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acts, but nevertheless properly determined that there was insufficient evidence to support the racketeering conviction. With respect to the other convictions, we conclude that the Appellate Court improperly determined that the denial of a continuance effectively deprived the defendant of his right of self-representation. Accordingly, we affirm in part and reverse in part the judgment of the Appellate Court.

The record and the opinion of the Appellate Court set forth the following background facts and procedural history. "The charges upon which the defendant was brought to trial were based upon his alleged involvement in seven separate sales of cocaine to a police informant, David Hannon, during an undercover police investigation of illegal drug activity in the area of Pembroke and Ogden Streets in Bridgeport between late June through early November, 2010." Id., 259. As will be discussed more fully in part I B of this opinion, during that time period, the investigating task force of officers from the Bridgeport Police Department and the Connecticut State Police obtained extensive audiotape and videotape surveillance footage of these sales, in which the defendant, working from the porch of his duplex home, which directly abutted the sidewalk on Pembroke Street, sold cocaine to Hannon, or facilitated sales to Hannon by six other drug dealers, namely, David Moreland, Jason Ortiz, Willie Brazil, Raymond Mathis, Carlos Lopez, and Kenneth Jamison.[4]

"In an amended long form information dated January 3, 2012, the state charged the defendant, more particu-

[4] We note that the state did not specifically allege in the operative information that Brazil, Jamison, and Lopez had participated in any of the narcotics sales of which the defendant was convicted, including those alleged as predicate acts for the racketeering charge. Jamison and Lopez were, however, specifically alleged to be coconspirators for purposes of the conspiracy count. The evidence adduced at trial, discussed in detail in part I of this opinion, demonstrates that Brazil and Lopez had some involvement in the narcotics sales of which the defendant was convicted.

larly, with: one count each of sale of narcotics by a person who is not drug-dependent and sale of narcotics within 1500 feet of a school by a person who is not drug-dependent in connection with six of the seven alleged sales; and one count each of conspiracy to sell narcotics and racketeering based upon his alleged involvement in all seven such alleged sales, as specially pleaded both in the conspiracy count, as overt acts in furtherance of the alleged conspiracy, and in the racketeering count, as incidents of racketeering activity claimed to prove his involvement in a pattern of racketeering activity, as required by . . . § 53-396 (a). The jury found the defendant guilty of the lesser included offenses of sale of narcotics by a person who is drug-dependent and sale of narcotics within 1500 feet of a school by a person who is drug-dependent based upon his proven involvement in sales of cocaine to Hannon on the six dates he was charged in the information with committing such offenses, particularly June 30, July 14, July 16, August 6, August 24, and November 9, 2010. The jury also found the defendant guilty of both conspiracy to sell narcotics and racketeering, specifying as to the latter charge, in a special verdict returned pursuant to § 53-396 (b), that the sole basis for its finding that the defendant had engaged in a pattern of racketeering activity as a member of an enterprise was his involvement in the sale of cocaine on two of the seven dates specified in the information, June 30 and November 9, 2010, which it found to have constituted 'incidents of racketeering activity.' The trial court later sentenced the defendant on all charges of which he was convicted to a total effective sentence of twenty years incarceration." (Footnote omitted.) Id., 259–60.

The defendant appealed from the judgment of conviction to the Appellate Court. Although the defendant

constitute enterprise under RICO [emphasis omitted]), cert. denied, 568 U.S. 1011, 133 S. Ct. 623, 184 L. Ed. 2d 396 (2012); *United States* v. *Rogers*, 89 F.3d 1326, 1337 (7th Cir.) ("[t]he continuity of an informal enterprise and the differentiation among roles can provide the requisite structure to prove the element of enterprise" [internal quotation marks omitted]), cert. denied, 519 U.S. 999, 117 S. Ct. 495, 136 L. Ed. 2d 387 (1996).

Applying these principles to the record in the present case, we conclude that the evidence of an association in fact enterprise is insufficient to sustain the jury's verdict, even when the evidence is viewed in the light most favorable to the state. We begin our review of the evidence with the June 25, 2010 transaction.[18] Specifically, Hannon went to the corner of Pembroke and Ogden Streets intending to make a controlled narcotics purchase from the defendant. Prior to Hannon's arrival, Detective Jason Amato had observed the defendant standing in front of his house with Moreland and Mathis and then observed the defendant leaving the area. After Hannon arrived, Moreland informed him that the defendant had gone to the police station to seek victims' compensation for injuries he had sustained in a shooting. Hannon purchased cocaine from Moreland, who had returned to the porch of the defendant's home to obtain it from Mathis. A review of the videotape evidence demonstrates that the porch of the defendant's home, and its short set of access steps, directly abutted the sidewalk on Pembroke Street.

With respect to the June 30, 2010 sale, which the jury found to be one of the two predicate acts in the pattern of racketeering, Hannon called Ortiz, an "associate" of the defendant on Ortiz' mobile phone, looking to

[18] Although the defendant was not charged with the sale of narcotics in connection with the transaction on June 25, 2010, as noted in part I of this opinion, the evidence relating to that transaction is relevant to prove the existence of an enterprise for purposes of CORA.

purchase drugs. While Hannon was on his way to the corner of Pembroke and Ogden, the defendant called Hannon to ask why he had not yet arrived. When Hannon arrived at that location, he called the defendant to indicate his arrival. Once Hannon arrived at the defendant's home, the defendant gestured to Ortiz and the two of them made the sale to Hannon as described by the Appellate Court. See *State* v. *Bush*, supra, 156 Conn. App. 263–64.

The state also relied on evidence from sales on August 6, 2010, and August 24, 2010. In particular, the August 24, 2010 sale was precipitated by a telephone call from Hannon to the defendant's home phone number, which the defendant had given to Hannon after selling him cocaine on August 6. To complete the August 24, 2010 sale to Hannon, the defendant obtained cocaine from Lopez on his front porch.

Finally, we review the November 9, 2010 sale, which the jury found to be the second predicate act of racketeering. First, Hannon set up the purchase by calling the defendant on the mobile phone number that he previously had used to contact Ortiz,[19] to let him know that he was on the way to meet him. The remainder of the transaction took place as described by the Appellate Court, including the fact that the defendant, upon learning of Hannon's desire to purchase cocaine, called Moreland to obtain the cocaine. The defendant took Hannon's money, and Moreland himself delivered the cocaine to Hannon on Pembroke Street. The defendant later contacted Hannon to confirm that the delivery had occurred, and discussed further Hannon's stated interest in having the defendant help him purchase a gun. See id., 264–65.

We conclude that this evidence was insufficient to prove the association in fact necessary to establish an

[19] The defendant testified that he was given the mobile phone by a female associate of Ortiz after Ortiz had been arrested.

violation of General Statutes §§ 21a-277 and 21a-278a (b), one count of conspiracy to sell narcotics in violation of General Statutes §§ 53a-48 and 21a-278 (b), and one count of racketeering, based upon two of the six sales of narcotics of which he was convicted, in violation of the Corrupt Organizations and Racketeering Activity Act (CORA), General Statutes § 53-395 (c).[1] On appeal, the defendant claims: (1) that there was insufficient evidence to establish that, while associated with an enterprise, he conducted or participated in the enterprise through a pattern of racketeering activity, as required to support his conviction for racketeering; and (2) that the trial court violated his constitutional right to represent himself at trial by denying his request for a reasonable continuance to review his attorney's case file before the start of evidence at trial.[2] We agree with the defendant on both of his claims. Accordingly, we reverse the judgment and remand this case to the trial court with direction to render a judgment of acquittal on the charge of racketeering and for a new trial on all of the other charges of which the defendant was convicted.

The charges upon which the defendant was brought to trial were based upon his alleged involvement in seven separate sales of cocaine to a police informant, David Hannon, during an undercover police investigation of illegal drug activity in the area of Pembroke and Ogden Streets in Bridgeport between late June through early November, 2010. In an amended long form information dated January 3, 2012, the state charged the defendant, more particularly, with: one count each of sale of narcotics by a person who is not drug-dependent

[1] The defendant was acquitted of six counts of sale of narcotics by a person who is not drug-dependent in violation of § 21a-278 (b).

[2] The defendant also alleges various instructional errors and challenges the legality of the sentence imposed on the conspiracy charge. Because we reverse the judgment as set forth herein, we need not address the defendant's additional claims of error.

and sale of narcotics within 1500 feet of a school by a person who is not drug-dependent in connection with six of the seven alleged sales; and one count each of conspiracy to sell narcotics and racketeering based upon his alleged involvement in all seven such alleged sales, as specially pleaded both in the conspiracy count, as overt acts in furtherance of the alleged conspiracy, and in the racketeering count, as incidents of racketeering activity claimed to prove his involvement in a pattern of racketeering activity, as required by General Statutes § 53-396 (a). The jury found the defendant guilty of the lesser included offenses of sale of narcotics by a person who is drug-dependent and sale of narcotics within 1500 feet of a school by a person who is drug-dependent based upon his proven involvement in sales of cocaine to Hannon on the six dates he was charged in the information with committing such offenses, particularly June 30, July 14, July 16, August 6, August 24, and November 9, 2010. The jury also found the defendant guilty of both conspiracy to sell narcotics and racketeering, specifying as to the latter charge, in a special verdict rendered pursuant to § 53-396 (b),[3] that the sole basis for its finding that the defendant had engaged in a pattern of racketeering activity as a member of an enterprise was his involvement in the sale of cocaine on two of the seven dates specified in the information, June 30 and November 9, 2010, which it found to have constituted "incidents of racketeering activity." The trial court later sentenced the defendant on all charges of which he was convicted to a total effective sentence of twenty years incarceration. There after, the defendant filed this appeal. Additional facts

[3] General Statutes § 53-396 (b) provides: "In any prosecution under this chapter the court or the jury, as the case may be, shall indicate by special verdict the particular incidents of racketeering activity that it finds to have been proved by the state beyond a reasonable doubt."

CONNECTICUT APPELLATE REPORTS

Vol. 179

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

BRENDA I. TIRADO *v.* CITY OF TORRINGTON
(AC 39273)

Keller, Elgo and Bear, Js.

Syllabus

The plaintiff sought damages for the allegedly improper addition of her motor vehicle to the 2004 grand list of the defendant city, Torrington, resulting in a tax assessment on the vehicle. In 2010, the city of Waterbury issued a certificate of change for its 2004 grand list, removing the plaintiff's vehicle therefrom, after receiving information from the plaintiff that she resided in Torrington at that time. In adding the plaintiff's vehicle to its 2004 grand list in 2010, the defendant also issued a certificate of change. The plaintiff claimed, inter alia, that the defendant issued its certificate of change after the three year statute of limitations (§ 12-57) had run. The trial court dismissed the action for lack of subject matter jurisdiction, concluding that the plaintiff had failed to exhaust her available administrative remedies before she filed her action pursuant to the statute (§ 12-117a) governing appeals to the Superior Court from municipal boards of assessment appeals, and that she had failed to file her action within one year of the assessment if she had proceeded under the statute (§ 12-119) governing applications for relief when property has been wrongfully assessed. The plaintiff appealed to this court, claiming that the trial court improperly dismissed her action for lack of subject matter jurisdiction. *Held* that the trial court properly dismissed the plaintiff's action for lack of subject matter jurisdiction: although the trial court incorrectly determined that § 12-119 applied to the plaintiff's

claim that the defendant acted without authority when it issued the certificate of change and added her vehicle to its 2004 grand list, as that claim did not fall within the scope of the categories of claims available under § 12-119, the court correctly determined that § 12-117a applied on the basis of her claim that she was aggrieved by the actions of the defendant's tax assessor; moreover, because the plaintiff did not appeal from the tax assessment to the defendant's board of assessment appeals before filing her action with the trial court pursuant to § 12-117a, which directs that a taxpayer must appeal from a municipal tax assessment to a board of assessment appeals prior to appealing to the Superior Court, the plaintiff failed to exhaust her available administrative remedies, thereby depriving the trial court of subject matter jurisdiction over her action; furthermore, this court declined to consider the plaintiff's claim, asserted for the first time on appeal, that she did not receive notice of the defendant's certificate of change and tax assessment in time to challenge the assessment, as this court was not bound to consider claims of law not properly raised at trial.

Argued October 24, 2017—officially released January 9, 2018

Procedural History

Action to recover damages in connection with the defendant's allegedly improper assessment of taxes on certain of the plaintiff's personal property, and for other relief, brought to the Superior Court in the judicial district of Waterbury and transferred to the judicial district of Litchfield, where the court, *Shah, J.*, denied the plaintiff's motion to strike; thereafter, the matter was tried to the court; judgment dismissing the plaintiff's action, from which the plaintiff appealed to this court. *Affirmed.*

Brenda I. Tirado, self-represented, the appellant (plaintiff).

Jaime M. LaMere, corporation counsel, for the appellee (defendant).

Opinion

BEAR, J. The plaintiff, Brenda I. Tirado, appeals from the judgment of dismissal rendered by the trial court for lack of subject matter jurisdiction. The dispositive issue in this appeal is whether the court improperly

dismissed the plaintiff's action for lack of subject matter jurisdiction due to her failure to (1) file her complaint within one year of the tax assessment pursuant to General Statutes § 12-119, and (2) exhaust available administrative remedies prior to filing an action pursuant to General Statutes § 12-117a.[1] We agree that the court lacked subject matter jurisdiction because the plaintiff failed to exhaust her administrative remedies prior to filing suit pursuant to § 12-117a, and, accordingly, we affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. On March 22, 2010, the city of Waterbury issued a certificate of change for the 2004 grand list, removing the plaintiff's motor vehicle therefrom, after receiving information from the plaintiff that she resided in Torrington on October 1, 2004.[2] The city of

[1] The plaintiff also claims on appeal that the trial court erred in (1) allowing the defendant, the city of Torrington, "to raise a special defense and evidence outside of the defendant's pleading [in violation of Practice Book § 10-3 (a)]," (2) finding that General Statutes § 12-57 (b) is the applicable section for issuing a certificate of change for a motor vehicle, and (3) denying her motion to strike on the grounds that it was untimely and it did not contain an accompanying memorandum as required by Practice Book § 10-39. Because the issue of subject matter jurisdiction is dispositive of this appeal, we do not address the plaintiff's other claims. See, e.g., *Heinonen* v. *Gupton*, 173 Conn. App. 54, 55 n.1, 162 A.3d 70, cert. denied, 327 Conn. 902, 169 A.3d 794 (2017); see also *Bailey* v. *Medical Examining Board for State Employee Disability Retirement*, 75 Conn. App. 215, 223, 815 A.2d 281 (2003) ("[h]aving determined that the Superior Court properly found that it lacked subject matter jurisdiction, we do not reach the plaintiff's second claim").

[2] At trial, the defendant's tax assessor testified as follows: "At some point it was discovered, by information provided to the assessor's office in Waterbury, proof that [the plaintiff's] residency was not in Waterbury on October 1, 2004, but [that she] was [a] resident of Torrington on . . . October 1, 2004 . . . ." In its memorandum of law in opposition to the plaintiff's motion for summary judgment, the defendant alleged that the information the city of Waterbury received came from the plaintiff: "The plaintiff provided two forms of written proof to the city of Waterbury that she lived in the city of Torrington on October 1, 2004: (1) a Connecticut Light & Power bill dated [September 2, 2004] and (2) a statement from Michael F. Wallace Middle School in Waterbury that the plaintiff's son attended Forbes Elementary School in the city of Torrington during the 2004–2005 school year. . . .

Waterbury forwarded its certificate of change to the defendant, the city of Torrington. On March 24, 2010, after receiving the Waterbury certificate of change, the defendant's tax assessor issued a certificate of change and added the plaintiff's motor vehicle to its 2004 grand list.[3]

On February 10, 2014, the plaintiff filed a complaint in the judicial district of Waterbury, claiming that the defendant issued a certificate of change after the three year statutory limit set forth in General Statutes § 12-57.[4] On March 3, 2014, the defendant filed an answer, denying that the expiration of any limitations period required the defendant's tax assessor's office to remove the plaintiff's name from the list of individuals owing taxes to the defendant. On October 20, 2015, the plaintiff filed a certificate of closed pleadings and a claim for trial.

On February 8, 2016, the court, *Shapiro*, *J.*, granted the defendant's motion to transfer the matter to the

Based [on] this information, the city of Waterbury issued a certificate of change removing the vehicle from its 2004 motor vehicle grand list." At trial, the plaintiff was questioned more than once as to how the two forms of proof of residence came into the possession of the assessor in the city of Waterbury, but each time the plaintiff stated that she did not know or did not remember.

[3] The tax for the Waterbury 2004 grand list was assessed at $301.14. The city of Waterbury issued a tax credit to the plaintiff for $301.14. The tax for the Torrington 2004 grand list was assessed at $182.80.

[4] Although the plaintiff refers generally to § 12-57 in her complaint, her quotation of the statutory language indicates that she is asserting that her claim pertains to subsection (a), which provides in relevant part that "[w]hen it has been determined by the assessors of a municipality that tangible personal property has been assessed when it should not have been, the assessors shall, not later than three years following the tax due date relative to the property, issue a certificate of correction removing such tangible personal property from the list of the person who was assessed in error . . . ." General Statutes § 12-57 (a). As the court set forth in its memorandum of decision, however, subsection (a) pertains to tangible personal property; subsection (b) is applicable to motor vehicles, the property at issue in this matter, and there is no statute of limitations for issuing a certificate of change for a motor vehicle. See General Statutes § 12-57 (b).

judicial district of Litchfield because an aggrieved taxpayer must bring an application for relief in the judicial district where the town or city is located. See General Statutes §§ 12-117a and 12-119.

On April 26, 2016, the plaintiff filed a motion for summary judgment and a memorandum in support thereof, claiming that the defendant acted without authority when it added the plaintiff's motor vehicle to its 2004 grand list on March 24, 2010, pursuant to General Statutes § 12-60. On April 27, 2016, the defendant objected to the plaintiff's motion for summary judgment, arguing that the certificate of change was issued pursuant to § 12-57 (b), not § 12-60. On April 28, 2016, the plaintiff filed a reply brief in further support of her motion for summary judgment, but she withdrew her summary judgment motion on May 4, 2016. Thereafter, on May 12, 2016, the plaintiff filed a motion to strike the defendant's answer, which the court, *Shah*, *J.*, denied on May 17, 2016, on the grounds that the motion was untimely filed more than two years after the filing of the defendant's answer and did not contain an accompanying memorandum that was required pursuant to Practice Book § 10-39.

A one day bench trial took place on May 17, 2016. Following trial, the court rendered a judgment of dismissal for lack of subject matter jurisdiction because "[t]he plaintiff failed to exhaust available administrative remedies before she filed the present action pursuant to . . . § 12-117a. . . . She also failed to file her complaint within one year of the assessment if she had proceeded under . . . § 12-119."[5] (Citations omitted.) This appeal followed.

[5] The court also noted in its memorandum of decision that "§ 12-57 (b) allows a municipality to issue a certificate of correction at any time upon receipt of notice of a vehicle that the municipality should have assessed in any tax year. If the court had jurisdiction and reached a decision on the merits, the court would have found for the defendant. The plaintiff is liable for the tax assessment on her motor vehicle for the 2004 tax year based on

We begin by setting forth our standard of review. "A determination regarding a trial court's subject matter jurisdiction is a question of law. When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Stones Trail, LLC* v. *Weston*, 174 Conn. App. 715, 735, 166 A.3d 832, cert. dismissed, 327 Conn. 926, 171 A.3d 59 (2017).

In the present case, the issue of subject matter jurisdiction was raised by the court sua sponte, as it was entitled to do.[6] "[I]t is a fundamental rule that a court may raise and review the issue of subject matter jurisdiction at any time. . . . Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . . 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." (Internal quotation marks omitted.) Id., 736. "[W]henever it is found . . . that the court lacks jurisdiction of the subject matter, the judicial authority shall dismiss the action." Practice Book § 10-33.

Because our determination of whether the court erred in dismissing the plaintiff's case for lack of subject

her admission that she lived in the city of Torrington in 2004 and was subject to applicable taxes."

[6] In her principal brief on appeal to this court, the plaintiff states in her statement of issues that the trial court erred in raising the issue of subject matter jurisdiction sua sponte, but she fails to analyze that claim. She thus is deemed to have abandoned it. See, e.g., *Clelford* v. *Bristol*, 150 Conn. App. 229, 233, 90 A.3d 998 (2014) ("[a]ssignments of error which are merely mentioned but not briefed beyond a statement of the claim will be deemed abandoned and will not be reviewed by this court" [internal quotation marks omitted]).

matter jurisdiction depends, in part, on whether § 12-119 or § 12-117a applies to the plaintiff's claim, we first address the plaintiff's argument on appeal that §§ 12-119 and 12-117a do not apply to an appeal of a tax assessment under §§ 12-57 and 12-60.[7] We agree with the plaintiff that the court erred in ruling that § 12-119 was applicable to her claim, and that she violated § 12-119, but we disagree with her that the court erred in ruling that § 12-117a was applicable to her claim.

"When a taxpayer is aggrieved by the assessment of his property, there are statutory procedures in place for the taxpayer to challenge the assessment. [T]he legislature has established two primary methods by which taxpayers may challenge a town's assessment or revaluation of their property. First, any taxpayer claiming to be aggrieved by an action of an assessor may appeal, pursuant to General Statutes § 12-111, to the town's board of [assessment appeals]. The taxpayer may then appeal, pursuant to . . . § [12-117a], an adverse decision of the town's board of [assessment appeals] to the Superior Court. The second method of

[7] Although subject matter jurisdiction may be raised at any time, a court is limited in its ability to raise, sua sponte, the issue of lack of subject matter jurisdiction for a plaintiff's failure to timely commence an action, where the statute of limitations "is procedural and personal rather than substantive or jurisdictional and is thus subject to waiver." *L. G. DeFelice & Son, Inc.* v. *Wethersfield*, 167 Conn. 509, 513, 356 A.2d 144 (1975) (holding that court erred by sua sponte raising one year statute of limitations in § 12-119 because defendant had waived statute of limitations defense by not pleading it). Thus, if the plaintiff's claim was brought pursuant to § 12-119, the court improperly raised, sua sponte, the issue of the one year statute of limitations imposed by § 12-119 because the defendant in the present case waived a statute of limitations defense by not raising it. See id. If, however, the plaintiff's claim was brought pursuant to § 12-117a, the court properly raised, sua sponte, the issue of subject matter jurisdiction because the plaintiff failed to exhaust her administrative remedies prior to filing the action, which required dismissal. See *Piteau* v. *Board of Education*, 300 Conn. 667, 678, 15 A.3d 1067 (2011) ("[i]n the absence of exhaustion of [an available administrative] remedy, the action *must be* dismissed" [emphasis added; internal quotation marks omitted]).

challenging an assessment or revaluation is by way of § 12-119." (Footnote omitted; internal quotation marks omitted.) *Interlude, Inc.* v. *Skurat*, 253 Conn. 531, 537, 754 A.2d 153 (2000).

Our Supreme Court has defined the applicability of § 12-119 as follows: "[Section] 12-119 allows a taxpayer one year to bring a claim that the tax was imposed by a town that had no authority to tax the subject property, or that the assessment was manifestly excessive and could not have been arrived at except by disregarding the provisions of the statutes for determining the valuation of [the] property . . . . The first category in the statute embraces situations where a tax has been laid on property not taxable in the municipality where it is situated . . . . The second category consists of claims that assessments are (a) manifestly excessive and (b) . . . could not have been arrived at except by disregarding the provisions of statutes for determining the valuation of the property." (Citation omitted; internal quotation marks omitted.) Id., 537–38. Thus, "[§] 12-119 addresses two different types of cases: (1) When it is claimed that a tax has been laid on property not taxable in the town or city in whose tax list such property was set; and (2) a tax laid on property was computed on an assessment which, under all the circumstances, was manifestly excessive and [must] have been arrived at . . . by disregarding the [proper] . . . valuation of such property . . . ." (Internal quotation marks omitted.) Id., 538.

In the present case, the plaintiff filed an action, claiming that the defendant acted without authority when it issued a certificate of change for the 2004 grand list because it was prohibited from doing so by the three year statute of limitations in § 12-57 (a).[8] We agree with

[8] As set forth in greater detail in footnote 4 of this opinion, the plaintiff incorrectly cites to § 12-57 (a), which contains a three year statute of limitations for assessing a tax on tangible personal property. See General Statutes § 12-57 (a). Pursuant to § 12-57 (b), the applicable section for motor vehicles,

the plaintiff that this claim does not fall within the scope of the categories of claims available under § 12-119. The first category of § 12-119 does not apply because the plaintiff admitted that she lived in Torrington on October 1, 2004, and she thus is not claiming that the tax in question "has been laid on property not taxable in the town or city in whose tax list such property was set . . . ." (Internal quotation marks omitted.) *Interlude, Inc.* v. *Skurat*, supra, 253 Conn. 538; cf. *Hotshoe Enterprises, LLC* v. *Hartford*, 284 Conn. 833, 836–37, 937 A.2d 689 (2008) (owners of condominium hangar units at airport brought action pursuant to § 12-119, claiming that property was tax exempt as "land . . . held in trust . . . for state-owned airport"); *Faith Center, Inc.* v. *Hartford*, 192 Conn. 434, 435, 472 A.2d 16 (religious organization brought action pursuant to § 12-119, claiming that its property was tax exempt), cert. denied, 469 U.S. 1018, 105 S. Ct. 432, 83 L. Ed. 2d 359 (1984). The second category of § 12-119 does not apply because the plaintiff does not claim that the tax is "manifestly excessive" in that it "disregard[s] the [proper] . . . valuation of [the] property . . . ." (Internal quotation marks omitted.) *Interlude, Inc.* v. *Skurat*, supra, 538; cf. *Wheelabrator Bridgeport, L.P.* v. *Bridgeport*, 320 Conn. 332, 340–41, 133 A.3d 402 (2016) (plaintiff brought action pursuant to, inter alia, § 12-119, claiming that "valuations were excessive"); *Griswold Airport, Inc.* v. *Madison*, 289 Conn. 723, 728, 961 A.2d 338 (2008) (airport brought action pursuant to § 12-119, claiming that assessment was "manifestly excessive"). On the basis of the foregoing, we agree with the plaintiff that § 12-119 does not apply to her claim that the defendant acted without authority when it issued a certificate of change and added her motor vehicle to its 2004 grand list. See, e.g., *Second Stone Ridge Cooperative Corp.* v.

there is no statute of limitations for issuing a certificate of change for a motor vehicle. See General Statutes § 12-57 (b).

Bridgeport, 220 Conn. 335, 343, 597 A.2d 326 (1991) (finding that, where plaintiff's claim did not satisfy category requirements under § 12-119, "an appeal under § 12-119 was not authorized").

In contrast to § 12-119, "[§] 12-117a . . . provide[s] a method by which an owner of property may directly call in question the valuation placed by assessors upon his property . . . ." (Internal quotation marks omitted.) *Konover* v. *West Hartford*, 242 Conn. 727, 734, 699 A.2d 158 (1997). Pursuant to General Statutes § 12-111 (a), "[a]ny person . . . claiming to be aggrieved by the doings of the assessors of such town may appeal therefrom to the board of assessment appeals." If the taxpayer is not satisfied with the board's decision, "[§] 12-117a . . . allows taxpayers to appeal the decisions of municipal boards of [assessment appeals] to the Superior Court . . . ." *Konover* v. *West Hartford*, supra, 734. "In a § 12-117a appeal, the trial court performs a two step function. The burden, in the first instance, is upon the plaintiff to show that he has, in fact, been aggrieved by the action of the board in that his property has been overassessed. . . . Only after the court determines that the taxpayer has met his burden of proving that the assessor's valuation was excessive and that the refusal of the board . . . to alter the assessment was improper, however, may the court then proceed to the second step in a § 12-117a appeal and exercise its equitable power to grant such relief as to justice and equity appertains . . . ." (Citations omitted; internal quotation marks omitted.) Id., 734–35.

In the present case, the plaintiff did "call in[to] question the valuation placed by [the defendant's assessor] upon [her] property . . . ." (Internal quotation marks omitted.) Id., 734. The plaintiff claimed that the defendant acted without authority when it issued a certificate of change and added her motor vehicle to its 2004 grand list beyond the three year statute of limitations that the

plaintiff alleged was applicable. On the basis of her claim that she was "aggrieved by the doings of the [defendant's] assessors"; General Statutes § 12-111 (a); that claim was appealable to the defendant's Board of Assessment Appeals and then, if she was dissatisfied with the board's decision, to the Superior Court. See General Statutes § 12-117a; see also *Interlude, Inc.* v. *Skurat*, supra, 253 Conn. 537.

