant asserted that "[t]he aforementioned costs/services are essential for the undersigned to adequately prepare for trial."

In his motion, the defendant relied principally on *Ake* v. *Oklahoma*, 470 U.S. 68, 83, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985), in which the United States Supreme Court held that "when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the [s]tate must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist

in evaluation, preparation, and presentation of the defense." In the present case, the defendant's motion was accompanied by an affidavit of indigency. In it, the defendant listed assets of zero and liabilities of $10,270. On appeal, the defendant represents that $10,000 of those liabilities represents money loaned by the defendant's mother to pay for his trial counsel's retainer.

The court heard argument on the motion that same day. At the hearing, defense counsel clarified that the request was for investigative fees related to "witnesses in the bar that evening." Counsel stated that "[t]here [were] a number of people in the bar [on the evening of the alleged sexual assault], probably five, six, bartender, et cetera, give or take . . . ." Counsel stated that "what we're looking for is some assistance in covering these costs, as [the defendant] is indigent, with respect to an investigator for use and preparation for trial, service of subpoenas, et cetera." In response to questioning by the court, defense counsel stated that the attorneys representing the defendant in this matter were acting as private counsel, and that the defendant's mother paid them a retainer fourteen months earlier.

The court ruled as follows: "Your client filed a speedy trial motion. Conceivably, this trial could have started today. So, if I have to make a finding that these witnesses are absolutely necessary for your defense—the fact that he's filed a speedy trial motion and the fact that this trial could have started today with witnesses being presented almost negates the necessity of this investigation. So, I'm going to make a finding that there really hasn't—I'm not convinced he's indigent, he's hired private counsel through his family, there are resources there, and I'm not convinced that these witnesses are an absolute necessity. So, based on the *Ake* [v. *Oklahoma*, supra, 470 U.S. 68] decision, I have to make those two findings. I'm not in a position to make

those today. I'm denying your request for any funds to be supplied to defense counsel on behalf of their client."

The defendant argues that this court should review the trial court's ruling for an abuse of discretion and that because the court abused its discretion by denying the preceding motion, it violated his right to due process. See *State* v. *Clemons*, 168 Conn. 395, 404, 363 A.2d 33 ("[w]e cannot find . . . that the defendant's request [for an expert witness funded by the state] was reasonable and necessary under the circumstances and thus we cannot find that the court abused its discretion in denying the motion"), cert. denied, 423 U.S. 855, 96 S. Ct. 104, 46 L. Ed. 2d 80 (1975). We are not persuaded.

Analysis of the defendant's claim is governed by our Supreme Court's recent decision in *State* v. *Wang*, 312 Conn. 222, 92 A.3d 220 (2014). In *Wang*, our Supreme Court, addressing four reserved questions of law from the trial court; see General Statutes § 52-235; concluded in part that "due process, as guaranteed under the fourteenth amendment to the United States constitution, requires the state to provide an indigent self-represented criminal defendant with expert or investigative assistance when he makes a threshold showing that such assistance is reasonably necessary for the preparation and presentation of his defense." *State* v. *Wang*, supra, 245. It further concluded that "the statutes governing public defender services require the [Public Defender Services Commission (commission)] to authorize public expenditures, to be paid from the commission's budget, for expert or investigative services for indigent self-represented defendants when the commission determines, as a threshold matter, that such services are reasonably necessary to the defense." Id., 264–65. The court also determined that "the trial court does not retain discretion to authorize" such expenditures. Id., 264.

The defendant has failed to demonstrate that the court abused its discretion by denying his request for funds because, pursuant to *Wang*, the court lacked the discretion to grant the request. See id.

Moreover, even if we were to review the court's ruling for an abuse of discretion; see *State* v. *Clemons*, supra, 168 Conn. 401–404 (our Supreme Court assumed, without deciding, that the trial court was the appropriate entity to grant or deny such requests); the record before us does not support the defendant's claim. The defendant failed to make a proper showing that the funds for investigative services were "reasonable and necessary" to the defense. Id., 404; see also *State* v. *Wang*, supra, 312 Conn. 245 (defendant must make "threshold showing that such assistance is reasonably necessary for the preparation and presentation of his defense"). As the court in the present case observed, the fact that the defendant filed a speedy trial motion, pursuant to which trial could have already begun by the time the defendant filed the motion for costs, militates against a finding that such funds were necessary to the defense. The primary rationale advanced by the defendant—that the defense needed to interview individuals who were present in the bar on the night of the alleged sexual assault—is not in and of itself a sufficient rationale.

Additionally, we observe that, before this court, the defendant merely speculates, but has failed to demonstrate, that the funds sought likely would have yielded evidence favorable to the defense or that the court's ruling left him financially unable to employ a constitutionally sufficient defense. Such speculation is insufficient to demonstrate the existence of reversible error. For all of the foregoing reasons, this claim fails.

