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JULIE BECUE *v.* MARK BECUE

The defendant's petition for certification to appeal from the Appellate Court, 185 Conn. App. 812 (AC 38994), is denied.

*John H. Van Lenten*, in support of the petition.

*Richard W. Callahan*, in opposition.

Decided February 27, 2019

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PETER BORIA *v.* COMMISSIONER OF CORRECTION

The petitioner Peter Boria's petition for certification to appeal from the Appellate Court, 185 Conn. App. 901 (AC 39028), is denied.

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

*Temmy Ann Miller*, assigned counsel, in support of the petition.

Decided February 27, 2019

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FRANK P. CANNATELLI *v.* STATEWIDE GRIEVANCE COMMITTEE

The plaintiff's petition for certification to appeal from the Appellate Court, 186 Conn. App. 135 (AC 39703), is denied.

*Frank P. Cannatelli*, self-represented, in support of the petition.

Decided February 27, 2019

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DOMINGOS GABRIEL ET AL. *v.* MOUNT VERNON FIRE INSURANCE COMPANY

The defendant's petition for certification to appeal from the Appellate Court, 186 Conn. App. 163 (AC 40174), is denied.

*Dennis M. Carnelli*, assigned counsel, and *Joseph J. Andriola*, assigned counsel, in support of the petition.

*Michael S. Burrell*, in opposition.

Decided February 27, 2019

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CITIBANK, N.A., TRUSTEE *v.* LAURA A. STEIN ET AL.

The defendant Brian Stein's petition for certification to appeal from the Appellate Court, 186 Conn. App. 224 (AC 40199), is denied.

*Brian Stein*, self-represented, in support of the petition.

Decided February 27, 2019

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VIRGINIA FINGELLY *v.* TOWN
OF FAIRFIELD ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 186 Conn. App. 905 (AC 40569), is denied.

*Virginia Fingelly*, self-represented, in support of the petition.

*John W. Cannavino, Jr.*, in opposition.

Decided February 27, 2019

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OHAN KARAGOZIAN *v.* USV OPTICAL, INC.

The plaintiff's petition for certification to appeal from the Appellate Court, 186 Conn. App. 857 (AC 40907), is granted, limited to the following issue:

"Did the Appellate Court correctly construe and apply *Brittell* v. *Department of Correction*, 247 Conn. 148, 717 A.2d 1254 (1998), in holding that an action for constructive discharge in violation of public policy requires that the plaintiff allege and prove not only that the employer intended to create an intolerable work atmosphere but that the employer intended thereby to force the plaintiff to resign?"

*John R. Williams*, in support of the petition.

*Elizabeth M. Lacombe* and *Robert M. Palumbos*, pro hac vice, in opposition.

Decided February 27, 2019

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ERIC HAM *v.* COMMISSIONER
OF CORRECTION

The petitioner Eric Ham's petition for certification to appeal from the Appellate Court, 187 Conn. App. 160 (AC 37998), is denied.

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

*Vishal K. Garg*, in support of the petition.

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

Decided February 27, 2019

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ROBERT BUIE *v.* COMMISSIONER OF CORRECTION

The petitioner Robert Buie's petition for certification to appeal from the Appellate Court, 187 Conn. App. 414 (AC 40520), is denied.

*Heather Clark*, assigned counsel, in support of the petition.

*Bruce R. Lockwood*, supervisory assistant state's attorney, in opposition.

Decided February 27, 2019

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DARLENE BOUCHER *v.* SAINT FRANCIS GI ENDOSCOPY, LLC

The plaintiff's petition for certification to appeal from the Appellate Court, 187 Conn. App. 422 (AC 40597), is denied.

*James V. Sabatini*, in support of the petition.

*Christopher A. Klepps* and *Christopher L. Brigham*, in opposition.

Decided February 27, 2019

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CITIMORTGAGE, INC. *v.* ANDREW H. PRITCHARD ET AL.

The named defendant's petition for certification to appeal from the Appellate Court, 187 Conn. App. 901 (AC 41070), is denied.

*Andrew H. Pritchard*, self-represented, in support of the petition.

*Peter A. Ventre*, in opposition.

Decided February 27, 2019

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# CONNECTICUT APPELLATE REPORTS

# Vol. 188

CASES ARGUED AND DETERMINED

IN THE

## APPELLATE COURT

OF THE

## STATE OF CONNECTICUT

# MARY DOE ET AL. *v.* DEPARTMENT OF MENTAL HEALTH AND ADDICTION SERVICES ET AL. (AC 40190)

Elgo, Bright and Moll, Js.

*Syllabus*

The plaintiffs, M and her conservator, J, brought this action against the defendants for alleged violations of the patients' bill of rights (§ 17a-540 et seq.) in connection with M's treatment and confinement at the defendant forensic psychiatric hospital. The plaintiffs claimed, inter alia, that M's commitment as the only woman in an otherwise all male maximum security unit at the hospital was a per se violation of the patients' bill of rights, and violated her right to "humane and dignified treatment" pursuant to § 17a-542. The trial court rendered judgment in favor of the defendants, from which the plaintiffs appealed to this court. *Held*:

1. The trial court properly concluded that the civil commitment of M, as the only woman in an otherwise all male maximum security unit at the hospital, was not a per se violation of the patients' bill of rights; notwithstanding the remedial purpose and significant provisions of the patients' bill of rights, it does not mandate that committed patients be subject to categorical gender segregation, the plaintiffs failed to provide any authority in support of their claim that the placement of M in the subject unit was per se inhumane and undignified solely because the unit housed only men at the time that she was placed there for treatment, and this court declined to hold that dual gender confinement in the unit was per se inhumane and undignified, as it would have been imprudent for this court to graft, by judicial fiat, an unqualified mandate onto the patients' bill of rights where no such rule exists, the legislature could have imposed such a rule but has not done so, whether such a placement violates the patients' bill of rights is necessarily contingent on the factual circumstances, including the reasons for the placement, and the imposition of a per se rule would be inconsistent with the purpose of the patients' bill of rights, which was intended to remedy the then prevailing conditions of our mental health institutions and to ensure the fair treatment of patients by, in part, imposing a mandatory requirement of a specialized treatment plan.
2. The plaintiffs could not prevail on their claim that the trial court improperly applied the standard outlined in *Mahoney* v. *Lensink* (213 Conn. 548) to determine that the defendants' treatment of M while she was committed to the maximum security unit did not violate her right to humane and dignified treatment under § 17a-542: contrary to the claim of the plaintiffs, *Mahoney* makes clear that the right to a specialized treatment plan is part of, and not severable from, the right to humane and dignified

treatment and, thus, the standard for a violation of § 17a-542, as outlined by *Mahoney*, is not only applicable to a claim that there was a failure to develop a specialized treatment plan, but also is applicable to a claim that the patient did not receive humane and dignified treatment; accordingly, the trial court properly applied the *Mahoney* standard to conclude that the defendants' treatment of M was not inhumane and undignified, as the defendants' treatment plan was permissible and reasonable in view of the severity and resistant nature of M's medical condition and in light of her diagnosis, the defendants made a good faith effort to remedy M's hygiene in that they assigned her to the only room with a half bathroom, offered her privacy when she needed to take a shower in the unit, and brought her special toilet articles, the defendants made a good faith effort to engage M in activities outside the unit, where she would be able to socialize with other female patients, and in view of M's prior history of secreting sharp items and the mandatory policy of the hospital, two strip searches of M that were conducted, although traumatizing, were a permissible and reasonable part of her treatment.

Argued December 10, 2018—officially released March 12, 2019

*Procedural History*

Action to recover damages for the defendants' alleged violations of the patients' bill of rights in connection with the named plaintiff's treatment and confinement at a forensic psychiatric hospital, brought to the Superior Court in the judicial district of Litchfield and tried to the court, *Schuman*, *J.*; judgment in favor of the defendants, from which the plaintiffs appealed to this court. *Affirmed.*

*Lisa M. Vincent*, for the appellants (plaintiffs).

*Ralph E. Urban*, assistant attorney general, for the appellees (defendants).

*Opinion*

BRIGHT, J. The plaintiffs, Mary Doe and her conservator Jane Doe,[1] appeal from the judgment of the trial court, rendered after a trial to the court, in favor of the defendants, the Department of Mental Health and

[1] The trial court granted the plaintiffs permission to use pseudonyms for purposes of bringing this action.

Addiction Services, Connecticut Valley Hospital, and Whiting Forensic Division of Connecticut Valley Hospital (Whiting). On appeal, the plaintiffs claim that the court improperly (1) concluded that the commitment of Mary Doe, as the only woman in an otherwise all male maximum security unit at a forensic psychiatric hospital, was not a per se violation of the statutory bill of rights for psychiatric patients (patients' bill of rights); see General Statutes §§ 17a-540 through 17a-550; and (2) applied the standard outlined by *Mahoney* v. *Lensink*, 213 Conn. 548, 565–68, 569 A.2d 518 (1990), to determine that the defendants' treatment of Mary Doe while she was committed to the maximum security unit had not violated her right to "humane and dignified treatment" under § 17a-542. We affirm the judgment of the trial court.

The following facts, as found by the trial court, and procedural history are relevant to our resolution of this appeal. Mary Doe was born in 1970, and she was raised by her great aunt because her parents essentially were absent from her early life. Mary Doe's childhood and adolescence were "chaotic, unpredictable, and dangerous, often requiring intensive mental health treatment and containment." She was raped when she was eleven or twelve years old, and she may have been subject to another incident of sexual abuse thereafter. Between the ages of twelve and nineteen, Mary Doe committed physical acts of violence against a male student, two teenage girls, and her family members. She subsequently was diagnosed with "schizophrenia, paranoid type," and, at age nineteen, she was admitted to Connecticut Valley Hospital for the first time. Over the next twenty years, Mary Doe committed seventy-nine reported assaults, some of which were "very serious," involving "dangerous instruments," such as "knives, plastic utensils, a broken CD, and broken radio antennae." In connection with these incidents, Mary Doe

was arrested numerous times "and then examined and treated for lack of competency to stand trial." In 2007, Jane Doe became Mary Doe's conservator.

Between 1992 and 2008, Mary Doe intermittently was committed to Whiting, which is the only forensic psychiatric hospital in Connecticut. Whiting has a capacity of "somewhere between [ninety-one] and 110 beds." While committed between 1992 and 2008, Mary Doe "exhibited difficult behaviors such as paranoid delusions, resistance to taking medications, poor hygiene and lack of showering, making crude comments and accusations about sex, urinating in common areas, throwing liquids and other items, hoarding of items, and, at least at one point, expressing a suicidal intent."

In 2008, Mary Doe involuntarily was committed pursuant to an order of the Probate Court and, consequently, she was placed in unit 6 at Whiting on December 24, 2008. Unit 6 is a maximum security unit with an approximate capacity of twelve persons. Unit 6 is a "highly specialized section for patients," like Mary Doe, "who had a history of trauma, psychotic episodes, and serious impairment. No other unit at Whiting could provide such treatment." Her admission diagnosis included, among other things, "schizophrenia, paranoid type, post-traumatic stress disorder, borderline intellectual functioning, type two diabetes, [and] seizure disorder . . . ." Mary Doe resided in unit 6 until January 30, 2011, when she was discharged from Whiting and began living in Jane Doe's residence with supervision from the staff of Community Systems, Inc. (Community Systems). After she assaulted Jane Doe's husband and two Community Systems staff members, Mary Doe involuntarily was committed pursuant to an order of the Probate Court. Mary Doe then resided in unit 6 from April 6, 2011 through May 18, 2012. Thereafter, Mary Doe again was discharged from Whiting and, after approximately four years, she returned to Whiting,

where she currently resides.[2] Mary Doe was the only female who resided in unit 6 during the operative periods between 2010 and 2012.

On April 23, 2013, the plaintiffs, pursuant to § 17a-550,[3] filed the present civil action against the defendants seeking monetary damages. In the operative amended complaint, dated June 15, 2014, the plaintiffs alleged that the defendants were responsible for the "diagnosis, observation, or treatment of persons with psychiatric disabilities . . . ." They also alleged, in relevant part, that from April 25, 2010 through January 29, 2011,[4] and from April 6, 2011 through May 18, 2012, the defendants' placement of Mary Doe in the otherwise all male unit 6, as well as the defendants' treatment of Mary Doe while in unit 6, caused the "dehumanization and degradation" of Mary Doe in violation of § 17a-542.

On February 17, 2017, after a three day trial, the court issued a memorandum of decision in which it rendered judgment in favor of the defendants on the plaintiffs' complaint. The court concluded that the placement of Mary Doe in the otherwise all male unit 6 was not a per se violation of her right to humane and dignified treatment pursuant to the patients' bill of rights. The court also concluded, pursuant to the standard set forth in *Mahoney* v. *Lensink*, supra, 213 Conn. 565–68, that

[2] The plaintiffs' complaint makes no claim regarding Mary Doe's current commitment and the trial court made no factual findings regarding her current commitment; thus, such information is not necessary to a resolution of the plaintiffs' claims on appeal.

[3] General Statutes § 17a-550 provides: "Any person aggrieved by a violation of sections 17a-540 to 17a-549, inclusive, may petition the superior court within whose jurisdiction the person is or resides for appropriate relief, including temporary and permanent injunctions, or may bring a civil action for damages."

[4] On March 19, 2014, the court dismissed "any claim alleged to have occurred prior to April 25, 2010," as barred by the three year statute of limitations contained in General Statutes § 52-577. The plaintiffs do not challenge that ruling in this appeal.

the treatment of Mary Doe while she was confined in unit 6 was not inhumane and undignified in violation of § 17a-542.[5] This appeal followed. Additional facts will be set forth as necessary.

Before turning to the merits of the plaintiffs' claims, we briefly set forth the applicable standard of review. "The scope of our appellate review depends upon the proper characterization of the rulings made by the trial court. To the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly erroneous. When, however, 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.) *Sun Val, LLC* v. *Commissioner of Transportation*, 330 Conn. 316, 325–26, 193 A.3d 1192 (2018); *Hartford* v. *CBV Parking Hartford, LLC*, 330 Conn. 200, 214, 192 A.3d 406 (2018) ("[w]hether the trial court applied the proper legal standard is subject to plenary review on appeal"). On appeal, the plaintiffs do not contest any of the factual findings of the court; instead, their claims challenge the court's conclusions of law and application of the proper legal standard. Accordingly, our review of both of the plaintiffs' claims is plenary.