Having concluded that § 12-117a applies to the plaintiff's claim, we next address the plaintiff's argument that the trial court "misappl[ied] the law" in "dismissing the case for lack of subject matter jurisdiction." Specifically, the plaintiff claims that the court erred in dismissing the case because a question of statutory interpretation is a question of law for the court. We disagree.

The court dismissed the plaintiff's case for lack of subject matter jurisdiction because the plaintiff failed to exhaust her available administrative remedies prior to filing the action pursuant to § 12-117a, which contemplates that a taxpayer must challenge a municipality's tax assessment to the board of assessment appeals prior to appealing to the Superior Court. See General Statutes § 12-117a.[9] "It is a settled principle of administrative law that, if an adequate administrative remedy exists, it must be exhausted before the Superior Court will obtain jurisdiction to act in the matter." (Internal quotation marks omitted.) *Fairchild Heights Residents Assn., Inc.* v. *Fairchild Heights, Inc.*, 310 Conn. 797,

[9] General Statutes § 12-117a provides in relevant part: "Any person . . . claiming to be aggrieved by the action of the board of tax review or the board of assessment appeals, as the case may be, in any town or city may, within two months from the date of the mailing of notice of such action, make application, in the nature of an appeal therefrom . . . with respect to the assessment list . . . to the superior court for the judicial district in which such town or city is situated, which shall be accompanied by a citation to such town or city to appear before said court." General Statutes § 12-117a.

808, 82 A.3d 602 (2014); accord *LaCroix* v. *Board of Education*, 199 Conn. 70, 83–84, 505 A.2d 1233 (1986). "In the absence of exhaustion of [an available administrative] remedy, the action must be dismissed." (Internal quotation marks omitted.) *Piteau* v. *Board of Education*, 300 Conn. 667, 678, 15 A.3d 1067 (2011). Because the plaintiff never appealed the defendant's 2004 grand list tax assessment to the defendant's Board of Assessment Appeals, she therefore failed to exhaust her available administrative remedies prior to filing her action. Accordingly, the court properly determined, pursuant to § 12-117a and established precedent, that it lacked subject matter jurisdiction.[10]

Finally, the plaintiff claims for the first time on appeal that she did not receive notice of the certificate of change and the defendant's tax assessment, and that by the time she learned about them years later, it was too late to challenge the defendant's tax assessment pursuant to §§ 12-117a and 12-119.[11] The plaintiff did

[10] We note that even if we were to agree with the plaintiff's claim that the court improperly concluded that there was a lack of subject matter jurisdiction under both §§ 12-119 and 12-117a, we would remand with direction to the court to render judgment in favor of the defendant in accordance with its statement that it would do so if it were able to reach the merits of the plaintiff's claim. On the basis of our review of the record, the court correctly noted as a matter of law in its memorandum of decision following trial that "§ 12-57 (b) allows a municipality to issue a certificate of correction *at any time* upon receipt of notice of a vehicle that the municipality should have assessed in any tax year. . . . The plaintiff is liable for the tax assessment on her motor vehicle for the 2004 tax year based on her admission that she lived in the city of Torrington in 2004 and was subject to applicable taxes." (Emphasis added.)

[11] At oral argument before this court, the plaintiff stated that the defendant's tax assessor sent the tax bill to her former Torrington address, despite the fact that she gave her current Waterbury address to the tax assessor, and she thus did not receive notice of the change until two years after the notice was sent. Though she did not frame it as an issue on appeal, the plaintiff also states in her principal brief that she had not "received the tax bill nor the certificate of change [because] it was sent to an address in Torrington that the plaintiff hadn't lived at in over five years by the Torrington tax assessor."

not raise the issue of lack of notice in the trial court.[12] Because the plaintiff did not raise this issue in the court proceedings, we decline to consider it on appeal. See, e.g., *Chief Disciplinary Counsel* v. *Rozbicki*, 326 Conn. 686, 695, 167 A.3d 351 (2017) ("[t]o permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court or the opposing party to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party" [internal quotation marks omitted]); *State* v. *Hilton*, 45 Conn. App. 207, 222, 694 A.2d 830 ("[w]e are not bound to consider claims of law not properly raised at trial"), cert. denied, 243 Conn. 925, 701 A.2d 659 (1997), cert. denied, 522 U.S. 1134, 118 S. Ct. 1091, 140 L. Ed. 2d 147 (1998).

In summary, § 12-119 does not apply to the plaintiff's claim, and, therefore, "an appeal under § 12-119 was not authorized." *Second Stone Ridge Cooperative Corp.* v. *Bridgeport*, supra, 220 Conn. 343. An appeal under § 12-117a also could not be maintained by the plaintiff because she failed to exhaust available administrative remedies before filing her action pursuant to that statute. See *Piteau* v. *Board of Education*, supra, 300 Conn. 678. Accordingly, the court properly dismissed the plaintiff's action for lack of subject matter jurisdiction.

[12] At trial, in contradiction to her statements on appeal, the plaintiff testified: "In . . . 2010 I received a letter from Torrington stating that . . . I owed back taxes . . . back from . . . 2004 or something like that." Her sworn testimony at trial thus conflicts with her unsworn statements in this appeal.

Further, as set forth in footnote 2 of this opinion, it appears that the change from Waterbury to Torrington was made at the plaintiff's request, after she provided Waterbury with two forms of proof that she lived in Torrington on October 1, 2004, also undercutting her argument as to lack of notice.

The plaintiff's claims at trial were that the three year statute of limitations under which the assessor could issue a certificate of change had run, that she had paid her taxes, and that the certificate of change form incorrectly listed § 12-60, instead of §12-57, at the top. At no point during trial, or in her pleadings, did the plaintiff allege a lack of notice of the 2010 tax assessment.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* RICHARD BUSH (AC 34886)

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

Syllabus

Convicted of the crimes of sale of narcotics, sale of narcotics within 1500 feet of a school, conspiracy to sell narcotics and racketeering, the defendant appealed to this court, which reversed the trial court's judgment and remanded the case to the trial court with direction to render a judgment of acquittal on the charge of racketeering and for a new trial on all of the other charges of which the defendant was convicted. Thereafter, the state, on the granting of certification, appealed to the Supreme Court, which disagreed with this court's conclusion that the defendant was entitled to a new trial on the remaining charges and remanded the case to this court for consideration of his remaining claims on appeal. The defendant claimed, inter alia, that the trial court committed structural error when it failed to grant his initial request to represent himself and unlawfully sentenced him to twenty years incarceration on his conviction for conspiracy, which, he claimed, exceeded by five years the maximum possible term of incarceration for conspiracy to sell cocaine. On remand, *held*:

1. The trial court did not abuse its discretion when it failed to grant the defendant's initial request to represent himself and suggested to him that his trial counsel continue to represent him through voir dire; the defendant could not reasonably be found to have made a clear and unequivocal request to proceed without counsel, the defendant having agreed with the court's suggestion after the court canvassed him to determine whether he had the capacity to represent himself.
2. The defendant could not prevail on his claim that the jury was misled by the trial court's instructions on the conspiracy charge, which was based on his assertion that the court failed to instruct the jury on the elements of possession of narcotics and possession of narcotics with intent to sell, and to determine which of the underlying crimes charged against him that he conspired to commit: it was not likely that the jury was misled by the court's failure to mention or describe other offenses listed in the information as alleged objects of the conspiracy, as the guilty verdict was necessarily based on the only theory of liability on which the jury was instructed, which was conspiracy to sell cocaine, and, although the information listed four offenses as alleged objects of the

conspiracy, there was no reasonable possibility that the jury was confused or misled by the court's failure to mention in its instructions the charges of possession of narcotics or possession of narcotics with intent to sell as other alleged objects of the conspiracy, the court having limited the scope of the charged conspiracy to the sale of narcotics.

3. The trial court improperly sentenced the defendant to twenty years incarceration on the conspiracy conviction, as the most serious crime of which he was convicted that was proved to have been an object of the conspiracy was the sale of cocaine by a drug-dependent person, which carried a maximum possible prison sentence of fifteen years for a first offense, and, contrary to the state's claim that the twenty year sentence was lawful because the defendant testified that he had a prior conviction for sale of cocaine, which exposed him, as a repeat offender, to a maximum possible prison sentence of thirty years, there never was a trial or other proceeding or a factual finding as to his alleged status as a repeat offender, as the state initially informed the court, defense counsel and the defendant that it would not prosecute a part B information with respect to the conspiracy charge and thereafter withdrew the part B information after the jury returned its verdict; accordingly, the sentence on the conspiracy conviction was vacated and the case was remanded for resentencing.

Argued September 18, 2017—officially released January 9, 2018

Procedural History

Substitute information charging the defendant with six counts each of the crimes of sale of narcotics by a person who is not drug-dependent and sale of narcotics within 1500 feet of a school by a person who is not drug-dependent, and with one count each of the crimes of conspiracy to sell narcotics and racketeering, brought to the Superior Court in the judicial district of Fairfield, geographical area number two, and tried to the jury before *Thim*, *J.*; verdict and judgment of guilty of six counts each of the lesser included offenses of sale of narcotics within 1500 feet of a school by a person who is drug-dependent and sale of narcotics by a person who is drug-dependent, and one count each of conspiracy to sell narcotics and racketeering, from which the defendant appealed to this court, which reversed the trial court's judgment and remanded the case with direction to render judgment of not guilty on the racketeering

charge and for a new trial on the other charges; thereafter, the state, on the granting of certification, appealed to the Supreme Court, which reversed this court's judgment in part and remanded the case to this court for further proceedings. *Reversed in part; further proceedings.*

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

Adam E. Mattei, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *C. Robert Satti*, supervisory assistant state's attorney, for the appellee (state).

Opinion

SHELDON, J. This case is before us on remand from our Supreme Court following its affirmance of our determination that insufficient evidence was presented at trial to sustain the conviction of the defendant, Richard Bush, for racketeering in violation of General Statutes § 53-393 et seq. The Supreme Court disagreed, however, with this court's determination that the defendant was entitled to a new trial on the other charges of which he had been found guilty—six counts each of sale of narcotics and sale of narcotics within 1500 feet of a school, and one count of conspiracy to sell narcotics—because the trial court's denial of his motion for a continuance to review voluminous discovery documents after granting his second request to represent himself had effectively deprived him of his constitutional right to self-representation. Before us now are the defendant's additional claims of error as to his remaining convictions. The defendant claims that the trial court: (1) violated his constitutional right to self-representation by not granting his initial request to represent himself on the second day of voir dire; (2) improperly instructed the jury on the charge of conspiracy; and (3) improperly sentenced him to a term of twenty years

incarceration on his conviction for conspiracy. We reject the defendant's first two claims of error, and thus conclude that he is not entitled to a new trial. We agree with the defendant, however, that he was improperly sentenced to a term of twenty years incarceration on his conviction for conspiracy. Accordingly, we remand this case for resentencing on that conviction.

The Supreme Court recounted the following relevant factual and procedural background, as previously set forth by this court. "The charges upon which the defendant was brought to trial were based upon his alleged involvement in seven separate sales of cocaine to a police informant, David Hannon, during an undercover police investigation of illegal drug activity in the area of Pembroke and Ogden Streets in Bridgeport between late June [and] early November, 2010. . . . [D]uring that time period, the investigating task force of officers from the Bridgeport Police Department and the Connecticut State Police obtained extensive audiotape and videotape surveillance footage of these sales, in which the defendant, working from the porch of his duplex home, which directly abutted the sidewalk on Pembroke Street, sold cocaine to Hannon, or facilitated sales to Hannon by six other drug dealers, namely, David Moreland, Jason Ortiz, Willie Brazil, Raymond Mathis, Carlos Lopez, and Kenneth Jamison.

"In an amended long form information dated January 3, 2012, the state charged the defendant, more particularly, with: one count each of sale of narcotics by a person who is not drug-dependent and sale of narcotics within 1500 feet of a school by a person who is not drug-dependent in connection with six of the seven alleged sales; and one count each of conspiracy to sell narcotics and racketeering based upon his alleged involvement in all seven such alleged sales, as specially pleaded both in the conspiracy count, as overt acts in furtherance of the alleged conspiracy, and in the

racketeering count, as incidents of racketeering activity claimed to prove his involvement in a pattern of racketeering activity, as required by [General Statutes] § 53-396 (a). The jury found the defendant guilty of the lesser included offenses of sale of narcotics by a person who is drug-dependent and sale of narcotics within 1500 feet of a school by a person who is drug-dependent based upon his proven involvement in sales of cocaine to Hannon on the six dates he was charged in the information with committing such offenses, particularly June 30, July 14, July 16, August 6, August 24, and November 9, 2010. The jury also found the defendant guilty of both conspiracy to sell narcotics and racketeering, specifying as to the latter charge, in a special verdict returned pursuant to § 53-396 (b), that the sole basis for its finding that the defendant had engaged in a pattern of racketeering activity as a member of an enterprise was his involvement in the sale of cocaine on two of the seven dates specified in the information, June 30 and November 9, 2010, which it found to have constituted incidents of racketeering activity. The trial court later sentenced the defendant on all charges of which he was convicted to a total effective sentence of twenty years incarceration." (Citation omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Bush*, 325 Conn. 272, 277–78, 157 A.3d 586 (2017). Specifically, the defendant was sentenced to: twenty years incarceration on his conviction for conspiracy in violation of General Statutes §§ 53a-48 and 21a-278 (b); fifteen years incarceration on each of his six convictions for sale of narcotics by a drug-dependent person in violation of General Statutes § 21a-277 (a), to run concurrently with his sentence for conspiracy; and three years incarceration on each of his six convictions for sale of narcotics by a drug-dependent person within 1500 feet of a school in violation of General Statutes § 21a-278a (b), to run concurrently with one another and with his sentence for

conspiracy, but consecutively to his concurrent sentences for sale of narcotics.

The defendant appealed from his conviction to this court. This court, as previously noted, reversed his racketeering conviction and directed that a judgment of acquittal be entered on that charge. This court further determined that he was entitled to a new trial on the other charges of which he had been convicted because he had effectively been denied his right to represent himself when the trial court, after granting his request to represent himself, denied his motion for a continuance to review voluminous discovery documents before the start of trial. *State* v. *Bush*, 156 Conn. App. 256, 112 A.3d 834 (2015), rev'd, 325 Conn. 272, 157 A.3d 586 (2017). Our Supreme Court affirmed the reversal of the defendant's racketeering conviction, but disagreed with this court's conclusion that the defendant was entitled to a new trial on the remaining charges because the trial court violated his constitutional right to self-representation when it denied his request for a continuance to examine the state's disclosure on the eve of trial. We now address his remaining claims on appeal. Additional facts will be set forth as necessary.

I

The defendant first claims that the trial court violated his constitutional right to represent himself at trial by denying his initial request to do so. Although the court ultimately granted the defendant's second request to represent himself, and the defendant subsequently withdrew that request and elected to proceed with his attorney's representation after his motion for a continuance was denied, he claims that the court committed structural error by denying his initial request to represent himself. We disagree.

The following additional procedural history is relevant to this claim. "On the first day of voir dire, March

12, 2012, the defendant told the court that he and [his court-appointed counsel, Vicki Hutchinson] 'don't connect at all,' and that he was 'very uncomfortable' with her. In response, the court told the defendant: 'Sir, this case is over a year old . . . approximately a year old, you were arrested about a year ago, around July. You were brought to this courthouse in July of [2011], you plead[ed] not guilty, and . . . Hutchinson has represented you since then. This is . . . and we're ready to start picking the jury, and this is the first request, [a] request to have someone other than . . . Hutchinson represent yourself. . . . Hutchinson is an extremely well experienced defense attorney, we're going forward with the trial at this time.'

"The next day, March 13, 2012, the defendant again voiced his dissatisfaction with Hutchinson's representation. The defendant also complained that he had not had the opportunity to review with his attorney various documents and videotapes she had procured through discovery. In response, the court reiterated that the defendant's trial had already begun and that Hutchinson was a very experienced attorney. The court explained that the trial would proceed with jury selection that morning, but that the defendant would be given the afternoon to meet with Hutchinson. At that point, the state suggested that the court may have an obligation, pursuant to *State* v. *Flanagan*, 293 Conn. 406, 978 A.2d 64 (2009), to canvass the defendant as to his request to represent himself. The court responded, '[w]e're not at that point yet.' Voir dire resumed.

"Shortly thereafter, when the defendant interrupted the voir dire proceedings, the court asked him if he wanted to represent himself. When the defendant responded in the affirmative, the court canvassed him both to determine if he had the desire and the capacity to represent himself, and to warn him of the dangers and disadvantages of self-representation. After asking

the defendant several questions on these subjects, the court proposed to the defendant that he agree to have Hutchinson pick the jury, and then it would revisit the issue of whether he should be allowed to represent himself going forward. The defendant initially agreed to that proposal. Voir dire thus continued until 1:15 p.m., with Hutchinson still representing the defendant. Thereafter, as promised, the defendant was afforded the rest of the day to meet with Hutchinson to review the state's disclosure.

"The next day, March 14, 2012, the defendant notified the court that technical difficulties prevented him from being able to watch certain of the videotapes that he had sought to watch on the previous afternoon. Following an exchange with the defendant and a discussion with counsel, the court decided not to proceed with voir dire that day so as to give the defendant another opportunity to view the videotapes that he had not been able to view the day before.

"After the defendant reviewed the videotapes, the court revisited the defendant's request to represent himself, and the defendant reiterated his desire to do so. The court then thoroughly canvassed the defendant and determined that he validly waived his right to counsel. The court asked Hutchinson to remain present as standby counsel for the defendant, and then adjourned for the day." *State* v. *Bush*, supra, 325 Conn. 306–308.

On the next day, March 15, 2012, the court denied the defendant's request for a continuance to review approximately 900 pages of documents that the state had provided to Hutchinson. After the court denied his request for a continuance, the defendant elected to proceed with Hutchinson as his attorney.

The defendant now claims that the court committed structural error when it failed to grant his initial request

to represent himself on the second day of voir dire. We disagree.

"The sixth amendment to the United States constitution provides in relevant part: In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense. The sixth amendment right to counsel is made applicable to state prosecutions through the due process clause of the fourteenth amendment. . . . In *Faretta* v. *California*, [422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)], the United States Supreme Court concluded that the sixth amendment [also] embodies a right to self-representation and that a defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so. . . . In short, forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so. . . .

"It is well established that [t]he right to counsel and the right to self-representation present mutually exclusive alternatives. A criminal defendant has a constitutionally protected interest in each, but since the two rights cannot be exercised simultaneously, a defendant must choose between them. When the right to have competent counsel ceases as the result of a sufficient waiver, the right of self-representation begins. . . . Put another way, a defendant properly exercises his right to self-representation by knowingly and intelligently waiving his right to representation by counsel. . . .

"The inquiry mandated by Practice Book § 44-3 is designed to ensure the knowing and intelligent waiver of counsel that constitutionally is required. . . . We ordinarily review for abuse of discretion a trial court's determination, made after a canvass pursuant to . . . § 44-3, that a defendant has knowingly and voluntarily waived his right to counsel. . . . [W]here the defendant

claims that the trial court improperly failed to exercise that discretion by canvassing him after he clearly and unequivocally invoked his right to represent himself . . . whether the defendant's request was clear and unequivocal presents a mixed question of law and fact, over which . . . our review is plenary. . . .

"State and federal courts consistently have discussed the right to self-representation in terms of invoking or asserting it . . . and have concluded that there can be no infringement of the right to self-representation in the absence of a defendant's proper assertion of that right. . . . The threshold requirement that the defendant clearly and unequivocally invoke his right to proceed pro se is one of many safeguards of the fundamental right to counsel. . . . Accordingly, [t]he constitutional right of self-representation depends . . . upon its invocation by the defendant in a clear and unequivocal manner. . . . In the absence of a clear and unequivocal assertion of the right to self-representation, a trial court has no independent obligation to inquire into the defendant's interest in representing himself . . . . [Instead] recognition of the right becomes a matter entrusted to the exercise of discretion by the trial court. . . . Conversely, once there has been an unequivocal request for self-representation, a court must undertake an inquiry [pursuant to Practice Book § 44-3], on the record, to inform the defendant of the risks of self-representation and to permit him to make a knowing and intelligent waiver of his right to counsel. . . .

"Although a clear and unequivocal request is required, there is no standard form it must take. [A] defendant does not need to recite some talismanic formula hoping to open the eyes and ears of the court to [that] request. Insofar as the desire to proceed pro se is concerned, [a defendant] must do no more than state his request, either orally or in writing, unambiguously

to the court so that no reasonable person can say that the request was not made. . . . Moreover, it is generally incumbent upon the courts to elicit that elevated degree of clarity through a detailed inquiry. That is, the triggering statement in a defendant's attempt to waive his right to counsel need not be punctilious; rather, the dialogue between the court and the defendant must result in a clear and unequivocal statement. . . .

"Finally, in conducting our review, we are cognizant that the context of [a] reference to self-representation is important in determining whether the reference itself was a clear invocation of the right to self-representation. . . . The inquiry is fact intensive and should be based on the totality of the circumstances surrounding the request . . . which may include, inter alia, whether the request was for hybrid representation . . . or merely for the appointment of standby or advisory counsel . . . the trial court's response to a request . . . whether a defendant has consistently vacillated in his request . . . and whether a request is the result of an emotional outburst . . . ." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Pires*, 310 Conn. 222, 230–32, 77 A.3d 87 (2013).

As explained herein, on the second day of voir dire, following a colloquy with the defendant, the court canvassed him to determine whether he had the capacity to represent himself. Upon hearing the defendant's responses to its inquiries, the court stated that it would not be "a wise decision" for him to represent himself and suggested that Hutchinson continue to represent him through voir dire, after which his request to represent himself would be revisited. The defendant agreed to the court's suggestion, stating, "[o]kay, we could do that. That's no problem . . . I mean fair is fair." In these circumstances, the defendant cannot reasonably be found to have made a clear and unequivocal request to proceed without counsel at that time. Moreover, in

light of the defendant's agreement with the trial court's suggestion that he proceed with the assistance of counsel during voir dire, we cannot conclude that the court abused its discretion in proceeding with voir dire with Hutchinson representing the defendant.

II

The defendant next claims that the court erred in two ways in instructing the jury on the charge of conspiracy against him. First, he claims that the court erred by failing to instruct the jury on the elements of possession of narcotics in violation of General Statutes § 21a-279 and possession of narcotics with intent to sell in violation of § 21a-277 (b), two of the four offenses that were listed in the information as alleged objects of the charged conspiracy. Second, he claimed that the court erred in failing to instruct the jury to specify in its verdict, if it found him guilty of conspiracy, which of those listed offenses had been proved beyond a reasonable doubt to be the intended object or objects of the conspiracy. The defendant claims that these alleged infirmities in the court's instructions likely misled the jury. We are not persuaded.

"[I]n reviewing a constitutional challenge to the trial court's instruction, we must consider the jury charge as a whole to determine whether it is reasonably possible that the instruction misled the jury. . . . The test is whether the charge as a whole presents the case to the jury so that no injustice will result. . . . We will reverse a conviction only if, in the context of the whole, there is a reasonable possibility that the jury was misled in reaching its verdict. . . . A jury instruction is constitutionally adequate if it provides the jurors with a clear understanding of the elements of the crime charged, and affords them proper guidance for their determination of whether those elements were present." (Internal quotation marks omitted.) *State* v. *Frasier*, 169 Conn. App.

500, 509–10, 150 A.3d 1176 (2016), cert. denied, 324 Conn. 912, 153 A.3d 653 (2017).

On the conspiracy charge, the court instructed the jury that "the state must prove three elements beyond a reasonable doubt. First: there was an agreement between the defendant and one or more persons to engage in the sale of—of cocaine. Second: there was an overt act in furtherance of the subject of the agreement by one of those persons who are part of the agreement. Third: the defendant specifically intended to commit the crime; that is, to sell cocaine.

"As to the first element, an agreement between the defendant and one or more persons that criminal conduct be performed, the state must prove that [the defendant] came to an understanding with at least one other person to further the criminal purpose of selling of cocaine. The state . . . need not prove a formal or express agreement. The state may rely on circumstantial evidence if such evidence is sufficient to prove beyond a reasonable doubt the existence of an agreement.

"The second essential element is that after the agreement was formed, one or more of the conspirators carried out an overt act in furtherance of the conspiracy. An overt act is any step, action or conduct taken to achieve the objective of the conspiracy. It makes no difference which member of the conspiracy commits the act; it need not be the defendant. The state must prove beyond a reasonable doubt at least one member of the conspiracy carried out the overt act.

"The third essential element is that when the defendant entered into the conspiratorial agreement, he intended to violate the drug laws. The state must prove beyond a reasonable doubt that [the defendant] had the intent, the conscious objective to violate the criminal laws, and the sale of cocaine. The state claims that the

conspirators agreed and the defendant had the intent to sell . . . cocaine.

"I have previously discussed the essential elements of the sale of cocaine laws. Essentially, the state must prove [that the defendant] intended to sell or deliver cocaine to persons who are not members of the conspiracy.

"To summarize this charge, the state must prove beyond a reasonable doubt that [the defendant] intended to sell cocaine, and acting with that intent he agreed with one or more persons to pursue conduct that involve[d] the sale of cocaine. The state must further prove that at least one of the conspirators did an overt act in furtherance of the conspiracy. If you find beyond a reasonable doubt all these elements are proven, you shall find [the defendant] guilty of conspiracy. If you find the state has failed to prove any element beyond a reasonable doubt, you should find him not guilty of the conspiracy charge."

In so instructing the jury, the court narrowed the description of the charged conspiracy, and thus the legal basis upon which the defendant could lawfully be found guilty of that offense as charged, of conspiracy to sell cocaine. It thereby effectively eliminated, as possible objects of the charged conspiracy, both possession of cocaine in violation of § 21a-279 and possession of cocaine with intent to sell in violation of § 21a-277 (b). Because the jury's guilty verdict, and thus the defendant's conspiracy conviction, were necessarily based on the only theory of liability on which the jury was instructed—that of conspiracy to sell cocaine—it is not likely that the jury was misled by the court's failure to mention or describe other offenses listed in the information as alleged objects of the conspiracy in its final instructions.

The defendant also argues that the trial court improperly failed to charge the jury that it must determine which underlying crime or crimes he conspired to commit. In support of this argument, the defendant cites to *State* v. *Toth*, 29 Conn. App. 843, 618 A.2d 536, cert. denied, 225 Conn. 908, 621 A.2d 291 (1993), in which the defendant allegedly conspired to commit three separate crimes. There, because the trial court allegedly failed to instruct the jury that it must find which specific crime or crimes the defendant and his coconspirators had conspired to commit, the trial court could not know from the jury's verdict which offense or offenses the defendant had been convicted of conspiring to commit. The court in *Toth* thus held that, "in the absence of an instruction to the jury that it must determine beyond a reasonable doubt which of several object offenses the defendant conspired to commit, the jury was misled by the charge." Id., 864.

The reasoning in *Toth* is plainly inapposite to this case, however, for here, although four offenses were listed in the information as alleged objects of the charged conspiracy, the court instructed the jury that it could find the defendant guilty of conspiracy only on the theory of conspiracy to sell cocaine. Because the court thereby limited the scope of the charged conspiracy to the sale of narcotics, there was no reasonable possibility that the jury was confused or misled by the court's failure to mention possession of narcotics or possession of narcotics with intent to sell as other alleged objects of the charged conspiracy.

III

The defendant's final claim of error is that the trial court unlawfully sentenced him to twenty years incarceration on his conviction for conspiracy. The defendant claims that the challenged sentence exceeds by five years the maximum possible term of incarceration

for conspiracy to sell cocaine, as that crime was charged and proved against him in this case. He thus asks that his sentence for conspiracy be vacated and that this case be remanded to the trial court for resentencing on that charge in accordance with law.

Our Penal Code has long provided, in § 53a-48 (a), that "[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." Under that statute, the three essential elements of conspiracy, are (1) that the defendant agreed with one or more persons to engage in or cause the performance of conduct constituting one or more crimes, which are referred to as the "objects" of the conspiracy; (2) that any one of the coconspirators committed an overt act in pursuance of such conspiracy; and (3) that the defendant specifically intended, at the time of the conspiratorial agreement, to commit or cause the performance of conduct constituting one or more crimes that were the objects of the conspiracy.

The crime of conspiracy, so defined, does not carry a specific maximum punishment that is the same in all cases. Instead, the maximum punishment imposable for conspiracy is made to depend upon the seriousness of the crime or crimes that is/are proved to have been the object(s) of the conspiracy. On this score, our Penal Code further provides, in General Statutes § 53a-51, that "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."