III

The defendant's final claim is that the state's closing argument was improper and deprived him of a fair trial. We disagree.

"Our jurisprudence concerning prosecutorial impropriety during closing argument is well established. [I]n analyzing claims of prosecutorial [impropriety], we engage in a two step analytical process. The two steps are separate and distinct: (1) whether [impropriety] occurred in the first instance; and (2) whether that [impropriety] deprived a defendant of his due process right to a fair trial. Put differently, [impropriety] is [impropriety], regardless of its ultimate effect on the fairness of the trial; whether that [impropriety] caused or contributed to a due process violation is a separate and distinct question." (Internal quotation marks omitted.) *State* v. *Carrasquillo*, 290 Conn. 209, 222, 962 A.2d 772 (2009). "[W]hen a defendant raises on appeal a claim that improper remarks by the prosecutor deprived the defendant of his constitutional right to a fair trial, the burden is on the defendant to show . . . that the remarks were improper . . . ." (Internal quotation marks omitted.) *State* v. *Maguire*, 310 Conn. 535, 552, 78 A.3d 828 (2013).

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

"Nevertheless, the prosecutor has a heightened duty to avoid argument that strays from the evidence or diverts the jury's attention from the facts of the case. [The prosecutor] is not only an officer of the court, like every attorney, but is also a high public officer, representing the people of the [s]tate, who seek impartial justice for the guilty as much as for the innocent. . . . By reason of his office, he usually exercises great influence [on] jurors. His conduct and language in the trial of cases in which human life or liberty [is] at stake should be forceful, but fair, because he represents the public interest, which demands no victim and asks [for] no conviction through the aid of passion, prejudice, or resentment. If the accused [is] guilty, he should [nonetheless] be convicted only after a fair trial, conducted strictly according to the sound and well-established rules which the laws prescribe. While the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered, it must never be used as a license to state, or to comment [on], or to suggest an inference from, facts not in evidence, or to present matters which the jury ha[s] no right to consider. . . .

"[I]t is axiomatic that a prosecutor may not advance an argument that is intended solely to appeal to the jurors' emotions and to evoke sympathy for the victim or outrage at the defendant. . . . An appeal to emotions, passions, or prejudices improperly diverts the jury's attention away from the facts and makes it more difficult for it to decide the case on the evidence in the record. . . . When the prosecutor appeals to emotions, he invites the jury to decide the case, not according to a rational appraisal of the evidence, but on the basis of powerful and irrelevant factors [that] are likely to skew that appraisal. . . . An improper appeal to the jurors' emotions can take the form of a personal attack on the defendant's character . . . or a plea for sympathy for the victim or her family." (Citations omitted; internal quotation marks omitted.) Id., 553–55.

The defendant identifies numerous allegedly improper remarks made by the state, which he groups into four categories of impropriety. We discuss each such category, and the remarks that the defendant assigns to each, in the following subparts.

A

The defendant first argues that the state's closing argument contained several improper remarks that "attacked defense counsel and the defense tactics . . . ." We disagree.

"[T]he prosecutor is expected to refrain from impugning, directly or through implication, the integrity or institutional role of defense counsel. . . . There is a distinction [however] between argument that disparages the integrity or role of defense counsel and argument that disparages a theory of defense. . . . Moreover, not every use of rhetorical language is improper. . . . There is ample room, in the heat of argument, for the prosecutor to challenge vigorously the arguments made by defense counsel." (Internal quotation marks omitted.) *State* v. *James*, 141 Conn. App. 124, 149, 60 A.3d 1011, cert. denied, 308 Conn. 932, 64 A.3d 331 (2013).

The following facts are relevant. During closing argument, the prosecutor made the following remarks: "And bear in mind the cutting cross-examination that [the victim] went through. Defense counsel asked her a series of questions . . . she stood firm and stated that her recitation of the facts with respect to the sexual assault were accurate." The prosecutor also remarked: "Detective [James] Crean [of the Torrington police] got up on the [witness] stand, and he took his own fair share of cutting questions on cross." The defendant objects to the prosecutor's use of the term "cutting" to refer to defense counsel's cross-examination.