I

The plaintiffs first claim that, contrary to the court's conclusion, the defendants' placement of Mary Doe in the otherwise all male unit 6 was per se inhumane and

[5] The court also concluded that the defendants did not violate the specialized treatment plan provision of § 17a-542 by failing to create a treatment plan suitable to Mary Doe's needs, and that the defendants did not violate the proscription of § 17a-544 (b) that "[m]edication shall not be used as a substitute for [a] habilitation program." Neither of these conclusions is challenged on appeal.

undignified and, thus, constituted a violation of the patients' bill of rights. We disagree.

"The provisions of the [patients'] bill of rights . . . are significant. They include not just the protection of a patient's personal, property [and] civil rights; General Statutes § 17a-541; rights to communicate by mail and telephone and to receive visitors; General Statutes §§ 17a-546 and 17a-547; and qualified rights to refuse the administration of medication and certain treatment; General Statutes § 17a-543; but also include a positive, meaningful right to treatment, consistent with the requirements of good medical practice, in other words, not only basic custodial care but also an individualized effort to help each patient by formulating, administering and monitoring a specialized treatment plan as expressly mandated by [§ 17a-542]." (Footnote omitted; internal quotation marks omitted.) *State* v. *Anderson*, 319 Conn. 288, 315–16, 127 A.3d 100 (2015). These provisions "illuminate the breadth of the legislative concern for the fair treatment of mental patients." *Mahoney* v. *Lensink*, supra, 213 Conn. 556, 559 (patients' bill of rights "was intended to remedy the then prevailing conditions at state mental health facilities"). In particular, the plaintiffs rely on § 17a-542, which provides in relevant part: "Every patient treated in any facility for treatment of persons with psychiatric disabilities shall receive humane and dignified treatment at all times, with full respect for his personal dignity and right to privacy. Each patient shall be treated in accordance with a specialized treatment plan suited to his disorder. . . ."

Notwithstanding the remedial purpose and significant provisions of the patients' bill of rights, it does not mandate that committed patients be subject to categorical gender segregation. Further, the plaintiffs fail to direct us to any precedent that supports their contention that the placement of Mary Doe in unit 6 was

per se inhumane and undignified solely because the unit housed only men at the time that she was placed there for treatment, and we are aware of none. The plaintiffs recognize this deficiency, but, nevertheless, they advocate that this court hold, as a matter of law, that the placement of a female in an otherwise all male maximum security unit at a forensic psychiatric hospital is per se inhumane and undignified and, thus, constitutes a violation of the patients' bill of rights. We decline to do so for the following reasons.

First, it would be imprudent for this court to graft, by judicial fiat, an unqualified mandate onto the patients' bill of rights where no such rule exists. "We are not in the business of writing statutes; that is the province of the legislature. Our role is to interpret statutes as they are written. . . . [We] cannot, by [judicial] construction, read into statutes provisions [that] are not clearly stated." (Internal quotation marks omitted.) *Thomas* v. *Dept. of Developmental Services*, 297 Conn. 391, 412, 999 A.2d 682 (2010). If the legislature wanted to impose an absolute rule mandating the gender segregation of patients committed to a maximum security unit at a psychiatric hospital, it could have done so. In the absence of such a mandate, we decline to hold that dual gender confinement in unit 6 is a per se violation of the patients' bill of rights.

Second, the humane and dignified treatment standard cannot be reduced to a bright line rule in this context. When asked at oral argument before this court to articulate the confines of the proposed per se rule, the plaintiffs' counsel agreed that coed housing of patients, by itself, is not a per se violation of the statute. Other than saying that a single woman in a ward with more than one man is impermissible, counsel was unable to articulate sufficiently the female to male ratio that would constitute a per se violation. In addition, counsel pointed to other factors, such as whether the unit was locked and

whether there were sufficient bathroom facilities for each sex, as affecting the determination of whether the housing is "per se" illegal. These responses, as well as the plaintiffs' reliance on the fact that Mary Doe, as a victim of sexual assault, was particularly afraid of violent men, like those housed in unit 6, demonstrate the necessity for a fact intensive inquiry to determine whether the placement of a female in an otherwise all male ward constitutes inhumane and undignified treatment. Whether such a placement is violative of the patients' bill of rights is necessarily contingent on the factual circumstances, including the reasons for placement in unit 6, the treatment capabilities of unit 6, available alternatives to unit 6, the patient's psychological history, and the patient's specific conditions of confinement in unit 6. Furthermore, a per se rule is incompatible with the standard applicable to determining whether the patients' bill of rights has been violated, which, as described in part II of this opinion, is at least partially dependent on whether the "treatment plan was permissible and *reasonable in view of the relevant information available* . . . ." (Emphasis added.) *Mahoney* v. *Lensink*, supra, 213 Conn. 566.

Third, the imposition of the plaintiffs' per se rule would be inconsistent with the purpose of the patients' bill of rights. As outlined previously in this opinion, the patients' bill of rights was intended to remedy the then prevailing conditions of our mental health institutions and to ensure the fair treatment of mental patients by, in part, imposing a mandatory requirement of a specialized treatment plan. See id., 565–68. If, as the plaintiffs propose, a female may never be placed in unit 6 with all males, regardless of circumstance, that restriction would narrow the treatment options available to females.[6] As a result, the proposed per se rule would

[6] Likewise, we recognize the general principle of deference to decisions made by qualified professionals regarding a patient who has been involuntarily committed to a state institution. See *Youngberg* v. *Romeo*, 457 U.S.

prohibit the assignment of a female to an otherwise all male unit 6, even if that assignment is a component of the most appropriate specialized treatment plan. Furthermore, the per se rule potentially would have a negative impact on the fair treatment of other patients confined at Whiting, who also are entitled to humane and dignified treatment as part of a specialized treatment plan, if the defendants are constrained from relocating a patient with dangerous propensities, like Mary Doe, to unit 6.

On the basis of the foregoing, we reject the plaintiffs' proffered per se rule and, accordingly, conclude that the court properly determined that the civil commitment of Mary Doe, as the only woman in an otherwise all male maximum security unit at a forensic psychiatric hospital, was not a per se violation of the patients' bill of rights.

II

The plaintiffs also claim that the court improperly applied the standard outlined by *Mahoney* v. *Lensink*, supra, 213 Conn. 565–68, to determine that the defendants' treatment of Mary Doe while she was committed to the maximum security unit did not violate her right to "humane and dignified treatment" under § 17a-542. In particular, the plaintiffs argue that the standard articulated by *Mahoney* is inapplicable to their claim, which relies solely on the mandate of § 17a-542 that patients receive "humane and dignified treatment," because they assert that *Mahoney* considered only the purportedly distinct mandate of § 17a-542 that a patient "be treated in accordance with a specialized treatment plan suited to his disorder." They argue that the court erred in

307, 322–23 and n.29, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982) ("there certainly is no reason to think judges or juries are better qualified than appropriate professionals in making such decisions").

applying *Mahoney* to their humane and dignified treatment claim. We disagree.

In *Mahoney*, our Supreme Court considered, in relevant part, whether the plaintiffs' complaint sufficiently stated "a cause of action for deprivation of the right to humane and dignified treatment that [General Statutes] § 17-206c, [now § 17a-542],[7] guarantees to every patient in state mental hospitals." (Footnote added; internal quotation marks omitted.) Id., 562. In making that determination, our Supreme Court began with an examination of the relevant statutory language and recognized that "[s]ince the legislature chose not to attach a statutory definition to the phrase 'humane and dignified treatment,' we must interpret this language in light of the established canons of statutory construction." Id., 563. After reviewing a report composed by a task force, our Supreme Court concluded that "[i]n its adoption of a statutory right to humane and dignified treatment, the legislature intended to afford patients a meaningful right to treatment, consistent with the requirements of good medical practice." Id., 565. The court, relying on several medical treatises, held that "[m]eaningful treatment . . . requires not only basic custodial care but also an individualized effort to help each patient by formulating, administering and monitoring a 'specialized treatment plan' as expressly mandated by § 17-206c." Id.

Our Supreme Court then pronounced the following standard applicable to claims alleging a violation of § 17-206c: "The statutory responsibility for the formulation and subsequent monitoring of an appropriate treatment plan for each patient does not, however, encompass a guarantee that the treatment plan will

[7] Although § 17-206c, as interpreted by *Mahoney* v. *Lensink*, supra, 213 Conn. 563–68, has been the subject of subsequent technical amendments and was recodified at § 17a-542, the substantive provisions of § 17-206c remain materially unchanged from the provisions of § 17a-542.

invariably produce the desired results. A poor outcome may occur despite the best possible medical practice. . . . The standard for determining whether the provisions of § 17-206c have been violated thus cannot depend on the outcome of treatment. . . .

"To recover for a violation of the statute, a plaintiff must prove, as the statute prescribes . . . that the conditions of his hospitalization were statutorily deficient. The plaintiff must allege and prove that the hospital failed initially to provide, or thereafter appropriately to monitor, an individualized treatment suitable to his psychiatric circumstances. In assessing whether the plaintiff has met his burden of proof, the trier of fact must inquire not whether the hospital has made the best decision possible but rather whether its treatment plan was permissible and reasonable in view of the relevant information available and within a broad range of discretion. . . . The issue, under § 17-206c is whether the hospital made good faith efforts to improve the patient's mental health and not whether it succeeded in fulfillment of this goal." (Citations omitted; footnotes omitted.) Id., 565–67.

The plaintiffs interpret the foregoing standard outlined by *Mahoney* as applicable only to the right to a specialized treatment plan, which is set forth in the second sentence of § 17a-542, and not applicable to the right to humane and dignified treatment, which they claim is a separate and independent obligation set forth in the first sentence of § 17a-542. We disagree.

The first two sentences of § 17a-542 provide: "Every patient treated in any facility for treatment of persons with psychiatric disabilities shall receive humane and dignified treatment at all times, with full respect for his personal dignity and right to privacy. Each patient shall be treated in accordance with a specialized treatment plan suited to his disorder." The language of the first

sentence makes clear that all psychiatric patients are entitled to humane and dignified treatment for their disabilities. The second sentence then provides that such treatment must be pursuant to a specialized treatment plan. Thus, the two sentences work in concert to create a single requirement—the creation of a specialized treatment plan that is at all times humane and dignified, with full respect for the patient's personal dignity and right to privacy. This requirement applies not only to the medical treatment provided pursuant to the plan, but also to the custodial setting in which it is provided.

Our Supreme Court discussed the unified nature of the obligation created by § 17a-542 in *Mahoney*. At the outset of its analysis, our Supreme Court specifically stated that it sought to interpret the phrase "humane and dignified treatment," as utilized by what is now § 17a-542. Id., 563. It then reasoned that the phrase was intended to mean a "meaningful right to treatment, consistent with the requirements of good medical practice." Id., 565. The court thus confirmed that whether the patient is treated humanely and with dignity must be determined in the context of the medical treatment that the patient receives. The court then made clear that the patient's living conditions cannot be divorced from the medical treatment that the patient receives. "Meaningful treatment thus requires not only basic custodial care but also an individualized effort to help each patient by formulating, administering and monitoring a 'specialized treatment plan' as expressly mandated by [§ 17a-542]." Id.

*Mahoney* thus makes clear that the right to a specialized treatment plan is part of, and not severable from, the right to humane and dignified treatment. This interpretation is bolstered by our Supreme Court's use of broad language to outline that the standard is applicable to "a violation of the statute," as opposed to precise

language specifically delineating that the standard was applicable to only one part of the statute. Id., 566; see also *State* v. *Anderson*, supra, 319 Conn. 315–16 (reaffirming principles of *Mahoney*). Accordingly, the standard for a violation of § 17a-542, as outlined by *Mahoney*, is not only applicable to a claim that there was a failure to develop a specialized treatment plan; rather, it also is applicable to a claim that the patient did not receive humane and dignified treatment.

In the present case, the court considered each of the plaintiffs' claims that Mary Doe had not received humane and dignified treatment. First, the plaintiffs alleged that Mary Doe "did not have privacy for hygiene and other needs, [and] that she suffered from being on an otherwise all male ward," and, second, the plaintiffs alleged "that she was subject to strip searches." The court made the following findings of fact in connection with each part of the plaintiffs' claim.

As to the first part of their claim, the court found that Mary Doe periodically would not shower and refused to shower in other units, "appeared disheveled" and wore multiple layers "to conceal her femininity," had stuffed paper in her ears to muffle the noise from the unit, and had "often made sexually oriented remarks, sometimes inviting the staff to engage in sexual acts with her, and expressed a fear of men and of being raped." The court also made findings as to Mary Doe's medical condition, including that she "fell within the one third of psychosis patients who are resistant to treatment," and that she "has a delusional preoccupation with being raped and murdered regardless of her setting," which was not caused by her placement in unit 6, but, rather, is a "symptom of her schizophrenia and complicates the sexual trauma she experienced earlier in her life." (Internal quotation marks omitted.) Further, the court relied on the testimony of one of Mary

Doe's psychiatrists that she was "grossly psychotic, long-term treatment resistant, and the second most dangerous and one of the most challenging patients in his thirty year career." (Internal quotation marks omitted.)

The court also found that "[t]he staff at Whiting truly cared for [Mary Doe] and tried their best to accommodate her needs. At first, their primary concern was admittedly not hygiene but rather [her] safety and the safety of the staff and other patients. Although it may have proved difficult to free [Mary Doe] completely of her fear for her safety, fortunately there was not one incident of violence against her during the complaint period. Further, with regard to hygiene, the staff provided her the only room in the unit with a half bathroom, offered her privacy when taking a shower in the unit facility, and even bought her special toilet articles to entice her to clean herself. There was noise on the unit, but that noise is perhaps endemic to a maximum security unit in a psychiatric hospital. The staff tried to engage [her] in activities outside the unit such as walking in the courtyard or going to the gym. There, [Mary Doe] could socialize with other female patients. [Mary Doe's] behavior and appearance improved towards the end of her stays at Whiting. That outcome is at least partly the result of her treatment." (Footnote omitted.) Indeed, "the court did not find a single instance of bad faith on the part of the defendants."