To implement this relational rule of sentencing for conspiracy, it is well settled that the state must prove not only which particular crimes were the agreed and

intended objects of the charged conspiracy, but also that the defendant, when entering into the conspiratorial agreement, specifically intended to commit or cause the performance of conduct constituting such object crimes, and that the overt act upon which the state relies to obtain a conviction was committed in pursuance of an agreement to commit such object crimes. Without such specificity in the jury's guilty verdict, the court cannot determine, without impermissible speculation, what particular type of conspiratorial agreement underlies that verdict, or thus what maximum sentence can lawfully be imposed on the defendant on the basis of that verdict.

In this case, the defendant was brought to trial on an information charging him, in the second count, with conspiracy to violate several listed provisions of the State Dependency Producing Drug Law, particularly §§ 21a-278 (b), 21a-277 (a), 21a-277 (b) and 21a-279, while acting with the intent to violate those statutes. The second count further alleged that, "in the performance of such conspiracy," the defendant and/or one or more other named coconspirators committed at least one of seven overt acts, each a sale of cocaine on a particular date and at a particular location in the city of Bridgeport. The six alleged overt acts in which the defendant was alleged to have participated conformed precisely, as to date, location, and persons participating, to the six alleged sales of cocaine on which the state based separate substantive charges of one count each of sale of cocaine by a person who is not drug-dependent in violation of § 21a-278 (b) and sale of cocaine by a person who is not drug-dependent within 1500 feet of a school, in violation of § 21a-278a (b), in the third through the fourteenth counts of the information.

The defendant defended himself at trial on his substantive charges of sale of cocaine by a person who is not drug-dependent and sale of cocaine by a person

who is not drug-dependent within 1500 feet of a school, inter alia, by claiming and attempting to prove, in the manner of an affirmative defense, that he was drug-dependent throughout the period in which he was alleged to have made the sales of cocaine here at issue. On the basis of that defense, which the defendant supported at trial by his own testimony and that of others who knew him as to his long-standing drug addiction, the trial court instructed the jury as to each alleged sale of cocaine both on the charged offenses of sale of cocaine by a person who is not drug-dependent and sale of cocaine by a person who is not drug-dependent within 1500 feet of a school and on the lesser included offenses of sale of cocaine by a drug-dependent person and sale of cocaine by a drug-dependent person within 1500 feet of a school. So instructed, the jury found the defendant not guilty on each charge of sale of cocaine by a person who is not drug-dependent and sale of cocaine by a person who is not drug-dependent within 1500 feet of a school, but found him guilty on each charge of sale of cocaine by a drug-dependent person and sale of cocaine by a drug-dependent person within 1500 feet of a school.

In light of the defendant's acquittal on all charges of sale of cocaine by a person who is not drug-dependent under § 21a-278 (b), pursuant to his affirmative defense of drug dependency, the defendant claims that the most serious crime which was proved at trial to have been an object of the charged conspiracy was sale of cocaine by a drug-dependent person in violation of § 21a-277 (a), which carries with it, for a first offense, a maximum possible prison sentence of fifteen years. He argues, on that basis, that his twenty year prison sentence for conspiracy must be vacated because it exceeds the statutory maximum prescribed by law.

The state does not dispute the defendant's claim that, in light of the jury's finding on the issue of drug dependency, the most serious crime he was found to have

conspired to commit was sale of cocaine by a drug-dependent person in violation of § 21a-277 (a). It argued in its brief, however, that that sentence was entirely lawful because the defendant has a prior conviction for sale of cocaine, as he admitted in his testimony at trial, and thus was exposed, as a repeat offender, to a maximum possible prison sentence of thirty years, both on each of his substantive charges of sale of cocaine by a drug-dependent person and on the charge of conspiracy to sell cocaine in violation of §§ 53a-48 and 21a-277 (a).

On this record, however, there are two important reasons why the state's argument must be rejected. First, although the state specially pleaded in a part B information that the defendant was subject to enhanced penalties on each of his charges of sale of cocaine because he was a repeat offender, the state's trial prosecutor expressly informed the trial court, defense counsel and the defendant, at an in-court proceeding designed to warn the defendant about the dangers and disadvantages of representing himself at trial, that the state had not filed and would not prosecute the part B information with respect to the charge of conspiracy. For that reason, the trial court acknowledged on the record that the defendant's maximum possible prison sentence on the still-pending charge of conspiracy to sell cocaine by a person who is not drug-dependent in violation of §§ 53a-48 and 21a-278 (b) was twenty years, as prescribed by the latter statute for a first offense. Therefore, upon the defendant's acquittal on each charge of sale of cocaine by a person who is not drug-dependent, and his resulting conviction of the lesser included offense of sale of cocaine by a drug-dependent person, the most serious prison sentence the defendant could have received on the charge of conspiracy to sell cocaine at the time of such cocaine sales was a term of fifteen years.

The second reason why the state is incorrect in its argument that the defendant's maximum possible sentence on each charge of sale of cocaine by a drug-dependent person was thirty years is that the state withdrew the part B information in this case shortly after the jury returned its guilty verdict. As a result, there never was a trial or other fact-finding proceeding, before the jury or the trial court, as to the defendant's alleged status as a repeat offender, and thus there was no factual finding that he had that status despite his testimony on the record on that subject. For the foregoing reasons, the defendant's maximum possible prison sentence on the charge of conspiracy to sell cocaine as a drug-dependent person in violation of §§ 53a-48 and 21a-277 (a) is a term of fifteen years.

The judgment is reversed only as to the sentence on the conspiracy conviction and the case is remanded for resentencing in accordance with law. The judgment is affirmed in all other respects.

In this opinion the other judges concurred.

RECYCLING, INC. *v.* COMMISSIONER OF ENERGY AND ENVIRONMENTAL PROTECTION
(AC 38868)

Alvord, Keller and Pellegrino, Js.

Syllabus

The plaintiff appealed to this court from the judgment of the trial court dismissing its administrative appeal from the decision by the defendant Commissioner of Energy and Environmental Protection denying its application for an individual recycling permit and revoking its general permit to operate a recycling facility. A hearing officer for the defendant found that the plaintiff had submitted false, incomplete and incorrect information regarding its ownership and control in its application for an individual permit, and that the plaintiff had demonstrated a pattern or practice of inability or unwillingness to comply with the defendant's

permit requirements in violation of statute (§ 22a-6m [a]). The hearing officer also found that the plaintiff, over a period of five years, had made numerous material omissions in its representations to the Department of Energy and Environmental Protection in violation of certain department regulations (§ 22a-3a-5 [d] [2] [B] and [C]), and that C, who was the beneficial owner of the plaintiff, had disguised his ownership to keep his past criminal convictions from tainting the permitting process. On appeal, the plaintiff claimed, inter alia, that the trial court improperly upheld the denial of its application for an individual recycling permit and the revocation of its general permit to operate a recycling facility, and that the hearing officer had applied an erroneous standard of review and improperly excluded relevant evidence. *Held*:

1. The trial court properly dismissed the plaintiff's appeal, there having been substantial evidence in the record to support the hearing officer's finding that the plaintiff had demonstrated a pattern or practice of noncompliance with the defendant's permit requirements to warrant the revocation of its general permit registration and the denial of its application for an individual permit; the plaintiff made numerous material omissions in its representations to the department in violation of § 22a-3a-5 (d) (2) (B) and (C), which require the disclosure of all relevant and material facts, as the plaintiff's application for the individual permit did not disclose its relationship to C or that C was involved in its formation, operations and financing, the plaintiff did not disclose the documents that would allow C to divest other individuals of control over the plaintiff, and the evidence of the allegations in a related civil action that involved C suggested a conscious effort to deceive the department throughout the permitting process.
2. The plaintiff could not prevail on its claim that the denial of its permit application was not warranted, even if the plaintiff's compliance history with the defendant's permit requirements demonstrated a pattern of noncompliance; § 22a-6m (a) expressly grants the department authority to deny an application for a permit where, as here, there is a pattern or practice of failure to disclose material and relevant information, § 22a-3a-5 (d) (2) (B) of the department's regulations permitted revocation of the plaintiff's permit because of its failure to disclose all relevant and material facts in its application or where information the plaintiff had provided in its application was false or incomplete, and the department, in exercising its authority to deny the permit application, did not act unreasonably, arbitrarily, illegally or in abuse of its discretion.
3. The plaintiff's claim that the trial court improperly upheld the defendant's permit decisions because the hearing officer failed to apply the correct standard of review was unavailing: the plaintiff's rights to fundamental fairness in the administrative hearing were not violated on the basis of a statement by the hearing officer that the question before her was whether the record supported the permit decisions by the department's

staff, as the hearing officer conducted a thorough review of the voluminous record, and the level of her analysis was indicative of her fair and impartial de novo review of the record.

4. The hearing officer did not abuse her discretion by excluding evidence the plaintiff had sought to present as to the department's prior enforcement actions against other waste facilities; that evidence, in the absence of a claim of selective enforcement, had no logical tendency to aid the trier in the determination of whether the plaintiff had misrepresented and omitted pertinent facts in its application, and the plaintiff conceded that it was not making a claim of selective enforcement.

5. The trial court's finding that there was no bias on the part of the defendant's administrative adjudicators was not clearly erroneous, the plaintiff having failed to show actual bias and, therefore, failed to overcome the presumption that administrative agents acting in an adjudicative capacity are not biased; the plaintiff pointed to no facts in the record that suggested a prejudgment of adjudicative facts, any claimed bias on the part of the defendant was irrelevant, as the defendant had recused himself from the proceedings, evidence of adverse actions or conclusions drawn against the plaintiff was insufficient to prove actual bias, and the plaintiff cited no authority for the proposition that an entire administrative agency would be biased as a result of an individual commissioner's public statement on a contested matter.

Argued October 10, 2017—officially released January 9, 2018

Procedural History

Appeal from the decision by the defendant denying the plaintiff's application for an individual recycling permit and revoking its general permit to operate a recycling facility, brought to the Superior Court in the judicial district of New Britain, where the court, *Schuman, J.*, granted the motion to intervene filed by the city of Milford; thereafter, the matter was tried to the court, *Hon. Henry S. Cohn*, judge trial referee; judgment dismissing the appeal, from which the plaintiff appealed to this court; subsequently, the court, *Hon. Henry S. Cohn*, judge trial referee, issued an articulation of its decision. *Affirmed.*

Alan M. Kosloff, for the appellant (plaintiff).

David H. Wrinn, assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, and *Kirsten S. P. Rigney*, assistant attorney general, for the appellee (defendant).

David A. Slossberg, with whom was *Amy E. Souchuns*, for the appellee (intervenor city of Milford).

Opinion

ALVORD, J. The plaintiff, Recycling, Inc. (RCI), appeals from the judgment of the trial court dismissing its administrative appeal from the decision of the defendant[1] Commissioner of Energy and Environmental Protection (commissioner),[2] denying its application for an individual permit to construct and operate a volume reduction facility (individual permit) and revoking its general permit to construct and operate certain recycling facilities (general permit). On appeal, RCI claims that the trial court erred in dismissing its appeal because: (1) the denial and revocation was not warranted under the circumstances of this case; (2) the hearing officer violated its rights to a fair hearing by applying an erroneous standard of review; (3) the hearing officer erroneously excluded relevant evidence; and (4) the commissioner engaged in improper conduct during the proceedings. We affirm the judgment of the trial court.[3]

The following facts and procedural history are relevant to RCI's appeal. In 2008, RCI held a general permit registration to operate a limited recycling facility at 990 Naugatuck Avenue in Milford. In February of that year,

[1] The city of Milford successfully intervened as a defendant prior to the administrative hearing in this case. On appeal to the trial court, the city of Milford again intervened as a defendant.

[2] The Commissioner of Energy and Environmental Protection acts on behalf of the Department of Energy and Environmental Protection and references in this opinion to the department include the commissioner or his designee.

[3] In hearing administrative appeals such as the present one, the Superior Court acts as an appellate body. See General Statutes § 4-183 (j) (providing standard of review for administrative appeals to Superior Court); see also *Connecticut Coalition Against Millstone* v. *Connecticut Siting Council*, 286 Conn. 57, 85, 942 A.2d 345 (2008) (noting that Superior Court sits "in an appellate capacity" when reviewing administrative appeals).

RCI submitted an application to the Connecticut Department of Energy and Environmental Protection (department or DEEP) for an individual permit, which would allow RCI to increase the volume and breadth of its recycling operations. At the time, RCI was purportedly owned by Darlene Chapdelaine. Chapdelaine corresponded with the department on numerous occasions regarding the application for an individual permit, and represented herself as the sole owner of RCI. On February 10, 2012, nearly four years after RCI submitted its application, the department issued a tentative determination to approve RCI's application for an individual permit.

In April, 2012, before the department had made a final determination on the individual permit application, department staff learned of a lawsuit between Chapdelaine and Gus Curcio, Sr. over ownership of RCI. The pleadings in that lawsuit alleged that Curcio disguised his true ownership of RCI from the department to keep his past criminal convictions from tainting the permitting process. Documents attached to the complaint undermined RCI's representations to the department that Chapdelaine was the sole owner of RCI. On October 23, 2012, the court rendered judgment concluding that Curcio was the beneficial owner of 100 percent of RCI.

Consequently, in November, 2012, the department issued a tentative determination to withdraw its approval and deny RCI's application for an individual permit. The department also notified RCI that it intended to revoke its general permit registration. The department explained that the basis for its denial and revocation was RCI's failure to disclose Curcio's extensive ownership interests and its false or misleading representations as to the control of RCI. On January 24, 2013, the department issued a revised and amended

notice of intent to revoke RCI's general permit registration, adding, as a basis for revocation, RCI's and Curcio's inability or unwillingness to comply with permit requirements. The notice also relied on a June 11, 2012 notice of violation (NOV) issued to RCI by the department.

On February 27, 2013, the department provided RCI with a compliance conference in accordance with General Statutes § 4-182 (c),[4] at which it was afforded the opportunity to demonstrate to department staff that it had met all of the requirements for lawful retention of its general permit. On May 17, 2013, the department notified RCI that it had not changed its position as a result of the compliance conference and that justification remained to deny RCI's application for an individual permit and revoke its general permit registration.

On November 12, 2013, a five day hearing commenced before a department hearing officer.[5] On August 25, 2014, the hearing officer issued a proposed final decision concluding that RCI had submitted false, incomplete, and incorrect information regarding its ownership and control in its application to the department for an individual permit, and that it had demonstrated a pattern or practice of inability or unwillingness

[4] General Statutes § 4-182 (c) provides in relevant part: "No revocation, suspension, annulment or withdrawal of any license is lawful unless, prior to the institution of agency proceedings . . . the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license. . . ."

[5] General Statutes § 22a-208a (e) provides in relevant part: "The commissioner may hold a public hearing prior to approving or denying an application if in his discretion the public interest will be best served thereby, and shall hold a hearing upon receipt of a petition signed by at least twenty-five persons. . . ."

Section 22a-3a-5 (d) (1) of the Regulations of Connecticut State Agencies provides in relevant part: "Unless otherwise provided by law, any Department proceeding to revoke, suspend or modify a license shall commence with issuance of notice to the licensee. Such notice shall . . . inform the licensee that he may within thirty days of issuance of the notice file a request for a hearing . . . ."

to comply with the department's permit requirements. The hearing officer found, inter alia, that Curcio tightly controlled RCI's financing, expenditures, and daily operations. In the proposed final decision, the hearing officer recommended that the department deny RCI's application for an individual permit and revoke RCI's general permit registration.

RCI subsequently raised exceptions to the proposed final decision. On November 12, 2014, Deputy Commissioner Susan K. Whalen[6] heard argument on the exceptions. On February 5, 2015, the deputy commissioner adopted the proposed final decision and denied RCI's individual permit application and revoked its general permit registration.

In March, 2015, RCI appealed to the Superior Court, challenging the department's decision. The trial court heard oral argument on January 7, 2016. On January 20, the court dismissed the appeal. This appeal followed.

I

RCI first claims that the court erred in upholding the deputy commissioner's decision because the department's denial of its application and revocation of its general permit registration was "arbitrary and capricious and an abuse of discretion . . . ." Specifically, it argues that department "[s]taff failed to demonstrate a pattern or practice of noncompliance sufficient to warrant revocation of the general permit or denial of the individual permit," and "[e]ven if RCI's compliance history demonstrated a pattern of noncompliance, revocation and denial is not warranted." We disagree.

The following additional facts, which are based on the hearing officer's findings, are relevant to this claim.

[6] As discussed in part IV of this opinion, the commissioner recused himself from these proceedings and designated the deputy commissioner as the final decision maker.

The hearing officer concluded that RCI provided false and incomplete information regarding its ownership in violation of section 6 of the general permit,[7] which demonstrated a pattern or practice of noncompliance with the terms and conditions of the general permit. James Barrett, who was nominated by Curcio as RCI's first president in 2008, testified that he owned all of RCI's stock at the time of the general permit application. That application requires, in relevant part, that the applicant or permittee (1) identify the owner and operator of the facility; (2) sign the application certifying that it is "true, accurate and complete"; and (3) report any changes in information provided. Barrett testified that he did not remember signing the general permit application. The signature on the registration certificate of the application read "Barret," with one "t" rather than two. Additionally, a letter concerning RCI's use of its property for recycling operations accompanied the application. The letter purported to be from and signed by Barrett, but Barrett testified that he did not write or sign the letter. Barrett testified that the signature on the application was not his, and that he did not know who signed the letter in his name.[8]

As the hearing officer found, "Curcio considered himself to be the owner of RCI and controlled RCI through Barrett." Barrett's testimony supported this conclusion. He testified, in relevant part, that: (1) he did not know where the books and records for RCI were kept and maintained; (2) he could not recall signing more than one check on behalf of RCI; (3) checks were "signed" by a rubber stamp of his signature, which he thought was kept by Chapdelaine; (4) he knew that Curcio was

[7] Section 6 of the general permit, which lists the general conditions of a general permit registration, provides, in relevant part, that if information provided on the application proves to be false or incomplete, the general permit registration may be revoked.

[8] When the department approved RCI's original application for its general permit registration, it was unaware that the signatures were not Barrett's.

"financing the [department] application process," but did not know whether he was the sole source of money; (5) he was unaware of whether RCI paid any taxes while he was president; (6) he was unaware of whether operations were ongoing at the 900 Naugatuck site; and (7) when he filed for bankruptcy in December, 2008, he did not list RCI as a business in which he was an officer or director or in which he owned 5 percent or more of the voting securities within the past six years.

In October, 2009, Chapdelaine replaced Barrett as the president of RCI. Despite the requirement that a registrant or permittee report any changes provided on the general permit application to the department, RCI did not correct the registration information as required until February, 2010, when Chapdelaine signed the registration renewal application as president of RCI. Despite Chapdelaine's representations to the department that she owned and controlled the operations of RCI, the hearing officer found that "Chapdelaine's claim that she [was] the owner of RCI and the exclusive holder of 100 percent of RCI's stock is not supported by the record and the logical conclusions that can be drawn from it." She based this conclusion, in relevant part, on the facts that: (1) there was no evidence that shares of RCI's stock were registered in Chapdelaine's name; (2) Chapdelaine executed a document shortly after her nomination as president providing that she is the owner of record of RCI " 'in name only' " and referencing other documents that show that she could be dispossessed of this ownership at any time by Curcio; (3) a shareholder's agreement signed by Chapdelaine in 2011 explicitly stated that she owned 10 percent or ten shares of RCI's stock and was required to offer it to RCI and the other stockholders before selling them to a third party; and (4) evidence received regarding the 2012 litigation between Curcio and Chapdelaine over the control of RCI revealed that Curcio nominated Chapdelaine to be the

sole officer and director of RCI to facilitate the filing of RCI's permit application. The hearing officer further found that "[Chapdelaine] was not able to independently operate RCI. She did not decide how RCI would spend its money. She even lacked the power to maintain her own position with RCI; the 'beneficial paperwork' she signed could cause her to be removed from RCI at any time."

The hearing officer concluded that Curcio controlled the major decisions of RCI. Curcio directed that RCI be formed, negotiated the purchase of the business' property, decided to open a recycling facility at the property, nominated RCI's presidents, and controlled RCI with and through them. In his civil action against Chapdelaine, Curcio set out to prove his ownership and control of RCI. A copy of Curcio's sworn complaint was admitted into evidence at the hearing, along with a transcript of the trial in that case. On the basis of this evidence, the hearing officer found that Curcio "nominated Chapdelaine to be the sole officer and director of RCI for the purpose of facilitating the filing of RCI's permit application. She has, at all times, been required and directed to operate the business of the corporation at his direction and with his express approval." During the hearing, Curcio "tried to repudiate his prior sworn statements that he owned or was the owner of RCI, even when they were read to him during this proceeding, through evasive or vague answers to questions or outright denials of his prior statements." Curcio claimed that he was always the "beneficial owner" of RCI, with Barrett and Chapdelaine acting as his "nominees."

The hearing officer also found that RCI misrepresented or omitted pertinent information from its application for an individual permit. The individual permit

application requires that a corporation identify its owners, operator, officers, directors, and certain shareholders. The application must include agreements between all parties involved in the project for ownership and control of the facility. It also must include information that illustrates the relationship between parties involved in the ownership and control of the facility. The department expects an application to list all shareholders holding 20 percent or more of a corporation's stock, including stockholders holding stock only as a nominee for another person or entity or someone holding a beneficial interest in the stock. The application also requires an applicant to include all sources of funding and mortgages.

Despite these requirements, RCI's application for an individual permit did not disclose Curcio's involvement with RCI. Curcio, who testified that he "chose to stay as a beneficial owner" and did not want his name associated with the application, was not listed on the application. Curcio was not listed as having an ownership interest in RCI, being closely involved with its operations, nor being its sole source of funds. Additionally, neither the " 'beneficial paperwork' " that Chapdelaine signed, allowing her to be removed from RCI at any time, or the shareholder agreement that stated she owned 10 percent of RCI stock, was disclosed on the application.

On the basis of this evidence, the hearing officer recommended that RCI's general permit registration be revoked because (1) RCI failed to disclose who owned and controlled the company, in violation of section 6 of the general permit; (2) the certifying signature was false, in violation of § 22a-3a-5 (a) (2) of the Regulations of Connecticut State Agencies;[9] and (3) RCI demonstrated a "pattern or practice of noncompliance which

[9] Section 22a-3a-5 (a) (2) of the Regulations of Connecticut State Agencies provides in relevant part: "An application, including any attachments thereto, shall be certified by the applicant and by the individual or individuals respon-

demonstrates the applicant's unwillingness or inability to achieve and maintain compliance with the terms and conditions of the permit,"[10] as evidenced by its consistent failure to submit required quarterly reports on time or at all, and accurately or completely,[11] as well as the misrepresentations in its permit application and submittal of false, incomplete, and inaccurate information.

Citing regulations that permit the commissioner to revoke a permit or deny an application where misrepresentations by the applicant are discovered, the hearing officer further recommended that RCI's application for

sible for actually preparing the application, each of whom shall state in writing: 'I have personally examined and am familiar with the information submitted in this document and all attachments thereto, and I certify that based on reasonable investigation, including my inquiry of those individuals responsible for obtaining the information, the submitted information is true, accurate and complete to the best of my knowledge and belief. I understand that a false statement in the submitted information may be punishable as a criminal offense, in accordance with section 22a-6 of the General Statutes, pursuant to section 53a-157 of the General Statutes, and in accordance with any other applicable statute.' . . ."

[10] See General Statutes § 22a-6m (a).

[11] The hearing officer concluded that RCI's failure to submit timely and accurate quarterly reports supported a finding of a pattern or practice of noncompliance with the requirements of the general permit. On appeal, RCI challenges this conclusion. The trial court, however, "decline[d] to resolve this factual dispute in light of its conclusions on disclosure . . . ." Because the trial court did not decide RCI's claim regarding its failure to submit timely and accurate quarterly reports, we decline to address it. See *Smith* v. *Redding*, 177 Conn. App. 283, 294, A.3d (2017) ("Connecticut appellate courts will not address issues not decided by the trial court" [internal quotation marks omitted]). Furthermore, although RCI filed a motion for articulation, it did not seek articulation on this point, nor did RCI file a motion for reargument. See *Pike* v. *Bugbee*, 115 Conn. App. 820, 826, 974 A.2d 743 ("It is . . . the responsibility of the appellant to move for an articulation or rectification of the record . . . or to ask the trial judge to rule on an overlooked matter. . . . In the absence of any such attempts, we decline to review this issue." [Internal quotation marks omitted.]), cert. granted on other grounds, 293 Conn. 923, 980 A.2d 912 (2009) (appeal withdrawn December 1, 2011). Accordingly, we decline to reach this claim.

the individual permit be denied because RCI (1) misrepresented[12] its stock ownership interests on its application; (2) misrepresented information as to who owns and controls RCI on its application; and (3) did not provide complete or accurate information about its finances or funding sources. As noted, the deputy commissioner adopted the proposed final decision and denied RCI's individual permit application and revoked its general permit registration. The trial court, in dismissing RCI's appeal, concluded that it failed to disclose to the department "all required information."[13]

We begin with the applicable standard of review and principles of law that guide our analysis. "[J]udicial review of an administrative agency's action is governed by the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq., and the scope of that review is limited. . . . When reviewing the trial court's decision, we seek to determine whether it comports with the [UAPA]. . . . [R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither this court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Conclusions of law reached by the administrative agency must stand if . . . they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts. . . . The court's ultimate

[12] Although the hearing officer characterized these findings as "misrepresentations," she acknowledged that RCI's "misrepresentations took many forms, including omitted, inaccurate and false information . . . ."

[13] The trial court concluded that it need not reach the issue of whether RCI's submissions to the department amounted to "misrepresentations" on the ground that the plaintiff had violated "the statutes and applicable regulations" that "require full disclosure . . . ."

duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of [its] discretion." (Internal quotation marks omitted.) *AFSCME, AFL-CIO, Council 4, Local 2405* v. *Norwalk*, 156 Conn. App. 79, 85–86, 113 A.3d 430 (2015).

General Statutes § 22a-6m (a) provides in relevant part: "In exercising any authority to issue, renew, transfer, modify or revoke any permit, registration, certificate or other license under any of the provisions of this title, the Commissioner of Energy and Environmental Protection may consider the record of the applicant for, or holder of, such permit, registration, certificate or other license, the principals, and any parent company or subsidiary, of the applicant or holder, regarding compliance with environmental protection laws of this state, all other states and the federal government. If the commissioner finds that such record evidences a pattern or practice of noncompliance which demonstrates the applicant's unwillingness or inability to achieve and maintain compliance with the terms and conditions of the permit, registration, certificate or other license for which application is being made, or which is held, the commissioner, in accordance with the procedures for exercising any such authority under this title, may . . . deny any application for the issuance, renewal, modification or transfer of any such permit, registration, certificate or other license, or . . . revoke any such permit, registration, certificate or other license." Additionally, the department's rules of practice[14] provide, in relevant part, that the commissioner may revoke, suspend, or modify a license if "[t]he licensee or a person on his behalf failed to disclose all

[14] Section 22a-209-4 (h) (3) of the Regulations of Connecticut State Agencies provides that "[a] permit to construct or operate may be revoked or suspended in accordance with Section 4-182 of the General Statutes and the Rules of Practice of the Department, as amended."

relevant and material facts in the application for the license or during any Department proceeding associated with the application . . . .'' Regs., Conn. State Agencies § 22a-3a-5 (d) (2) (B).

A

RCI first contends that ''staff failed to demonstrate a pattern or practice of noncompliance,'' pursuant to § 22a-6m (a), ''to warrant revocation of the general permit or denial of the individual permit.'' We disagree.

''The substantial evidence rule governs judicial review of administrative fact-finding under the UAPA. . . . An administrative finding is supported by substantial evidence if the record affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . The substantial evidence rule imposes an important limitation on the power of the courts to overturn a decision of an administrative agency . . . and to provide a more restrictive standard of review than standards embodying review of weight of the evidence or clearly erroneous action. . . . The United States Supreme Court, in defining substantial evidence in the directed verdict formulation, has said that it is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'' (Citations omitted; internal quotation marks omitted.) *Dolgner* v. *Alander*, 237 Conn. 272, 281, 676 A.2d 865 (1996).

We conclude that there is substantial evidence in the record to support the hearing officer's finding of a pattern or practice of noncompliance that demonstrates RCI's unwillingness or inability to achieve and maintain compliance with the terms and conditions of the permit. The record revealed that, over a period of five years,

RCI made numerous material omissions in its representations to the department, in violation of department regulations that require disclosure of all relevant and material facts; see Regs., Conn. State Agencies § 22a-3a-5 (d) (2) (B) and (C); as well as general permit requirements that prohibit providing incomplete information. See footnote 6 of this opinion. The record supports the hearing officer's finding that Curcio, through Barrett and Chapdelaine, controlled RCI. Barrett's testimony revealed that he was not involved in, nor familiar with, RCI's operations. RCI's application for the general permit was signed by a "James Barret," and Barrett testified that he did not remember signing the application or the letter that accompanied the application. Although Chapdelaine was involved with RCI's operations, ample evidence, such as the document, signed by Chapdelaine, that proclaimed her the owner of RCI "in name only," and evidence regarding the 2012 litigation between Curcio and her, supports the conclusion that Curcio ultimately controlled RCI's operations.