Further, during her rebuttal argument, the prosecutor made the following remarks (those to which the defendant objects are emphasized): "[*Defense counsel*] *did a great job of testifying*. Pay close attention to the court's instructions that the arguments of counsel and any facts that they argue aren't evidence. It's your recollection of the facts. . . . So, there's just two examples [referring to alleged instances of defense counsel inaccurately recounting trial testimony during closing argument] of why you should really be careful about the *smoke and mirrors* you just saw, okay. And that's what it was. Counsel said, don't lose your common sense. Please, don't lose your common sense. When's the last time you had consensual sex and ran down the road naked, crying, calling the police. You didn't want to get in trouble? Why don't—why would you give a statement to the police? *Come on. That's what begs some sense of—some different sense of reality to come into play.* . . . What's consistent is that [the victim's] hands were filthy with abrasions from holding herself while [the defendant was] on top of her. She has a scratch on her breast. She's got another mark somewhere along the side of her chest, as indicated by the nurse. And her knees are bruised as she's kicking, the only thing she can move while he's on top of her. Come on. [Defense counsel] never asked her. There's no testimony about why there's no marks on her belly. *That's his spin on it.* There are equally consistent reasons that can be equally consistent reasonable inferences that can be drawn from the evidence you actually have in front of you. *Offensive? What's offensive, what's offensive is that conduct we're actually dealing with here.* It's not offensive that a nineteen year old girl went to a bar and tried to get drunk and gets drinks. . . . But do you know a nineteen year old girl, who, despite having done that, runs down the road naked, crying, curled up in a ball, saying, 'I was just raped. Call my mom.' You know?"

The defendant contends that the preceding statements demeaned, impugned the credibility of, and imputed an intent to deceive to defense counsel. According to the defendant, "[c]ollectively, these phrases invoked the highly offensive and completely improper myth of a sleazy defense attorney obtaining an acquittal by dishonest and manipulative tactics." As such, the defendant asserts, the remarks constituted prosecutorial impropriety and deprived him of due process. As an initial matter, we observe that the defendant did not object to any of the preceding remarks at trial. "It is well established law, however, that a defendant who fails to preserve claims of prosecutorial [impropriety] need not seek to prevail under the specific requirements of *State* v. *Golding*, [supra, 213 Conn. 239–40], and, similarly, it is unnecessary for a reviewing court to apply the four-pronged *Golding* test. . . . Our Supreme Court has explained that the defendant's failure to object at trial to . . . the [occurrence] that he now raises as [an instance] of prosecutorial impropriety, though relevant to our inquiry, is not fatal to review of his [claim]. . . . This does not mean, however, that the absence of an objection at trial does not play a significant role in the determination of whether the challenged statements were, in fact, improper. . . . To the contrary, we continue to adhere to the well established maxim that defense counsel's failure to object to the prosecutor's argument when it was made suggests that defense counsel did not believe that it was [improper] in light of the record of the case at the time." (Internal quotation marks omitted.) *State* v. *Fernandez*, 169 Conn. App. 855, 867–68, 153 A.3d 53 (2016).

With respect to the prosecutor's use of the term "cutting" to refer to defense counsel's cross-examination of the victim and the police officer, we do not find those remarks to be improper. The prosecutor was permitted

to comment on a witness' response to cross-examination, and the quality of that cross-examination, in order to argue that the witness' testimony was credible. See *State* v. *Ciullo*, 314 Conn. 28, 47–48, 100 A.3d 779 (2014) (prosecutor's description, during closing argument, of defense counsel's cross-examination as "lengthy and laborious," which prosecutor argued merely highlighted that testimony at issue was consistent throughout difficult cross-examination, not improper [internal quotation marks omitted]). "The occasional use of rhetorical devices is simply fair argument." (Internal quotation marks omitted.) *State* v. *Maguire*, supra, 310 Conn. 553. Moreover, the prosecutor's language was "neither colorful nor malicious . . . ." *State* v. *Ciullo*, supra, 48.

The phrase, "[defense counsel] did a great job of testifying," was similarly not improper. As her subsequent comments indicate, the prosecutor was making the point that defense counsel's recollection of the facts was not evidence—indisputably a correct statement of the law. See *State* v. *Grayton*, 163 Conn. 104, 113–14, 302 A.2d 246, cert. denied, 409 U.S. 1045, 93 S. Ct. 542, 34 L. Ed. 2d 495 (1972). The prosecutor then argued that defense counsel's recollection of certain testimony was, in the present case, inaccurate. The defendant asserts that the phrase at issue implied that defense counsel "had not based his argument on fact or reason, but had intended to mislead the jury by means of an artfully deceptive argument." (Internal quotation marks omitted.) We disagree. The prosecutor was permitted to contest defense counsel's recollection of trial testimony because such testimony "[bore] on the issue before the jury, namely, the guilt or innocence of the defendant." *State* v. *Young*, 76 Conn. App. 392, 404, 819 A.2d 884, cert. denied, 264 Conn. 912, 826 A.2d 1157 (2003); see also *State* v. *Swain*, 101 Conn. App. 253, 275, 921 A.2d 712, cert. denied, 283 Conn. 909, 928 A.2d 539 (2007). The remark did not stray into improper territory by

implying that defense counsel's intent was to deceive the jury. Moreover, to the extent that the defendant contends that the remark was impermissibly sarcastic, we observe that "some use of sarcastic and informal language, when intended to forcefully criticize a defense theory on the permissible bases of the evidence and the common sense of the jury, is not necessarily improper." *State* v. *James*, supra, 141 Conn. App. 150. The comment does not appear to us to have been an improper use of sarcasm for the purpose of impugning the role of defense counsel.