As to the second part of the plaintiffs' claim, the court found that Mary Doe "was strip searched on two occasions," at least one of which "was a traumatic experience for [her]." It also found that "[w]hile it is hard to describe any strip search in itself as humane and dignified, strip searches were a necessary part of [Mary Doe's] institutionalization," as mandated by Whiting policy for all patients who left the institutional grounds unsupervised. "Moreover, [Mary Doe] had a prior history of secreting sharp items—on one occasion attempting to

bring one into the institution—and of using dangerous items in assaultive attacks. Thus, a strip search had a particular justification in [Mary Doe's] case. Finally, the evidence suggested that female officers conducted the strip searches of [Mary Doe] and that no improper conduct by them occurred during those searches." (Footnotes omitted.) Indeed, on one occasion, the required strip search was obviated when agency police accompanied Mary Doe to the hairdresser.

The court then cited *Mahoney* v. *Lensink*, supra, 213 Conn. 566–67, for the propositions that "[t]he standard for determining whether the provisions of § 17-206c have been violated thus cannot depend on the outcome of treatment," and "[t]he issue, under § 17-206c, is whether the hospital made good faith efforts to improve the patient's mental health and not whether it succeeded in fulfillment of this goal." (Internal quotation marks omitted.) The court applied the *Mahoney* standard to the foregoing facts and concluded that Mary Doe was not subject to inhumane and undignified treatment while committed to unit 6.

On the basis of these findings, which are uncontested on appeal, we conclude that the court properly applied the *Mahoney* standard to conclude that the defendants' treatment of Mary Doe was not inhumane and undignified. The defendants' treatment plan was permissible and reasonable in view of the severity and resistant nature of Mary Doe's medical condition, which transcends her commitment to unit 6. In light of her diagnosis, the defendants made a good faith effort to remedy Mary Doe's hygiene in that they assigned her to the only room with a half bathroom, offered her privacy when she needed to take a shower in the unit, and brought her special toilet articles. As for the noise that is inherent in unit 6 and Mary Doe's fear of men, the defendants made a good faith effort by engaging her in activities outside unit 6, where she would be able to

socialize with other female patients, and, importantly, there was no incident of violence against her. Furthermore, although the ultimate success of the treatment is not the touchstone of the *Mahoney* standard, it is instructive that Mary Doe's behavior and appearance improved toward the end of the periods during which she was committed to unit 6.

Likewise, in view of the mandatory Whiting policy and Mary Doe's prior history of secreting sharp items, the two strip searches, although traumatizing, were a permissible and reasonable part of her treatment. The court's findings establish that the defendants made a good faith effort to diminish this negative effect on Mary Doe by accompanying her off of the premises, which obviated the need for a strip search, and by utilizing female officers to conduct the strip searches when a search was required. In addition, the court's unchallenged findings that the "staff at Whiting truly cared for [Mary Doe] and tried their best to accommodate her needs," that the defendants' primary concern was safety, and that there was no instance of bad faith on behalf of the defendants, compel the conclusion that the defendants did not subject Mary Doe to inhumane and undignified treatment. Therefore, we conclude that the court properly applied the *Mahoney* standard to determine that the defendants' treatment of Mary Doe while she was committed to unit 6 did not violate her right to "humane and dignified treatment" under § 17a-542.

The judgment is affirmed.

In this opinion the other judges concurred.

# ALETA DEROY *v.* STEPHEN M. RECK ET AL.
## (AC 40021)

Keller, Elgo and Bright, Js.

*Syllabus*

The plaintiff sought to recover damages for legal malpractice from the defendant attorneys, who had represented the plaintiff's mother, the decedent, in connection with the decedent's execution of a will that was subsequently found to be null and void due to the decedent's incompetence at the time she executed the will. The trial court granted in part the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court, claiming that the trial court improperly concluded that expert testimony was necessary to establish the standard of proper professional skill or care. Specifically, the plaintiff claimed that the requirement for expert testimony in legal malpractice cases was obviated because the defendants' conduct demonstrated such an obvious and gross want of care and skill that neglect was clear even to a layperson. The plaintiff's claim was based, in part, on the fact that one of the defendant attorneys had referred the decedent to be examined by T, a neuropsychologist, who authored a report concluding that the decedent was suffering from dementia and that it was unlikely that she could make fully informed, thoughtful judgments regarding complex financial or legal issues. After reviewing that report, the defendants decided to proceed with the execution of the decedent's will. *Held* that the trial court properly rendered summary judgment in favor of the defendants, as their alleged malpractice was not so gross and obvious that their failure to comply with the standard of care would have been clear, even to a layperson: the plaintiff's reliance on T's report as the basis for a fact finder to conclude, without expert testimony, that the defendants violated the standard of care was misplaced, as this court concluded previously that T's conclusion in the report was not determinative of whether the decedent was competent to execute the will, the defendants' knowledge of T's report did not mean that they obviously and grossly violated the standard of care by concluding that the decedent was competent to execute the will, and, thus, expert testimony was required to show what actions the defendants, as attorneys, should have taken considering T's report and the correct standard for testamentary capacity; moreover, the fact that the plaintiff ultimately prevailed in her previous action to contest the validity of the will did not obviate the need for expert testimony, and her reliance on the defendants' observations and interactions with the decedent prior to and during the execution of the will only highlighted the need for expert testimony, as the standard of care owed may have been different for

each defendant in light of each defendant's particular circumstances, relationship to the decedent and knowledge of her mental state.

Argued December 12, 2018—officially released March 12, 2019

*Procedural History*

Action to recover damages for legal malpractice, and for other relief, brought to the Superior Court in the judicial district of New London, where the court, *Vacchelli*, *J.*, granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

*Aleta Deroy*, self-represented, the appellant (plaintiff).

*Cristin E. Sheehan*, with whom, on the brief, was *Patrick J. Day*, for the appellees (defendants).

*Opinion*

BRIGHT, J. In this legal malpractice action, the self-represented plaintiff, Aleta Deroy, appeals from the summary judgment rendered by the trial court in favor of the defendant attorneys, Stephen M. Reck, Raymond Trebisacci, and Lewis A. Button III. On appeal, the plaintiff claims, inter alia,[1] that the court improperly concluded that expert testimony was necessary to establish the standard of proper professional skill or care, and that the failure of the plaintiff to disclose such an expert required the court to render summary judgment in favor of the defendants. We affirm the judgment of the trial court.

[1] The plaintiff also claims on appeal that the court improperly concluded that the three year statute of limitations contained in General Statutes § 52-577 barred the plaintiff's action as a matter of law. We need not decide that claim because we conclude that the court properly determined that the plaintiff's failure to disclose an expert witness was fatal to her action. See *James* v. *Valley-Shore Y.M.C.A., Inc.*, 125 Conn. App. 174, 176 n.1, 6 A.3d 1199 (2010), cert. denied, 300 Conn. 916, 13 A.3d 1103 (2011).

Viewed in the light most favorable to the plaintiff as the nonmoving party, the record reveals the following facts and procedural history. In February, 2002, the decedent, Edith Baron, was a widow with three children: the plaintiff, Jeanne Baron, and Glen Baron. On February 3 and 12, 2002, the decedent executed quitclaim deeds conveying her interest in an eighty-nine acre farm to herself and to Jeanne Baron as tenants in common. On February 12, 2002, the decedent executed a will (February will) devising the entirety of her estate, including her interest in the farm, to the plaintiff and Glen Baron in equal shares.

In May, 2002, Jeanne Baron's son, Elias Baron, contacted Attorney Button, with whom he was friends, and told him that the decedent desired to make a new will. At that time, Attorney Button was a new lawyer working for Attorney Trebisacci and Attorney Reck in their law firm, Trebisacci & Reck. The proposed new will, which was drafted by Attorney Trebisacci, devised the decedent's interest in the farm to Jeanne Baron and provided that the residue and remainder of the estate would be distributed in equal shares to her three children.

While the new will was being drafted, the decedent was exhibiting symptoms of dementia. Attorney Button, who had not completed many will executions, was concerned about the decedent's testamentary capacity and, as a result, he referred her to be examined by Christopher Tolsdorf, a neuropsychologist. On June 12, 2002, after evaluating the decedent, Dr. Tolsdorf authored a report in which he concluded that she was suffering from dementia. In his report, Dr. Tolsdorf specifically concluded that "[g]iven her cognitive impairments it is unlikely that she would be able to make fully informed, thoughtful judgments regarding complex financial or legal issues." After reviewing and discussing Dr. Tolsdorf's report, Attorney Button and Attorney Trebisacci

decided to proceed with the execution of the decedent's new will.[2]

On July 3, 2002, the decedent went to the office of Trebisacci & Reck to execute her new will. Attorney Trebisacci was supposed to preside over the will execution, but he had to leave the office. He told Attorney Button that if the decedent arrived at the office before he returned, Attorney Button should proceed with the will execution in his absence. When the decedent arrived at the defendants' office, Attorney Trebisacci had not yet returned. Following Attorney Trebisacci's instructions, Attorney Button proceeded with the will execution. During the execution of the new will, Attorney Button observed that the decedent was "so confused that the proceedings had to be halted." In light of the fact that Attorney Trebisacci was not in the office, Attorney Button sought the assistance of the other partner in the firm, Attorney Reck. Attorney Reck questioned the decedent about the newly drafted will, and it was decided that she was to proceed and execute the will. The decedent executed the new will (July will) on the same date.

On July 26, 2006, the decedent died. The plaintiff previously had not been aware of the July will and, thus, she had expected her inheritance of the farm to

[2] At some point, Dr. Tolsdorf also issued an undated opinion letter that references his June 12, 2002 report. In the opinion letter, Dr. Tolsdorf averred that "[b]ased on her clinical presentation and her test results it is my professional opinion that [the decedent] was not competent in June, 2002, due to dementia." Although the record is unclear as to when the opinion letter was issued, the use of past tense and the reference to the previously completed report suggests that the opinion letter was issued sometime after June, 2002. This conclusion is buttressed by the fact that the plaintiff has relied only on Dr. Tolsdorf's June 12, 2002 report, and not the undated opinion letter, as a basis for her claims against the defendants. In fact, the plaintiff has never claimed before this court or the trial court that the undated opinion letter was available to the defendants at the time the decedent executed the new will in July, 2002. Consequently, the opinion letter is immaterial to our resolution of this appeal.

be in accordance with the terms of the February will. The plaintiff subsequently challenged the July will in the Probate Court on the grounds of undue influence and lack of testamentary capacity. On November 5, 2008, after a hearing, the Probate Court rejected the plaintiff's challenge to the July will.

On December 4, 2008, the plaintiff filed an appeal from the decision of the Probate Court to the Superior Court. On November 3, 2010, after an evidentiary proceeding, the Superior Court issued an oral decision declaring the July will "null and void" on the basis that the decedent was "incompetent" when she executed the July will. Jeanne Baron filed an appeal from the decision of the Superior Court to this court.

On June 5, 2012, this court held that the Superior Court had "applied an incorrect standard to the question of testamentary capacity," and, thus, reversed the judgment of the Superior Court and remanded the matter for further proceedings. *Deroy* v. *Estate of Baron*, 136 Conn. App. 123, 129–30, 43 A.3d 759 (2012). In particular, this court held that the Superior Court incorrectly based its determination that the decedent was not competent on Dr. Tolsdorf's conclusion that the decedent lacked the capacity to make judgments about "complex financial issues." (Internal quotation marks omitted.) Id., 129. Instead, the Superior Court was required to determine whether the decedent "had mind and memory sound enough to know and understand the business upon which she was engaged, that of the execution of a will, at the very time she executed it." (Internal quotation marks omitted.) Id., 128. This court further noted that "[i]t is equally clear that an individual may possess the mental capacity necessary to make a will although incapable of transacting business generally." Id.

On June 18, 2013, after a trial on remand, the Superior Court issued a memorandum of decision in which it

found that the decedent lacked the testamentary capacity to execute the July will, and, thus, it declared the July will void. No appeal was taken from the June 18, 2013 judgment.

On June 23, 2015, the plaintiff filed the present legal malpractice action against the defendants. In the operative one count, second amended complaint, the plaintiff alleged that the defendants "were [the decedent's] attorneys in the interviewing, drafting, and execution of her" July will. The plaintiff alleged that, in light of Dr. Tolsdorf's report, the defendants knew or should have known that the decedent lacked the testamentary capacity to execute the July will and, thus, "departed from the standard of professional care owed to protect [the decedent's] legal interest in this matter," and "had committed legal malpractice," by permitting the decedent to execute the July will.

On August 5, 2016, the defendants filed a motion for summary judgment and a memorandum of law in support thereof. The defendants contended, in relevant part, that they were entitled to judgment as a matter of law because the plaintiff had failed to obtain or disclose an expert who could testify regarding the applicable standard of care. In support of their motion, the defendants attached a number of exhibits principally evincing the prior proceedings before the Probate Court and the Superior Court.

On September 26, 2016, the plaintiff filed an objection to the defendants' motion for summary judgment and a memorandum of law in support thereof. The plaintiff argued, among other things, that expert testimony was not required because the defendants' conduct fell within the exception to the expert testimony requirement for obvious and gross want of care and skill. On October 3, 2016, the plaintiff filed several attachments in support of her objection that related to the prior proceedings

contesting the July will.[3] The defendants and the plaintiff subsequently filed supplemental memoranda in support of their respective positions.

On December 6, 2016, after a hearing, the court issued a memorandum of decision granting the defendants' motion for summary judgment. The court concluded, in relevant part,[4] that the defendants were entitled to judgment as a matter of law because expert testimony was required to establish whether "the defendants deviated from the prevailing professional standard of care," and the plaintiff had not disclosed such an expert.[5] This appeal followed.

We begin by setting forth the standard of review and legal principles that govern our resolution of this appeal. "It is well established that Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any

[3] The defendants moved to strike certain exhibits submitted by the plaintiff. In a December 6, 2016 memorandum of decision, the court granted the motion to strike in part. Neither party contests this ruling on appeal.

[4] The court also concluded that a genuine issue of material fact existed as to whether the defendants owed a duty to the plaintiff. However, the court determined that the defendants were entitled to judgment as a matter of law because there was no genuine issue of material fact that the plaintiff's action was barred by the three year statute of limitations contained in § 52-577. The court's conclusion as to the duty owed by the defendants to the plaintiff is not at issue in this appeal and, as outlined previously in footnote 1 of this opinion, we need not consider the court's conclusion regarding § 52-577.