Applications for both a general and individual permit require the applicant to disclose information about the owners and operators of RCI. Despite these requirements, RCI's application for the individual permit did not disclose Curcio's relationship to RCI. RCI did not disclose that Curcio was involved in the formation, operations, and financing of RCI. RCI did not disclose the "beneficial documents" that would allow Curcio to divest Chapdelaine of control of RCI at any time. Furthermore, evidence of the allegations in the civil suit between Curcio and Chapdelaine suggested a conscious effort to deceive the department throughout the permitting process.

Plainly, we cannot say that there is not substantial evidence in the record to support the hearing officer's finding that RCI demonstrated a pattern or practice of

noncompliance[15] to warrant revocation of its general permit registration and denial of its application for an individual permit. This court may not "retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact." (Internal quotation marks omitted.) *AFSCME, AFL-CIO, Council 4, Local 2405* v. *Norwalk*, supra, 156 Conn. App. 85.[16]

[15] RCI argues that "RCI respectfully maintains that DEEP has not demonstrated a 'significant wilful noncompliance' sufficient to revoke RCI's general permit and deny RCI's individual permit pursuant to § 22a-6m." This argument is without merit, as the statute requires only a finding of "a pattern or practice of noncompliance which demonstrates the applicant's unwillingness or inability to achieve and maintain compliance . . . ." General Statutes § 22a-6m (a).

[16] RCI relies on *Yaworski, Inc.* v. *Dept. of Environmental Protection*, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. CV-95-0550682 (June 21, 1996) (17 Conn. L. Rptr. 39), nonbinding authority, to support his argument that the hearing officer improperly found a pattern or practice of noncompliance.

In *Yaworski, Inc.*, the trial court affirmed the department's denial of a permit on the basis of, in relevant part, a history of failure to comply with state environmental laws and regulations in the operation of the landfill. Id., 41. RCI argues that "[i]n contrast to the years of repeated violations found in *Yaworski, Inc.*, Mr. Curcio has never been charged for an environmental crime and has only been involved in a civil enforcement matter relating to environmental compliance one time prior to the current matter." RCI's reading of *Yaworski, Inc.*, however, is misguided. *Yaworski, Inc.*, was an acknowledgement of the commissioner's discretion to find a history of noncompliance justifying the denial of a permit application. There, the trial court stated that the commissioner has discretion to deny an application for a permit, even where "the applicant has never been formally adjudicated as a violator." *Yaworski, Inc.* v. *Dept. of Environmental Protection*, supra, 17 Conn. L. Rptr. 41. Additionally, the court explicitly rejected an argument, similar to that of RCI here, that the commissioner's enforcement of the rule allowing denial of a permit application on the basis of past noncompliance was "arbitrary and discriminatory in view of the commissioner's failure to take similar action in other cases" on the ground that it amounted to a claim for selective enforcement, which was not at issue in the case. Id., 42.

Furthermore, Curcio's personal compliance history was not the sole basis on which the department denied RCI's application and revoked its permit registration. Even if we assumed, arguendo, that Curcio's personal compliance history did not justify such actions by the department, denial and revocation would still be within the department's discretion on the basis

B

RCI next contends that, "[e]ven if Recycling, Inc.'s compliance history demonstrated a pattern of noncompliance, revocation and denial is not warranted." We are unpersuaded.

Courts give administrative agencies "broad discretion in the performance of their administrative duties, provided that no statute or regulation is violated." *Forest Walk, LLC* v. *Water Pollution Control Authority*, 291 Conn. 271, 286, 968 A.2d 345 (2009). "If the penalty meted out is within the limits prescribed by law, the matter lies within the exercise of the [agency's] discretion and cannot be successfully challenged unless the discretion has been abused." (Internal quotation marks omitted.) *Wasfi* v. *Dept. of Public Health*, 60 Conn. App. 775, 790, 761 A.2d 257 (2000), cert. denied, 255 Conn. 932, 767 A.2d 106 (2001). Here, the statutes and regulations that govern the department expressly grant the department authority to deny the individual permit application and revoke the general permit registration. Section 22a-6m (a) grants the department authority to deny an application for a permit, or to revoke a permit or registration, where the record evidences a pattern or practice of noncompliance, which the hearing officer found here in light of RCI's failure to disclose material and relevant information to the department. The department's rules of practice and the requirements of the general permit further provide that the department may revoke a license where the licensee fails to disclose all relevant and material facts in an application, or where information provided on the application proves to be false or incomplete. See Regs., Conn. State Agencies § 22a-3a-5 (d) (2) (B); footnote 7 of this opinion. The department exercised its authority to deny the individual permit application and revoke the general permit

of the repeated omissions of material and relevant information made to the department.

registration based on the overwhelming evidence of failures to disclose material and relevant facts as required. This court must "decide whether, in light of the evidence, the [agency] acted unreasonably, arbitrarily, illegally, or in abuse of its discretion." (Internal quotation marks omitted.) *United Technologies Corp.* v. *Commissioner on Human Rights & Opportunities*, 72 Conn. App. 212, 225, 804 A.2d 1033, cert. denied, 262 Conn. 920, 812 A.2d 863 (2002).We conclude that it did not.

II

RCI next claims that the court erred in upholding the deputy commissioner's decision because the hearing officer failed "to apply the correct standard of review for an administrative proceeding . . . ." Specifically, it argues that "[t]he administrative hearing process is founded on a fair and impartial hearing by a neutral hearing officer . . . conducting a de novo review of the evidentiary record," and because the hearing officer in this case "review[ed] the record for evidence in support of DEEP's findings, rather than undertaking an impartial de novo review" of the evidence, "[t]he entirety of the hearing officer's evaluation of the evidence, her findings of fact and her application of those facts to applicable law, is irretrievably tainted by her use of the wrong standard of review."[17] (Emphasis omitted.) We disagree.

The following additional facts and procedural history are relevant to this claim. In November, 2012, a department hearing officer held a five day hearing on the issues of the department's tentative determinations to deny RCI's application for an individual permit and to

[17] Although RCI frames this argument as being based on the trial court's application of an incorrect "standard of review," the argument ultimately relates to the fundamental fairness of the administrative proceedings before the hearing officer, and we address that claim accordingly.

revoke its general permit registration. RCI, the department, and the city of Milford all fully participated in this hearing. The hearing officer heard the testimony of eight witnesses, some of whom were called to the witness stand more than once, including Chapdelaine and Curcio. Additionally, the hearing officer received over two thousand pages of documents into evidence.

Following the hearing, the hearing officer issued a proposed final decision. In the proposed final decision, she described her duty as hearing officer as follows: "In order to render my proposed final decision, I must review the record that has been compiled and developed during this proceeding to determine whether the record supports staff's tentative determination to deny RCI's permit application and revoke its general permit registration. My role is to evaluate the evidence in the record, find facts based on this record, and make conclusions of law based on these facts. The question before me is not whether I would have reached the same conclusions as staff, but whether the facts and evidence in the record support staff's decision."

The proposed final decision contained extensive findings of fact, including findings on the issues of ownership and control of RCI, misrepresentations in RCI's individual permit application, and RCI's noncompliance with the requirements of its general permit registration. The hearing officer concluded that "RCI submitted an incomplete and misleading application that omitted certain required information and provided inaccurate and false information regarding its ownership, financial stability, and corporate structure and operations," and that "[t]hese misrepresentations and Curcio's history of noncompliance demonstrate a pattern or practice of noncompliance that shows RCI's unwillingness or inability to achieve and maintain compliance with the terms and conditions of the pending permit." The proposed final decision recommended that the department deny RCI's

application for an individual permit and revoke RCI's general permit registration.

Both RCI and the defendant filed exceptions in response to the proposed final decision. On November 12, 2014, the parties appeared before Deputy Commissioner Whalen for oral argument on the exceptions. In relevant part, RCI argued that the hearing officer's statement in the proposed final decision that "[t]he question before me is not whether I would have reached the same conclusions as staff, but whether the facts and evidence in the record support staff's decision," appeared to "defer to staff's actions," and was indicative of "a fail[ure] to undertake a de novo review of the evidence." In the final decision, the deputy commissioner rejected those arguments and concluded that the hearing officer conducted "a balanced and unbiased review of all of the evidence before her and did not presume the validity of staff's actions." She characterized the hearing officer's statement as "an attempt to define the limited scope of the proceeding, which was to determine whether or not there was cause to revoke RCI's general permit and deny the application for the individual permit." The deputy commissioner concluded that "[i]t is clear to me that the hearing officer in this case took an impartial and unweighted review of the evidence before her, as evidenced by the detailed level of analysis set forth in the [proposed final decision]."

On appeal to the trial court, RCI again challenged the hearing officer's review of the evidence, arguing that "the required de novo review of the evidence was not undertaken . . . ." In its memorandum of decision, the trial court rejected this argument, stating: "The hearing officer stated that she would, as required by DEEP regulations, 'evaluate the evidence in the record, find facts based on this record, and make conclusions of law based on these facts.' The hearing officer also stated

that '[t]he question before me is not whether I would have reached the same conclusions as staff, but whether the facts and evidence in the record support staff's decision.' . . . RCI relies on this second sentence to claim that the hearing officer was merely looking at the record to see if it supported the DEEP staff's decision. On the other hand, the first quoted sentence shows that the hearing officer intended to meet the requirement[s] of . . . § 22a-3a-6 (d) (1), requiring a fair and impartial proceeding and ruling. The hearing officer's detailed findings and conclusions of law support this conclusion. The court will not overturn an administrative hearing officer's determination where the full context of the proposed final decision does not support RCI's contention."[18]

We begin by setting forth the applicable standard of review. "[J]udicial review of an administrative agency's action is governed by the Uniform Administrative Procedure Act (UAPA) . . . and the scope of that review is limited. . . . When reviewing the trial court's decision, we seek to determine whether it comports with the [UAPA]." (Internal quotation marks omitted.) *AFSCME, AFL-CIO, Council 4, Local 2405* v. *Norwalk*, supra, 156 Conn. App. 85–86. "[A]lthough we have noted that [a]n agency's factual and discretionary determinations are to be accorded considerable weight by the courts . . . we have maintained that [c]ases that present pure questions of law . . . invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) *Miller* v. *Dept. of Agriculture*, 168 Conn. App. 255, 266, 145 A.3d 393, cert. denied,

[18] Section 22a-3a-6 (d) (1) of the Regulations of Connecticut State Agencies provides: "The hearing officer shall conduct a fair and impartial proceeding, assure that the relevant facts are fully elicited, adjudicate issues of law and fact, and prevent delay and harassment."

323 Conn. 936, 151 A.3d 386 (2016). "The right to fundamental fairness in administrative proceedings encompasses a variety of procedural protections. . . . The scope of the right to fundamental fairness in administrative proceedings, like the scope of the constitutional right to due process that it resembles, is a question of law over which our review is plenary." (Citation omitted; internal quotation marks omitted.) *FairwindCT, Inc.* v. *Connecticut Siting Council*, 313 Conn. 669, 711, 99 A.3d 1038 (2014).

We cannot conclude that, in light of the record before this court, RCI's rights to fundamental fairness in its administrative hearing[19] were violated on the basis of the hearing officer's statement that "[t]he question before me is not whether I would have reached the same conclusions as staff, but whether the facts and evidence in the record support staff's decision." As noted, the hearing officer heard five days of evidence. The hearing officer permitted each party to present testimony, enter exhibits, and cross-examine witnesses; she herself questioned witnesses. Over the course of

[19] Although RCI characterizes these rights as "due process rights" and cites federal authority interpreting the due process clauses of the federal constitution, we note that our Supreme Court has ruled: "The right to fundamental fairness in administrative proceedings encompasses a variety of procedural protections . . . . In a number of administrative law cases decided after *Board of Regents* v. *Roth*, [408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)], we have characterized these procedural protections as 'due process' rights. . . . Although the 'due process' characterization, at first blush, suggests a constitutional source, there is no discussion in these cases of a property interest in terms of constitutional due process rights. These decisions are, instead, based on a line of administrative law cases and reflect the development, in Connecticut, of a common-law right to due process in administrative hearings. Although the facts of the present case do not require us to explore its boundaries, this common-law right is not coextensive with constitutional due process. . . . Therefore, to eliminate any further confusion, we will discontinue the use of the term 'due process' when describing the right to fundamental fairness in administrative proceedings." (Citations omitted.) *Grimes* v. *Conservation Commission*, 243 Conn. 266, 273 n.11, 703 A.2d 101 (1997).

the five day hearing, the hearing officer repeatedly referred to building a record, and stated that she would review the record of the hearing to reach her conclusion. Upon review of the record, she made forty-five findings of fact, each supported by numerous citations to the record, and fifteen pages of well reasoned conclusions of law based on the application of the law to those facts. She credited the "abundant evidence" provided by the department, and concluded that RCI failed to "introduce evidence to refute [s]taff's conclusions and show that it had provided accurate, truthful and complete information on its permit application . . . [and] failed to provide any credible and convincing justification for its failure to include required information that would have revealed that Gus Curcio, Sr., was involved in RCI." It is clear, upon examination of the proposed final decision, that the hearing officer conducted a thorough review of the voluminous record before her. We agree with the deputy commissioner and the trial court that the detailed level of the hearing officer's analysis is indicative of her fair and impartial de novo review of the record before her.[20]

III

RCI next claims that the court erred in upholding the deputy commissioner's decision because the hearing officer excluded relevant evidence at the hearing. Specifically, RCI argues that it was improper for the hearing

[20] Even assuming arguendo that the hearing officer's statement was an imprecise characterization of her review of the record, we cannot conclude that this statement undermined the entire hearing process. RCI cannot show that it suffered material prejudice as a result of this statement. See *Murach* v. *Planning & Zoning Commission*, 196 Conn. 192, 205, 491 A.2d 1058 (1985) ("not all procedural irregularities require a reviewing court to set aside an administrative decision; material prejudice to the complaining party must be shown" [internal quotation marks omitted]). As noted, the hearing officer detailed numerous findings of fact, supported by an abundance of citations to the record. Accordingly, RCI has failed to demonstrate that it suffered material prejudice.

officer to exclude evidence of prior department decisions or enforcement actions because "[a] key question in this proceeding is whether or not RCI's conduct reasonably warrants revocation of its general permit," and "[t]hat question cannot be answered in a vacuum; prior decisions and actions of the agency are relevant to the consideration of that question." We conclude that the exclusion of the documents at issue was not improper.

The following additional facts and procedural history are relevant to this claim. At the hearing, RCI sought to introduce two hundred pages of evidence relating to the department's enforcement actions against other waste facilities in Connecticut. The department objected on relevancy grounds. In response, RCI argued that the documents were relevant to testimony by a department employee, Darlene Sage, which it interpreted as suggesting a department policy to take adverse action against applicants or permit holders after a certain number of violations. Alternatively, both the department and the town argued that RCI was precluded from using the documents to make out a claim for selective enforcement,[21] as RCI had removed selective enforcement from its issues in its revised prehearing exchange materials. RCI conceded that it was "not making the claim of selective prosecution," but argued that the documents were relevant to the hearing officer in making her decision "as a guide." RCI asserted that the hearing officer "should be looking to what the department has done in similar and indeed more egregious circumstances."

[21] To make out a claim for selective enforcement, a claimant must prove that: "(1) the [claimant], compared with others similarly situated, was selectively treated; and (2) . . . such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bath faith intent to injure a person." (Internal quotation marks omitted.) *Cadlerock Properties Joint Venture, L.P.* v. *Commissioner of Environmental Protection*, 253 Conn. 661, 671, 757 A.2d 1 (2000), cert. denied, 531 U.S. 1148, 121 S. Ct. 1089, 148 L. Ed. 2d 963 (2001).

The hearing officer sustained the objections and excluded the documents from evidence.[22] In the proposed final decision, the hearing officer concluded that because selective enforcement was not an issue in the hearing, due to RCI's removal of selective enforcement as a legal issue in its prehearing materials, "evidence of how other applicants were treated by DEEP is therefore irrelevant" and was properly excluded as such.

RCI raised an exception to the hearing officer's exclusion of the documents. It argued that the hearing officer excluded the evidence on the basis that "it was tantamount to making an offer to show selective prosecution," and "[t]hat's not what the offer was about." RCI asserted that the offer of evidence "was about showing that the agency, if you look at the body of decisions that it made in this area, is acting arbitrarily and capriciously in an abuse of its discretion . . . ." In the final decision, Deputy Commissioner Whalen concluded: "The hearing officer properly excluded these exhibits as irrelevant. Selective enforcement was not an issue in the proceeding. Where evidence is irrelevant, it is not error to exclude it."

On appeal to the trial court, RCI again challenged the exclusion of the documents, arguing that "[t]he hearing

[22] The hearing officer explained her ruling as follows:

"Hearing Officer: But I'm not sure the department—it doesn't sound as if the department sits down and says, well, this one is just like the other ones where we have seven violations. If they do an eighth, just like all the others, they'll have this punishment. It sounds [like] it's very much a case-by-case kind of determination depending on the factors and depending on the nature of the problems. . . .

"What I heard the witness say was, we look at circumstances, we look at the nature of the offenses. So, you know, I could have—these could all be other facilities that have had fewer violations or whatever, and I don't think that would make a difference in my decision; I know it wouldn't. Because—just because the department has done something different for other facilities, they're not telling me that they have a policy where I'm going to be adding up what's happening. Well, this facility had this problem, so they got off and this one didn't. And as you said, selective enforcement is not an issue."

officer's refusal to take into account past agency actions, actions which necessarily constitute expressions of agency policy, reflects her bias in favor of DEEP's positions in this proceeding . . . ." (Citation omitted.) The trial court concluded that "the hearing officer did not deny due process in her ruling, made under the UAPA's § 4-178 (1) evidentiary standard."

We begin by setting forth the applicable standard of review and legal principles that guide our analysis. Pursuant to the UAPA, in contested administrative proceedings, "[a]ny oral or documentary evidence may be received, but the agency shall, as a matter of policy, provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence . . . ." General Statutes § 4-178 (1). The department's rules of practice[23] vest the hearing officer with the authority to "[a]dmit or exclude evidence and rule on objections to evidence . . . ." Regs., Conn. State Agencies § 22a-3a-6 (d) (2) (E). The department's rules of practice also prohibit the hearing officer from admitting "any evidence which is irrelevant, immaterial, unduly repetitious, untrustworthy, or unreliable." Regs., Conn. State Agencies § 22a-3a-6 (s) (1).

"In order to reverse an agency decision on the basis of an erroneous evidentiary ruling, it is necessary that the appellant demonstrate that substantial rights of [his] have been prejudiced because the administrative findings, inferences, conclusions, or decisions are . . . clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record." (Internal quotation marks omitted.) *Tomlin* v. *Personnel Appeal Board*, 177 Conn. 344, 348, 416 A.2d 1205 (1979). "[T]he

[23] The UAPA requires administrative agencies to "[a]dopt as a regulation rules of practice setting forth the nature and requirements of all formal and informal procedures available provided such rules shall be in conformance with the provisions of this chapter . . . ." General Statutes § 4-167 (a) (1).

plaintiff bears the burden of demonstrating that a hearing officer's evidentiary ruling is arbitrary, illegal or an abuse of discretion." (Internal quotation marks omitted.) *Gagliardi* v. *Commissioner of Children & Families*, 155 Conn. App. 610, 617, 110 A.3d 512, cert. denied, 316 Conn. 917, 113 A.3d 70 (2015).

Here, RCI has not shown that the hearing officer's decision to exclude the evidence of enforcement actions against other Connecticut waste facilities was arbitrary, illegal, or an abuse of discretion. Our case law has defined relevant evidence as "evidence that has a logical tendency to aid the trier in the determination of an issue. . . . One fact is relevant to another if in the common course of events the existence of one, alone or with other facts, renders the existence of the other either more certain or more probable." (Internal quotation marks omitted.) *Merchant* v. *State Ethics Commission*, 53 Conn. App. 808, 822, 733 A.2d 287 (1999). The purpose of the hearing was to determine whether RCI made misrepresentations and omissions to the department and failed to comply with the requirements of its general permit, justifying denial of its application for an individual permit and revocation of its general permit registration. RCI sought to introduce evidence of how the department treated other waste facilities in Connecticut, in rebuttal to alleged testimony by Sage as to department "policy" in dealing with purported violators. While Sage did testify about the procedure followed when waste facilities do not comply with department reporting requirements, she did not express a department "policy" as to how purported violators were treated. If anything, her testimony demonstrated that department staff individually examines and responds to potential deficiencies in submitted materials.[24]

[24] Although Sage's testimony referred to the "typical" situation in which entities are able to correct insufficiencies on their reports after being contacted by the department staff one time, she also testified that department

Evidence of how the department treated other waste facilities, in the absence of a claim for selective enforcement, has no logical tendency to aid the trier in the determination of the issues of whether RCI misrepresented and omitted pertinent facts to the department and failed to comply with the requirements of its general permit, justifying denial of its application for an individual permit and revocation of its general permit registration. Accordingly, we agree with the trial court that the hearing officer's ruling excluding the evidence under the UAPA § 4-178 (1)'s evidentiary standard was not arbitrary, illegal, or an abuse of discretion.

IV

RCI's final claim is that the court erred in upholding the deputy commissioner's decision because the commissioner engaged in improper conduct during the pendency of the proceedings. Specifically, it argues that

staff will "work with" entities who have failed to comply with reporting requirements:

"The Witness: Typically, we don't usually have to go past one time. Very rarely. Maybe two times to get reporting back. When it goes beyond that—

"Hearing Officer: Yes.

"The Witness: —it—I have to say, if we're talking about Recycling, Inc., it's one of the only ones that I've ever known to have to go back and forth so much.

"Hearing Officer: Really?

"The Witness: Yes.

"Hearing Officer: So, a more typical kind of problem is just something that's corrected the first time—

"The Witness: Correct.

"Hearing Officer: —or a second time? So, it's unusual for a facility to be more than one or two times—

"The Witness: Correct.

"Hearing Officer: —of having problems?

"The Witness: If an entity doesn't submit the reports at all or they haven't ever submitted the reports at all, they get a NOV, a notice of violation, typically, to start.

"Hearing Officer: And if your opinion, when a facility says, oh, it's just an oversight or, oh, we forgot, or, oh, you know, we'll do better next time, and they don't, what's your feeling on that?"

"The Witness: I mean, we work with them. We give them a chance to get the reports to us. If they don't then we proceed with enforcement."

"the commissioner improperly engaged in *ex parte* communications with the town of Milford and then publicly issued an official statement which harshly criticized Plaintiff and in effect directed DEEP to rule against plaintiff." It further asserts that "DEEP staff was aware of this statement and apparently felt constrained by it (although they never admitted it)." We reject this claim.[25]

The following additional facts and procedural history are relevant to this claim. Before the department issued its tentative determination to deny RCI's application for an individual permit and revoke its general permit, the city of Milford approached then Commissioner Daniel C. Esty "to report its understanding of Curcio's role at RCI and to impress on him that it was inappropriate for DEEP to approve RCI's application for an individual permit." Following that meeting, Commissioner Esty released a public statement which read, in part: "Given questions now being raised about the ownership of Recycling, Inc., I do not believe it is appropriate to move forward with proceedings on a permit application for that company to operate a solid waste facility in Milford. . . . Let me speak very frankly here. This agency would never grant a permit to someone

[25] At the outset, we note arguments made by the department and the town that RCI has not properly preserved this issue for appellate review. In its memorandum of decision, the trial court, before deciding the issue on its merits, noted that RCI "did not brief this issue to the court." RCI, instead, raised this argument for the first time at oral argument before the trial court. Accordingly, because we reject RCI's argument that the commissioner's actions impacted these proceedings on the merits, we do not address these waiver arguments. See *Hadden* v. *Capitol Region Education Council*, 164 Conn. App. 41, 43 n.4, 137 A.3d 775 (2016) (declining to address defendant's waiver argument because even if claim were preserved properly, controlling precedent clearly disposed of it on merits); *State* v. *Tarasiuk*, 125 Conn. App. 544, 547 n.5, 8 A.3d 550 (2010) ("The state argues that this claim was waived because the defendant approved of the instructions at trial. Because we find that the charge as stated was proper, we decline to address the issue of waiver.").

attempting to stand in for an individual with a background that would make them ineligible to obtain one. So, either a court decision will lift the cloud of doubt now hanging over this project so that the review process can move forward, or if not, the staff of this agency will withdraw the preliminary approval it granted and move to deny this permit application." Following this statement, but before the hearing, the commissioner recused himself from these proceedings and designated Deputy Commissioner Whalen as the final decision maker.[26]

On appeal to the trial court, RCI raised this issue for the first time at oral argument. In its memorandum of decision, the court concluded: "Here, RCI has not met its burden to show that the commissioner violated due process. He did talk to the town and issue a statement. But he also recused himself from the hearing as well as reviewing the hearing officer's proposed decision and issuing a final decision. RCI, in addition, did not brief this issue to the court. The court concludes similarly on an allied issue raised by RCI, that the DEEP staff was biased in its factual investigation by the commissioner's meeting with the town. RCI has not met its burden to show that the commissioner's actions dominated the staff's position at the administrative hearing, or earlier."

We begin with the applicable standard of review and principles of law that guide our analysis. "The applicable due process standards for disqualification of administrative adjudicators do not rise to the heights of those prescribed for judicial disqualification. . . . The mere

[26] At the hearing, RCI offered into evidence a copy of the commissioner's public statement. Through counsel, RCI asserted: "I want it on the record that there is good cause for Mr. Esty's—Commissioner Esty to disqualify himself in [the role of final decision maker]." Counsel for the department responded that "the commissioner is not the final decision maker in this case," as Commissioner Esty had already decided to recuse himself.

appearance of bias that might disqualify a judge will not disqualify an arbitrator. . . . Moreover, there is a presumption that administrative [adjudicators] acting in an adjudicative capacity are not biased. . . . To overcome the presumption, the plaintiff . . . must demonstrate actual bias, rather than mere potential bias, of the [adjudicators] challenged, unless the circumstances indicate a probability of such bias too high to be constitutionally tolerable. . . . The plaintiff has the burden of establishing a disqualifying interest." (Internal quotation marks omitted.) *Moraski* v. *Connecticut Board of Examiners of Embalmers & Funeral Directors*, 291 Conn. 242, 262, 967 A.2d 1199 (2009).

"In order to prove bias as a ground for disqualification, the plaintiff must show more than an adjudicator's announced previous position about law or policy . . . . He must make a showing that the adjudicator has prejudged adjudicative facts that are in dispute. . . . A tribunal is not impartial if it is biased with respect to the factual issues to be decided at the hearing. . . . The test for disqualification has been succinctly stated as being whether a disinterested observer may conclude that [the administrative adjudicator] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." (Citations omitted; internal quotation marks omitted.) *Clisham* v. *Board of Police Commissioners*, 223 Conn. 354, 362, 613 A.2d 254 (1992). "In addition, we note that [a] determination of the existence or absence of actual bias is a finding of fact. . . . It is axiomatic that [t]his court will not reverse the factual findings of the trial 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. . . . In making this determination, every reasonable presumption must be given in

favor of the trial court's ruling." (Citations omitted; internal quotation marks omitted.) *Jones* v. *Connecticut Medical Examining Board*, 129 Conn. App. 575, 588, 19 A.3d 1264 (2011), aff'd, 309 Conn. 727, 72 A.3d 1034 (2013).

RCI has failed to show actual bias on the part of the administrative adjudicators[27] in this case and, therefore, has failed to overcome the presumption that administrative agents acting in an adjudicative capacity are not biased. RCI has pointed to no facts in the record that suggest a prejudgment of adjudicative facts by either the hearing officer or the deputy commissioner. Counsel for RCI conceded as much at oral argument before this court.[28] Any claimed bias on the part of the commissioner is irrelevant, as he recused himself from these proceedings. RCI does little more than point to what it alleges was "[a]n overreaction all the way around" on the part of department staff as evidence of bias. Evidence of adverse actions or conclusions drawn against a party is insufficient to prove actual bias. See, e.g., *State* v. *Fullwood*, 194 Conn. 573, 581–82, 484 A.2d 435 (1984) ("The defendant has equally failed to substantiate his related allegation that the trial judge's rulings on various pretrial and trial motions demonstrate actual bias. Adverse rulings do not themselves constitute evidence of bias."); *Elf* v. *Dept. of Public Health*, 66 Conn. App. 410, 426, 784 A.2d 979 (2001) ("[h]ere, the plaintiff

[27] We note that RCI fails to identify which department employees "felt constrained" by the commissioner's statement. We assume, for purposes of this opinion, that RCI argues with respect to the hearing officer and deputy commissioner.