The prosecutor's remark, "Come on. That's what begs some sense of—some different sense of reality to come into play," was also not improper. The comment appears to have been made in response to the following statement made by defense counsel during closing argument: "What's [the victim's] motive? Well, can't figure it out. She's given us a couple reasons. I lied to protect my friends. I didn't want to get in trouble with the police. I didn't want them to get in trouble. I didn't want the bar to get in trouble. I'm glad she's so concerned about all these people. She had no problem, you may conclude, being untruthful about more than just those things that I've identified. You can conclude, it's reasonable to infer, that she may have been untruthful for other reasons." To the extent that defense counsel was arguing in that statement that the victim fabricated the sexual assault so that she and her friends would not "get in trouble," therefore, the prosecutor countered by questioning whether it was plausible (i.e., in accord with "reality") that one would attempt to avoid such trouble by initiating contact with the police. In making the comment at issue, the prosecutor was not attacking the credibility of defense counsel, but rather "focus[ing] the jury on weaknesses in the defendant's theory of defense . . . ." *State* v. *Maguire*, supra, 310 Conn. 558.

The prosecutor's remark, "That's [defense counsel's] spin on it," did not constitute impropriety. As previously set forth, the prosecutor made this remark in response to defense counsel's argument that, if the alleged sexual assault occurred in the manner described by the victim, with the defendant sexually assaulting the victim while she was on her stomach on the railroad tracks, then she would have had visible injuries to her stomach, which she did not. In *State* v. *Swain*, supra, 101 Conn. App. 273–76, this court addressed the question of whether the prosecutor use of the term "spin" to refer to defense counsel's argument was improper. This court concluded that "whether we view the word 'spin' in isolation or in the context in which it was uttered, we do not conclude that it either directly or by implication denigrated the integrity or the role of defense counsel. . . . We may presume that the jury was well aware that the defendant's attorney had summarized the evidence with a particular viewpoint or bias, namely, one in favor of his client. Pointing this out to the jury does not rise to the level of suggesting that a typical defense tactic has been employed; it merely states the obvious." (Internal quotation marks omitted.) Id., 275. For those same reasons, we conclude that the prosecutor's use of the word "spin" in the present case was not improper.

Also not improper was the prosecutor's comment, "Offensive? What's offensive . . . is that conduct we're actually dealing with here." According to the defendant, this remark implied that "*defense counsel's arguments* [were] offensive." (Emphasis added.) We disagree with this interpretation of the prosecutor's remark. During closing argument, defense counsel made the following comments with respect to the testimony of Crean, the Torrington police officer who investigated the case: "[H]is answers as to why he overlooked that false statement . . . are ridiculous, they are offensive . . . ." Defense counsel also stated in reference to the victim:

"This is the person that the state wants us to believe to support their case to argue that it's been proven beyond a reasonable doubt and to convict [the defendant]. That's offensive." We believe that the prosecutor, in responding with her remarks, was referring to the *defendant's* conduct (i.e., the sexual assault) as "offensive," not to any tactics employed by defense counsel. Accordingly, the prosecutor's remark was not improper in the manner claimed by the defendant.

Finally, the defendant argues that the prosecutor's use of the phrase, "smoke and mirrors," to describe defense counsel's closing argument was improper. The state, acknowledging *State* v. *Maguire*, supra, 310 Conn. 557 ("smoke and mirrors" improper), and *State* v. *Orellana*, 89 Conn. App. 71, 103, 872 A.2d 506 (same), cert. denied, 274 Conn. 910, 876 A.2d 1202 (2005), concedes that the phrase likewise was improper in the present case. We therefore assume the same. The state, however, contends that the impropriety did not deprive the defendant of his due process right to a fair trial. We agree. "[O]ur determination of whether any improper conduct by the state's attorney violated the defendant's fair trial rights is predicated on the factors set forth in *State* v. *Williams*, [204 Conn. 523, 540, 529 A.2d 653 (1987)], with due consideration of whether that [impropriety] was objected to at trial. . . . These factors include the extent to which the [impropriety] was invited by defense conduct or argument, the severity of the [impropriety], the frequency of the [impropriety], the centrality of the [impropriety] to the critical issues in the case, the strength of the curative measures adopted, and the strength of the state's case." (Citation omitted; internal quotation marks omitted.) *State* v. *Carrasquillo*, supra, 290 Conn. 222. "In determining whether the defendant was denied a fair trial [by virtue of prosecutorial impropriety] we must view the prosecutor's comments in the context of the entire trial. . . . The