[5] The plaintiff does not dispute that she failed to obtain or disclose an expert regarding the standard of care owed by the defendants. In fact, she attempted to retain such an expert but was unable to find someone willing to take on the matter. In an attempt to rectify this deficiency, the plaintiff, on July 12, 2016, filed a "motion to dispense with expert witness testimony" in which she argued that exceptions to the requirement of expert testimony in a legal malpractice action applied to the present case. The court ordered that argument be scheduled on the motion, however, in light of the court's memorandum of decision granting the motion for summary judgment, no further action was taken on the motion.

material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court." (Internal quotation marks omitted.) *Graham* v. *Commissioner of Transportation*, 330 Conn. 400, 414–15, 195 A.3d 664 (2018). "The determination of whether expert testimony is needed to support a claim of legal malpractice presents a question of law. . . . Accordingly, our review is plenary." (Internal quotation marks omitted.) *Grimm* v. *Fox*, 303 Conn. 322, 329, 33 A.3d 205 (2012).

"Summary judgment in favor of a defendant is proper when expert testimony is necessary to prove an essential element of the plaintiff's case and the plaintiff is unable to produce an expert witness to provide such testimony. . . . Malpractice is commonly defined as the failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss, or damage to the recipient of those services . . . . Generally, a plaintiff alleging legal malpractice must prove all of the following elements: (1) the existence of an attorney-client relationship; (2) the attorney's wrongful act or omission; (3) causation; and (4) damages." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Bozelko* v. *Papastavros*, 323 Conn. 275, 282–83, 147 A.3d 1023 (2016).

"As a general rule, for the plaintiff to prevail in a legal malpractice case in Connecticut, he must present expert testimony to establish the standard of proper professional skill or care. . . . The requirement of expert testimony in malpractice cases serves to assist lay people, such as members of the jury . . . to understand the applicable standard of care and to evaluate the defendant's actions in light of that standard." (Internal quotation marks omitted.) *Grimm* v. *Fox*, supra, 303 Conn. 329–30. "There is an exception to this rule, however, [when] there is such an obvious and gross want of care and skill that neglect is clear even to a lay person." (Internal quotation marks omitted.) Id., 330. This exception "is limited to situations in which the . . . attorney essentially has done nothing whatsoever to represent his or her client's interests . . . ." (Internal quotation marks omitted.) Id., 335. Nevertheless, "[t]here very well may be instances in which an attorney, after a period of competent representation, engages in conduct that clearly falls below the requisite standard of care, and in such a circumstance the jury may not require the aid of expert testimony to understand the applicable standard." Id., 336 n.14; see *Cammarota* v. *Guerrera*, 148 Conn. App. 743, 751–52, 87 A.3d 1134 (concluding that attorney's act of giving check payable to client to another individual constituted negligence within common experience of lay jurors not requiring expert testimony), cert. denied, 311 Conn. 944, 90 A.3d 975 (2014).

Here, it is undisputed that the plaintiff did not retain or disclose an expert witness to testify concerning the standard of care to which the defendants' legal representation should be held. See footnote 5 of this opinion. Instead, the plaintiff contends that the requirement of expert testimony was obviated because the defendants' conduct demonstrated such an obvious and gross want of care and skill that neglect is clear even to a layperson.

The gravamen of the plaintiff's claim is that the defendants breached the applicable standard of care by collectively permitting the decedent to execute the July will notwithstanding her apparent mental state, as evinced by Dr. Tolsdorf's report and their observations of the decedent prior to and during the July will execution. We are not persuaded.

In support of her position, the plaintiff primarily relies on *Paul* v. *Gordon*, 58 Conn. App. 724, 754 A.2d 851 (2000). In *Paul*, the defendant attorney agreed to "handle" a summary process action filed against the plaintiffs, his clients. (Internal quotation marks omitted.) Id., 725–26. The defendant, however, took no action in connection with the summary process action and, consequently, judgment by default was rendered against the plaintiffs and they were evicted from the premises. Id., 726. On appeal, this court reversed the judgment of the trial court granting the defendant's motion for summary judgment and held that "no expert testimony is required to establish legal malpractice in a situation where an action has been brought against a party and judgment by default is rendered against that party in the case because his attorney has allegedly done absolutely nothing to protect him. The defendant's alleged failure to take any action whatsoever to protect the interests of the plaintiffs is conduct that involves such an obvious and gross want of care and skill that the neglect would be clear even to a layperson." Id., 728.

In contrast to *Paul*, there is no allegation in the present case that the defendants did "absolutely nothing"; id.; to defend the plaintiff. In the present case, unlike *Paul*, the plaintiff challenges the propriety of the actions taken by the defendants in connection with their representation of the decedent and the execution of the July will. Indeed, there is no genuine issue of material fact

that the defendants took certain precautions in connection with the execution of the July will, including referring the decedent to Dr. Tolsdorf for an evaluation and assessing the decedent at the time the July will was executed. Thus, this court's decision in *Paul* simply does not apply to the facts of this case.

Furthermore, the plaintiff's reliance on Dr. Tolsdorf's report as the basis for a fact finder to conclude, without expert opinion, that the defendants violated the standard of care, is misplaced. This court, in *Deroy*, explicitly held that Dr. Tolsdorf's conclusion that the decedent was unable "to make fully informed, thoughtful judgments regarding complex financial issues" was not determinative of whether the decedent was competent to execute the July will. (Internal quotation marks omitted.) *Deroy* v. *Estate of Baron*, supra, 136 Conn. App. 129. Consequently, contrary to the plaintiff's argument, the defendants' knowledge of Dr. Tolsdorf's report does not mean that they obviously and grossly violated the standard of care by concluding that the decedent was competent to execute the will. To the contrary, expert testimony was required to show what actions the defendants, as attorneys, should have taken considering not just Dr. Tolsdorf's report, but also the correct standard for testamentary capacity as set forth by this court in *Deroy*. See id., 128–29.

Likewise, the fact that the plaintiff ultimately prevailed in the Superior Court in her contest to the validity of the July will does not obviate the need for expert testimony. Neither the Superior Court's decision on remand, nor any of the other decisions regarding the plaintiff's contest of the July will, outlined the standard of care that is required of attorneys in similar situations or addressed the reasonableness of the defendants' actions. See *Grimm* v. *Fox*, supra, 303 Conn. 324, 331–32 (rejecting plaintiff's reliance on "critical statements" made by our Supreme Court in prior decision regarding

materials submitted by defendant attorney in connection with prior case).

Finally, the plaintiff's reliance on the defendants' observations and interactions with the decedent prior to and during the July will execution only highlights the need for expert testimony. In particular, expert testimony was required because the standard of care owed may have been different for each defendant. Each defendant had a different level of involvement with the decedent and the execution of the July will. Attorney Button was a new lawyer who had not conducted many will executions. He twice brought his concerns regarding the decedent's testamentary capacity to the partners to whom he reported. He also arranged for the decedent to see Dr. Tolsdorf and discussed Dr. Tolsdorf's report with his superior, Attorney Trebisacci. He went forward with the will execution only after raising his concerns about the decedent's testamentary capacity with the firm's other partner, Attorney Reck, and after Attorney Reck told him, after interviewing the decedent, to proceed with the execution of the will. Attorney Trebisacci knew of Dr. Tolsdorf's concerns but was not present to witness the decedent when she executed the will; instead, Attorney Trebisacci instructed Attorney Button to proceed in his absence. Attorney Reck questioned and observed the decedent at the execution to determine her capacity at that time. Expert testimony was required to explain the standard of care each defendant owed to the decedent in light of each defendants' particular circumstances, relationship to the decedent, and knowledge of her mental state.

We conclude that the alleged malpractice of each defendant in the present case was not so gross and obvious that their failure to comply with the standard of care was clear, even to a layperson. The present case is not one in which the defendants did "nothing whatsoever"; (internal quotation marks omitted) id.,

335; in connection with the execution of the July will; but rather, is one in which the plaintiff contests whether the propriety of the defendants' decision to proceed with the execution of the July will satisfied the requisite professional standard of care. Expert testimony as to the applicable standard of proper professional skill or care applicable under the circumstances, and whether any of the defendants breached the standard applicable to them, is necessary for the resolution of the plaintiff's claim. Accordingly, in the absence of such testimony, the court properly concluded that the defendants were entitled to judgment as a matter of law.

The judgment is affirmed.

In this opinion the other judges concurred.

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## STATE OF CONNECTICUT *v.* JOSE DIEGO GONZALEZ (AC 41512)

Lavine, Keller and Bishop, Js.

*Syllabus*

Convicted of the crimes of home invasion, sexual assault in the first degree and of risk of injury to a child, the defendant appealed. The defendant's conviction resulted from an incident in which he entered the minor victim's apartment while her family was asleep and sexually assaulted her. The defendant claimed, inter alia, that he was deprived of his constitutional rights to a fair trial and to be heard by counsel at the close of evidence because his counsel could not effectively rebut the prosecutor's position during closing argument to the jury. The defendant asserted that his counsel was prevented from knowing how the prosecutor intended to marshal the evidence because she did not present her substantive discussion of the evidence until the rebuttal portion of her argument to the jury. *Held*:

1. The evidence was sufficient to support the defendant's conviction of home invasion, as the jury reasonably could have concluded that he unlawfully entered the victim's dwelling with the intent to commit the crime of sexual assault by the use of force: the jury reasonably could have inferred from the entirety of the evidence that the defendant had been observing the victim's dwelling, knew the layout of the apartment

and the family's sleeping habits, and had been watching the victim through her bedroom window, as the defendant acknowledged evidence showing that he entered the dwelling through her brother's bedroom window, knew how to get to the victim's bedroom, asked her age, and told her that what he was going to do would not hurt before he put a pillow over her face and sexually assaulted her; moreover, the defendant was in the apartment for a short period of time, disturbed no one but the victim, committed no other crime and immediately left after sexually assaulting the victim, and it defied common sense and experience to believe that the defendant thought that the victim willingly would have been open to his sexual predation, such that he believed that he would not need to use the threat of force to sexually assault her.

2. The defendant could not prevail on his claim that he was entitled to a new trial, which was based on his assertion that prosecutorial improprieties during closing argument deprived him of his constitutional rights to a fair trial and to be heard by counsel at the close of evidence:

a. The format of the prosecutor's closing argument was not improper and did not deny the defendant his constitutional right to be heard by counsel during closing argument; the court did not deny defense counsel the opportunity to make a final argument to the jury, the arguments of the prosecutor and defense counsel demonstrated that each was aware of the evidence and the opposing party's theory of the case, the defendant did not identify any controlling authority regarding the use of time in closing argument, and the record showed that defense counsel reminded the jury that he had one opportunity to address the jury although the prosecutor had two opportunities, pointed out the weaknesses in the state's case, argued that the DNA evidence was unreliable and that the state should not be entitled to rely on it, was able to address the evidentiary issues that formed the basis of both portions of the prosecutor's final argument and directly attacked statements that the prosecutor made during her summation.

b. The defendant's claim that the prosecutor improperly raised new issues and mischaracterized DNA and fingerprint evidence during her rebuttal argument was unavailing: the record was inadequate to address the defendant's assertion that the prosecutor's argument about DNA evidence implicated errors in probabilistic reasoning, as the prosecutor's argument was predicated on the evidence, the defendant presented no evidence to support his claim and failed to object to the prosecutor's DNA argument or to seek to correct the claimed misstatement, and some degree of imprecision can be expected when a layperson discusses or evaluates scientific or statistical evidence without the benefit of expert testimony; moreover, the defendant could not have been prejudiced by the prosecutor's argument about the fingerprint evidence, as there was no fingerprint evidence that connected him to the crimes at issue, and the prosecutor's comment that fingerprints on a window in the brother's bedroom could have been there for 100 years was not

improper, as the point of her argument, which incorporated testimony by a police officer that the victim's house was estimated to be 100 years old, was to emphasize that no one knew when or who put the fingerprints on the window, and whether the remark was hyperbole or in response to the argument of defense counsel, the arguments of both counsel had a basis in the evidence.

c. The defendant could not prevail on his unpreserved claim that he was entitled to a new trial because his counsel was not given an opportunity to counter the prosecutor's statement in her rebuttal argument that the defendant was the only person in Connecticut who could be a contributor to a certain DNA mixture; defense counsel did not object to the prosecutor's statement, and he made clear to the jury in his final argument all of the problems in the collection, preservation and testing of the DNA evidence after the prosecutor, at the conclusion of the first portion of her summation, told the jury that DNA was the key to the case.

3. The defendant could not prevail on his claim that he was entitled to a new trial on the charge of home invasion because the prosecutor misled the jury during closing argument about the elements of that crime; although the prosecutor read the charge of home invasion as it was stated in the information, indicated that the applicable statute (§ 53a-100aa) was wordy and gave a shorthand description of that crime, she more than once told the jurors that the court would instruct them on the law and that the court's instructions were what counted, and the defendant having failed to claim that the court improperly charged the jury on the crime of home invasion, it was presumed, in the absence of evidence to the contrary, that the jury followed the court's instructions.

Argued October 17, 2018—officially released March 12, 2019

*Procedural History*

Substitute information charging the defendant with three counts of the crime of sexual assault in the first degree, and with the crimes of home invasion and risk of injury to a child, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *Blue*, *J.*; verdict of guilty; thereafter, the court denied the defendant's motions for a judgment of acquittal and for a new trial, and rendered judgment in accordance with the verdict, from which the defendant appealed. *Affirmed.*

*Kevin W. Munn*, assigned counsel, for the appellant (defendant).

*Laurie N. Feldman*, special deputy assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Stacey M. Miranda*, senior assistant state's attorney, for the appellee (state).

*Opinion*

LAVINE, J. The defendant, Jose Diego Gonzalez,[1] appeals from the judgment of conviction, rendered after a jury trial, of one count of home invasion in violation of General Statutes § 53a-100aa (a) (1), three counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2), and one count of risk of injury to a child in violation of General Statutes § 53-21 (a) (2). On appeal, the defendant claims that there was insufficient evidence that he intended to commit sexual assault by force at the time he entered the victim's home.[2] He also claims that the prosecutor's closing argument was improper and (1) deprived him of his right to be heard by counsel during final argument, (2) deprived him of the right to a fair trial, and (3) entitled him to a new trial on the charge of home invasion. We disagree and, therefore, affirm the judgment of the trial court.