[28] At oral argument, RCI's counsel stated: "Although I have no evidence of this, there is some suggestion that that decision that the . . . commissioner announced *could have* improperly tainted the judgment of the staff. I cannot prove that. I have no way of proving it. But once that horse is out of the barn, you have to ask yourself: was the reason that the staff recommended denial, recommended revocation, was that impacted by [the commissioner's public statement]?" (Emphasis added.)

does not point to any indication of actual bias on the part of the hearing officer other than that she found facts that supported a revocation of the plaintiff's license"). Furthermore, RCI cites no authority, and we are unable to find any, for the proposition that an entire administrative agency would be biased by an individual commissioner's public statement on a contested matter.[29] We conclude that the trial court's finding that there was no bias was not clearly erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

TREMAINE SMITH *v.* COMMISSIONER OF CORRECTION (AC 38769)

Keller, Elgo and Beach, Js.

Syllabus

The petitioner sought a writ of habeas corpus, claiming that his trial counsel had provided ineffective assistance in advising him on pretrial confinement credit during a plea proceeding. In February, 2010, the petitioner,

[29] While RCI's argument suggests that it also is challenging the commissioner's role in these proceedings as improper, it focuses on the effect of the commissioner's actions on other members of the department. We agree that under the facts and circumstances of this case, the commissioner may have acted inappropriately by issuing a public statement before the commencement of these proceedings, but conclude that RCI cannot show that it has suffered any adverse consequences as a result of the commissioner's involvement, or lack thereof, in these proceedings. The commissioner recused himself from these proceedings before the hearing occurred. He did not participate in the hearing, and his decision to recuse himself as final decision maker was noted on the record. He did not act as the final decision maker and, instead, designated a deputy commissioner to act as such. To the extent that RCI challenges the commissioner's involvement in this case as improper, we conclude that RCI has not shown that it suffered any material prejudice as the result of the commissioner's actions, as any prejudice was cured by the commissioner's recusal. See *Murach* v. *Planning & Zoning Commission*, supra, 196 Conn. 205. Accordingly, any argument challenging the commissioner's role in these proceedings is without merit.

while waiting to be sentenced on a guilty plea to a violation of probation charge, was arrested and arraigned on a variety of additional charges, including kidnapping in the first degree. At the time of his arraignment, the petitioner was ordered held in custody on bond on all charges against him. In September, 2010, the petitioner was sentenced on the violation of probation plea. Thereafter, the petitioner pleaded guilty to the kidnapping charge pursuant to a plea offer, and the trial court sentenced him to a total effective sentence of fourteen years incarceration, execution suspended after ten years, with three years of probation, to run concurrently with an eleven year sentence that he previously had received on a conviction of attempt to commit robbery in the first degree. The trial court also explained to the petitioner that he would receive jail credit dating back to September, 2010. At the time, the petitioner did not raise any issue with respect to jail credit for time served prior to that date. In his amended petition for a writ of habeas corpus, the petitioner claimed, in alleging ineffective assistance, that his trial counsel failed to request that the petitioner be awarded the approximately seven months of jail credit that had accrued between February, 2010, the date his presentence incarceration had commenced, and September, 2010. At the habeas trial, trial counsel testified that he mistakenly had advised the petitioner that he would receive all of his jail credit. The petitioner testified that he had relied on trial counsel's assurance regarding jail credit and that the reason that he had agreed to the plea offer on the kidnapping charge was because he expected to receive full jail credit. The habeas court rendered judgment denying the habeas petition, concluding that the petitioner had failed to establish the requisite prejudice. Thereafter, the habeas court denied the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court did not abuse its discretion in denying the petition for certification to appeal, as the petitioner failed to demonstrate that his claim that his trial counsel had provided ineffective assistance was debatable among jurists of reason, that a court could have resolved the issue in a different manner, or that the issue was adequate to deserve encouragement to proceed further, and, accordingly, the petitioner's appeal was dismissed: the petitioner failed to meet his burden of proving that there was a reasonable probability that, but for his allegedly mistaken belief that he was going to receive the additional seven months of jail credit, he would not have accepted the plea offer on the kidnapping charge and instead would have gone to trial, as the primary evidence offered by the petitioner to support his claim was his own testimony, which the habeas court did not credit, and this court could not disturb that court's determination that the petitioner's testimony was not credible; moreover, trial counsel testified that receiving full jail credit was only one of many concerns that the petitioner had with respect to the plea, trial counsel also testified that he disagreed with the suggestion of the petitioner's habeas counsel that the petitioner was against entering a

guilty plea unless he received all of his jail credit, and the record revealed that, if the petitioner proceeded to trial, he faced a maximum exposure on the kidnapping charge of thirty years of incarceration, ten of which were mandatory, additional exposure as a persistent serious felony offender, and the prospect of his sentence on the kidnapping charge running consecutively to, rather than concurrently with, his eleven year attempted robbery sentence.

Argued October 18, 2017—officially released January 9, 2018

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, *Sferrazza*, *J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Deren Manasevit, assigned counsel, for the appellant (petitioner).

Laurie N. Feldman, special deputy assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Grayson Holmes*, former special deputy assistant state's attorney, for the appellee (respondant).

Opinion

ELGO, J. The petitioner, Tremaine Smith, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his amended petition for a writ of habeas corpus, in which he alleged ineffective assistance on the part of his trial counsel in advising him on presentence confinement credit during a plea proceeding. The dispositive issue is whether the habeas court abused its discretion in so doing. We conclude that it did not and, accordingly, dismiss the appeal.

The following factual and procedural history is relevant to our resolution of this appeal. On January 14,

2008, the petitioner pleaded guilty to one count of escape in the first degree in violation of General Statutes § 53a-169, and was sentenced to a term of five years incarceration, execution suspended after nine months, with three years of probation. He thereafter violated the terms of his probation and, on November 30, 2009, entered a guilty plea in docket number CR-07-0364815 for violating General Statutes § 53a-32 (first docket). Prior to sentencing on that matter, the petitioner, on February 3, 2010, was arrested and arraigned on a variety of additional charges. In docket number CR-10-0387865, the petitioner was charged with one count of kidnapping in the first degree in violation of General Statutes § 53a-92 (second docket). In docket number CR-10-0387866, the petitioner was charged with one count each of attempt to commit robbery in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-134 (a) (3), and attempt to commit kidnapping in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-92 (a) (2) (B) (third docket). At the time of the February 3, 2010 arraignment, the petitioner was ordered held in custody on bond on all charges. On June 30, 2010, the petitioner was charged with one count of criminal violation of a protective order in violation of General Statutes § 53a-223 (fourth docket).[1]

The petitioner appeared before the trial court for a sentencing hearing on his violation of probation plea in June, 2010. At that time, the court advised the petitioner as follows: "I was prepared today to sentence you on the violation of probation [charge]. I'm not going to do that because you don't want to be put in a position where you end up doing dead time[2] and you have to

[1] That charge was predicated on allegations that the petitioner made a threatening telephone call to one of his victims while incarcerated.

[2] " '[D]ead time' is prison parlance for presentence confinement time that cannot be credited because the inmate is a sentenced prisoner serving time on another sentence." *Griffin* v. *Commissioner of Correction*, 123 Conn. App. 840, 843 n.3, 3 A.3d 189, cert. denied, 229 Conn. 906, 10 A.3d 522 (2010).

make a knowing and intelligent decision as to whether you want to resolve all [your] cases at one time and thereby get one sentence." (Footnote added.) The court thus deferred its decision to allow the petitioner additional time to "make an informed decision" on how to proceed.

The petitioner declined to proceed with a global resolution of his pending cases. On September 13, 2010, the court held a sentencing hearing on the petitioner's violation of probation plea. Due to the fact that the petitioner "didn't even make it twelve hours without violating the conditions of his [November 30, 2009] release," the state requested a sentence of four years and three months incarceration, the full amount of time remaining on the underlying sentence for escape in the first degree. The court nevertheless sentenced the petitioner to a lesser sentence of four years incarceration. At his habeas trial, the petitioner's counsel informed the habeas court that "[a]ll of his credit" that had accrued since his arrest on February 3, 2010, was applied by the trial court toward that sentence. Cf. *Washington* v. *Commissioner of Correction*, 287 Conn. 792, 800, 950 A.2d 1220 (2008) (explaining that General Statutes § 18-98d "excludes from [presentence confinement] credit any time that a prisoner spends incarcerated for a prior conviction before sentencing on a separate, pending charge").[3]

[3] To be clear, the authority of the trial court to award *any* jail credit to the petitioner following his September 13, 2010 sentencing on the violation of probation charge is not at issue in this appeal. We note that this court recently declined to address a similar issue in *Gooden* v. *Commissioner of Correction*, 169 Conn. App. 333, 339–40 n.3, 150 A.3d 738 (2016) ("[w]e leave consideration of whether 'the practice of awarding jail credit when defendants are not statutorily entitled is an illegal ultra vires act' for another day"); see also *Harris* v. *Commissioner of Correction*, 271 Conn. 808, 823, 860 A.2d 715 (2004) (where concurrent sentences are imposed on different dates, simultaneously accrued jail credit can be applied to first sentence but cannot be applied to second sentence).

At the September 13, 2010 sentencing hearing, the trial court advised the petitioner that an offer for a "global resolution" of all other charges remained pending. The terms of that plea offer were fifteen years incarceration, execution suspended after ten years, with three years of probation. The court informed the petitioner that if he accepted that plea offer within the next four weeks, the court would "make it retroactive so [the petitioner] would not lose any time in jail." The petitioner rejected that offer.

The petitioner subsequently proceeded to a trial on the charges detailed in the third docket, at the conclusion of which the jury found the petitioner guilty of attempt to commit robbery in the first degree.[4] On April 15, 2011, the court sentenced the defendant to a term of eleven years incarceration, concurrent to the petitioner's four year sentence on his violation of probation conviction. See *State* v. *Smith*, 148 Conn. App. 684, 694, 86 A.3d 498 (2014), aff'd, 317 Conn. 338, 118 A.3d 49 (2015).

On May 5, 2011, the petitioner appeared before the trial court for a plea hearing on the kidnapping charge contained in the second docket. At that time, the court advised him that the plea offer was for fourteen years incarceration, execution suspended after ten years, with three years of probation, which sentence would run concurrently with the eleven year sentence he had received weeks earlier on his attempted robbery conviction. The following colloquy between the court and the petitioner then occurred:

"The Court: Okay. Just so it's clear, Mr. Smith, I told you before, when a case is called in for trial, I was offering you fourteen years suspended after ten years with three years of probation to run concurrent[ly] with

[4] The jury found the defendant not guilty on the attempted kidnapping charge.

the sentence you're now doing [on the attempted robbery conviction], and I was going to bring it back to September [13, 2010], the date you went to jail on the violation of probation. Understood? You got that?

"[The Petitioner]: I'm listening.

"The Court: No. Understand that so far.

"[The Petitioner]: Yeah."

The petitioner's trial counsel, Attorney Thomas Mitchell-Hoffler,[5] then informed the court that the petitioner was concerned that he had lost a total of eighteen months of credit for presentence confinement.[6] Mitchell-Hoffler continued: "I was explaining to him [that is] called dead time and because [the petitioner] didn't take a global offer on the day [he was] sentenced . . . on the [violation of probation plea], any time after that would be dead time." Mitchell-Hoffler then informed the court that the petitioner was asking for a lesser sentence in light of that dead time. The court declined that request and ordered the matter to be placed on the firm trial list.

Later that day, the matter was recalled. During its canvass, the court inquired as to whether the petitioner was satisfied with Mitchell-Hoffler's representation. When the petitioner indicated that he wished he had "more time to think about" the offer, the court promptly concluded its canvass, stating: "I'm not taking the plea because he wants more time. He's not going to come back later and say there's a habeas or the judge forced him to plead. Trial list. That's it."

[5] Mitchell-Hoffler represented the petitioner in the criminal proceedings on all four dockets detailed in this opinion.

[6] Approximately fifteen months had passed between the petitioner's confinement on February 3, 2010, and the May 5, 2011 plea hearing.

The matter was called a third time later that day. After Mitchell-Hoffler assured the court that the petitioner was prepared to enter his plea, the court canvassed the petitioner. During that canvass, the petitioner indicated that he had adequate time to consider the terms of the plea and was satisfied with Mitchell-Hoffler's representation. The petitioner also acknowledged that he faced a maximum exposure on the kidnapping charge of thirty years incarceration, ten of which were a mandatory minimum, which sentence could run consecutively to his eleven year sentence for attempted robbery.[7] The petitioner at that time pleaded guilty, pursuant to the *Alford* doctrine,[8] to both the kidnapping in the first degree and the criminal violation of a protective order charges contained in the second and fourth dockets. On the kidnapping charge, the court sentenced the petitioner in accordance with the terms of the plea. On the protective order violation, the court sentenced him to a concurrent term of one year incarceration. The court thus entered a total effective sentence of fourteen years incarceration, execution suspended after ten years, with three years of probation,

[7] At the plea hearing, the state proffered the following factual basis for the kidnapping in the first degree charge: "[O]n December 1, 2009, [the petitioner] had been recently released from jail. While he was in jail, apparently he was upset with the behavior of . . . a former girlfriend of his. When he was released from jail, he found her here in Waterbury, abducted her from her apartment, took her in a van at knifepoint. She was blindfolded. [He] [d]rove her around threatening her on a number of occasions. She was able to get free and suffered . . . minor physical injuries as a result of the incident."

[8] "Under *North Carolina* v. *Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), a criminal defendant is not required to admit his guilt . . . but consents to being punished as if he were guilty to avoid the risk of proceeding to trial. . . . A guilty plea under the *Alford* doctrine is a judicial oxymoron in that the defendant does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea nevertheless." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 285 Conn. 556, 558 n.2, 941 A.2d 248 (2008).

to run concurrently with the petitioner's eleven year sentence for attempted robbery.

The court then explained to the petitioner that, pursuant to that sentence, he would receive jail credit dating back to September 13, 2010. At that time, neither the petitioner nor Mitchell-Hoffler raised any issue with respect to credit for time served prior to that date. Moreover, the mittimus issued by the court, which was admitted into evidence at the habeas trial, specified that the petitioner was entitled to jail credit from September 13, 2010.

The petitioner thereafter filed a direct appeal of his conviction for attempted robbery, as charged in the third docket. While that appeal was pending, the petitioner, appearing as a self-represented litigant, filed a petition for a writ of habeas corpus challenging that conviction. In his petition, he alleged that the Department of Correction (department) had not correctly calculated his jail credit with respect to his sentence for attempted robbery.

Nineteen months later, this court ruled on the petitioner's direct appeal and reversed his judgment of conviction for attempted robbery due to evidential insufficiency. See *State* v. *Smith*, supra, 148 Conn. App. 685. When our Supreme Court subsequently granted certification to review that judgment, the petitioner filed a motion to continue his habeas proceeding. In that motion, the petitioner, now aided by habeas counsel, averred that if the Supreme Court affirmed this court's judgment, it would render the habeas action moot, because "his best relief in the habeas court would be a new trial" on the attempted robbery charge. The court granted the continuance, thereby postponing the habeas trial indefinitely.

Approximately one year later, our Supreme Court affirmed this court's reversal of the petitioner's judgment of conviction for attempt to commit robbery in

the first degree and remanded the case to the trial court with direction to render a judgment of acquittal on that charge. *State* v. *Smith*, 317 Conn. 338, 356, 118 A.3d 49 (2015). The petitioner, however, did not withdraw his habeas corpus petition. Rather, he filed an amended petition for a writ of habeas corpus that, for the first time, alleged that he was "collaterally attacking" his judgment of conviction for kidnapping in the first degree, as charged in the second docket. In that petition, the petitioner claimed, inter alia, that Mitchell-Hoffler rendered ineffective assistance of counsel in that "he failed to request that the petitioner be awarded [approximately seven months of] jail credit" from February 3, 2010, the date on which his presentence incarceration commenced, rather than from September 23, 2010.[9]

A habeas trial was held on December 4, 2015. The petitioner's case consisted of the testimony of Mitchell-Hoffler and the petitioner. In addition, several transcripts of the petitioner's criminal proceedings, the August 5, 2011 mittimus, and a certified "movement sheet" prepared by the department were admitted into evidence as exhibits. In his testimony, Mitchell-Hoffler acknowledged that the petitioner was reluctant to enter a plea on his kidnapping charge and had "many concerns," including obtaining credit for jail time. Mitchell-Hoffler testified that he had multiple discussions with Judge Damiani, the trial judge, about the issue of jail credit, and "begged him to give [the petitioner] some time back on the dead time . . . ." In response, Judge

[9] The amended petition also alleged that Mitchell-Hoffler (1) rendered ineffective assistance by failing to conduct a proper investigation, (2) failed to adequately explain the elements of the charges and the evidence in the state's possession, and (3) made "what the petitioner interpreted as threats," which rendered his plea unknowing and involuntary. Those contentions are not at issue in this appeal. As the petitioner states in his principal appellate brief, he "is not pursuing these claims on appeal. [He] is pursuing only the claim that he relied on [Mitchell-Hoffler's] erroneous advice concerning presentence confinement credits in deciding to accept the plea offer."

Damiani reminded Mitchell-Hoffler that he was not obligated by law to credit any such jail time, but ultimately agreed to credit a portion of that time. As Mitchell-Hoffler recounted on cross-examination:

"[The Respondent's Counsel]: Judge Damiani was aware of the dead time issue.

"[Mitchell-Hoffler]: That's correct.

"[The Respondent's Counsel]: And Judge Damiani said to you that he wouldn't give him that credit. He wouldn't put it on the [mittimus].

"[Mitchell-Hoffler]: He was going . . . to use the [September 13, 2010] date that was given for the [violation of probation].

"[The Respondent's Counsel]: So, Judge Damiani communicated to you and to [the petitioner] that he would get some credit, but not all.

"[Mitchell-Hoffler]: I'm not sure if those were his exact words, but he said he was going to give him credit, so I was happy.

"[The Respondent's Counsel]: And Judge Damiani explained to [the petitioner] that if he didn't take the offer that he wasn't going to get any credit.

"[Mitchell-Hoffler]: And that he was going to the trial list that day, and he would start picking a jury.

"[The Respondent's Counsel]: And that [the petitioner] was going to get more time than what the offer was.

"[Mitchell-Hoffler]: [Judge] Damiani warned everyone that if you didn't take the offer at that time, if you came back even a day later, it was going up at least by a year."

Mitchell-Hoffler also testified that, prior to the guilty plea on the kidnapping charge, he advised the petitioner that any dead time would not count as credit against his period of incarceration. Mitchell-Hoffler admitted that, because the sentences on both the violation of probation and the kidnapping convictions were to commence on the same date, he had assumed that the department nonetheless would credit the petitioner's jail time back to February 3, 2010. Mitchell-Hoffler testified that, in light of that assumption, he had advised the petitioner that he would receive all of his jail credit and conceded that his advice ultimately was mistaken. At the same time, when he was asked whether the petitioner "was against entering a plea unless he received all of his jail credit," Mitchell-Hoffler answered, "I wouldn't characterize it as that, no." Mitchell-Hoffler testified that receiving his full jail credit was but one of several concerns of the petitioner. In addition, Mitchell-Hoffler testified that, at the time of the May 5, 2011 plea hearing, the petitioner was exposed to a sentencing enhancement as a persistent serious felony offender.[10]

The petitioner was the second and final witness at the habeas trial. He testified that he had relied on Mitchell-Hoffler's assurance that he would receive credit for all jail time served. He further testified that the reason he agreed to the plea on the kidnapping charge was because he expected to receive "all of" the approximately seven months of jail credit that had accrued

[10] The April 23, 2010 transcript indicates that the state had filed a part B information against the petitioner. At that time, the trial court advised the petitioner that the state was "charging you as a persistent felony offender saying you have a prior felony conviction. That ups the penalties." At the May 5, 2011 plea hearing, the state noted that although the petitioner "does qualify as a persistent dangerous felony offender . . . given the fact that the [plea offer] contemplates a sentence less than he would get if he weren't a habitual offender, it doesn't make any sense to have him plead to it."

between the time of his initial confinement and September 13, 2010. On cross-examination, the petitioner acknowledged that, at the time that he accepted the plea, the trial court advised him that he would receive jail credit dating back to September 13, 2010. The petitioner admitted that, when so apprised by the court, he did not voice any concern or objection.

In its memorandum of decision, the habeas court found the petitioner's testimony to be "unworthy of belief." The court further concluded that the petitioner had not demonstrated that, but for Mitchell-Hoffler's allegedly deficient performance with respect to his jail time credit, he "would have persisted in his request to have a jury decide his fate rather than take advantage of Judge Damiani's proposed disposition." The court thus denied the amended petition for a writ of habeas corpus, concluding that the petitioner had not established the requisite prejudice. See *Hill* v. *Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). The petitioner subsequently filed a petition for certification to appeal to this court, which the habeas court denied, and this appeal followed.

"When the habeas court denies certification to appeal, a petitioner faces a formidable challenge, as we will not consider the merits of a habeas appeal unless the petitioner establishes that the denial of certification to appeal amounts to an abuse of discretion." *Jefferson* v. *Commissioner of Correction*, 144 Conn. App. 767, 772, 73 A.3d 840, cert. denied, 310 Conn. 929, 78 A.3d 856 (2013). To prevail, the petitioner must 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." (Emphasis omitted; internal quotation marks omitted.) *Simms* v. *Warden*, 230 Conn. 608, 616, 646 A.2d 126 (1994).

We conclude that the petitioner has not sustained that substantial burden. To prevail on his claim that Mitchell-Hoffler rendered ineffective assistance of counsel, the petitioner was obligated to demonstrate both deficient performance and resulting prejudice. See *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). For claims arising out of the plea process, a petitioner "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill* v. *Lockhart*, supra, 474 U.S. 59.

The primary evidence offered by the petitioner to support such a claim was his own testimony at the habeas trial. Significantly, the habeas court did not credit that testimony, deeming it "unworthy of belief." As our Supreme Court has observed, an appellate court "does not . . . evaluate the credibility of the witnesses. . . . Rather, we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude. . . . The 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." (Internal quotation marks omitted.) *Taylor* v. *Commissioner of Correction*, 324 Conn. 631, 643–44, 153 A.3d 1264 (2017); see also *Eastwood* v. *Commissioner of Correction*, 114 Conn. App. 471, 484, 969 A.2d 860 (appellate court does not second-guess findings of habeas court related to credibility of witnesses), cert. denied, 292 Conn. 918, 973 A.2d 1275 (2009). This court, therefore, cannot disturb the habeas court's determination that the petitioner's testimony was not credible.

In addition, the habeas court heard testimony from Mitchell-Hoffler. On direct examination, the petitioner's habeas counsel suggested that the petitioner "was against entering a plea unless he received all of his jail

credit." Mitchell-Hoffler disagreed, stating, "I wouldn't characterize it as that, no." Mitchell-Hoffler also testified that the petitioner had "many concerns" about entering a plea and that the jail credit issue was "one of" those concerns.

Furthermore, the record reveals that the petitioner faced a maximum exposure on the kidnapping charge of thirty years incarceration, ten of which were a mandatory minimum, as the petitioner acknowledged during the plea canvass on May 5, 2011. The petitioner faced additional exposure as a persistent serious felony offender. See footnote 10 of this opinion. Moreover, the petitioner faced the prospect of his sentence on the kidnapping charge running consecutively to his eleven year sentence for attempted robbery, as well as the accrual of additional dead time if he proceeded to trial. Pursuant to the plea offer, the petitioner's incarceration would be suspended after he had served ten years on the kidnapping charge, which sentence ran concurrently with the eleven year sentence that he had received weeks earlier on his conviction for attempted robbery. As Mitchell-Hoffler testified at the habeas trial, and as the record plainly reflects, the terms of that offer effectively meant that the petitioner would not serve one day more than his existing eleven year sentence due to the concurrent nature of the plea.

In light of the foregoing, we agree with the habeas court that the petitioner failed to meet his burden of proving that, but for his allegedly mistaken belief that he was going to receive the additional seven months of jail credit, he would not have accepted that plea offer and would have insisted on going to trial. We therefore conclude that the petitioner has not demonstrated that his ineffective assistance of counsel claim is debatable among jurists of reason, could be resolved in a different manner, or is adequate to deserve encouragement to proceed further. See *Simms* v. *Warden*, supra, 230

Conn. 616. Accordingly, the habeas court did not abuse its discretion in denying the petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

ERIC BOYKIN *v.* STATE OF CONNECTICUT ET AL.
(AC 39392)

Lavine, Alvord and Beach, Js.

Syllabus

The plaintiff sought to recover damages from the defendants, the state of Connecticut and the Commissioner of Transportation, for injuries he sustained as a result of an allegedly defective crosswalk button when he was struck by a vehicle while he was walking in a pedestrian crosswalk. The trial court granted the defendants' motion to dismiss for lack of subject matter jurisdiction and rendered judgment for the defendants, from which the plaintiff appealed to this court. The defendants claimed that the written notice of claim that the plaintiff filed pursuant to the state highway defect statute (§ 13a-144) was patently defective because it failed to provide the defendants with sufficient notice of the cause of the injuries that the plaintiff alleged. The trial court concluded that because the written notice of claim, which constitutes a waiver of the state's sovereign immunity, failed to state sufficiently the cause of the injuries alleged by the plaintiff, it failed to meet the minimum requirements of § 13a-144, thereby depriving the court of subject matter jurisdiction. The notice stated that the plaintiff was injured because, inter alia, the defendants were negligent in failing to place a pedestrian crosswalk button at the intersection, and to inspect and repair the crosswalk button so as to provide a safe pedestrian crosswalk. *Held* that the trial court improperly granted the defendants' motion to dismiss, as the plaintiff's written notice of claim provided sufficient information as to the cause of his injury to permit the commissioner to gather information about the case intelligently and, therefore, was not patently defective; the plaintiff provided the defendants with notice that the condition or absence of a crosswalk button at the intersection caused his injury, and the notice informed the defendants of his intent to file a claim and furnished them with a guide as to how to conduct further inquiries to protect their interests.

Argued October 19, 2017—officially released January 9, 2018

Procedural History

Action to recover damages for personal injuries sustained as a result of an allegedly defective state highway, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Wenzel*, *J.*, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed; further proceedings.*

Brendon P. Levesque, with whom were *Scott T. Garosshen* and, on the brief, *Kimberly A. Knox*, for the appellant (plaintiff).

Kevin S. Coyne, with whom, on the brief, was *Joseph M. Walsh*, for the appellees (defendants).

Opinion

ALVORD, J. The plaintiff, Eric Boykin, appeals from the judgment of the trial court dismissing the present action against the defendants, the state of Connecticut and James P. Redeker, Commissioner of Transportation (commissioner),[1] for lack of subject matter jurisdiction. The plaintiff claims that the court improperly concluded that sovereign immunity deprived it of subject matter jurisdiction because his written notice of claim pursuant to the state highway defect statute, General Statutes § 13a-144,[2] was patently defective in its description of

[1] Although the plaintiff also names the state as a defendant, for ease of discussion, we refer only to the commissioner throughout this opinion.

[2] General Statutes § 13a-144, which serves as a waiver of the state's sovereign immunity for claims arising out of certain highway defects, provides in relevant part: "Any person injured in person or property through the neglect or default of the state . . . by means of any defective highway . . . which it is the duty of the Commissioner of Transportation to keep in repair . . . may bring a civil action to recover damages sustained thereby against the commissioner in the Superior Court. No such action shall be brought . . . unless notice of such injury and a general description of the same and of the cause thereof and of the time and place of its occurrence has been given in writing within ninety days thereafter to the commissioner. . . ."

the cause of his injury. We agree with the plaintiff, and accordingly, reverse the judgment of the trial court.