question of whether the defendant has been prejudiced by prosecutorial [impropriety], therefore, depends on whether there is a reasonable likelihood that the jury's verdict would have been different absent the sum total of the improprieties. . . . [T]he state bears the burden of demonstrating beyond a reasonable doubt that there is no reasonable likelihood that the jury's verdict would have been different absent the improprieties at issue." (Citations omitted; internal quotation marks omitted.) *State* v. *Angel T.*, 292 Conn. 262, 287–88, 973 A.2d 1207 (2009). We are not persuaded that the lone improper remark deprived the defendant of his right to a fair trial. Although the remark was not invited, it was isolated and not severe. See *State* v. *Orellana*, supra, 109 ("['smoke and mirrors'] neither strongly critical nor severely condemnatory of the defendant's attorney"). We also note that defense counsel did not object at trial to the prosecutor's use of the phrase, and "[d]efense counsel's objection or lack thereof allows an inference that counsel did not think the remarks were severe." (Internal quotation marks omitted.) Id. Further, the remark was not central to critical issues in the case—the trial was, of course, about the defendant's conduct with the victim, not "the integrity or institutional role of defense counsel"; (internal quotation marks omitted) id., 101; which we do not believe was substantially impugned by the comment. Defense counsel did not object to the remark, and the court did not deliver a remedial instruction concerning the remark. Nevertheless, any harm that the impropriety caused was mitigated by the court's statement to the jury, during instructions, that both defense counsel and the state "have represented their clients professionally, zealously and always within the bounds of propriety." Finally, the state's case was not weak. Although it largely came down to the jury's assessment of the victim's credibility, several aspects of the victim's testimony concerning

the incident on the railroad tracks were corroborated by other sources of evidence.[11] Accordingly, we do not believe that "there is a reasonable likelihood that the jury's verdict would have been different absent the [impropriety]." (Internal quotation marks omitted.) *State* v. *Angel T.*, supra, 287. We must, therefore, reject this argument.

B

The defendant next argues that the state made an improper "golden rule" argument during closing remarks. We disagree.

The following facts are relevant. During her rebuttal argument, the prosecutor made the following remarks (the ones to which the defendant objects are emphasized): "Counsel said, don't lose your common sense. Please, don't lose your common sense. *When's the last time you had consensual sex and ran down the road naked, crying, calling the police.* . . . Offensive? What's offensive, what's offensive is that conduct we're actually dealing with here. It's not offensive that a nineteen year old girl went to a bar and tried to get drunk and gets drinks. It happens every single day of the week. I'm sure—*I'm sure each one of you knows somebody who might have gone into a bar under age, at some point. You might even know a kid who didn't want to*

[11] For instance, the state presented the testimony of two bystanders who stated that they saw the victim naked or partially naked in downtown Torrington in the early morning hours of September 3, 2011. One of those witnesses testified that the victim told him that she had been raped. Items of clothing belonging to the victim were found at or near the railroad tracks. See footnote 4 of this opinion. The state also presented photographic evidence of scrapes and bruises on the victim's body. Underwood testified about the description of the sexual assault that the victim had given at the hospital; that description was largely consistent with the victim's trial testimony. The state also elicited the testimony of Cynthia Jock, who lived with the defendant and who saw him the morning after the incident. In response to the state's question of whether "[the defendant] was more nervous than [she] had ever seen him before," Jock answered yes.

get in trouble. But do you know a nineteen year old girl, who, despite having done that, runs down the road naked, crying, curled up in a ball, saying, 'I was just raped. Call my mom.' You know? I mean, and then she gives a statement to the police."

We observe the following legal principles relative to this argument. "A golden rule argument is one that urges jurors to put themselves in a particular party's place . . . or into a particular party's shoes. . . . Such arguments are improper because they encourage the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence. . . . They have also been equated to a request for sympathy. . . . We noted that golden rule claims arise in the criminal context when the prosecutor ask[s] the jury to put itself in the place of the victim, the victim's family, or a potential victim of the defendant. . . . The danger of these types of arguments lies in their [tendency] to pressure the jury to decide the issue of guilt or innocence on considerations apart from the evidence of the defendant's culpability." (Citations omitted; internal quotation marks omitted.) *State* v. *Stephen J. R.*, 309 Conn. 586, 605–606, 72 A.3d 379 (2013).