The jury reasonably could have found the following facts on the basis of the evidence presented at trial. The victim was ten years old on October 15, 2014, when the defendant entered her first floor apartment in a three-family house in Meriden at approximately 3:40 a.m. At that time, the victim, her mother, her mother's boyfriend, and the victim's younger siblings and stepsiblings were asleep in their respective bedrooms.[3] The

[1] The defendant was formerly known as Desmond James.

[2] In accordance with our policy of protecting the privacy interests of the victims of sexual abuse and the crime of risk of injury to a child, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

[3] The victim's mother has five daughters, a son, and five stepchildren.

front door, a living room window, and the victim's bedroom window faced the front of the house above the porch that ran across the front of the house. The victim's brother had a bedroom in the rear of the apartment with a window above a hatchway that the defendant could have used to enter the apartment.

Earlier, at approximately 8 p.m., the victim had fallen asleep in her bed in the room that she shared with her stepsisters. The victim awoke shortly before 3:45 a.m. when she felt someone touch her lower back. She saw a black man with short dreadlocks leaning over her. She did not know him, asked him who he was, and what he was doing there. The defendant did not answer her but asked her how old she was. She stated that she was eight years old, hoping that he would leave her alone. The defendant touched the victim's buttocks beneath her shorts and underwear. The victim pushed herself against the wall to stop him. The defendant took hold of the victim's ankles and put one over each of his shoulders and told her that "this wouldn't hurt . . . ."

The defendant pulled the victim's shorts and underwear down to her knees and put a pillow over her face. He pulled down his own pants, and rubbed and licked the victim's vagina before penetrating it with his penis. The victim tried to get away from the defendant, but she could not free herself from his grip. When the defendant finished, he pulled up the victim's underwear and shorts and threatened to kill her if she told anyone what he had done. He covered her with a blanket and told her to go to sleep. The defendant walked out of the victim's bedroom and partially closed the door. The victim watched him walk through the kitchen toward her brother's bedroom. The window in her brother's room was wide open. No one else in the house was aware of the defendant's presence. The victim's sisters remained asleep, and her brother heard nothing.

The victim's mother had awakened at approximately 3:20 a.m., gone into the kitchen to get a bottle to feed her infant, and returned to her bedroom. She saw no one in the apartment at that time. Later, when the victim's mother went back to the kitchen, she saw the victim standing at her bedroom door. The victim, shaking with fright, ran into the kitchen and stated that there was a "black guy" in her room. When the victim and her mother entered the victim's bedroom, they saw the defendant peering in the window from the front porch. The victim's mother had never seen the man before. He had dark skin and a braid hanging out of his hoodie. The defendant ran toward the back of the house. The victim's mother tried to pursue him, but she could not keep up with him.

The victim told her mother what the defendant had done to her. When the victim went to the bathroom, she saw a clear, wet substance on her vagina and asked her mother if she could wash. The victim's mother, who was medically trained, recognized the presence of semen in her daughter's underwear. She instructed the victim not to wipe off anything. The police were summoned.

The victim was taken by ambulance to Midstate Medical Center in Meriden, but because Midstate Medical Center does not perform rape kits on children, she was transported to Yale-New Haven Hospital where Deborah Jane Gallagher, a nurse, administered a rape kit. Gallagher used swabs to obtain DNA samples from the victim's vagina and fourchette, which was torn. Gallagher also took a sample of the victim's blood that would be used to compare the victim's DNA with the DNA collected on the swabs. At the conclusion of the examination, the victim went to the Department of Children and Families' child sexual abuse clinic on Long Wharf Drive in New Haven, where she was interviewed. During the forensic interview, the victim described the

perpetrator as having a scratch on his left cheek, clean shaven, and approximately forty years old. The defendant was twenty-three years old and had a full beard and mustache when he was arrested two days later.

The police searched the victim's apartment, focusing their attention on her bed and two windows in her brother's room. They were able to lift fingerprints from the windows, but some of the fingerprints were insufficiently defined to be evaluated. Other fingerprints did not match the defendant's or those of anyone in the police database.[4]

The police identified the defendant, an African-American man with short dreadlocks, as a suspect and arrested him in Waterbury on October 17, 2014. At the time of the defendant's arrest, the police obtained a sample of the defendant's DNA from the inside of his cheek.

Daniel T. Renstrom, a DNA analyst at the state forensics laboratory, testified about his analysis of the DNA samples that were sent to the laboratory. He developed profiles of the victim's and the defendant's DNA, and a profile of the DNA on the swabs of the victim's vagina and fourchette. Renstrom divided the DNA samples from the victim's vagina and fourchette into two components, an epithelial or nonsperm-rich fraction and a sperm-rich fraction. He compared the two fractions to DNA profiles of the victim and the defendant. The swab of the victim's fourchette contained a mixture of DNA, that is, DNA from more than one contributor. Renstrom determined that the victim was the source of the epithelial fraction from the DNA sample from her fourchette, but he could not identify the other contributor due to

[4] During his cross-examination of the investigating police officers, the defendant elicited evidence that demonstrated errors in the fingerprint investigation and record keeping. See part II B 2 of this opinion.

an insufficient amount of DNA. Pursuant to the laboratory's policy, Renstrom eliminated the defendant as a DNA contributor to the DNA mixture from the victim's fourchette.

The DNA profile obtained from the swab of the victim's vagina also produced a mixed DNA profile. The swab contained both saliva and spermatozoa. The victim was a contributor to the epithelial fraction. The sperm-rich fraction contained a mixture of DNA from both the victim and the defendant.[5] The number of people who have the DNA profile that was identified as the defendant's is approximately one in 52 million in the African-American population, one in 37 million in the Hispanic population, and one in 66 million in the Caucasian population.

The defendant was charged in a long form information with home invasion in violation of § 53a-100aa (a) (1), three counts of sexual assault in the first degree in violation of § 53a-70 (a) (2), and one count of risk of injury to a child in violation of § 53-21 (a) (2). On December 15, 2016, a jury returned a verdict of guilty on all counts charged. Thereafter, the defendant filed a motion for a judgment of acquittal as to his conviction of home invasion[6] and a motion for a new trial on the

[5] Renstrom explained that in dividing the DNA, the epithelial and sperm-rich fractions cannot be separated completely.

[6] In his motion for a judgment of acquittal, the defendant stated that to convict him of home invasion the state had to establish beyond a reasonable doubt that when he entered the victim's home, he did so with the intent to compel another person to engage in sexual intercourse by the use of force or by the threat of use of force, which reasonably caused such person to fear physical injury. The defendant contended that there was no evidence to suggest or from which to infer that the perpetrator knew who lived in the home before he entered. Moreover, there is no evidence to suggest how long the perpetrator was in the victim's home or what he did in the home prior to awakening the victim. The defendant argued that the only evidence from which the jury possibly could infer the perpetrator's intent when he entered the home was the fact that he ultimately committed a sexual assault.

ground of prosecutorial impropriety.[7] The court denied both motions. On February 24, 2017, the court sentenced the defendant to an effective term of sixty-five years imprisonment. The defendant appealed.

I

The defendant first claims that the state failed to present sufficient evidence for the jury to find that he intended to commit a sexual assault by force at the time he entered the victim's home, as was required to convict him of home invasion. We disagree.

The state alleged in count one of the long form information that on or about October 15, 2014, at approximately 3:41 a.m., the defendant "unlawfully entered a dwelling, while a person other than a participant in the crime (to wit: [the victim]) was actually present in such dwelling, with intent to commit a crime therein (to wit: Sexual Assault in the First Degree [§] 53a-70 [a] [1]),[8] and, in the course of committing the offense: he committed a felony against the person of another person other than a participant in the crime who was actually present in such dwelling, said conduct being in violation of [§]

[7] In his motion for a new trial, the defendant asserted that the prosecutor's argument was improper because it was unsupported by evidence and amounted to unsworn testimony. The defendant claimed that the prosecutor mischaracterized the testimony of Gunjan Tiyyagura, an emergency department physician, regarding the cause of a tear to the victim's fourchette, and made an assertion about the DNA evidence for which there was no evidence. He also claimed that the court erred in failing to give the jury instruction on proof beyond a reasonable doubt that he had requested.

[8] General Statutes § 53a-70 (a) provides in relevant part: "A person is guilty of sexual assault in the first degree when such person (1) compels another person to engage in sexual intercourse by the use of force against such other person . . . ."

The state also charged the defendant in three separate counts with sexual assault in the first degree in violation of § 53a-70 (a) (2), which provides in relevant part: "A person is guilty of sexual assault in the first degree when such person . . . (2) engages in sexual intercourse with another person and such other person is under thirteen years of age and the actor is more than two years older than such person . . . ."

53a-100aa (a) (1) of the Connecticut General Statutes."[9] (Footnote added.)

"In reviewing a sufficiency of the evidence claim, we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the jury reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . [P]roof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the trier, would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty." (Internal quotation marks omitted.) *State* v. *Brown*, 299 Conn. 640, 646–47, 11 A.3d 663 (2011).

"[T]he jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to

[9] General Statutes § 53a-100aa (a) provides in relevant part: "A person is guilty of home invasion when such person enters . . . a dwelling, while a person other than a participant in the crime is actually present in such dwelling, with intent to commit a crime therein, and, in the course of committing the offense: (1) Acting either alone or with one or more persons, such person or another participant in the crime commits or attempts to commit a felony against the person of another person other than a participant in the crime who is actually present in such dwelling . . . ."

consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . . Moreover, [w]here a group of facts are relied upon for proof of an element of the crime it is [its] *cumulative impact* that is to be weighed in deciding whether the standard of proof beyond a reasonable doubt has been met and each individual fact need not be proved in accordance with that standard." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Otto*, 305 Conn. 51, 65–66, 43 A.3d 629 (2012).

"Furthermore, [i]t is immaterial to the probative force of the evidence that it consists, in whole or in part, of circumstantial rather than direct evidence." (Internal quotation marks omitted.) Id., 66. In fact, "circumstantial evidence may be more certain, satisfying and persuasive than direct evidence." (Internal quotation marks omitted.) *State* v. *Sienkiewicz*, 162 Conn. App. 407, 410, 131 A.3d 1222, cert. denied, 320 Conn. 924, 134 A.3d 621 (2016). "If evidence, whether direct or circumstantial, should convince a jury beyond a reasonable doubt that an accused is guilty, that is all that is required for a conviction." (Internal quotation marks omitted.) *State* v. *Jackson*, 257 Conn. 198, 206, 777 A.2d 591 (2001).

"Intent is a mental process, and absent an outright declaration of intent, must be proved through inferences drawn from the actions of an individual, i.e., by circumstantial evidence. . . . The intent of the actor is a question for the trier of fact, and the conclusion of the trier in this regard should stand unless it is an unreasonable one." (Citation omitted; internal quotation marks omitted.) *State* v. *Barnes*, 99 Conn. App. 203, 212, 913 A.2d 460, cert. denied, 281 Conn. 921, 918 A.2d 272 (2007).

On the basis of our review of the evidence, we conclude that there was sufficient evidence presented for the jury reasonably to conclude that the defendant unlawfully entered the victim's dwelling with the intent to commit the crime of sexual assault by use of force. The evidence that permitted such an inference included, among other things, the location of the victim's bedroom window above the porch; the failure of the victim's mother to see the defendant in the dwelling when she went to the kitchen at 3:20 a.m.; the defendant's having gone to the victim's bedroom and awakened her; the defendant's having asked the victim her age and telling her that "this wouldn't hurt"; the defendant's having put a pillow over her face and having sexually assaulted her; the defendant's having threatened to kill the victim if she told anyone what he had done; his leaving the scene of the assault immediately by walking through the kitchen and exiting the window in the brother's bedroom; the lack of evidence of another crime having been committed in the dwelling; and the victim's viewing the defendant peering into her bedroom window after he exited the dwelling.

The foregoing, along with the evidence in its entirety, permitted the jury reasonably to conclude that the defendant entered the apartment to sexually assault the victim by force. The jury reasonably could have inferred that the defendant had been observing the dwelling and knew the layout of the apartment, knew the family's sleeping habits, and had been watching the victim through her bedroom window. The defendant acknowledges that there was evidence that he entered the victim's dwelling through her brother's bedroom window. The defendant knew how to get from the brother's room to the victim's bedroom and went directly to the victim, not one of the sisters. He asked her age and told her that "this wouldn't hurt . . . ." He was in the apartment for a short period of time, disturbed no one but the

victim, committed no other crime, and immediately left after sexually assaulting the victim. "Common experience tells us that an unlawful entry into a dwelling at night is not without purpose. Nor are people accustomed to enter homes of strangers through a window for innocent purposes." *State* v. *Zayas*, 195 Conn. 611, 617, 490 A.2d 68 (1985).

The jury reasonably could have inferred that the manner in which the defendant entered the victim's dwelling and carried out his sexual assault of her was circumstantial evidence that, when he entered the dwelling, he had the intent to commit a sexual assault. The single-mindedness with which the defendant entered the dwelling, proceeded to the victim's bedroom, and sexually assaulted her against her will is compelling evidence of this intent. See *State* v. *Barnes*, supra, 99 Conn. App. 203. *Barnes* is a case in which the defendant was charged with, among other things, burglary in the third degree. Id., 204. On appeal, the defendant, Antonio G. Barnes, claimed that the state had presented insufficient evidence to convict him of burglary because there was insufficient evidence that "he intended to commit a crime when he entered the [apartment]." Id., 212. The evidence demonstrated that Barnes entered that victim's apartment without consent, took her cellular telephone, and struck her. Id. He grabbed the victim's "arms so that she could not move and, in response to her statement to [a third party] to telephone the police, stated that he would be able to hit [the victim] before the police arrived." Id., 212–13. This court construed "the evidence in the light most favorable to sustaining the verdict" and "concluded that the evidence established that at the time of entering the dwelling, [Barnes] intended to commit the crime of assault against [the victim]." Id., 213.