The record reveals the following procedural history. On November 16, 2015, the plaintiff filed a single count complaint, in which he alleged that on or about December 26, 2014, he was struck by a vehicle while walking north on the western side of East Main Street in the pedestrian crosswalk at the entrance of Interstate 95 south in Bridgeport. By a letter dated February 13, 2015, the plaintiff sent written notice of his intent to bring an action pursuant to § 13a-144 for personal injuries sustained as a result of the incident. The commissioner received the notice on February 17, 2015. The notice described the cause of injury as follows: "On December 26, 2014 at approximately 6:06 p.m., Eric Boykin was injured due to the negligence [of the] State of Connecticut Department of Transportation, who failed to place a pedestrian cross walk button at the intersection of East Main St., and I-95, Bridgeport, CT, failed to inspect the pedestrian crossing, failed to repair the pedestrian cross walk button and failed to provide a safe pedestrian cross walk for pedestrians such as the plaintiff."[3]

On February 18, 2016, the commissioner filed a motion to dismiss for lack of subject matter jurisdiction. In his memorandum of law in support of the motion to dismiss, the commissioner argued that the plaintiff's claim did not fall within § 13a-144's waiver of sovereign immunity because the written notice was patently defective. Specifically, the commissioner argued, in relevant part, that "the notice is fatally defective as to setting forth a general description of the cause of the particular injury."[4] The commissioner contended that

[3] In his complaint, the plaintiff attributed his injuries to "the defective roadway, crosswalk and associated traffic and/or pedestrian control systems . . . ."

[4] In his motion to dismiss, the commissioner also claimed that the notice was patently defective in describing the location of the incident. The court rejected this claim, concluding that the location described was "reasonably definite and limited," and "looking to the notice as a whole, the commissioner

"[b]ased upon the notice, the commissioner has absolutely no idea how the particular injury occurred or what the cause of the injury was. The notice contains nothing more than bald allegations of responsibility . . . without specifying the specific nature or cause." On April 29, 2016, the plaintiff filed an objection to the commissioner's motion to dismiss, arguing that the written notice satisfied the requirements of § 13a-144 because it provided a "general description" of the cause of injury, as required by the language of the statute.

On May 6, 2016, after a hearing, the court granted the commissioner's motion to dismiss. In its memorandum of decision, the court stated that it relied on this court's decision in *Frandy* v. *Commissioner of Transportation*, 132 Conn. App. 750, 34 A.3d 418 (2011), cert. denied, 303 Conn. 937, 36 A.3d 696 (2012), and reasoned that "[t]he more the court reads [the] language [of the notice], the more ambiguous and open-ended it appears. Suffice it to say that how any of these claimed features caused injuries to plaintiff simply does not appear. Uncertainty begins with the inconsistent statements that the state failed to place a crosswalk button at this location and then failed to repair the crosswalk button. . . . The claims that the state was negligent or that the crosswalk was unsafe are simply conclusions and add nothing to the notice in terms of helping the reader understand how such caused the claimed injury." The court concluded that the notice failed to meet the minimal requirements of § 13a-144 by failing to state sufficiently the cause of the injuries alleged and, therefore, the state's sovereign immunity was not waived, depriving the court of subject matter jurisdiction. This appeal followed.

We begin by setting forth the standard of review and legal principles that guide our analysis. "A motion to

reading the notice should understand the location as the pedestrian crosswalk within the intersection."

dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . Moreover, [t]he doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss. . . . When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." (Citation omitted; internal quotation marks omitted.) *Filippi* v. *Sullivan*, 273 Conn. 1, 8, 866 A.2d 599 (2005).

The plaintiff brought this action pursuant to § 13a-144, which provides a waiver of the state's sovereign immunity[5] in civil actions alleging injuries caused by defective state highways or sidewalks. The statute provides in relevant part: "Any person injured in person or property through the neglect or default of the state or any of its employees by means of any defective highway, bridge or sidewalk which it is the duty of the Commissioner of Transportation to keep in repair . . . may bring a civil action to recover damages sustained thereby against the commissioner in the Superior Court. No such action shall be brought except within two years from the date of such injury, nor unless notice of such injury and a general description of the same and of the

[5] "It is the established law of our state that the state is immune from suit unless the state, by appropriate legislation, consents to be sued." (Internal quotation marks omitted.) *Salgado* v. *Commissioner of Transportation*, 106 Conn. App. 562, 566, 942 A.2d 546 (2008).

cause thereof and of the time and place of its occurrence has been given in writing within ninety days thereafter to the commissioner. . . .'' General Statutes § 13a-144.

''[Section] 13a-144 created a new cause of action not authorized at common law, in derogation of sovereign immunity. The notice requirement contained in § 13a-144 is a condition precedent which, if not met, will prevent the destruction of sovereign immunity. . . . The notice [mandated under § 13a-144] is to be tested with reference to the purpose for which it is required. . . . The [notice] requirement . . . was not devised as a means of placing difficulties in the path of an injured person. The purpose [of notice is] . . . to furnish the commissioner with such information as [will] enable him to make a timely investigation of the facts upon which a claim for damages [is] being made. . . . The notice requirement is not intended merely to alert the commissioner to the occurrence of an accident and resulting injury, but rather to permit the commissioner to gather information to protect himself in the event of a lawsuit. . . . [In other words] [t]he purpose of the requirement of notice is to furnish the [commissioner] such warning as would prompt him to make such inquiries as he might deem necessary or prudent for the preservation of his interests, and such information as would furnish him a reasonable guide in the conduct of such inquiries, and in obtaining such information as he might deem helpful for his protection. . . . Unless a notice, in describing the place or cause of an injury, patently meets or fails to meet this test, the question of its adequacy is one for the jury and not for the court, and the cases make clear that this question must be determined on the basis of the facts of the particular case. . . . [U]nder § 13a-144, the notice must provide sufficient information as to the injury and the cause thereof and the time and place of its occurrence to permit the commissioner to gather information about

the case intelligently." (Citations omitted; internal quotation marks omitted.) *Filippi* v. *Sullivan*, supra, 273 Conn. 8–10.

"The cause of the injury required to be stated must be interpreted to mean the defect or defective condition of the highway which brought about the injury. . . . It is sufficient and customary in defective highway cases to state that the cause was a specified defective condition, without further statement that it in turn was due to negligence in failing to keep the highway in repair or otherwise." (Internal quotation marks omitted.) *Frandy* v. *Commissioner of Transportation*, supra, 132 Conn. App. 754.

On appeal, the plaintiff argues that he "provided the defendants with more than sufficient information to investigate the pedestrian crosswalk button at the specified location." Specifically, he contends that "the notice made clear that the negligence centered around the crosswalk button, the lack of safety of the intersection included the failure to have or repair a crosswalk button, the failure to inspect the intersection or crosswalk button, leading to an unsafe pedestrian crosswalk." The commissioner responds that "[g]iven the limited amount of information provided by the plaintiff, it was impossible for the defendants to conduct a meaningful inquiry or develop a defense to the plaintiff's claim. The defendants could not know whether the specific defect was a pothole, a streetlight failure, or an automobile driving into the crosswalk. Without being provided with that knowledge, the defendants are left to guess as to what caused the plaintiff's alleged injuries. Accordingly, the plaintiff's notice is patently defective." We do not agree that the notice is patently defective.

We conclude that the plaintiff's notice provided sufficient information as to the cause of his injury to permit the commissioner to gather information about the case intelligently and, therefore, was not patently defective. We disagree with the commissioner that "each of the

plaintiff's assertions in the notice with respect to causation fail to properly advise the defendants of the mechanism by which he was injured."[6] On the contrary, the notice provides sufficient information that would allow the commissioner to investigate the alleged defects that made the crosswalk unsafe (i.e., the crosswalk button, or lack thereof, at the pedestrian crosswalk of the described intersection).

[6] At oral argument before this court, the plaintiff conceded that, under our case law, the allegations that the commissioner "failed to inspect the pedestrian crossing" and "failed to provide a safe pedestrian crosswalk for pedestrians such as the plaintiff" are too vague to meet the notice requirements of § 13a-144. The plaintiff argued, however, that under our Supreme Court's decision in *Filippi* v. *Sullivan*, supra, 273 Conn. 1, the inclusion of these allegations in the notice does not render it patently defective.

Although *Filippi* concerned the notice's description of the location of the accident, we are guided by its reasoning. There, the plaintiff brought an action against the commissioner for injuries he sustained in an automobile accident allegedly caused by the commissioner's failure to post lane closure signs on a portion of Interstate 95. Id., 2–3. The commissioner filed a motion to dismiss on the ground that the notice was patently defective in that it " 'describe[d] two different and distinct locations,' " and therefore failed to sufficiently describe the location of the accident. Id., 6. Although the notice provided that the accident occurred at a point in the road immediately after a " 'graded blind curve' " between two exits on Interstate 95; id., 6 n.3; evidence in the record established that there was more than one curve in the road between the points identified. Id., 11.

On appeal from the trial court's denial of the commissioner's motion to dismiss, our Supreme Court concluded that the notice was not patently defective. Id., 11–12. The court acknowledged that, although the notice described two different locations that were almost two miles apart from one another and the accident could have occurred in only one of those locations, no evidence in the record "indicate[d] that there is more than one *graded blind* curve *immediately prior* to either of those two points." (Emphasis in original.) Id., 11. Thus, the court could not conclude that "the notice necessarily was too vague to permit the commissioner to identify the location of the accident and injury with reasonable certainty." Id.

Just as one of the alleged locations in *Filippi* was legally insufficient, the plaintiff here concedes that two of his alleged causes of injury are legally insufficient to provide adequate notice to the commissioner. The inclusion of a cause of injury that would be legally insufficient on its own, however, does not invalidate the notice provided by the statements regarding the crosswalk signal, just as the inclusion of a second location in *Filippi* did not invalidate the entire notice, as it does not make the notice "too vague

In reaching its decision, the trial court stated that it relied on this court's decision in *Frandy*. The plaintiff in *Frandy* alleged that she was injured while riding her bicycle on State Street in North Haven. *Frandy* v. *Commissioner of Transportation*, supra, 132 Conn. App. 752. The plaintiff sent a written notice of claim to the commissioner describing the cause of injury as follows: "Plaintiff's injuries were caused as a result of the defective condition of the pavement which caused her to be thrown from her bicycle." (Internal quotation marks omitted.) Id. The plaintiff served her complaint more than four months later, in which she alleged for the first time that " 'the defective condition of the pavement' " was a hole in the road. Id. The commissioner filed a motion to dismiss one count of the complaint on the basis of a lack of subject matter jurisdiction. After a hearing, the trial court denied the motion to dismiss. Id.

On appeal, the commissioner in *Frandy* argued that the trial court improperly denied his motion to dismiss because the plaintiff's notice of claim was defective in that it failed to state a cause of injury as required by § 13a-144. Id., 754. This court agreed and reversed the judgment of the trial court. Id., 754, 756. This court concluded that the plaintiff's notice patently failed to meet the statutory requirement that the notice provide a general description of the cause of injury because it "merely state[d] that the cause of the plaintiff's bicycle accident was due to 'the defective condition of the pavement' but it [did] not specify the precise nature of the claimed defect." Id., 754. This court characterized the plaintiff's description of her cause of injury as a "conclusory phrase"; id., 755; that would not provide the commissioner the opportunity to "gather information to protect himself in a lawsuit . . . ." Id., 756.

to permit the commissioner to identify" the cause of the accident and injury "with reasonable certainty." Id.

We conclude that the present case is distinguishable from *Frandy*. In *Frandy*, the plaintiff's notice only alleged that her injuries were caused by the "defective condition of the pavement which caused her to be thrown from her bicycle." (Internal quotation marks omitted.) Id., 752. It provided no further indication of what defect or defective condition caused the plaintiff to be thrown from her bicycle. Until the plaintiff served her complaint, which was served beyond the ninety day period in which notice had to be filed, the plaintiff provided the commissioner with no indication that her injuries were caused by a hole in the road. Id. Unlike the plaintiff in *Frandy*, the plaintiff here provided notice that the claimed defect that caused his injury was the condition of the crosswalk, namely, the condition or absence of a crosswalk button at the intersection. In effect, *Frandy*'s notice amounted merely to a legal conclusion that the pavement was " 'defective' . . . ." Such a "conclusory phrase is not a description of the relevant highway defect"; id., 755; and could not be expected to allow the commissioner to "gather information to protect himself in a lawsuit without knowing the nature of the defect . . . ." Id., 756. Here, the plaintiff's notice provided the commissioner with notice of the nature of the defect when it directed his attention to the crosswalk button.

The trial court, in its memorandum of decision, reasoned: "Uncertainty begins with the inconsistent statements that the state failed to place a crosswalk button at this location and then failed to repair the crosswalk button." We note, however, that notice "need not be expressed with the fullness and exactness of a pleading. . . . Under § 13a-144, the notice must provide sufficient information as to the injury and the cause thereof and the time and place of its occurrence *to permit the commissioner to gather information about the case intelligently*." (Emphasis added; internal quotation marks

omitted.) *Oberlander* v. *Sullivan*, 70 Conn. App. 741, 746, 799 A.2d 1114, cert. denied, 261 Conn. 924, 806 A.2d 1061 (2002).[7] The sufficiency of the notice, with respect to the cause of injury, is a matter to be determined by the jury. See *Filippi* v. *Sullivan*, supra, 273 Conn. 11.

We conclude that the plaintiff's notice was not patently defective, as it "both informed the defendant of the plaintiff's intent to file a claim and furnished the defendant with a guide as to how to conduct further inquiries to protect its interests." *Tedesco* v. *Dept. of Transportation*, 36 Conn. App. 211, 214, 650 A.2d 579 (1994).

The judgment is reversed and the case is remanded for further proceedings according to law.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* GANG JIN
(AC 39893)

DiPentima, C. J., and Elgo and Flynn, Js.

Syllabus

The defendant, who had been convicted, pursuant to a guilty plea, of the crime of conspiracy to commit burglary in the third degree, appealed to this court from the judgment of the trial court denying his motion to open the judgment of conviction. The defendant, who claimed to be a legal permanent resident of the United States, sought to open the judgment of conviction to allow him to continue with his application for accelerated rehabilitation, and claimed that he had been denied the effective assistance of counsel because he had not been properly advised of the immigration benefits of accelerated rehabilitation. The trial court denied the motion to open, concluding that the defendant had withdrawn

[7] Furthermore, we agree with the plaintiff that "[w]hether there was no button or the button was broken is irrelevant. The point is, in the absence of a working crosswalk button, there was no method to ensure safe passage across the street. . . . Once on notice that there was a problem with a crosswalk button, the commissioner could easily gather information about the matter."

his application for accelerated rehabilitation as part of a plea agreement prior to the judgment of conviction and sentencing. *Held*:

1. The defendant's claims that the trial court improperly denied his application for the accelerated rehabilitation program and determined that he received the effective assistance of counsel were unavailing: it having been clear from the record that the court never ruled on the defendant's application for accelerated rehabilitation because it had been withdrawn at the proceeding during which he entered his guilty plea, the defendant could not now complain about a ruling that the court never made, and the court, which sentenced the defendant on the same date it accepted his guilty plea, was divested of jurisdiction at that time and, thus, lacked jurisdiction over the defendant's motion to open and to consider his claim of ineffective assistance of counsel; accordingly because the trial court lacked jurisdiction to consider the motion to open, it should have dismissed rather than denied that motion.

2. The defendant's claim, raised for the first time on appeal, that the trial court had jurisdiction to correct an illegal sentence pursuant to the applicable rule of practice (§ 43-22) was not reviewable; the defendant did not file a motion to correct an illegal sentence, which may be filed at any time to raise a claim of an illegal sentence, our rules of practice confer the authority to correct an illegal sentence on the trial court, which is in a superior position to fashion an appropriate remedy for an illegal sentence, and it was not appropriate to review the defendant's unpreserved claim of an illegal sentence for the first time on appeal.

Argued November 13, 2017—officially released January 9, 2018

Procedural History

Substitute information charging the defendant with the crime of burglary in the third degree, brought to the Superior Court in the judicial district of Hartford, geographical area number twelve, where the defendant was presented to the court, *Baldini*, *J.*, on a plea of guilty; judgment of guilty; thereafter, the court *Kwak*, *J.*, denied the defendant's motion to open the judgment, from which the defendant appealed to this court. *Improper form of judgment; judgment directed.*

Nitor V. Egbarin, for the appellant (defendant).

James M. Ralls, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Courtney M. Chaplin*, assistant state's attorney, for the appellee (state).

DiPENTIMA, C. J. The defendant, Gang Jin, appeals from the denial of his motion to open the judgment of conviction,[1] after his guilty plea made pursuant to the *Alford* doctrine,[2] of conspiracy to commit burglary in the third degree in violation of General Statutes §§ 53a-103 and 53a-48. On appeal, the defendant claims that the court (1) improperly denied his application for the accelerated rehabilitation program pursuant to General Statutes § 54-56e[3] and (2) erred in determining that he had received the effective assistance of counsel. The state counters that, following the imposition of the defendant's sentence, the court lacked jurisdiction to consider the defendant's motion to open. Additionally,

[1] The defendant captioned his motion as a "Motion to Reopen." "Although the motion was entitled a motion to reopen, we note that because the motion had not been opened previously, the use of that term is both improper and misleading. . . . The appropriate phrase is motion to open, and we reference it in this opinion accordingly. . . . *Rino Gnesi Co.* v. *Sbriglio*, 83 Conn. App. 707, 709 n.2, 850 A.2d 1118 (2004)." (Internal quotation marks omitted.) *State* v. *Wahab*, 122 Conn. App. 537, 539 n.2, 2 A.3d 7, cert. denied, 298 Conn. 918, 4 A.3d 1230 (2010).

[2] "Under *North Carolina* v. *Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), a criminal defendant is not required to admit his guilt . . . but consents to being punished as if he were guilty to avoid the risk of proceeding to trial. . . . A guilty plea under the *Alford* doctrine is a judicial oxymoron in that the defendant does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea nevertheless. . . . *Rodriguez* v. *Commissioner of Correction*, 167 Conn. App. 233, 234 n.1, 143 A.3d 630 (2016); *Misenti* v. *Commissioner of Correction*, 165 Conn. App. 548, 551–52 n.2, 140 A.3d 222, cert. denied, 322 Conn. 902, 138 A.3d 932 (2016)." (Internal quotation marks omitted.) *State* v. *Robles*, 169 Conn. App. 127, 128 n.1, 150 A.3d 687 (2016), cert. denied, 324 Conn. 906, 152 A.3d 544 (2017).

[3] "General Statutes § 54-56e provides in relevant part: (a) There shall be a pretrial program for accelerated rehabilitation of persons accused of a crime or crimes or a motor vehicle violation or violations for which a sentence to a term of imprisonment may be imposed, which crimes or violations are not of a serious nature. Upon application by any such person for participation in the program, the court shall, but only as to the public, order the court file sealed. . . ." (Internal quotation marks omitted.) *State* v. *Apt*, 319 Conn. 494, 500 n.5, 126 A.3d 511 (2015).

the state argues that the defendant's claim that the court retained jurisdiction because he had been sentenced in an illegal manner,[4] which was raised for the first time on appeal, fails because he challenges the "events prior to his conviction and guilty plea, rather than events at sentencing." The state further contends that the defendant's guilty plea, made pursuant to the *Alford* doctrine, waives all prior nonjurisdictional defects. We agree with the state that, following the imposition of the defendant's sentence, the court's jurisdiction terminated. Additionally, we decline to consider the defendant's claim of an illegal sentence because he failed to present this issue to the trial court via a motion to correct an illegal sentence. Finally, the form of the judgment is improper, and therefore we reverse the judgment and remand the case with direction to dismiss the defendant's motion to open.

The following facts and procedural history are relevant to our discussion. In an information dated April 3, 2014, the state charged the defendant with burglary in the second degree in violation of General Statutes § 53a-102, conspiracy to commit burglary in the second degree in violation of General Statutes §§ 53a-102 and 53a-48, possession of burglar's tools in violation of General Statutes § 53a-106 and attempt to commit larceny in the sixth degree in violation of General Statutes § 53a-125. On November 10, 2014, the defendant filed an application for accelerated rehabilitation.

The defendant, represented by Attorney Theodore A. Kowar, Jr., appeared before the court, *Baldini*, *J.*, on January 12, 2016. At the outset of this proceeding, the clerk confirmed the defendant's eligibility for accelerated rehabilitation. Kowar stated the defendant was withdrawing the application for accelerated rehabilitation. The prosecutor and Kowar informed the court that they had reached a plea agreement. Specifically, the

[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

defendant agreed to plead guilty to the substituted charge of conspiracy to commit burglary in the third degree in exchange for a five year sentence, execution suspended, and five years of probation.[5]

After canvassing the defendant,[6] the court found that plea was made knowingly and voluntarily with the assistance of competent counsel. It accepted the defendant's *Alford* plea and rendered a judgment of conviction. The court imposed the agreed-upon sentence of five years incarceration, execution suspended, and five years of probation.[7]

sentence imposed in an illegal manner or any other disposition made in an illegal manner."

[5] The prosecutor set forth the following factual basis for the defendant's plea: "Your Honor, it appears that on or about April 2, 2014, in the town of Glastonbury, police responded to a report of a home—a residential burglary. Upon arriving they found a complainant indicating that there was a male who was attempting to enter into the home and the male was seen to be an Asian male, approximately twenty to thirty years of age; attempted to enter the home; entered the home, however, left the home after being scared away by, I believe, a resident of the home—homeowner.

"Another witness saw the Asian male going through the backyards of various homes and entering into a black vehicle which was later followed and stopped by police officers. Upon stopping that vehicle, police found the defendant to be a passenger of that vehicle and another individual . . . to be the driver of that vehicle. Inside the vehicle they found several burglary tools including a crowbar as well as a screwdriver and a black coat that had been described by a witness watching—who had observed the Asian male running through backyards and then subsequently entering that vehicle.

"It was found this defendant was a passenger in that vehicle . . . and that the two [individuals] had engaged in an agreement to go to that area to commit burglaries or a burglary to that home to retrieve funds that had a substantial or had a value knowing that this defendant [and the second individual] had previously known each other and [the second individual] owed the defendant money and therefore they engaged in this agreement to commit this burglary . . . ."

In light of these facts, the prosecutor subsequently persuaded the court that good cause existed to justify a five year period of probation.

[6] During the canvass, the court informed the defendant that if he was not a citizen of the United States, this conviction could result in deportation, exclusion from readmission or a denial of naturalization.

[7] The court also ordered the defendant to pay restitution and to not have any contact with the victims in this matter.

On November 7, 2016, the defendant, now represented by Attorney Nitor Egbarin, filed a motion to open the judgment. The defendant, who claimed to be a legal permanent resident of the United States, requested to have his case opened "to allow him to continue with his application for [accelerated rehabilitation] to which he is eligible." He further alleged that he had not been advised of the immigration benefits of the accelerated rehabilitation application, and that Kowar's withdrawal of that application "was neither a correct action nor correct legal advice," constituting a denial of his "right to effective assistance of counsel."

On November 22, 2016, the court, *Kwak*, *J.*, held a hearing on the defendant's motion. Egbarin requested that the court open the case to afford the defendant the opportunity to pursue his application for accelerated rehabilitation. The prosecutor, in an attempt to clarify any issues regarding the application for accelerated rehabilitation, noted that Judge Baldini had indicated in certain pretrial conversations that she would not find good cause to grant accelerated rehabilitation in this case.[8] Nevertheless, the defendant's application for accelerated rehabilitation, which was filed on November 10, 2014, remained pending until the January 12, 2016 hearing. At that hearing the defendant withdrew the application, pleaded guilty and was sentenced. Accordingly, the prosecutor reasoned the court's jurisdiction over the case terminated at that time. Thus, the prosecutor requested that the court deny the defendant's motion to open.

In response, Egbarin referred to his claim of ineffective assistance of counsel, and requested that Judge Kwak consider whether good cause existed with

[8] General Statutes § 54-56e (c) provides in relevant part" "This section shall not be applicable . . . (5) unless good cause is shown, to (A) any person charged with a class C felony . . . ." We note that burglary in the second degree is a class C felony. See General Statutes § 53a-102 (b).

respect to the application for accelerated rehabilitation. Following a recess, the court issued its decision. It determined that the defendant withdrew his application for accelerated rehabilitation on January 12, 2016. It then denied the defendant's motion to open. Finally, it observed that "once a person has been sentenced, the court no longer has jurisdiction to vacate a plea. This is not the proper procedure. And a habeas is more—a habeas petition is more a proper procedure than to have the trial court [open] judgment."

On appeal, the defendant first claims that the court improperly denied his application for accelerated rehabilitation. Specifically, he argues that he was denied the opportunity to present evidence of good cause in support of his application, that a person charged with a class C felony is eligible for accelerated rehabilitation upon a showing of good cause and that Judge Baldini improperly denied the application in chambers and not in open court.

These arguments suffer from two substantial flaws. First, the record is clear the Judge Baldini did not deny the defendant's application for accelerated rehabilitation. She never ruled on this application because the application was withdrawn at the January 12, 2016 proceeding where the defendant pleaded guilty pursuant to the *Alford* doctrine. Thus, the foundation for the defendant's arguments collapses because it is based on an action of the trial court that simply did not occur. Although we agree that the record suggests that Judge Baldini was inclined to deny the application for accelerated rehabilitation, that inclination is immaterial because the court never acted on the application for accelerated rehabilitation following the withdrawal of said application. Put another way, the defendant cannot now complain about a ruling that the court never made. See, e.g., *Durso* v. *Aquilino*, 64 Conn. App. 469, 475, 780 A.2d 937 (2001) (claim of error is not reviewable

where objection to admission of evidence was withdrawn at trial); *State* v. *Rodriguez*, 10 Conn. App. 357, 358, 522 A.2d 1250 ("[i]t is axiomatic that, absent exceptional circumstances, *appellate review of all issues . . . [is limited] to those on which the trial court has had an opportunity to rule*" [emphasis added; internal quotation marks omitted]), cert. denied, 204 Conn. 804, 528 A.2d 1151 (1987).

Second, we agree with the state that the court lacked jurisdiction over the motion to open. The court sentenced the defendant on January 12, 2016, the same day it accepted his guilty plea. Under our well established law, the court was divested of jurisdiction at that time. Accordingly, it lacked the power to hear and determine the defendant's November 7, 2016 motion to open.

"The Superior Court is a constitutional court of general jurisdiction. In the absence of statutory or constitutional provisions, the limits of its jurisdiction are delineated by the common law. . . . It is well established that under the common law a trial court has the discretionary power to modify or vacate a criminal judgment before the sentence has been executed. . . . This is so because the court loses jurisdiction over the case when the defendant is committed to the custody of the commissioner of correction and begins serving the sentence. . . . *Because it is well established that the jurisdiction of the trial court terminates once a defendant has been sentenced, a trial court may no longer take any action affecting a defendant's sentence unless it expressly has been authorized to act.*" (Emphasis added; internal quotation marks omitted.) *State* v. *Robles*, 169 Conn. App. 127, 132, 150 A.3d 687 (2016), cert. denied, 324 Conn. 906, 152 A.3d 544 (2017); see also *State* v. *Banks*, 321 Conn. 821, 830, 146 A.3d 1 (2016); *State* v. *Monge*, 165 Conn. App. 36, 41–42, 138 A.3d 450, cert. denied, 321 Conn. 924, 138 A.3d 284

(2016). We conclude, therefore, that the trial court lacked jurisdiction to consider the defendant's motion to open.

Next, we address the defendant's claim of ineffective assistance of counsel. He contends that Kowar was constitutionally ineffective by advising the defendant to withdraw his application for accelerated rehabilitation and to plead guilty pursuant to the *Alford* doctrine. Specifically, the defendant argues that Kowar failed to advise him that his guilty plea would subject him to removal from the United States and this failure violated his sixth amendment right to effective assistance of counsel pursuant to *Padilla* v. *Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010).[9]

We again conclude that the court lacked jurisdiction to consider the defendant's claim of ineffective assistance of counsel.[10] We iterate that following the imposition of the defendant's sentence on January 12, 2016,

[9] In *Padilla* v. *Kentucky*, supra, 559 U.S. 356, the United States Supreme Court held that the "United States constitution requires an attorney for a criminal defendant to provide advice about the risk of deportation arising from a guilty plea." *Saksena* v. *Commissioner of Correction*, 145 Conn. App. 152, 157, 76 A.3d 192, cert. denied, 310 Conn. 940, 79 A.3d 892 (2013).

[10] As a general matter, our courts have recognized that the proper forum for a claim of ineffective assistance of counsel is an action seeking a writ of habeas corpus. *State* v. *Charles*, 56 Conn. App. 722, 729, 745 A.2d 842, cert. denied, 252 Conn. 954, 749 A.2d 1203 (2000); see also *State* v. *Bellamy*, 323 Conn. 400, 431, 147 A.3d 655 (2016) (habeas proceeding provides superior forum for claim of ineffective assistance of counsel because it provides opportunity for evidentiary hearing). "Absent the evidentiary hearing available in the collateral action, review in this court of the ineffective assistance claim is at best difficult and sometimes impossible. The evidentiary hearing provides the trial court with the evidence that is often necessary to evaluate the competency of the defense and the harmfulness of any incompetency." (Internal quotation marks omitted.) *State* v. *Charles*, supra, 729–30.