The defendant argues that the aforementioned remarks improperly sought to arouse the sympathy of the jurors "by asking them to think about a 'kid' or 'girl' who they know and how they would act if that kid had been raped." At trial, after the conclusion of closing arguments, the defendant made essentially the same argument, which the court rejected. We disagree with the defendant. In our view, the prosecutor, in making the remarks at issue, "was not appealing to the jurors' emotions or to their sympathies for the victim . . . [but, rather] was asking the jurors to draw inferences from the evidence that had been presented at trial regarding the actions of [the victim], based on the jurors' judgment of how a reasonable person would act

under the specified circumstances." *State* v. *Bell*, 283 Conn. 748, 773, 931 A.2d 198 (2007). The prosecutor was merely arguing to the jurors that the victim's behavior—running naked from the scene of the incident—was at odds with how a "reasonable person" would act following consensual sexual relations. Accordingly, the remarks were not improper.

C

Third, the defendant argues that the prosecutor, during closing argument, improperly read and referred to documents not in evidence and misrepresented certain facts. We disagree.

The following additional facts are relevant. During her rebuttal argument, the prosecutor made the following remarks: "Cheryl Underwood corroborated everything she said to you during the trial we've already—the incident that we're talking about, the forced sexual assault. Patient walked to some railroad tracks with an unknown male, was forced to her knees and told to perform oral sex on male. She refused. Forced to ground on knees, then on her back. Was then turned and forced onto her stomach. Male then forced vaginal intercourse with penile penetration. Male attempted anal penetration. Patient then was able to get up and ran with her shirt off down the street." The defendant then objected, to which the court responded: "Can't use the document. Use your notes." Although the record is not entirely clear on what "the document" was, the defendant asserts, and the state assumes, that it was a report that Underwood completed in connection with her treatment of the victim that was not admitted into evidence. We therefore assume the same.

"A prosecutor may invite the jury to draw reasonable inferences from the evidence; however, he or she may not invite sheer speculation unconnected to evidence. . . . Moreover, when a prosecutor suggests a fact not

in evidence, there is a risk that the jury may conclude that he or she has independent knowledge of facts that could not be presented to the jury." (Internal quotation marks omitted.) *State* v. *Carrasquillo*, supra, 290 Conn. 222.

In the present case, the prosecutor did not refer to a fact not in evidence. While the prosecutor used Underwood's report as, apparently, an aid for recalling portions of her testimony during closing argument, the testimony that the prosecutor recounted was, almost verbatim, the same testimony that the prosecutor elicited from Underwood during the evidentiary portion of the trial. Moreover, the prosecutor did not suggest in closing that there *was* a report completed by Underwood that would corroborate Underwood's testimony. The defendant has not provided any authority in support of the proposition that merely *looking* at a document not in evidence during closing argument is improper, and we are aware of none. This argument, therefore, fails.

The defendant also contends that the prosecutor misrepresented certain facts. The relevant portion of the prosecutor's closing argument is as follows: "And bear in mind the cutting cross-examination that [the victim] went through. Defense counsel asked her a series of questions, and she admitted each time . . . I didn't talk about the consensual sex behind Snapper Magee's, but she stood firm and stated that her recitation of the facts with respect to the sexual assault [was] accurate. And defense counsel only pointed out one inconsistency, which she did not remember saying, which was to the [emergency room] doctor, that it had occurred on the street—on a street. Now, she didn't recall saying that. It had nothing to do with the actual incident itself. And I submit, it's up to interpretation. But Cheryl Underwood, in my cross of her, documented that [the victim] told her exactly what she told you here in the

courtroom with respect to that forcible, nonconsensual encounter." Later in closing argument, the prosecutor remarked: "And, again, the only inconsistency pointed out by defense in cross was her statement to the [emergency room] doctor that it happened on the street."

The defendant specifically objects to the prosecutor's "one inconsistency" remarks. The defendant argues that the prosecutor's "assertion that there was only one [inconsistency between the victim's original reporting of the incident and her testimony at trial] . . . could not be refuted by the defendant because the others were barred by the trial court's ruling on rape shield. This was improper." We note that the defendant did not raise this argument before the trial court. See *State* v. *Fernandez*, supra, 169 Conn. App. 867–68 (unpreserved claims of prosecutorial impropriety are reviewable, but "we continue to adhere to the well established maxim that defense counsel's failure to object to the prosecutor's argument when it was made suggests that defense counsel did not believe that it was [improper] in light of the record of the case at the time" [internal quotation marks omitted]).

We disagree with the defendant's interpretation of the prosecutor's "one inconsistency" remarks. When read in context, the remarks pertained specifically to any inconsistencies between the victim's original reporting of the incident and her testimony at trial *concerning the intercourse on the railroad tracks*. The victim's inconsistent statements that were barred by the rape shield statute concerned events occurring *prior* to the sexual assault, and therefore would not fall within this category. Accordingly, the prosecutor's remarks were not improper in the manner claimed by the defendant.