In the present case, the defendant argues that the state failed to produce sufficient evidence that he had

formed the intent to commit a sexual assault by force when he entered the dwelling. This argument is predicated on the prosecutor's summation that did not marshal evidence demonstrating the defendant's intent when he entered the dwelling. The defendant has provided no legal support for the singular proposition that the prosecutor was required to marshal the evidence in any particular manner, and we are unaware of any Connecticut law requiring the state to marshal its evidence as the defendant suggests. Moreover, it is well known, as the jury was instructed in the present case, that the arguments of counsel are not evidence and that it is the jury's recollection of the evidence that is controlling. See, e.g., *Brown* v. *Bridgeport Police Dept.*, 155 Conn. App. 61, 86, 107 A.3d 1013 (2015); *State* v. *Spyke*, 68 Conn. App. 97, 113, 792 A.2d 93, cert. denied, 261 Conn. 909, 804 A.2d 214 (2002). The court also instructed the jury that it may not resort to speculation or conjecture and that its verdict had to be predicated on the evidence.

The defendant has not persuaded us that the jury decided the present case on anything other than the evidence before it. As previously noted, on the basis of its everyday experience and the evidence, the jury reasonably may have inferred that the defendant entered the dwelling with the intent to sexually assault the victim by means of force. See, e.g., *State* v. *Morocho*, 93 Conn. App. 205, 215, 888 A.2d 164 (jury reasonably may have inferred, on basis of everyday experience and evidence presented, that by entering victim's bedroom, lying on top of her while attempting to kiss and touch her all over her body, defendant took substantial step in line of conduct that would culminate in sexual intercourse), cert. denied, 277 Conn. 915, 895 A.2d 792 (2006). It defies common sense and experience to believe that the defendant thought that the victim willingly would have been open to his sexual predation,

such that he believed that he would not need to use the threat of force to sexually assault her.

For the foregoing reasons, we conclude that there was sufficient evidence to support the defendant's conviction of home invasion and that the trial court properly denied the defendant's motion for a judgment of acquittal on the count of home invasion.

II

The defendant claims that the prosecutor's closing argument was improper and therefore (1) deprived him of his constitutional right to be heard by counsel at the close of evidence, (2) deprived him of his constitutional right to a fair trial, and (3) entitled him to a new trial.[10] More specifically, he claims that by presenting her substantive discussion of the evidence during the rebuttal portion of her summation, the prosecutor prevented his counsel from knowing how the state intended to marshal the evidence and, therefore, counsel could not effectively rebut the state's position during his closing argument. He also claims that, during rebuttal argument, the prosecutor mischaracterized the evidence and introduced new claims that his counsel could not correct, and thus deprived him of a fair trial. Finally, the defendant claims that because the prosecutor reserved the substantive portion of her argument for rebuttal, he is entitled to a new trial. We disagree with each of the defendant's claims.

The defendant did not object to the prosecutor's argument on the grounds he has raised on appeal.[11] He seeks

[10] The defendant does not claim that the prosecutor's final argument raised any nonconstitutional issues such as a violation of the rules of practice; see Practice Book § 42-37; or a statutory right that he may have regarding final argument. See General Statutes § 54-88.

[11] Following the conclusion of the prosecutor's rebuttal argument, defense counsel objected to three statements the prosecutor made regarding the facts. The court overruled the objections, stating that the issues were for the jury to decide. On appeal, the defendant has not claimed that the court's rulings constituted an abuse of discretion.

appellate review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). Although trial counsel's failure to object to the prosecutor's argument is not fatal to the defendant's appellate claims, it suggests that trial counsel did not believe that the argument was improper. *State* v. *Chase*, 154 Conn. App. 337, 343–44, 107 A.3d 460 (2014), cert. denied, 315 Conn. 925, 109 A.3d 922 (2015). We agree that the defendant's claims are reviewable because the record is adequate for review and the claims are of constitutional magnitude. See *State* v. *Golding*, supra, 239. The defendant, however, cannot prevail, as no constitutional violations exist, and the prosecutor's final argument did not deprive him of his constitutional rights. See id., 240.

We begin our analysis of the defendant's claims by setting forth the standard of review. "[I]n analyzing claims of prosecutorial [impropriety], we engage in a two step analytical process. The two steps are separate and distinct: (1) whether [impropriety] occurred in the first instance; and (2) whether that [impropriety] deprived a defendant of his due process right to a fair trial." (Internal quotation marks omitted.) *State* v. *Angel T.*, 292 Conn. 262, 275, 973 A.2d 1207 (2009). "In other words, an impropriety is an impropriety, regardless of its ultimate effect on the fairness of the trial. Whether that impropriety was harmful and thus caused or contributed to a due process violation involves a separate and distinct inquiry. . . . [If] a defendant raises on appeal a claim that improper remarks by the prosecutor deprived the defendant of his constitutional right to a fair trial, the burden is on the defendant to show . . . that the remarks were improper . . . . The defendant also has the burden to show that, considered in light of the whole trial, the improprieties were so egregious that they amounted to a denial of due process." (Citations omitted; internal quotation marks omitted.) *State*

v. *Brett B.*, 186 Conn. App. 563, 573, A.3d (2018), cert. denied, 330 Conn. 961, A.3d (2019).

Our Supreme Court "has acknowledged: [P]rosecutorial [impropriety] of constitutional magnitude can occur in the course of closing arguments. . . . In determining whether such [impropriety] has occurred, the reviewing court must give due deference to the fact that [c]ounsel must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument. . . . Thus, as the state's advocate, a prosecutor may argue the state's case forcefully, [provided the argument is] fair and based upon the facts in evidence and the reasonable inferences to be drawn therefrom." (Internal quotation marks omitted.) *State* v. *Otto*, supra, 305 Conn. 76.

"While the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered, it must never be used as a license to state, or to comment upon, or to suggest an inference from, facts not in evidence, or to present matters which the jury ha[s] no right to consider." (Internal quotation marks omitted.) *State* v. *Ciullo*, 314 Conn. 28, 38, 100 A.3d 779 (2014). "A prosecutor may invite the jury to draw reasonable inferences from the evidence; however, he or she may not invite sheer speculation unconnected to evidence. . . . Moreover, when a prosecutor suggests a fact not in evidence, there is a risk that the jury may conclude that he or she has independent knowledge of facts that could not be presented to the jury." (Citations omitted.) *State* v. *Singh*, 259 Conn. 693, 718, 793 A.2d 226 (2002). "The prosecutor's office caries a special prestige in the eyes of the jury. . . . Consequently, [i]t is obligatory for prosecutors to find careful ways of inviting jurors to consider drawing argued inferences and conclusions and yet to avoid conveying the

impression that they are giving their personal views to the jurors." (Citations omitted; internal quotation marks omitted.) Id., 722.

The defendant's claims arise out of the prosecutor's closing argument, which consisted of two parts. We first outline the final arguments of both the prosecutor and defense counsel to provide a context in which to consider the defendant's claims. The prosecutor began the first portion of her summation by thanking the jurors for their service and then stated that she intended "to highlight" some of the evidence, but that the jury's recollection of the facts was what counted. She also stated that she was going to "highlight some points of law," but that the judge was going to instruct the jury on the law and "his word goes . . . ." She then summarized the evidence concerning the events that occurred in the victim's home during the night of October 15, 2014. Given those facts, she stated that the state charged the defendant with home invasion, three counts of sexual assault in the first degree, and risk of injury to a child. The prosecutor then stated: "The judge will give you the exact definition of these crimes at much more length than I will, and you will actually get the copy of his instructions to take with you in the jury room, but I'd like to summarize them briefly for you."

The prosecutor read the first count of the long form information charging the defendant with home invasion. She stated thereafter that the "statute is very wordy, but basically, it means that the defendant had to unlawfully enter the dwelling while a person was inside with the intent to commit a sexual assault and commit a felony while inside against another person . . . ." The prosecutor then addressed each of the three counts of sexual assault and risk of injury to a child with which the defendant was charged. She reminded the jury that the "judge, again, will have more detailed

instructions and you will have them in the jury room with you . . . .''

She concluded the first portion of her final argument by stating that the jury was going to hear from the defendant, particularly about fingerprints and mistakes made by the laboratory and the police, and that the victim and the victim's mother were unable to identify the perpetrator of the crimes from photographs or in court. Finally, she stated that you ''will hear all of these things and more from the defense, but while you are listening to their argument, there are three letters you will not be able to forget. There are three letters you will not be able to get out of your head. Those letters are DNA.''

Counsel for the defendant then presented his closing argument. He made a few general remarks and stated that it was the jury's recollection of the facts, not his, that mattered. He stated that he only had one chance to address the jury. He acknowledged the seriousness of the facts, and that the jury surely wanted justice for the victim and ''to believe that the Meriden police got the right man.'' He also reminded the jurors that they had acknowledged during voir dire that ''the verdict would have to be not guilty'' if the state had not proved the case beyond a reasonable doubt.

He argued that the ''majority of evidence in this case contradicts a piece of evidence that implicates the defendant.'' He asked the jury to consider three things: how much contradictory evidence there was, whether the evidence against the defendant was corroborated, and whether the evidence pointing the finger at the defendant was solid or problematic. He noted that there was no courtroom identification of the perpetrator and that the victim's description of the perpetrator did not ''line up'' with the defendant's appearance in four ways: the victim testified that the perpetrator had no facial

hair, had a scar on his cheek, was dark-skinned, and was forty years old. He pointed out that when the defendant was arrested, he had a full beard and was twenty-three years old. A photograph of the defendant taken at the time of his arrest depicts no scar and indicates that he is not dark-skinned.

With respect to fingerprints on the window in the brother's room, counsel for the defendant argued that the victim saw the perpetrator go back to her brother's room, and her mother discovered the window wide open. "It seems logical given the bulkhead or Bilco door that that's the window that the perpetrator went into. It's also logical that if you're pushing the window up, you might leave some prints there. . . . Could you imagine if his prints were found on that window, what we'd be looking at? . . . But those prints, he's excluded from leaving those prints; they're not his." "The state wants you to believe that maybe the kids were out there playing. They're not kids' prints. You heard the experts testify about that. *A hundred years?* The windows were there forever? I mean, come on, let's be serious." (Emphasis added.) He stated that the lack of evidence in terms of fingerprints was important.

Defense counsel also asked what corroborated the DNA evidence in the case and answered his own question, "[n]othing." He argued that there was no evidence that the sperm slide or the victim's panties or her sheets were tested, as those items were not sent to the laboratory. He urged the jury to listen to the judge's instructions that it was not the defendant's burden to put on evidence. Nonetheless, the defendant had called the detectives in the case to testify. The state called only the victim, her mother, the forensic interviewer, the nurse and doctor, and the laboratory scientists to testify.

Defense counsel further addressed the DNA evidence, arguing why it was problematic. In the profile

developed from one swab source, the defendant was eliminated as a contributor, but he was a contributor in a profile from another source. Defense counsel noted the inconsistent number of swabs. "So, the one [source] that has the most seminal fluid, the one that results in the smear with the sperm, he's eliminated from. That's problematic. This is not a reliable result. If a result is unreliable, then statistics mean nothing." Defense counsel also talked about mistakes the police made in recording and storing the fingerprints, and argued that Gallagher's testimony about the number of swabs in a rape kit was not consistent with the number of swabs sent to the laboratory. He concluded that the lack of evidence did not permit the jury to accept the reliability of the DNA evidence. He urged the jury not to decide the case on "blind faith . . . ."

On rebuttal, the prosecutor argued that the state was not asking the jury to decide the case on blind faith, but on science. She pointed out that the defendant did not leave his fingerprints on the window, but that he left "evidence from another part of his body," which "resulted in a DNA profile that only one in 52 million people in the African-American community have."

With respect to fingerprints, she stated that they "tell you nothing." There were fingerprints on the window, but "[w]e don't know where the prints came from or how long they've been there or if they've been there for a hundred years. The prints tell us nothing and show you nothing and prove nothing."

The prosecutor restated the victim's testimony regarding the incident on October 15, 2014. She reviewed the victim's description of the perpetrator and displayed photographs of the defendant that were in evidence. She also reviewed the testimony of the victim's mother. She recounted the testimony of Gallagher

and Gunjan Tiyyagura, an emergency department physician who described shining a BlueMax light on the victim's vagina that revealed the presence of semen. She recounted in summary the testimony regarding the forensic interview of the victim, and gave a more detailed recitation of the testimony of the laboratory scientists regarding the swabs and the DNA profiles produced from them. She mentioned that Renstrom developed known DNA profiles of both the victim and the defendant, and compared them with the profile obtained from the swab of the victim's vagina. The DNA of both the victim and the defendant were present in that profile. She stated that Renstrom "attached a statistic to the [number] of times you would see that profile in a number of people. He told you that you would see the DNA profile of the defendant once in 52 million people in the African-American community. Think about that, ladies and gentlemen. You hear evidence that the whole state of Connecticut is 3.5 million people. If we filled the entire state of Connecticut with 3.5 million African-Americans, 52 million African-Americans would be the population of Connecticut times fourteen. So, if we placed 3.5 million African-Americans in Connecticut and stacked thirteen more states the size of Connecticut on top of that full of African-Americans, we would still only see that profile one time. That, ladies and gentlemen, is proof beyond a reasonable doubt."

We now address the defendant's claims of prosecutorial impropriety.

A

The defendant's first claim of prosecutorial misconduct is that the prosecutor violated his constitutional right to be heard by counsel during oral argument by reserving the substantive discussion of the evidence for her rebuttal. He argues that, without knowing how the

state intended to marshal the evidence, his counsel could not effectively rebut the state's argument and, therefore, he lost his "last clear chance to persuade the [jury] that there may be reasonable doubt of [his] guilt," quoting *Herring* v. *New York*, 422 U.S. 853, 862, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975). He also claims that the prosecutor raised new arguments during her rebuttal.[12] We disagree.

"Under the sixth and fourteenth amendments to the United States constitution, a criminal defendant has a constitutionally protected right to make a closing argument. That right is violated not only when a defendant is completely denied an opportunity to argue before the court or the jury after all the evidence has been admitted, but also when a defendant is deprived of the opportunity to raise a significant issue that is reasonably inferable from the facts in evidence." (Internal quotation marks omitted.) *State* v. *Mungroo*, 104 Conn. App. 668, 675–76, 935 A.2d 229 (2007), cert. denied, 285 Conn. 908, 942 A.2d 415 (2008).