We note that, in the present case, a factual dispute arose at the hearing before Judge Kwak regarding whether Kowar had discussed the immigration consequences of the plea to the defendant. This disagreement exemplifies the reason why the strong preference for a habeas proceeding to resolve claims of ineffective assistance of counsel exists in our law.

the court was divested of jurisdiction. Accordingly, it was without the power to consider the defendant's claim of ineffective assistance of counsel that was raised in the November 7, 2016 motion to open.

Finally, the defendant argues, for the first time on appeal, that the trial court had jurisdiction, pursuant to Practice Book § 43-22, to correct that illegal sentence. Specifically, he contends that his sentence was imposed in an illegal manner, and therefore the court had jurisdiction to correct it at any time. As a general matter, § 43-22 "embodies a common-law exception that permits the trial court to correct an illegal sentence or other illegal disposition. . . . [I]n order for the court to have jurisdiction over a motion to correct an illegal sentence after the sentence has been executed, the sentencing proceeding [itself] . . . must be the subject of the attack. . . . [T]o invoke successfully the court's jurisdiction with respect to a claim of an illegal sentence, the focus cannot be on what occurred during the underlying conviction. . . .

"Connecticut courts have considered four categories of claims pursuant to [Practice Book] § 43-22. The first category has addressed whether the sentence was within the permissible range for the crimes charged. . . . The second category has considered violations of the prohibition against double jeopardy. . . . The third category has involved claims pertaining to the computation of the length of the sentence and the question of consecutive or concurrent prison time. . . . The fourth category has involved questions as to which sentencing statute was applicable. . . . [I]f a defendant's claim falls within one of these four categories, the trial court has jurisdiction to modify a sentence after it has commenced. . . . If the claim is not within one of these categories, then the court must dismiss the claim for a

lack of jurisdiction and not consider its merits." (Citations omitted; internal quotation marks omitted.) *State* v. *Robles*, supra, 169 Conn. App. 132–33.

In the present case, however, the defendant did not file a motion to correct an illegal sentence and instead raised his Practice Book § 43-22 claim for the first time on appeal. We recently have concluded that "it is inappropriate to review an illegal sentence claim that is raised for the first time on appeal. Our rules of practice confer the authority to correct an illegal sentence on the trial court, and that court is in a superior position to fashion an appropriate remedy for an illegal sentence. . . . Furthermore, the defendant has the right, at any time, to file a motion to correct an illegal sentence and raise [an illegal sentence] claim before the trial court. . . . *State* v. *Starks*, 121 Conn. App. 581, 592, 997 A.2d 546 (2010) (declining to review unpreserved claim of illegal sentence under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 [1989], or plain error doctrine embodied in Practice Book § 60-5); see also *Cobham* v. *Commissioner of Correction*, 258 Conn. 30, 38 n.13, 779 A.2d 80 (2001) (clarifying that judicial authority in context of Practice Book § 43-22 refers exclusively to trial court); *State* v. *Crump*, 145 Conn. App. 749, 766, 75 A.3d 758 ([i]t is not appropriate to review an unpreserved claim of an illegal sentence for the first time on appeal . . .), cert. denied, 310 Conn. 947, 80 A.3d 906 (2013); *State* v. *Brown*, 133 Conn. App. 140, 145–46 n.6, 34 A.3d 1007 (2012) (same), rev'd on other grounds, 310 Conn. 693, 80 A.3d 878 (2013)." (Internal quotation marks omitted.) *State* v. *Urbanowski*, 163 Conn. App. 377, 385, 136 A.3d 236 (2016), aff'd, 327 Conn. 169, A.3d (2017); see also *State* v. *Rivera*, 177 Conn. App. 242, 248–51, A.3d , (judicial authority to consider motion to correct illegal sentence is with trial court, not appellate courts of this state), petition for cert. filed (Conn. December 21, 2017) (No. 170342). We

therefore decline to review the defendant's claim of an illegal sentence.[11]

Having determined that the court lacked subject matter jurisdiction to consider the motion to open, we conclude that the court should have dismissed rather than denied that motion.

The form of the judgment is improper, the judgment denying the motion to open is reversed, and the case is remanded with direction to render judgment dismissing the motion to open.

In this opinion the other judges concurred.

JOSE ESTELA *v.* BRISTOL HOSPITAL, INC.
(AC 38813)

Lavine, Keller and Harper, Js.

Syllabus

The plaintiff physician brought an action against the defendant hospital, claiming that the defendant improperly had restricted his hospital privileges and engaged in anticompetitive behavior by stealing his patients. The trial court rendered a judgment of nonsuit as a result of the plaintiff's failure to comply with certain discovery orders and thereafter denied the plaintiff's motion to open the judgment. The trial court determined that the plaintiff had failed to satisfy the statutory (§ 52-212 [a]) requirement for opening a judgment of nonsuit because he did not demonstrate that he was prevented from prosecuting the matter as a result of mistake, accident or other reasonable cause. Thereafter, the plaintiff commenced the present action pursuant to the accidental failure of suit statute (§ 52-592 [a]), alleging that his noncompliance with the trial court's discovery

[11] The defendant also argues that the trial court had jurisdiction because the sentence was void. This argument is based on his assumption that had the trial court properly applied § 54-56e (c) (5) and had it granted the application for accelerated rehabilitation, the defendant would not have received the sentence of five years incarceration, execution suspended, and five years of probation. Thus, the defendant contends that both the plea and the sentence were void. This reasoning is based upon speculation and ignores the realities of the case, that is, that the defendant withdrew his application for accelerated rehabilitation. Accordingly, we conclude that this argument is wholly without merit.

orders in his first action was the result of mistake, inadvertence or excusable neglect. The defendant filed a motion to bifurcate the proceedings in order to adjudicate the plaintiff's claim that his action was not time barred due to the applicability of § 52-592 (a) separately from the merits of his underlying causes of action. The trial court thereafter rendered judgment for the defendant, concluding that the plaintiff's action could not be maintained under § 52-592 (a) because his original action had been terminated for serious disciplinary reasons related to his noncompliance with discovery orders, and not because of mistake, inadvertence or excusable neglect. On appeal to this court, the plaintiff claimed, inter alia, that the trial court improperly found that his alleged noncompliance with discovery orders did not occur in circumstances such as mistake, inadvertence or excusable neglect, and that the court improperly applied the statutory (§ 52-212) standard for opening a judgment of nonsuit in determining whether § 52-592 (a) applied. *Held*:

1. The trial court did not abuse its discretion in determining the applicability of § 52-592 (a) apart from the issues being tried on the merits in the interests of judicial efficiency, as the issue of that statute's applicability was dispositive because the plaintiff's claims would have been time barred under the applicable statutes of limitations if § 52-592 (a) did not apply, and it having been proper for the court to address the applicability of § 52-592 (a) through a motion to bifurcate, the defendant did not waive its right to challenge that statute's applicability by failing to previously raise the statute of limitations as a special defense.
2. Contrary to the plaintiff's claim, the trial court applied the correct standard in determining the applicability of § 52-592 (a) to the present action; although it was necessary for the trial court in the present case to consider the trial court's analysis in the plaintiff's first action under § 52-212, the trial court in the present case applied the correct standard in determining that the viability of the present action could not be based on § 52-592 (a) because the first action had been terminated for serious disciplinary reasons rather than because of mistake, accident or other reasonable cause within the meaning of § 52-212.
3. The trial court's findings as to the plaintiff's conduct that led to the judgment of nonsuit in the plaintiff's first action were not clearly erroneous, as the record supported the court's finding that the first action was dismissed for serious disciplinary reasons and not because of mistake, inadvertence or excusable neglect, and, contrary to the plaintiff's claims, the court considered his justifications for his noncompliance with discovery orders and did not overlook that disciplinary dismissals are not excluded categorically from the relief afforded by § 52-592 (a).
4. The plaintiff could not prevail on his unpreserved claim that § 52-592 (a) applies to any judgment of nonsuit, as this court was not bound to consider claims of law that were not properly raised at trial, and, even if the plaintiff's claim had been properly preserved, it contradicted precedent.

Argued September 18, 2017—officially released January 9, 2018

Procedural History

Action to recover damages for, inter alia, alleged tortious interference with business expectancies, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the court, *Young*, *J.*, following a hearing, issued a certain order as to the defendant's motion to bifurcate; thereafter, the court granted the plaintiff's motion for judgment and rendered judgment for the defendant, from which the plaintiff appealed to this court. *Affirmed.*

Joseph B. Burns, with whom, on the brief, was *Pamela A. LeBlanc*, for the appellant (plaintiff).

Holly L. Cini, with whom were *Sara R. Simeonidis* and, on the brief, *Jillian R. Orticelli*, for the appellee (defendant).

Opinion

HARPER, J. This appeal is the latest installment in a long and protracted litigation between the parties. The plaintiff, Jose Estela, a physician, appeals from the trial court's judgment that his case could not be maintained under the accidental failure of suit statute, General Statutes § 52-592 (a),[1] because his first action against the defendant, Bristol Hospital, Inc., was dismissed for "serious disciplinary reasons" and not as a matter of form. On appeal, the plaintiff claims that (1)

[1] General Statutes § 52-592 (a) provides in relevant part: "If any action, commenced within the time limited by law, has failed one or more times to be tried on its merits because of insufficient service or return of the writ due to unavoidable accident or the default or neglect of the officer to whom it was committed, or because the action has been dismissed for want of jurisdiction, or the action has been otherwise avoided or defeated by the death of a party or for any matter of form; or if, in any such action after a verdict for the plaintiff, the judgment has been set aside, or if a judgment of nonsuit has been rendered or a judgment for the plaintiff reversed, the plaintiff . . . may commence a new action . . . for the same cause at any time within one year after the determination of the original action or after the reversal of the judgment."

the defendant waived the right to challenge the applicability of § 52-592 (a); (2) the court incorporated a different and higher standard into its decision and thus deprived him of his rights under *Ruddock* v. *Burrowes*, 243 Conn. 569, 706 A.2d 967 (1998), by limiting the § 52-592 (a) hearing to the standard set forth in General Statutes § 52-212; (3) his alleged discovery noncompliance occurred in circumstances such as mistake, inadvertence, or excusable neglect; and (4) § 52-592 (a) applies to any judgment of nonsuit.[2] We disagree and, accordingly, affirm the judgment of the trial court.

[2] To the extent that any issues are nonreviewable, the plaintiff invokes the plain error doctrine. See Practice Book § 60-5. The plaintiff asserts that the court's decision "violates public policy and manifests injustice." Specifically, the plaintiff claims that the court committed plain error, resulting in manifest injustice, by (1) "[i]mposing sanctions on the plaintiff for reliance on misrepresentations made by the defendant's counsel"; (2) allowing the defendant to "greatly benefit from 'the same sauce . . . [that it] spread on the [plaintiff's goose]' despite that it 'also necessarily graced his own gander' "; (3) "[r]equiring the plaintiff to demonstrate sufficient evidence in support of an essential element of his cause of action prior to receipt of discovery that he [was] entitled to"; (4) "[r]equiring the plaintiff to produce his expert report based on unknown data, despite that such essential information was due and owing and being withheld improperly by the defendant"; and (5) "[w]rongfully converting the inapplicability of a § 52-592 (a) defense to a defense concerning jurisdiction . . . ."

"It is well established that the plain error doctrine . . . is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved [and nonconstitutional in nature], 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 . . . 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. . . .

"An appellate court addressing a claim of plain error first must determine if the error is indeed plain in the sense that it is patent [or] readily [discernible] on the face of a factually adequate record, [and] also . . . obvious in

The relevant procedural history is as follows. Prior to commencing the present action, the plaintiff commenced his first action, *Estela* v. *Bristol Hospital, Inc.*, Superior Court, judicial district of New Britain, Docket No. CV-11-6013260-S (*Estela I*), on November 3, 2011, alleging that the defendant improperly had restricted his hospital privileges and engaged in anticompetitive behavior by stealing his patients. The complaint set forth causes of action for tortious interference with business expectancies, breach of contract, breach of the covenant of good faith and fair dealing, tortious interference with contractual relations, and defamation. As the court in the present action, *Young, J.*, noted, *Estela I* "was heavily litigated, with well over 100 filings before it was ultimately terminated by the court, *Swienton, J.*, [on October 28, 2013] for the plaintiff's failure to comply with the court's deadlines [set forth in two court orders]."

On November 1, 2013, the plaintiff filed a motion for reargument or reconsideration of the entry of nonsuit, which the court in *Estela I* denied on November 18, 2013. The plaintiff then filed a motion to open the nonsuit on November 27, 2013, which the court denied on

the sense of not debatable. . . .

"[An appellant] 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; emphasis in original; footnote omitted; internal quotation marks omitted.) *State* v. *Jamison*, 320 Conn. 589, 595–97, 134 A.3d 560 (2016).

After a thorough review of the record, we are not convinced that the claimed errors are so clear that they are "[discernible] on the face of a factually adequate record" or "obvious in the sense of not debatable." (Internal quotation marks omitted.) Id., 596. Importantly, many of the claimed errors appear to pertain to the actions of the court in *Estela I*, and not those of the court in the present case. Further, even if the plaintiff had met his burden of establishing that the error was clear and harmful, he has failed to demonstrate "manifest injustice" that would permit use of this " 'extraordinary remedy' . . . ." Id., 597. Accordingly, we conclude that the plaintiff cannot prevail on his claim of plain error.

December 16, 2013. On January 7, 2014, the plaintiff filed a motion for reconsideration or reargument of the denial of the motion to open, which the court denied on January 21, 2014.

On February 10, 2014, the plaintiff appealed from the judgment denying his motion for reconsideration of the denial of the motion to open. This court dismissed the appeal as moot because the plaintiff did not "challenge the court's finding that he failed to show that he was prevented from prosecuting his action because of mistake, accident, or other reasonable cause"; *Estela* v. *Bristol Hospital, Inc.*, 165 Conn. App. 100, 107, 138 A.3d 1042, cert. denied, 323 Conn. 904, 150 A.3d 681 (2016); which prevented this court from affording him practical relief, even if the plaintiff's claims were resolved in his favor. Id., 108.

Prior to the resolution of the plaintiff's appeal from the judgment rendered in *Estela I*, on October 24, 2014, the plaintiff commenced the present action, which was essentially identical to *Estela I*, relying on § 52-592 (a), in avoidance of any claim that his causes of action would be time barred by the applicable statutes of limitations.[3] On December 16, 2014, the defendant filed a motion for summary judgment. In its memorandum of law in support of the motion for summary judgment, the defendant argued, in relevant part, that the applicable statutes of limitations barred the plaintiff's claims and assumed that the plaintiff was relying on the savings

[3] Although § 52-592 (a) was not specifically pleaded in the complaint, the parties stipulated to the court that it was not necessary under *Beckenstein Enterprises-Prestige Park, LLC* v. *Keller*, 115 Conn. App. 680, 690–91, 974 A.2d 764 ("[w]hile it has been suggested that it might be desirable for the plaintiff to plead sufficient facts necessary to bring the matter within the purview of § 52-592 . . . [i]t has been and is the holding of [our Supreme Court] that matters in avoidance of the Statute of Limitations need not be pleaded in the complaint but only in response to such a defense properly raised" [internal quotation marks omitted]), cert. denied, 293 Conn. 916, 979 A.2d 488 (2009).

provisions of § 52-592 (a), though the defendant did not explicitly challenge the applicability of the statute.

On February 26, 2015, prior to the plaintiff's filing an objection to the motion for summary judgment or action by the court, the defendant filed a motion for an order to bifurcate the trial, pursuant to General Statutes § 52-205[4] and Practice Book § 15-1,[5] to try the plaintiff's claim that his action was not time barred due to § 52-592 (a) separately from the merits of the underlying tort and breach of contract claims. On March 12, 2015, the plaintiff filed an objection to the defendant's motion for an order to bifurcate on the grounds that on multiple occasions the defendant had waived its right to challenge the applicability of § 52-592 (a) and was estopped from doing so by way of a motion to bifurcate. No immediate action was taken on the defendant's motion to bifurcate or the plaintiff's objection.

On June 23, 2015, the court overruled the plaintiff's objection to the defendant's motion for an order to bifurcate and scheduled an evidentiary hearing on the issue of whether § 52-592 (a) applies to the plaintiff's case. The evidentiary hearing took place on August 3, 2015. At the court's request, the parties filed posthearing briefs on August 10, 2015. On August 17, 2015, the court determined that, under the applicable analysis set forth in *Ruddock* v. *Burrowes*, supra, 243 Conn. 569, § 52-592 (a) did not apply to the plaintiff's case because "*Estela*

[4] General Statutes § 52-205 provides: "In all cases, whether entered upon the docket as jury cases or court cases, the court may order that one or more of the issues joined be tried before the others."

[5] Practice Book § 15-1 provides: "In all cases, whether entered upon the docket as jury cases or court cases, the judicial authority may order that one or more of the issues joined be tried before the others. Where the pleadings in an action present issues both of law and of fact, the issues of law must be tried first, unless the judicial authority otherwise directs. If some, but not all, of the issues in a cause are put to the jury, the remaining issue or issues shall be tried first, unless the judicial authority otherwise directs."

I was not dismissed as a matter of form . . . .'' The court found that ''[because *Estela I*] was terminated for serious disciplinary reasons and not because of mistake, inadvertence or excusable neglect . . . the viability of this action cannot be based upon . . . [§ 52-592 (a)].'' This appeal followed.[6] Additional facts and procedural history will be set forth as necessary.

I

We first address the plaintiff's claim that the defendant waived its right to challenge the applicability of § 52-592 (a) by failing to raise the statute of limitations as a special defense, in a motion to dismiss, or in its motion for summary judgment. The plaintiff further claims that a motion to bifurcate was the improper vehicle to challenge the applicability of § 52-592 (a). We disagree.

Absent § 52-592 (a), the causes of action set forth in the plaintiff's complaint in the present case were time barred by the applicable statutes of limitations in General Statutes §§ 52-577[7] and 52-597, which the defendant asserted, contrary to the plaintiff's claim, in its December 16, 2014 memorandum of law in support of its motion for summary judgment.[8] ''Section 52-592 (a) allows a plaintiff to commence a new action for the same cause, within one year, if the original action failed

[6] On August 21, 2015, prior to a final judgment, the plaintiff appealed from the court's decision that his action could not be maintained pursuant to § 52-592 (a). This court granted the defendant's motion to dismiss the appeal, by order dated October 20, 2015, for lack of a final judgment. On December 22, 2015, the plaintiff moved for judgment to be rendered in favor of the defendant, as the court's order on the motion to bifurcate so concluded the rights of the parties that further proceedings could not affect them. On January 4, 2016, the court rendered judgment in favor of the defendant.

[7] General Statutes § 52-577 provides that ''[n]o action founded upon a tort shall be brought but within three years from the date of the act or omission complained of.''

[8] General Statutes § 52-597 provides that ''[n]o action for libel or slander shall be brought but within two years from the date of the act complained of.''

to be tried on its merits . . . for any matter of form . . . . Deemed a saving statute, § 52-592 enables plaintiffs to bring anew causes of action despite the expiration of the applicable statute of limitations." (Internal quotation marks omitted.) *Vestuti* v. *Miller*, 124 Conn. App. 138, 143, 3 A.3d 1046 (2010).

"Pursuant to . . . § 52-205 and Practice Book § 15-1, the trial court may order that one or more issues that are joined be tried before the others. The interests served by bifurcated trials are convenience, negation of prejudice and judicial efficiency. . . . Bifurcation may be appropriate in cases in which litigation of one issue may obviate the need to litigate another issue. . . . The bifurcation of trial proceedings lies solely within the discretion of the trial court." (Footnotes omitted; internal quotation marks omitted.) *Dumas* v. *Mena*, 82 Conn. App. 61, 64, 842 A.2d 618 (2004). Because "[b]ifurcation of trial proceedings lies solely within the discretion of the trial court . . . appellate review is limited to a determination of whether that discretion has been abused." (Citations omitted; internal quotation marks omitted.) *O'Shea* v. *Mignone*, 50 Conn. App. 577, 582, 719 A.2d 1176, cert. denied, 247 Conn. 941, 723 A.2d 319 (1998). "In determining whether the trial court has abused its discretion, we must make every reasonable presumption in favor of the correctness of its action." (Internal quotation marks omitted.) Id., 583. "[T]he ultimate issue is whether the court could reasonably conclude as it did . . . ." (Internal quotation marks omitted.) *Saczynski* v. *Saczynski*, 109 Conn. App. 426, 428, 951 A.2d 670 (2008).

Our precedent demonstrates that the question of whether § 52-592 (a) applies may be addressed through a motion for an order to bifurcate. In *Plante* v. *Charlotte Hungerford Hospital*, 300 Conn. 33, 40–41, 12 A.3d 885

(2011),[9] the applicability of § 52-592 (a) initially was challenged in a motion to dismiss and a motion for summary judgment, both of which were denied by the trial court. Thereafter, "[f]ollowing discovery and numerous revisions to the operative complaint, the trial court . . . granted the hospital defendants' motion pursuant to General Statutes § 52-206 and Practice Book § 15-1 to bifurcate the proceedings, and to try the claim that the action was saved by § 52-592 (a) separately from the malpractice claims." Id., 41. On appeal, the Supreme Court upheld the court's determination that § 52-592 (a) did not save the plaintiff's action. Id., 39.

Similarly here, the defendant's first response to the plaintiff's complaint was to file a motion for summary judgment, in which it argued that the applicable statutes of limitations barred the plaintiff's claims.[10] The court never rendered a decision on the defendant's motion for summary judgment because the defendant filed a motion for an order to bifurcate the trial to determine

[9] In his principal brief, the plaintiff argues that the present case differs from *Plante* v. *Charlotte Hungerford Hospital*, supra, 300 Conn. 40–41, because, in *Plante*, the defendants challenged the applicability of § 52-592 (a) in a motion to dismiss and a motion for summary judgment, before the issue was ultimately addressed by way of a motion to bifurcate. The plaintiff argues that the defendant in this matter "never raised this defense . . . in its motion for summary judgment . . . ." (Citations omitted.) Contrary to the plaintiff's assertions, however, the defendant did argue in its motion for summary judgment that the plaintiff's claims were time barred by the applicable statute of limitations. Thus, the plaintiff has failed to demonstrate how this case is distinguishable from *Plante*.

[10] The plaintiff argues that § 52-592 (a) is a limitation defense, and that the defendant waived this defense because it did not specifically assert in its motion for summary judgment that § 52-592 (a) does not apply, but merely asserted that the claims were time barred. Section 52-592 (a), however, is not a defense that the defendant must plead; rather, § 52-592 (a) is an exception to the statute of limitations special defense that allows a plaintiff to maintain an otherwise time barred action. See *Beckenstein Enterprises-Prestige Park, LLC* v. *Keller*, 115 Conn. App. 680, 690–91, 974 A.2d 764, cert. denied, 293 Conn. 916, 979 A.2d 488 (2009); see also footnote 3 of this opinion.

whether § 52-592 (a) saved the plaintiff's case. The court determined that the question of whether § 52-592 (a) applied was a dispositive issue. Thus, in the present case, as in *Plante*, the court ultimately addressed the issue of the applicability of § 52-592 (a) through a motion to bifurcate.

The plaintiff also argues that the court was wrong to "recast" the defendant's motion for an order to bifurcate as a dispositive motion. We disagree.

It was within the court's discretion to bifurcate the proceedings and address the issue of the applicability of § 52-592 (a) apart from the issues being tried on the merits in the interests of judicial efficiency. See *Dumas* v. *Mena*, supra, 82 Conn. App. 64; see also *Reichhold Chemicals, Inc.* v. *Hartford Accident & Indemnity Co.*, 243 Conn. 401, 423–24, 703 A.2d 1132 (1997). In its memorandum of decision, the court noted that "[t]o allow this action to proceed through the same extensive litigation [as *Estela I*] only to have the court determine thereafter that it cannot be saved by [§ 52-592 (a)] would be a waste of the time and resources of the parties and the court. . . . The issue before the court at this time is whether the action may be saved by [§ 52-592 (a)]." Given that the plaintiff's claim would be time barred if § 52-592 (a) did not apply; see *Vestuti* v. *Miller*, supra, 124 Conn. App. 143 ("§ 52-592 enables plaintiffs to bring anew causes of action despite the expiration of the applicable statute of limitations . . . [but] to fall within the purview of § 52-592 . . . the original lawsuit must have failed for one of the reasons enumerated in the statute" [internal quotation marks omitted]); the court did not abuse its discretion in determining the applicability of § 52-592 (a) apart from the issues being tried on the merits.

II

We next address the plaintiff's claim that the court incorporated a different and higher standard into its

decision than the standard set forth in *Ruddock* v. *Burrowes*, supra, 243 Conn. 569. Specifically, the plaintiff asserts that he was deprived of his rights under *Ruddock* because "[r]ather than employing the 'mistake, inadvertence or excusable neglect' standard under § 52-592 (a) . . . and requiring a determination as to whether the nonsuited party engaged in 'egregious conduct,' the court limited the issue to one of 'mistake, [accident] or reasonable cause' under a standard utilized under . . . § 52-212." We disagree.

This court has opined that "§§ 52-592 and 52-212 have different purposes and, thus, employ different legal standards." *Skinner* v. *Doelger*, 99 Conn. App. 540, 559, 915 A.2d 314, cert. denied, 282 Conn. 902, 919 A.2d 1037 (2007). To open a nonsuit pursuant to § 52-212 (a),[11] a plaintiff must demonstrate that it was prevented from prosecuting its action by "mistake, accident or other reasonable cause . . . ." General Statutes § 52-212 (a). In contrast, the "matter of form" provision of § 52-592 (a), as set forth in *Ruddock*, requires a plaintiff to demonstrate that the prior suit failed "in circumstances such as mistake, inadvertence or excusable neglect." *Ruddock* v. *Burrowes*, supra, 243 Conn. 577. "[T]he question of whether the court properly applied § 52-592 presents an issue of law over which our review is plenary." *Tellar* v. *Abbott Laboratories, Inc.*, 114 Conn. App. 244, 249, 969 A.2d 210 (2009). "Under the plenary standard of review, we must decide whether the court's

[11] General Statutes § 52-212 (a) provides in relevant part: "Any . . . nonsuit in the Superior Court may be set aside, within four months following the date on which it was rendered or passed, and the case reinstated on the docket, on such terms in respect to costs as the court deems reasonable, upon the complaint or written motion of any party or person prejudiced thereby, showing reasonable cause, or that a good cause of action or defense in whole or in part existed at the time of the rendition of the judgment or the passage of the decree, and that the plaintiff or defendant was prevented by mistake, accident or other reasonable cause from prosecuting the action or making the defense."

conclusions are legally and logically correct and supported by the facts in the record." *Commissioner of Public Health* v. *Colandrea*, 175 Conn. App. 254, 259–60, 167 A.3d 471, cert. denied, 327 Conn. 957, A.3d (2017).

The plaintiff argues that the court improperly limited the August 3, 2015 evidentiary hearing on the applicability of § 52-592 to the "different and higher legal standard" set forth in § 52-212. In response, the defendant asserts that the court employed the correct standard and that the plaintiff "improperly conflates [the court's] discussion of the nonsuit in *Estela I* . . . ." (Citations omitted.) The defendant further argues that the court's memorandum of decision belies any argument that the court applied the wrong standard. We agree with the defendant.

To the extent that the plaintiff's argument rests on the standard quoted by the court during the August 3, 2015 evidentiary hearing, we note that our review of the hearing transcript reveals that the plaintiff did not object to the court's recitation of the § 52-212 standard, but instead, the plaintiff actually agreed[12] with the court

[12] We recognize that the plaintiff's counsel did state, at the start of the August 3, 2015 evidentiary hearing, that "the issue here is, did the plaintiff egregiously depart from the obligation to prosecute the case . . . ." Following that, however, the following colloquy took place:

"The Court: . . . The issue here is a very limited issue: mistake, accident or reasonable cause.

"[The Plaintiff's Counsel]: Yes. . . .

"The Court: . . . So, the motion to open nonsuit really doesn't matter here, does it? It's whether or not the nonsuit itself was entered and the cause of the nonsuit was not, from the defense perspective, mistake, accident or other reasonable cause?

"[The Plaintiff's Counsel]: I think that's correct, Your Honor.

"The Court: Okay. So, we don't have to deal with the deficiencies in the motion to open the nonsuit. . . . We only have to get to the reasons or what was done in an effort to prevent the nonsuit from entering . . . .

"[The Plaintiff's Counsel]: Yes, Your Honor.

"The Court: So, that's what we're limiting this hearing to.

"[The Plaintiff's Counsel]: You're correct, Your Honor.