D

Finally, the defendant argues that the prosecutor improperly vouched for the victim's credibility during

closing argument. We decline to review the merits of this argument.

According to the defendant, the prosecutor improperly vouched for the victim in the following statement during closing remarks: "If [the victim] wanted to keep her boyfriend from finding out about consensual [sexual relations] with another man, that was not the way to do it. And I submit that you can take away from that, that she is being credible, that there was not a motive for her to fabricate this subsequent sexual assault that was forced." We conclude that this argument is inadequately briefed. The defendant does not cite any legal authority with respect to this argument, nor does he provide any analysis aside from his conclusory statement that the remark constituted improper vouching. We therefore decline to reach the merits of this argument. See *Connecticut Coalition Against Millstone* v. *Connecticut Siting Council*, 286 Conn. 57, 87, 942 A.2d 345 (2008).

The judgment is affirmed.

In this opinion the other judges concurred.

SANLE ZHANG ET AL. *v.* 56 LOCUST ROAD, LLC
(AC 38853)

Lavine, Mullins and West, Js.

Syllabus

The plaintiffs sought to quiet title to certain real property. The trial court rendered judgment for the plaintiffs on their complaint and in favor of the defendant in part on a counterclaim it had filed, from which the defendant appealed and the plaintiffs cross appealed to this court. The trial court had found in the plaintiffs' favor on their claim of adverse possession and, with respect to the counterclaim, granted the defendant an easement by necessity over the disputed area. On appeal, the defendant claimed, inter alia, that the trial court improperly found in favor of the plaintiffs on their claim of adverse possession, and on cross appeal, the plaintiffs claimed that the court erred in granting the defendant the

easement by necessity. *Held* that the trial court having fully and accurately addressed the relevant issues in its memorandum of decision, and having set forth a proper statement of the facts and applicable law, further discussion by this court was not necessary, and the judgment was affirmed.

Argued May 24—officially released October 17, 2017

Procedural History

Action to quiet title to certain real property allegedly acquired by adverse possession, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendant filed a counterclaim; thereafter, the matter was tried to the court, *Povodator*, *J.*; judgment for the plaintiffs on the complaint and in part for the defendant on the counterclaim, from which the defendant appealed and the plaintiffs cross appealed to this court. *Affirmed.*

Michael J. Cacace, with whom was *Ronald E. Kowalski II*, for the appellant-appellee (defendant).

Richard E. Castiglioni, with whom were *Bridgitte E. Mott* and, on the brief, *Jonathan J. Kelson*, for the appellees-appellants (plaintiffs).

Opinion

PER CURIAM. The defendant, 56 Locust Road, LLC, appeals from the judgment of the trial court quieting title to a disputed area of land in favor of the plaintiffs, Sanle Zhang and Yanpin Li, and granting the defendant a ten foot easement by necessity over the easterly portion of the disputed area. The plaintiffs cross appeal from the portion of the judgment in which the court granted the defendant the easement by necessity. On appeal, the defendant claims: (1) because the plaintiffs' predecessors in title did not convey, either orally or by deed, their interest in the disputed area, the trial court erred in finding in favor of the plaintiffs on their claim

of adverse possession; (2) the trial court failed to balance the equities in this case by rejecting the defendant's equitable defenses; (3) General Statutes §§ 47-37 and 52-575 are unconstitutional because they permit a taking of property without just compensation; and (4) the easement granted by the court may not provide meaningful access to the defendant because the court specifically subjected the easement to the town's land use regulations.[1] The plaintiffs claim on cross appeal that the court erred in granting the defendant an easement by necessity.

Having examined the appellate record and having considered the briefs and the arguments of the parties, we conclude that the judgment of the trial court should be affirmed. The trial court fully and accurately addressed the issues relevant to the parties' appeals and, in its memorandum of decision, set forth a proper statement of both the facts and the applicable law. Any further discussion by this court would serve no useful purpose.

The judgment is affirmed.