"In general, the scope of final argument lies within the sound discretion of the court . . . subject to appropriate constitutional limitations." (Citation omitted; internal quotation marks omitted.) *State* v. *Arline*, 223

[12] The defendant claims that he was not able to respond to the prosecutor's rebuttal argument regarding Renstrom's testimony about the probability of inclusion, the defendant's exclusion from the sperm-rich portion of the profile sample identified as 1 C-3, the fingerprint evidence, the victim's description of the perpetrator, and saliva found on the three swabs. We disagree that defense counsel was unable to respond to the issues cited. At the close of the first portion of her argument, the prosecutor stated that "[t]here are three letters you will not be able to get out of your head. Those letters are DNA." This argument put the defendant on notice of the state's theory of the case. During his closing argument, defense counsel pointed out errors concerning the DNA evidence and its testing, and how the police and the laboratory handled the fingerprints taken from the window in the bedroom of the victim's brother. Defense counsel also emphasized the inconsistencies between the victim's description of the defendant and the defendant's appearance. See part II of this opinion.

Conn. 52, 59, 612 A.2d 755 (1992). The present case, however, is not one in which the defendant claims that the court improperly limited his right to argue to the jury. He instead takes issue with the prosecutor's strategy, claiming that because the prosecutor made her substantive argument during rebuttal, defense counsel could not counter the substance of the prosecutor's argument. Our review of the record discloses that the evidence was known to the defendant and his counsel, and that defense counsel vigorously argued the weaknesses in the state's case to the jury.

The defendant relies heavily on the legal underpinnings of *Herring* v. *New York*, supra, 422 U.S. 853, to argue that the form of the prosecutor's argument limited his right to counsel under the sixth amendment to the federal constitution. The facts of *Herring* are inapposite. At the time of *Herring*, a New York statute conferred upon judges in nonjury criminal trials the power to deny counsel an opportunity to argue the evidence before the judge rendered a judgment. Id., 853–54. The case called upon the Supreme Court to assess the constitutional validity of the New York law. Id., 854. During trial, at the conclusion of evidence, defense counsel had asked "to 'be heard somewhat on the facts.' The trial judge replied: 'Under the new statute, summation is discretionary, and I choose not to hear summations.' " Id., 856. The United States Supreme Court reversed the defendant's conviction, stating in part, that "closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial. . . . [C]ounsel for the defense has a right to make a closing summation to the jury, no matter how strong the case for the prosecution may appear to the presiding judge." Id., 858. "[T]he overwhelming weight of authority, in both federal and state courts, holds that a total denial of the opportunity for final argument in a nonjury criminal

trial is a denial of the basic right of the accused to make his defense." Id., 859.

*Herring* does not resemble the present case—or anything close to it.[13] First, the present case was tried before a jury. Second, the court did not deny defense counsel the opportunity to make a final argument to the jury. Third, defense counsel argued to the jury. Our review of the argument made by defense counsel discloses that he reminded the jury that it was its recollection of the facts that mattered and that he had only one opportunity to address the jury, although the prosecutor had two such opportunities. He ably pointed out the weaknesses in the state's case: the victim and her mother were unable to identify the perpetrator in court or from photographs, the victim's description of the perpetrator was not consistent with his appearance, there was no fingerprint evidence from the window where the perpetrator supposedly entered the dwelling, the DNA evidence was uncorroborated, and the nurse used two swabs to collect DNA from the victim but there were three swabs in the rape kit in the laboratory, among other things. Significantly, defense counsel argued that the DNA evidence was unreliable and that the state should not be entitled to rely on it.

Contrary to the defendant's argument, defense counsel was able to address the evidentiary issues in the

[13] The defendant also relies on *State* v. *Arline*, supra, 223 Conn. 52, and *State* v. *Hoyt*, 47 Conn. 518 (1880), for the proposition that an accused is entitled to argue to the trier of fact at the conclusion of the evidence. That constitutional right is not in dispute in the present case. The issue in the cited cases concerned the *trial court's* imposition of restrictions on counsel's argument, which is not the issue in the present instance.

In *Arline*, our Supreme Court reversed the judgment of conviction because the trial court restricted defense counsel's right to argue certain facts in evidence regarding the complainant's credibility. *State* v. *Arline*, supra, 223 Conn. 55-65. In *Hoyt*, the issue before the court was whether the trial court had the discretion to limit the amount of time for argument. *State* v. *Hoyt*, supra, 47 Conn. 534–36. Neither case concerns the manner in which the state apportions its final argument.

case that formed the basis of both portions of the prosecutor's final argument. Defense counsel's argument with regard to the evidence directly attacked statements the prosecutor made during her summation, to wit: "[Y]ou're going to hear a lot of things about fingerprints and mistakes by the lab or police with those fingerprints. You're also going to hear that there's no identification of the defendant by photograph. . . . [W]hile you are listening to their argument, there are three letters you will not be able to forget. There are three letters you will not be able to get out of your head. Those letters are DNA." The arguments of both the prosecutor and defense counsel demonstrate that each of them was well aware of the evidence in the case and the opposing party's theory of the case.

This court previously has stated that "[t]here is nothing to suggest that a closing argument must be made in a particular order or that the state's initial argument should contain the majority of its argument. Closing arguments must be fair and based on evidence. . . . We . . . must permit the state wide latitude in its decision to make the substantive portion of its closing argument during final closing argument . . . ." *State* v. *Rupar*, 86 Conn. App. 641, 656–57, 862 A.2d 352 (2004), cert. denied, 273 Conn. 919, 871 A.2d 1030 (2005); accord *State* v. *Schiavo*, 93 Conn. App. 290, 303 n.10, 888 A.2d 1115, cert. denied, 277 Conn. 923, 895 A.2d 797 (2006). As in *Rupar*, the defendant in the present case has not identified any controlling authority—be it a statute, a rule of practice, or case law—regarding the use of time in closing argument.[14] We, therefore, conclude that the

[14] In his appellate brief, the defendant has cited cases from federal and state courts reversing criminal convictions in which the prosecutor gave a perfunctory opening summation and presented the bulk of the argument on rebuttal. As an intermediate court of appeal, we are bound to follow the law established by our legislature and our Supreme Court. "[W]e are unable to overrule, reevaluate, or reexamine controlling precedent . . . ." *State* v. *LaFleur*, 156 Conn. App. 289, 302, 113 A.3d 472, cert. denied, 317 Conn. 906, 114 A.3d 1221 (2015). We, therefore, follow Connecticut precedent.

format of the prosecutor's closing argument was not improper and did not deny the defendant his constitutional right to be heard by counsel during closing argument.

B

The defendant's second claim is that the prosecutor was guilty of impropriety when, during rebuttal argument, she raised new issues and mischaracterized the evidence that, according to the defendant, infringed on his right to closing argument and deprived him of a fair trial.[15] On the basis of our review of the record, including the prosecutor's rebuttal argument, we conclude that there was no impropriety.[16] We now address each of the defendant's arguments.

1

The defendant claims that the prosecutor mischaracterized Renstrom's testimony regarding the expected frequency of individuals who could be a contributor to the mixture in the DNA sample identified as 1 C-B. We disagree.

During her rebuttal argument, the prosecutor stated in relevant part: "[I]f we placed 3.5 million African-Americans in Connecticut and stacked thirteen more states the size of Connecticut on top of that full of African-Americans, we would still only see that profile one time. That, ladies and gentlemen, is proof beyond a

[15] The defendant objected at trial to what he claims was the prosecutor's mischaracterization of the fingerprint testimony and thus preserved the claim for appellate review. He did not object to what he claims are new issues raised by the prosecutor in rebuttal. He, therefore, seeks appellate review pursuant to *State* v. *Golding*, supra, 213 Conn. 239–40. Although the claim is reviewable, a constitutional violation did not exist, and the defendant was not deprived of a fair trial. See parts II and II B 2 of this opinion.

[16] Because we conclude that there was no prosecutorial impropriety, we need not address the factors set forth in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987), to determine whether the defendant was denied due process.

reasonable doubt." The defendant notes that Renstrom testified that the population of Connecticut is approximately 3.5 million and that "the expected frequency of individuals who could be a contributor to the mixture in 1 C-B is approximately one in 52 million in the African-American population, approximately one in 66 million in the Caucasian population, and approximately one in 37 million in the Hispanic population."

The defendant claims that the prosecutor's argument implicates two errors in probabilistic reasoning. By telling the jury that only one person in Connecticut would be included as a contributor, the prosecutor urged the jury to commit the " 'uniqueness fallacy,' "[17] stating that "it is a fallacy to infer uniqueness from profile frequencies simply because they are smaller than the number of available objects."[18] The second error, the defendant argues, is "the probability of another match error, which conflates the chance that a single, randomly selected person could be included as a contributor with the chance that at least one other member of the population could be included."[19] The defendant contends that the prosecutor's incorrect reasoning was harmful because even a relatively low percentage chance that someone else could be included as a contributor may have been enough to convince the jury that there was a reasonable doubt as to the defendant's guilt.

We need not determine whether the defendant's statistical argument is correct. He presented no evidence

[17] According to the defendant, the reasoning of the uniqueness fallacy is that "(1) there is a 1 in 52 million chance that a person could be included as a contributor to the mixture; (2) the defendant's profile was included as a contributor; (3) the population of Connecticut is about 3.5 million; therefore (4) the defendant is the only person whose profile would be included as a contributor to the mixture."

[18] In his appellate brief, the defendant cited M. Saks & J. Koehler, "The Individualization Fallacy in Forensic Science Evidence," 61 Vand. L. Rev. 199, 204 (2008).

[19] In his appellate brief, the defendant cited J. Koehler, "Error and Exaggeration in the Presentation of DNA Evidence," 34 Jurimetrics J. 21, 33 (1993).

to support the claim he now raises on appeal, and the record is inadequate to address it. Our review of the record discloses that the prosecutor's argument was predicated on the evidence. On redirect examination, the prosecutor questioned Renstrom about the frequency of the defendant's DNA profile occurring in the African-American population in Connecticut:

"[The Prosecutor]: How many people are in the state of Connecticut?

"[The Witness]: I'm not sure of the exact population. I believe it's in the three to three and a half million people.

"[The Prosecutor]: Three, three and a half million. This statistic was what . . . you found the amount—the number of times you would expect to find this profile of—that was generated from the defendant's known? How many times would you expect to see that profile within—what was the statistic you put out? . . .

"[The Witness]: It was in the tens of millions. . . .

"[The Prosecutor]: So, demonstrate the item 1C-B is a mixture, and the defendant is included in one statistic that you put to this, that you would find the defendant's profile in that number?

"[The Witness]: So, what the statistic is referring to is, if I were to take general population, type those people, and then compare it to the knowns, 1C-B—or the unknown 1C-B sample, and the expected frequency of individuals who could be a contributor to that sample, 1C-B, is one in 52 million in the African-American population, one in 66 million in the Caucasian population, and one in 37 million in the Hispanic population."

DNA evidence is inherently complex, and the statistical conclusions to be drawn from it are equally complex. But neither the state nor the defendant presented expert testimony to help the jury understand the significance

of Renstrom's statistics. "The purpose of expert testimony is to aid the trier of fact in arriving at its own conclusion." *Breen* v. *Breen*, 18 Conn. App. 166, 174, 557 A.2d 140, cert. denied, 212 Conn. 801, 560 A.2d 984 (1989). "The purpose of expert testimony is to draw inferences from the facts which the fact finder could not draw at all or as reliably." *Marandino* v. *Prometheus Pharmacy*, 105 Conn. App. 669, 692, 939 A.2d 591 (2008), rev'd in part on other grounds, 294 Conn. 564, 986 A.2d 1023 (2010).

As previously noted, the defendant failed to object to the prosecutor's DNA argument. As our Supreme Court has stated, this is not fatal to a prosecutorial impropriety claim. See *State* v. *Stevenson*, 269 Conn. 563, 572–73, 849 A.2d 626 (2004). "This does not mean, however, that the absence of an objection at trial does not play a significant role in the determination of whether the challenged statements were, in fact, improper. . . . To the contrary, we continue to adhere to the well established maxim that defense counsel's failure to object to the prosecutor's argument when it was made suggests that defense counsel did not believe that it was [improper] in light of the record of the case at the time. . . . This is particularly true if, as in the present case, a defendant claims prosecutorial impropriety stemming from a prosecutor's discussion of DNA evidence. Such discussions require precise and nuanced distinctions in nomenclature that easily may be misconveyed or misunderstood, especially in light of the zealous advocacy that is part and parcel of a closing argument. If a prosecutor's arguments do not portray accurately the DNA evidence as it was presented to the jury or stray too far from reasonable inferences that may be drawn from such evidence, a contemporaneous objection by defense counsel would permit any misstatements, whether inadvertent or intentional, to be

remedied immediately." (Citation omitted; internal quotation marks omitted.) *State* v. *Brett B.*, supra, 186 Conn. App. 572.

The state contends that the prosecutor's argument was predicated on a reasonable inference to be drawn from the evidence and unmistakably was in reference to Renstrom's testimony. We agree. "We long have held that a prosecutor may not comment on evidence that is not a part of the record and may not comment unfairly on the evidence in the record. . . . It is not, however, improper for the prosecutor to comment upon the evidence presented at trial and to argue the inferences that the jurors might draw therefrom . . . . We previously have held that, if the evidence presented at trial is that the defendant is included as a contributor to a DNA profile, then it is not necessarily improper for a prosecutor to argue to a jury during closing argument that the DNA found was the defendant's as long as that is a reasonable inference to be drawn in light of the evidence as a whole." (Citations omitted; emphasis omitted; internal quotation marks omitted.) Id., 583.

To the extent that the prosecutor may have used an imprecise example or exaggerated,[20] the defendant failed to object or to correct the claimed misstatement, which suggests "that he did not believe at the time that the remarks warranted such intervention. When considered within the context of the state's entire argument and allowing some leeway for zealous advocacy, as we must, we cannot conclude that the prosecutor made any statements that reasonably can be viewed as improper under the circumstances or that the jury likely

[20] The defendant posits that many lawyers and judges have a difficult time interpreting probabilistic information. See J. Koehler, "Forensic Fallacies and a Famous Judge," 54 Jurimetrics J. 211, 212–17 (2014) (discussing three cases in which then Judge Richard A. Posner of the United States Court of Appeals for the Seventh Circuit committed basic errors in probabilistic reasoning, including DNA evidence).

was misled . . . .'' Id., 585–86. As a practical matter, some degree of imprecision can be expected when a layperson discusses, or evaluates, scientific or statistical evidence without the benefit of expert testimony. Opposing counsel, however, must be alert and raise an objection at the time when a purported error may be corrected. See id., 572.