"The Court: That it's mistake, accident or other reasonable cause."

that it was reciting the correct standard.[13] Additionally, although the court quoted the standard for § 52-212 at the evidentiary hearing, we cannot conclude that it did so in error. As the defendant asserts, in determining whether § 52-592 (a) applied, it was necessary for the court in the present case to consider the court's reasons in *Estela I* for entering the nonsuit, including its analysis under § 52-212. During the August 3, 2015 evidentiary hearing, the court told counsel: "I need to know what the deficiencies were that form the basis of [the] ruling [by the court in *Estela I*] on the motion for nonsuit." As this court noted in *Skinner* v. *Doelger*, supra, 99 Conn. App. 540, "§§ 52-592 and 52-212 have different purposes and, thus, employ different legal standards. There is a difference, however, between relying on the legal conclusions reached in an action and applying the legal standard that was employed in that action. . . . Indeed, *we wonder how a court could determine why an earlier lawsuit failed without relying on the factual findings and legal conclusions drawn in that other action*." (Emphasis added.) Id., 559.

More importantly, in its memorandum of decision, the court applied the correct standard under *Ruddock*, and not the standard under § 52-212—demonstrating that it rendered a decision applying the correct standard. See *Disciplinary Counsel* v. *Parnoff*, 158 Conn. App. 454, 467, 119 A.3d 621 (2015) (rejecting plaintiff's claim that court applied incorrect standard because, inter alia, "the language used by the court in its memorandum of decision indicates that the court was aware of and correctly applied the [proper] standard"), aff'd, 324 Conn. 505, 152 A.3d 1222 (2016). In its memorandum of decision, the court set forth its factual basis before

[13] In crafting the "matter of form" standard for § 52-592 (a), our Supreme Court cited to § 52-212 and indicated that "[§ 52-212] has language resembling our construction of § 52-592 (a)." *Ruddock* v. *Burrowes*, supra, 243 Conn. 577 n.13.

concluding: "For the reasons articulated above . . . [*Estela I*] was terminated for serious disciplinary reasons and not because of *mistake*, *inadvertence or excusable neglect*. Therefore, the viability of this action cannot be based upon . . . § 52-592." (Emphasis added.) Accordingly, we reject the plaintiff's claim that the court incorporated a "different and higher" standard than that under *Ruddock* in rendering its decision on the applicability of § 52-592 (a) to his case.[14]

III

We next address the plaintiff's claim that the court erred in finding that his alleged discovery noncompliance did not occur in circumstances such as mistake, inadvertence, or excusable neglect. The plaintiff argues that the court overlooked that disciplinary dismissals are not categorically excluded from the relief afforded by § 52-592 (a), and that the court did not consider his justifications for the alleged discovery noncompliance. The plaintiff further argues that the court's findings as to his conduct that led to the judgment of nonsuit are in clear error. We disagree.

The following additional facts and procedural history are relevant to this claim. As summarized in the court's memorandum of decision: "On August 3, 2015, the court conducted an evidentiary hearing solely on the applicability of § 52-592 [and] the circumstances which led to the court's granting of the motion for judgment of nonsuit and denial of the motion to open nonsuit in *Estela I*. Based upon the nature and conduct of the plaintiff that led to the granting of the motion for judgment of

[14] We also reject the plaintiff's argument that the court barred "evidence on the plaintiff's conduct that occurred outside of mistake, inadvertence or reasonable cause, such as excusable neglect." As the court noted in its memorandum of decision, and as the transcript supports, the plaintiff's witness testified at length as to the circumstances in which the discovery noncompliance occurred. The plaintiff has failed to show how the hearing was "limited" in any way.

nonsuit, the court determines that *Estela I* was not dismissed as a matter of form, but rather for serious disciplinary reasons. Therefore, the present action . . . cannot be maintained under § 52-592. The court sets forth its factual basis below.

"In *Estela I*, the defendant served a disclosure request upon the plaintiff on May 30, 2012. On September 12, 2012, the plaintiff provided some responses and asserted untimely objections. On September 18, 2012, the defendant filed a motion to compel complete responses. The plaintiff filed an objection to the motion to compel, essentially asserting that he was a 'busy practicing physician'; that the defendant provided no guidance as to how to comply; that some of the information requested was privileged or unavailable; and that he had provided substantial compliance. . . .

"On January 28, 2013, after [a] hearing, [the court] ordered the plaintiff to provide revised disclosure responses [by February 8, 2013]. The court further ordered the parties to return on February 25, 2013 'in order to advise the court whether the defendant is seeking further discovery.' On that date, again after [a] hearing, the court gave the plaintiff until March 29, 2013, to provide additional compliance with the discovery request. The primary compliance was to consist of tax returns and the report of the plaintiff's expert witness. As the plaintiff failed to comply with the court's order, the court entered a judgment of dismissal on October 28, 2013.

"At the evidentiary hearing in [the present case], the sole witness was the plaintiff's counsel, Mary Alice Moore Leonhardt, [who] testified at length about discussions between the plaintiff's counsel and [the defendant's] counsel in *Estela I* concerning outstanding discovery issues. Much of these discussions centered on information which the plaintiff requested from the

defendant in order to finalize a report of the plaintiff's expert. Attorney Leonhardt essentially claimed that the defendant's attorney led her down the primrose path by promising information which was never actually produced. Attorney Leonhardt assert[ed] that her reliance on the representations of [the defendant's] counsel caused her to be dilatory in complying with the court's order. . . .

"As to the tax returns, Attorney Leonhardt testified that the plaintiff did not possess copies of the returns and was at the mercy of the Internal Revenue Service in order to comply with the court's order. She did not explain why the plaintiff failed to comply with the court's order to timely provide tax returns. At the very least, [the] plaintiff could have provided [the defendant's] counsel an authorization to obtain the returns directly from the Internal Revenue Service.

"Attorney Leonhardt's assertions do not address the fact that the [court in *Estela I*] had serially ordered the plaintiff's compliance by February 29, 2013, and March 29, 2013. As of September 27, 2013, the plaintiff still had not complied, nor had he complied a month later when [the court in *Estela I*] granted the motion for nonsuit and entered judgment." (Footnote omitted.)

On the basis of these facts, the court in the present case determined that "[t]he testimony of Attorney Leonhardt and the evidence presented fail[ed] to establish that the judgment was entered as a matter of form. Rather, it is clear that the judgment entered in *Estela I* was a disciplinary judgment. . . . The court in *Estela I* conducted several hearings and issued several orders commanding the plaintiff's compliance with discovery. Despite this, the plaintiff repeatedly ignored the court's orders, thereafter never filed anything to inform the court [that he] could not comply and never filed any motion for extension of time. After almost six months of noncompliance, the court entered a disciplinary dis-

missal of the action.[15] This court cannot find that the plaintiff's counsel's failure to comply with the orders of Judge Swienton in *Estela I* was excused, excusable or accidental. . . . *Estela I* was terminated for serious disciplinary reasons and not because of mistake, inadvertence or excusable neglect. Therefore, the viability of this action cannot be based upon . . . § 52-592." (Footnote added.)

[15] In its order denying the plaintiff's motion to open nonsuit, the court in *Estela I* noted: "The defendant . . . moved for a judgment of nonsuit against the plaintiff . . . due to his failure to respond to the defendant's request for disclosure and production. After careful consideration . . . the court granted the motion for nonsuit on October 28, 2013. . . . On November 1, 2013, the plaintiff filed a motion to reargue/reconsider the court's granting of the nonsuit . . . [which] the court denied . . . on November 18, 2013. . . .

"On November 27, 2013, the plaintiff filed the present motion, motion to open nonsuit, and on December 2, 2013, the defendant filed its objection. Thereafter, on December 5, 2013, the plaintiff filed a notice of compliance (2003–2004 tax returns), and on December 11, 2013, the plaintiff filed a second notice of compliance (preliminary expert report). . . .

"The [plaintiff's] motion to open nonsuit was not filed with the appropriate supporting affidavit, [as required by General Statutes § 52-212a and Practice Book § 17-42]; therefore, this court is without the authority to set aside the nonsuit. . . . Even if the court were to consider [the] late fil[ed] affidavit, the plaintiff failed to establish that 'a good cause of action . . . existed . . . at the time of the rendition of the judgment [of nonsuit], and that the plaintiff . . . was prevented by mistake, accident or other reasonable cause from prosecuting the action . . . .' His filing of the notices of compliance AFTER the filing of the [defendant's] motion for [a judgment of] nonsuit is clear indication that he had failed to comply with the written discovery either at the time of the entry of nonsuit or at the time of the filing of the motion to open nonsuit. Furthermore, the plaintiff argues that his admitted noncompliance is due to the fault of either the defendant or a federal agency, honest mistake, grueling trial schedule, and/or lack of prejudice and/or harm to the defendant.

"The court finds no merit in the plaintiff's arguments or explanations. This is not the first instance of the plaintiff's failure to comply with written discovery . . . . Moreover, the plaintiff has admitted in his motion to open nonsuit that he 'purposefully held off on continuing his review and analysis of his own documents to cull out relevant information because he expected that the request[ed] patient information would be produced by the defendant . . . .' The plaintiff has failed to establish . . . that he was prevented from prosecuting this matter because of 'mistake, accident or other reasonable cause.' " (Citations omitted.)

"Disciplinary dismissals do not, in all cases, demonstrate the occurrence of misconduct so egregious as to bar recourse to § 52-592. . . . Whether the statute applies cannot be decided in a factual vacuum. To enable a plaintiff to meet the burden of establishing the right to avail himself or herself of the statute, a plaintiff must be afforded an opportunity to make a factual showing that the prior dismissal was 'a matter of form' in the sense that the plaintiff's noncompliance with a court order occurred in circumstances such as mistake, inadvertence or excusable neglect." (Citation omitted; footnote omitted.) *Ruddock* v. *Burrowes*, supra, 243 Conn. 576–77. Thus, "it is appropriate to consider each case along a continuum; at one extreme are dismissals for mistake or inadvertence, at the other extreme are dismissals for serious misconduct or a series of cumulative transgressions." (Internal quotation marks omitted.) *Tellar* v. *Abbott Laboratories, Inc.*, supra, 114 Conn. App. 251.

"On the one hand, in a long line of cases, we have held that § 52-592 (a) is remedial in nature and, therefore, warrants a broad construction. . . . On the other hand, our decisions also have underscored the importance of trial court caseflow management of crowded dockets. Caseflow management is based upon the premise that it is the responsibility of the court to establish standards for the processing of cases and also, when necessary, to enforce compliance with such standards. Our judicial system cannot be controlled by the litigants and cases cannot be allowed to drift aimlessly through the system. . . . In the event of noncompliance with a court order, the directives of caseflow management authorize trial courts, in appropriate circumstances, to take action against either the errant attorney or the litigant who freely chose the attorney." (Citations omitted; internal quotation marks omitted.) *Ruddock* v. *Burrowes*, supra, 243 Conn. 575.

"A determination of the applicability of § 52-592 depends on the particular nature of the conduct involved." *Stevenson* v. *Peerless Industries, Inc.*, 72 Conn. App. 601, 607, 806 A.2d 567 (2002). This requires the court to make factual findings, and "[a] finding of fact will not be disturbed unless it is clearly erroneous. . . ." Id., 606. "[T]he question of whether the court properly applied § 52-592 presents an issue of law over which our review is plenary." *Tellar* v. *Abbott Laboratories, Inc.*, supra, 114 Conn. App. 249.

As an initial matter, we reject the plaintiff's argument that "[t]he court was . . . wrong to not consider the plaintiff's justifications for his alleged discovery noncompliance . . . ." Both the court's memorandum of decision, which is quoted previously, and our review of the hearing transcript reveal that the court considered at length the plaintiff's justifications for his noncompliance. We also reject the plaintiff's argument that "[t]he court overlooked in its decision that disciplinary dismissals are not excluded categorically from the relief afforded by § 52-592 (a)." (Internal quotation marks omitted.) The court analyzed the case under the "matter of form" analysis set forth in *Ruddock* precisely because it recognized that disciplinary dismissals are not categorically excluded from relief under § 52-592 (a). Applying that standard, which is applicable to disciplinary dismissals, the court found that "[b]ased upon the nature and conduct of the plaintiff that led to the granting of the motion for judgment of nonsuit . . . *Estela I* was not dismissed as a matter of form, but rather for serious disciplinary reasons."

The plaintiff argues that the court's factual findings in the present case are in "clear error." In response, the defendant argues that "[e]ach of these challenged factual findings is amply supported in the record and, thus, there is no basis to conclude that the . . . factual

findings were clearly erroneous." We agree with the defendant.

The record readily supports the court's factual findings underlying its determination that the dismissal of *Estela I* did not occur in circumstances such as "mistake, inadvertence or excusable neglect." In *Estela I*, the plaintiff engaged in a pattern of delayed conduct by responding late to discovery requests, filing untimely objections, and filing notices of compliance after the filing of the defendant's motion for a judgment of nonsuit. The plaintiff failed to comply with two court orders, which ordered him to comply with outstanding discovery requests for his 2002–2004 tax returns and his expert report, by February 29, 2013, and March 29, 2013, respectively.

As justification for his noncompliance, the plaintiff represented to the court that he could not comply with the defendant's request to provide the expert report absent information from the defendant that had not yet been provided. As the court noted, however, the plaintiff failed to explain why he did not file a motion for extension of time in *Estela I* while waiting for this purportedly essential information from the defendant. The plaintiff also asserted that he could not comply with the discovery request for his 2002–2004 tax returns because he did not have copies, and he was waiting on copies to be provided by the Internal Revenue Service. The request for the tax returns, however, was not sent to the Internal Revenue Service until November 5, 2013—several days after the court in *Estela I* rendered the judgment of nonsuit on October 28, 2013, and months after the court-ordered deadlines to comply. Further, as the court noted, the plaintiff could have provided the defendant with an authorization to contact the Internal Revenue Service itself, but failed to do so. Moreover, the plaintiff even admitted in his motion to open the judgment of nonsuit in *Estela I* that he "*purposefully*

held off on continuing his review and analysis of his own documents to cull out relevant information because he expected that the request[ed] patient information would be produced by the defendant"[16] (emphasis added; internal quotation marks omitted);—further undercutting any argument that the nonsuit resulted from "mistake, inadvertence or excusable neglect."

Also as justification for his conduct in *Estela I*, the plaintiff argued that he complied with the "reasonable meaning" of the court's orders. Specifically, the plaintiff represented to the court in the present case that the parties had come to an agreement amongst themselves to extend the deadline for compliance.[17] "In Connecticut, [however] the general rule is that a court order must be followed until it has been modified or successfully challenged. . . . Our Supreme Court repeatedly has advised parties against engaging in self-help and has

[16] The plaintiff also argued, in essence, in the motion to open the judgment of nonsuit "that his failure to produce the tax returns for the requested years was an oversight, that his failure to produce the requested expert report on the plaintiff's losses was premised in turn on the defendant's own failure to produce the requisite patient information, and that the 'grueling trial schedule' of the plaintiff's attorney was partly responsible for the various delays at issue." *Estela* v. *Bristol Hospital, Inc.*, supra, 165 Conn. App. 103–104.

[17] During the August 3, 2015 evidentiary hearing, the following colloquy took place:

"[Attorney Leonhardt]: . . . When I got the motion for nonsuit on [September 26] I called Attorney [Michael G.] Rigg [the defendant's counsel], and I don't recall if I spoke with Attorney Rigg or with Attorney [Amy F.] Goodusky [cocounsel for the defendant], but they did agree to give us additional time, and we went through the documents and—

"The Court: And you confirmed it in writing? . . .

"[Attorney Leonhardt]: As best I can recollect, Your Honor, it was not reduced to writing. . . . [M]y understanding was that we would have additional time . . . .

"The Court: . . . Should you have relied on Attorney Rigg or Attorney Goodusky's representation that they would provide you with these things?

"[Attorney Leonhardt]: No, Your Honor.

"The Court: Okay.

"[Attorney Leonhardt]: That was my mistake."

stressed that an order of the court must be obeyed until it has been modified or successfully challenged." (Internal quotation marks omitted.) *Worth* v. *Commissioner of Transportation*, 135 Conn. App. 506, 520–21, 523, 43 A.3d 199 (rejecting plaintiff's claim that failure to comply with court order was "excusable neglect" and affirming trial court's finding that plaintiff's case was not saved by § 52-592), cert. denied, 305 Conn. 919, 47 A.3d 389 (2012). Thus, even if the parties had come to an agreement between themselves to extend the discovery deadline, the plaintiff needed to first inform the court of the agreement and have the court orders modified. The plaintiff failed to do so.

On the basis of the foregoing, we cannot say that the factual findings of the court in the present case, which led it to conclude that the nonsuit in *Estela I* did not occur in circumstances such as "mistake, inadvertence or excusable neglect," were clearly erroneous. See *Ruddock* v. *Burrowes*, supra, 243 Conn. 572. Our decision is consistent with cases applying § 52-592 (a). The present case is distinguishable from those cases where the court determined that the prior case was dismissed as a matter of form, i.e., in circumstances such as "mistake, inadvertence or excusable neglect." See, e.g., *Tellar* v. *Abbott Laboratories, Inc.*, supra, 114 Conn. App. 252 (holding § 52-592 saved plaintiff's case where "[t]he conduct . . . was neither repeated nor protracted . . . [but] consisted of a singular failure to comply with a discovery request over the course of four months"); *Stevenson* v. *Peerless Industries, Inc.*, supra, 72 Conn. App. 607–608 (stating "court improperly determined that the plaintiff could not avail himself of § 52-592 [a]" where failure to respond timely to request to revise and discovery demands was due to miscommunication between plaintiff and his counsel). Rather, the plaintiff's behavior is more akin to those cases where the court

found that § 52-592 (a) did not apply because the plaintiff's conduct was repeated or purposeful, and was not the result of "mistake, inadvertence or excusable neglect." See, e.g., *Plante* v. *Charlotte Hungerford Hospital*, supra, 300 Conn. 57 (concluding § 52-592 [a] did not apply, and describing plaintiff's failure to provide an opinion letter pursuant to General Statutes § 52-190a [a] as "blatant and egregious" where "[e]ven a cursory reading of § 52-190a would have revealed . . . [that the nurse writing the letter] did not qualify as a similar health care provider" [internal quotation marks omitted]); *Gillum* v. *Yale University*, 62 Conn. App. 775, 783, 773 A.2d 986 (concluding § 52-592 [a] did not apply, and describing conduct in the first case as "lackadaisical behavior by the plaintiffs at every turn" [internal quotation marks omitted]), cert. denied, 256 Conn. 929, 776 A.2d 1146 (2001).

In summary, although we recognize "that § 52-592 (a) is remedial in nature and, therefore, warrants a broad construction," our Supreme Court also has held that "[o]ur judicial system cannot be controlled by the litigants and cases cannot be allowed to drift aimlessly through the system." (Internal quotation marks omitted.) *Ruddock* v. *Burrowes*, supra, 243 Conn. 575. This court has recognized that there is "a critical distinction between categories of cases involving, for instance, [n]onappearances that interfere with proper judicial management of cases, and cause serious inconvenience to the court and to opposing parties . . . and those involving things such as a mere failure to respond to a notice of dormancy . . . ." (Citation omitted; internal quotation marks omitted.) *Skinner* v. *Doelger*, supra, 99 Conn. App. 557–58. Along the continuum, where "at one extreme are dismissals for mistake or inadvertence, [and] at the other extreme are dismissals for serious misconduct or a series of cumulative transgressions";

(internal quotation marks omitted) *Tellar* v. *Abbott Laboratories, Inc.*, supra, 114 Conn. App. 251; the record supports the court's finding that *Estela I* was dismissed for "serious disciplinary reasons,"[18] and not because of "mistake, inadvertence or excusable neglect." Therefore, the findings of the court in the present case as to the plaintiff's conduct that led to the judgment of nonsuit in *Estela I* are not clearly erroneous.

IV

Finally, the plaintiff asserts for the first time on appeal that § 52-592 (a) applies to *any* judgment of nonsuit. Specifically, as an alternative to the claim addressed in part II of this opinion, the plaintiff argues that the standard set forth in *Ruddock* does not apply to judgments of nonsuit, under the plain language of the statute. Before the court in the present case, however, the plaintiff argued that the standard set forth in *Ruddock* applied, and no party objected to its application. Further, the plaintiff argues at length in his principal brief on appeal that the court employed the wrong standard in determining whether § 52-592 applied to his case by *not* using the *Ruddock* analysis.

It is well established that "[w]e are not bound to consider claims of law not properly raised at trial." *State* v. *Hilton*, 45 Conn. App. 207, 222, 694 A.2d 830, cert. denied, 243 Conn. 925, 701 A.2d 659 (1997), cert. denied, 522 U.S. 1134, 118 S. Ct. 1091, 140 L. Ed. 2d 147 (1998). Further, even if we were to find that the

[18] Further, as the court commented in a footnote in its memorandum of decision: "The pattern of noncompliance with court orders continues from *Estela I* to [the present action]. The plaintiff has recently filed two motions for extension of time nunc pro tunc after failing to comply with this court's scheduling deadlines. While this conduct is not directly relevant to the issue at hand, the plaintiff's continued dilatory conduct does not reflect positively on his claim that his failure to comply with the prior court's orders was due to his counsel's reliance on representations made by [the defendant's] counsel or impossibility."

plaintiff's claim was properly preserved, it contradicts precedent. See *Lacasse* v. *Burns*, 214 Conn. 464, 473, 572 A.2d 357 (1990) ("[section] 52-592 does not authorize the reinitiation of all actions not tried on . . . [their] merits" [internal quotation marks omitted]); see also *Vestuti* v. *Miller*, supra, 124 Conn. App. 145 (applying standard set forth in *Ruddock* to judgment of nonsuit); *Stevenson* v. *Peerless Industries, Inc.*, supra, 72 Conn. App. 603–607 (same).

The judgment is affirmed.

In this opinion the other judges concurred.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 179

MEMORANDUM DECISIONS

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE *v.* EFSATATHIOS SAVVOULIDES ET AL.
(AC 39181)

Sheldon, Prescott and Shaban, Js.

Submitted on briefs December 11, 2017—officially released January 9, 2018

Named defendant's appeal from the Superior Court in the judicial district of Stamford-Norwalk, *Hon. Kevin Tierney*, judge trial referee.

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

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Recycling, Inc. *v.* Commissioner of Energy & Environmental Protection . . . 127
Administrative appeal; whether trial court improperly dismissed administrative appeal from decision by defendant Commissioner of Energy and Environmental Protection denying application for individual recycling permit and revoking general permit to operate recycling facility; whether substantial evidence supported hearing officer's finding of pattern or practice of noncompliance by plaintiff with permit requirements, in violation of statute (§ 22a-6m [a]), so as to warrant revocation of general permit registration and denial of application for individual permit; claim that denial of permit application was not warranted even if plaintiff's compliance history demonstrated pattern of noncompliance; whether it was abuse of discretion to deny permit application and revoke general

permit registration; claim that trial court improperly upheld defendant's decision because hearing officer failed to apply correct standard of review; claim that hearing officer abused discretion by excluding evidence of prior enforcement actions by Department of Energy and Environmental Protection against other waste facilities; whether trial court's finding that there was no bias on part of administrative adjudicators was clearly erroneous; whether plaintiff overcame presumption that administrative agents acting in adjudicative capacity are not biased.

Smith *v.* Commissioner of Correction. 160

Habeas corpus; ineffective assistance of counsel; pretrial confinement credit; claim that habeas court abused its discretion in denying petition for certification to appeal; whether petitioner failed to meet his burden of proving that there was reasonable probability that, but for trial counsel's allegedly deficient performance during plea proceeding, he would not have accepted plea offer and instead would have gone to trial.

Stack *v.* Hartford Distributors, Inc. 22

Arbitration; whether trial court properly rendered judgment granting application for order to proceed to arbitration regarding termination of plaintiff's employment; claim that termination of plaintiff's employment did not involve dispute arising out of interpretation or enforcement of parties' employment agreement and, therefore, that arbitration provision contained in that agreement was not applicable; claim that employment contract was void and unenforceable; whether issue of validity of employment contract should be considered by arbitrator in first instance where party did not challenge arbitration clause in employment agreement.

Stanley *v.* State's Attorney (Memorandum Decision) 901

State *v.* Bush 108

Sale of narcotics; sale of narcotics within 1500 feet of school; conspiracy to sell narcotics; whether trial court abused its discretion when it failed to grant defendant's request to represent himself and suggested that his trial counsel continue to represent him through voir dire; claim that jury was misled by trial court's instructions on conspiracy charge; claim that trial court failed to instruct jury on elements of possession of narcotics and possession of narcotics with intent to sell; claim that trial court failed to instruct jury to determine which of underlying charged crimes defendant had conspired to commit; whether trial court improperly sentenced defendant to twenty years incarceration on conspiracy conviction, where most serious crime of which he was convicted that was proved to have been object of conspiracy carried maximum possible prison sentence of fifteen years; vacation of sentence on conspiracy conviction.

State *v.* Grant 81

Manslaughter in first degree with firearm; assault in first degree; harmless error; claim that trial court abused its discretion in admitting certain witness' testimony and portions of defendant's statements to police indicating that defendant was involved in sale of drugs; whether admission of subject evidence was harmless; whether defendant demonstrated that admission of subject evidence had significant impact on jury's verdict; claim that trial court abused its discretion in permitting state to elicit testimony from witness that he had observed defendant carrying firearm on prior occasion; whether any alleged error in admission of witness' statement was harmless.

State *v.* Jackson 40

Assault in first degree; tampering with witness; claim that evidence was insufficient to prove defendant's identity as perpetrator of stabbing to support conviction of assault in first degree; claim that evidence was insufficient to support conviction of tampering with witness; whether trial court reasonably could have found that defendant attempted to induce witness to testify falsely; claim that trial court improperly denied motion to dismiss tampering with witness charges; claim that state violated separation of powers doctrine when it added witness tampering charges to substitute information without judicial determination as to whether probable cause existed for added offenses; reviewability of unpreserved claim that trial court violated defendant's sixth amendment right to confrontation and abused its discretion when it prevented him from asking witness certain questions on recross-examination.

State *v.* Jin 185

Conspiracy to commit burglary in third degree; whether trial court lacked jurisdiction to consider motion to open judgment of conviction following imposition of

sentence; reviewability of claims that trial court improperly denied application for accelerated rehabilitation program and that trial court erred in determining that defendant received effective assistance of counsel; reviewability of unpreserved claim that trial court had jurisdiction to correct imposition of illegal sentence pursuant to applicable rule of practice (§ 43-22) where defendant did not file motion to correct illegal sentence.

State *v.* Mukhtaar 1

Murder; claim that trial court abused its discretion in denying motions to correct illegal sentence and to allow expert witness to testify; claim that defendant's chronological age at time of crime was not representative of mental age; claim that trial court should have applied rationale of Miller v. *Alabama* (567 U.S. 460) and its progeny to adult defendant whose mental age, at time of crime, was not substantially different from that of juvenile; whether trial court was required under *Miller* necessarily and expressly to take defendant's mental state into consideration at sentencing where defendant was twenty years old at time of crime; whether defendant set forth colorable claim for relief under *Miller*; whether trial court lacked subject matter jurisdiction over motion to correct illegal sentence; whether trial court properly denied motion to allow expert testimony.

State *v.* Stanley (Memorandum Decision) 901

Tirado *v.* Torrington. 95

Allegedly improper tax assessment of plaintiff's motor vehicle; subject matter jurisdiction; whether trial court properly dismissed plaintiff's action for lack of subject matter jurisdiction; whether trial court incorrectly determined that statute (§ 12-119) governing applications for relief when property has been wrongfully assessed applied to plaintiff's claim; whether trial court correctly determined that statute (§ 12-117a) governing appeals to Superior Court from municipal boards of assessment appeals applied to plaintiff's claim; whether plaintiff failed to exhaust her available administrative remedies before appealing to Superior Court; claim that plaintiff did not receive notice of defendant's certificate of change and tax assessment in time to challenge assessment.

Notice of Application for Reinstatement to the Bar

NNH CV15 6052605 S. CHIEF DISCIPLINARY COUNSEL VS. JERRY GRUENBAUM. SUPERIOR COURT, JUDICIAL DISTRICT OF NEW HAVEN, DECEMBER 26, 2017.

This is to advise that Jerry Gruenbaum (102900) has filed an Application for Reinstatement as an Attorney Admitted to the Practice of Law in Connecticut. The application, which was filed in the Superior Court for the Judicial District of New Haven on December 18, 2017, has been filed in the following original grievance file: Chief Disciplinary Counsel v Gruenbaum, Jerry (NNH CV15-6052605). The application will be referred to a Standing Committee on Recommendations for Admission to the Connecticut Bar

Giovanni Spennato, Chief Clerk
Superior Court, Clerk's Office
235 Church Street
New Haven, CT 06510