[1] In its fourth claim, the defendant argues: "*If the defendant is unable to secure the necessary municipal approvals* . . . it [will] have no way to access the larger, nearly three acre, portion of the now severed 56 Locust Road property. Such a result would completely frustrate the trial court's order and would be contrary to Connecticut precedent requiring that the defendant be permitted to access its now landlocked property." (Emphasis added.) We conclude that this claim is premature and, therefore, unreviewable. "It is axiomatic that a claim is not ripe for adjudication when an injury is hypothetical, or a claim [is] contingent upon some event that has not and indeed may never transpire." (Internal quotation marks omitted.) *Lost Trail, LLC* v. *Weston*, 140 Conn. App. 136, 155, 57 A.3d 905, cert. denied, 308 Conn. 915, 61 A.3d 1102 (2013); see also *Astoria Federal Mortgage Corp.* v. *Matschke*, 111 Conn. App. 462, 464, 959 A.2d 652 (2008) ("the rationale behind the ripeness requirement is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . . [and we therefore] must be satisfied that the case before [us] does not present a hypothetical injury or a claim contingent upon some event that has not and indeed may never transpire" [internal quotation marks omitted]), cert. denied, 290 Conn. 909, 964 A.2d 544 (2009).

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NOTICE OF CONNECTICUT STATE AGENCY

DEPARTMENT OF SOCIAL SERVICES
NOTICE FOR PUBLIC REVIEW AND COMMENT

TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF)
STATE PLAN FFY 2018 - 2020

The State of Connecticut Department of Social Services has revised the State Plan for the Temporary Assistance for Needy Families (TANF) program to plan for federal fiscal years 2018 through 2020. Connecticut has made revisions as a result of decisions regarding program implementation and to maintain compliance with the Social Security Act and compliance with federal regulations pertaining to TANF.

The Department of Social Services is the agency responsible for the administration and coordination of the TANF program.

The TANF Plan 2018-2020, is available for review by visiting the Department of Social Services website:

http://portal.ct.gov/DSS/Economic-Security/State-Plans

Anyone wishing to comment on the TANF Plan shall have from October 17, 2017 to December 6, 2017 to submit comments.

Please direct comments and/or questions to:

> Peter Hadler, Program Manager - Eligibility Policy and Program Support Division at 860-424-5385 or peter.hadler@ct.gov before December 7, 2017.

The State of Connecticut is hereby consulting with local governments, tribal nations and private sector organizations and giving the opportunity to comment on the plan and the design of the services provided by the program described in this plan, so that services are provided in a manner appropriate to local populations. The department also hereby gives notice and seeks comments from the public at this time and any time it amends its regulations.

NOTICES

Small Claims Decentralization

Effective Monday, October 16, 2017, the Centralized Small Claims Office located at 80 Washington Street, Hartford, CT 06106 will be closed. No new small claims writs or any other documents on small claims cases can be filed at the Centralized Small Claims Office in person, by fax or by mail as of that date.

Effective Friday, September 1, 2017 and after, any small claims cases filed on paper or electronically will have an answer date after October 16, 2017, and any existing small claims case that requires a hearing date or has a final date for compliance ordered by a magistrate after September 1, 2017 will be transferred to the small claims docket at the appropriate judicial district or housing session. Upon transfer, a new docket number will be assigned, and documents filed on paper must include the new docket number and be filed with the clerk of the appropriate location. Documents filed electronically must be filed using the new docket number through E-Services *Superior Court E-Filing* ***not*** *Centralized Small Claims E-Filing*. Until 5:00 p.m. on October 13, 2017, any new cases, or documents filed on existing cases that have *not* been transferred, can be filed *on paper* with the Centralized Small Claims Office or appropriate court location, or electronically through *Centralized Small Claims E-Filing* by attorneys and law firms without an exclusion from electronic services requirements.

Effective October 16, 2017, and after, any *new* small claims cases filed on paper must be filed with the appropriate judicial district or housing session location clerk's office as set forth in Section 51-345 and 51-346 of the Connecticut General Statutes. Any *new* small claims case filed electronically must be filed through *Superior Court E-Filing.* Any documents filed on paper on an existing case that has *not* been transferred to a judicial district or housing session location must be filed with the appropriate judicial district or housing session clerk's office so that the case can then be transferred by the clerk and assigned a new docket number. Any application for an execution filed *electronically* on a small claims case that has *not* been transferred and assigned a new docket number, must be filed using the existing small claims docket number through *Centralized Small Claims E-Filing*, not *Superior Court E-Filing*. Once the execution is filed, the case will be transferred to the small claims docket in the appropriate judicial district or housing session location and assigned a new docket number.

To view a file that has not been transferred and assigned a new docket number, contact the appropriate judicial district or housing session location for assistance.

For more information on small claims decentralization, go to the Judicial Branch website at www.jud.ct.gov or a clerk's office, court service center, public information desk or law library.

Notice of Hearing on Application for Reinstatement to the Bar

Pursuant to Practice Book Section 2-53, a hearing has been scheduled for Friday, October 20, 2017, regarding Charles Spadoni's application for reinstatement to the Connecticut bar. The hearing will start at 9:30 a.m. at the New Haven Superior Court, located at 235 Church St., New Haven.

Stacy Votto
Committee Chair
New Haven Standing Committee