We conclude, therefore, that the prosecutor's rebuttal argument was not improper and that the defendant failed to demonstrate that he was denied a fair trial on the basis of the prosecutor's argument with respect to the DNA evidence.

2

The defendant also claims that the prosecutor mischaracterized the fingerprint evidence. We do not agree.

During the trial, the state presented testimony from John Cerejo, a detective with the Meriden Police Department, and Steve Burstein, a detective sergeant with the department, regarding the efforts the police made to get fingerprints from the window in the bedroom of the victim's brother. Many of the fingerprints were not sufficiently clear to be used for identification purposes, and none of them matched the defendant's fingerprints. According to Cerejo, the length of time a fingerprint stays on a surface depends on, among other things, whether it is exposed to sun and rain. He testified inconsistently as to how long the fingerprints on the window could have been there. According to Burstein, the window was exposed to the elements, and he did not know how long the fingerprints were on the window. He also testified that he did not know when the house had been built, but estimated, without objection, that it ''probably [was] a hundred years ago or so . . . .''

During her rebuttal, the prosecutor downplayed the importance of fingerprints on the window, arguing, in

part, "[w]e don't know where the prints came from or how long they've been there or if they've been there for a hundred years." The defendant claims that the argument was improper because there was no evidence that the fingerprints could have been on the window for anywhere close to one hundred years. We do not find the prosecutor's argument to have been improper. The obvious point of the prosecutor's argument was that there was no evidence as to whose fingerprints were on the window or when they happened to be put there. With a hyperbolic flourish, the prosecutor incorporated the testimony that the house was estimated to be one hundred years old to emphasize that no one knew when or who put fingerprints on the window. Surely, the jury understood the prosecutor's remark as an overstatement. Moreover, counsel for the defendant stated in his closing argument: "They're not kids' prints. You heard the experts testify about that. A hundred years? The windows were there forever? I mean, come on, let's be serious."

Whether the prosecutor's one hundred years remark was hyperbole or made in response to the argument of defense counsel, the arguments of both counsel had a basis in the evidence. Most importantly, there was no fingerprint evidence that connected the defendant to the crimes and, therefore, he could not have been prejudiced by the argument. The defendant's claim of prosecutorial impropriety during oral argument therefore fails.

C

The defendant also claims that he is entitled to a new trial because the prosecutor's allegedly improper rebuttal argument deprived him of the right to closing argument. We do not agree.

The defendant's claim is made through the lens of hindsight and is not supported by the record. The defendant expounds on his claim that he did not have a

chance to rebut the state's view of the evidence, and that his theory of defense was to challenge the persuasiveness and reliability of the DNA evidence. He asserted that he was denied the right to final argument especially with respect to the prosecutor's rebuttal argument that he was the only person in Connecticut who could be a contributor to the DNA mixture and that defense counsel was not given an opportunity to correct the argument. The defendant claims that this was extraordinarily harmful because juries, lawyers, and judges have a difficult time interpreting probabilistic information. This claim was not raised at trial and, therefore, is not preserved. Moreover, the defendant claims that he did not have the chance to counter the prosecutor's argument in the context of his own theory that there were serious questions about the collection, preservation, and testing of the physical evidence that called Renstrom's testimony into question.

The defendant's contention that he is entitled to a new trial on the basis of the prosecutor's rebuttal argument is flawed for at least two reasons. If, as he argues on appeal, the prosecutor's argument that he was the only person in Connecticut who could have contributed to the DNA mixture is wrong, defense counsel could have objected to the argument at trial, but did not. Counsel, therefore, must not have thought that it misled the jury. Given the complexity of DNA evidence, an objection must be raised at the time evidence is presented when it can be corrected. *State* v. *Brett B.*, supra, 186 Conn. App. 572.

As to his second contention that defense counsel could not counter the prosecutor's DNA argument, we note that at the conclusion of the first portion of her summation, the prosecutor, in so many words, told the jury that DNA was the key to the case. During his final argument, defense counsel made clear to the jury all of the problems in the collection, preservation, and

testing of the DNA evidence. The defendant, therefore, was not deprived of his right to final argument and to present his view of the DNA evidence. In fact, defense counsel anticipated and attempted to refute the prosecutor's rebuttal.

For the foregoing reasons, the defendant's claim of prosecutorial impropriety during final argument fails.

III

The defendant's final claim is that he is entitled to a new trial on the charge of home invasion because the second portion of the prosecutor's final argument misled the jury on the elements of the crime of home invasion, and that the misstatement was not harmless beyond a reasonable doubt. We disagree.

The defendant's claim is predicated on his representation, in his appellate brief, of a portion of the prosecutor's closing argument, to wit: "During closing argument, after quoting the substitute information, the state's attorney told the jury that 'basically, [the information] means that the defendant had to unlawfully enter the dwelling while a person was inside *with the intent to commit a sexual assault . . . .*' " (Emphasis in original.) He argues that the language misrepresented the law to the jury because it invited the jury to find him guilty even if it did not find beyond a reasonable doubt that he intended to commit a sexual assault by force at the time of entry. The defendant correctly states that prosecutors are not permitted to misstate the law because it invites a conviction unwarranted by the law and facts.[21] See *State* v. *Otto*, supra, 305 Conn. 77. "A

[21] The defendant also argues that all of the *Williams* factors except the frequency of the impropriety weigh in favor of reversal. See footnote 16 of this opinion; *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987). He contends that reversal is warranted because the state's case was relatively weak and the court gave no curative instruction. Because we conclude that the prosecutor committed no impropriety in her final argument, we need not address the *Williams* factors. Again, we note that trial counsel did not object to the portion of the prosecutor's argument at issue in this claim and requested no curative instruction.

review of the statements made by the prosecutor, in the context of the entire closing argument, is necessary to address the defendant's challenges." Id.

Our review of the prosecutor's entire summation discloses the context of the prosecutor's argument to which the defendant takes exception. After thanking the jury for its service, the prosecutor stated that she intended to highlight some of the evidence, but that if the jury had a different recollection of the evidence, its recollection was what counted. She also stated that she would highlight some points of law, but that *the trial judge would give the jury instructions on the law and that "his word goes . . . .*" (Emphasis added.)

The prosecutor then summarized the victim's testimony and stated that on the basis of "the horrific facts" the victim described, the state charged the defendant with five crimes. The prosecutor stated: "The judge will give you the exact definition of these crimes at much more length than I will, and you will actually get the copy of his instructions to take with you in the jury room, but I'd like to summarize them briefly for you." The prosecutor then read the first count of the long form information to the jury. Immediately thereafter, the prosecutor stated: "That statute is very wordy, but basically, it means that the defendant had to unlawfully enter the dwelling while a person was inside with the intent to commit a sexual assault and commit a felony while inside against another person; and again, this will be described further, but that's the first count of the information."

When the court instructed the jury, it stated in part: "You as the jury and I as the judge have separate functions. It's your function to find what the facts are in this case. With respect to the facts, you and you alone are charged with that responsibility. My function is to charge you on the law to be applied to the facts that

you find in order to decide this case. With respect to the law, what I say to you is binding on you, and you must follow all of my instructions."

With respect to the first count of the information, which alleged home invasion, the court instructed the jury that it would have the information in the jury room along with a copy of its charge. The court read the charge of home invasion to the jury and § 53a-100aa (a) (1). It then stated: "So, for you to find the defendant guilty of this charge, the state must prove each of the following elements beyond a reasonable doubt: (1) that the defendant knowingly and unlawfully entered a dwelling, (2) that the defendant intended to commit the crime of sexual assault in the first degree in violation of § 53a-70 (a) (1) in that dwelling, (3) that when the defendant entered the dwelling, a person other than a participant in the crime, namely [the victim], was actually present in the dwelling, and (4) that in the course of committing the home invasion, the defendant committed a felony against the person of another person other than a participant in the crime who was actually present in the dwelling."

The court elaborated on all of the elements of the crime of home invasion: "The second element that the state must prove beyond a reasonable doubt is that the defendant intended to commit the crime of sexual assault in the first degree in violation of § 53a-70 (a) (1) in the dwelling. Our statutes provide that a person acts intentionally with respect to a result when his conscious objective is to cause such result. What a person's intent has been is very largely a matter of inference. No witness can be expected to come here and testify that he looked into another person's mind and saw therein a certain intention. A jury may determine what a person's intention was at any given time by determining what that person's conduct was and what the circumstances were surrounding that conduct,

and from those things infer what his intention was. An intent may be inferred from circumstantial evidence, provided the inference is a reasonable one and warranted by facts that you find proven. To draw such an inference is not only the privilege but also the proper function of a jury, provided of course, that the inference drawn complies with the standards for inference set forth in my instruction on circumstantial evidence."

The trial court also instructed the jury on the elements of sexual assault in the first degree by the use of force, to wit: "The necessary intent to commit a crime must be an intent to commit either a felony or a misdemeanor in addition to the unlawful entering of the dwelling. In this case, the state claims that the defendant committed the crime of sexual assault in the first degree in violation of § 53a-70 (a) (1) . . . . That section provides . . . [a] person is guilty of sexual assault in the first degree when such person compels another person to engage in sexual intercourse by the use of force against such other person. For a person to intend to commit the crime of sexual assault in the first degree in violation of § 53a-70 (a) (1) . . . he must intend to (1) compel another person to engage in sexual intercourse, and (2) to accomplish the sexual intercourse by the use of force against the other person. With respect to this element, the state must first prove beyond a reasonable doubt that when the defendant entered the dwelling in question, he intended to compel another person to engage in sexual intercourse. Sexual intercourse means vaginal intercourse or cunnilingus between persons regardless of sex. . . . The state must additionally prove beyond a reasonable doubt that when the defendant entered the dwelling, he intended to accomplish the sexual intercourse by the use of force against . . . the other person."

The defendant does not claim that the court's instructions were improper. "Barring contrary evidence . . .

we must presume that juries follow the instructions given them by the trial judge." (Internal quotation marks omitted.) *State* v. *Morton*, 59 Conn. App. 529, 537, 757 A.2d 667 (2000). The defendant has not provided any evidence that the jury did not follow the instructions of the court.

The record discloses that the prosecutor read the charge of home invasion as stated in the information, and then indicated that the statute was wordy and gave a shorthand description of the crime, i.e., that the defendant unlawfully entered the dwelling with the intent to commit a sexual assault and commit a felony against another person. The prosecutor did not so much misstate the law as give an incomplete description of the charge against the defendant. The prosecutor, however, more than once told the jurors that the court would instruct them on the law and that the court's instructions were what counted. The defendant has not claimed that the court improperly charged the jury. We presume, in the absence of evidence to the contrary, that the jury followed the court's instructions. *State* v. *Webster*, 308 Conn. 43, 58–59 n.11, 60 A.3d 259 (2013). The defendant's claim, therefore, fails.

On the basis of our review of the record and for the reasons previously stated, we conclude that there was sufficient evidence by which the jury reasonably could have found the defendant guilty beyond a reasonable doubt of the crimes with which he was charged. Moreover, we conclude that the prosecutor committed no impropriety during her final argument and, therefore, the defendant was not denied his constitutional right to final argument, a fair trial, or due process.

The judgment is affirmed.

In this opinion the other judges concurred.

# ELLEN M. MANZO-ILL *v.* SAMUEL V. SCHOONMAKER III ET AL.
## (AC 40447)

DiPentima, C. J., and Keller and Moll, Js.

*Syllabus*

The plaintiff sought to recover damages from the defendant law firm, S Co., for legal malpractice and fraudulent misrepresentation in connection with its representation of her in a prior marital dissolution action. On May 20, 2013, the plaintiff delivered a writ of summons and complaint to a state marshal, who thereafter made service on S Co. on June 10, 2013. In response to the plaintiff's complaint, S Co. filed an answer and raised a special defense that the action was barred by the applicable statute of limitations (§ 52-577), which permits a tort action to be brought within three years from the date of the act or omission complained of. Thereafter, the trial court granted S Co.'s motion to bifurcate the trial, which requested the court to consider S Co.'s statute of limitations defense before it considered the merits of the plaintiff's complaint. Following a trial on the statute of limitations issue, the court rendered judgment in favor of S Co., concluding that the plaintiff's claims were barred by the three year limitation period set forth in § 52-577. In its memorandum of decision, the court found that after S, the attorney and partner at S Co. who represented the plaintiff in the dissolution action, informed the plaintiff that he planned to retire, the plaintiff indicated to S that she understood his letter to mean that she needed to retain new counsel, and that on March 11, 2010, she retained new counsel when another law firm filed an appearance in lieu of S Co., which withdrew S Co.'s appearance in the dissolution action by law pursuant to the relevant rule of practice (§ 3-9). The court also found that certain post-March, 2010 billing records of S Co. that the plaintiff had relied on failed to support her continuous representation claim and, thus, that plaintiff had failed to establish that the continuing representation doctrine tolled the statute of limitations. The plaintiff subsequently filed a motion to reargue, claiming that the court had failed to take judicial notice of S Co.'s automatic appearance in the appeal in the dissolution action when it considered her continuous representation claim. The trial court denied the motion to reargue, and the plaintiff appealed to this court. *Held*:

1. The trial court properly concluded that the plaintiff's action was barred by the statute of limitations set forth in § 52-577, as the evidence established that the attorney-client relationship between the plaintiff and S Co. terminated on March 11, 2010, thereby precluding the tolling of the statute of limitations through the doctrine of continuous representation after that date, and the plaintiff failed to commence her action within three years from that date: the plaintiff's claim that the trial court misapplied the rule in *DeLeo* v. *Nusbaum* (263 Conn. 588) regarding the continuous representation doctrine and the tolling of the statute of

limitations by erroneously expanding the rule with respect to whether the attorney-client relationship had ended was unavailing, as her assertion that the specific methods listed in *DeLeo* constitute the only valid methods to terminate an attorney-client relationship in establishing the first prong of the doctrine construed the rule in *DeLeo* too narrowly, the key issue instead being whether, under either a formal or de facto termination, the relationship between the attorney and client had ended, and evidence in the record demonstrated that the attorney-client relationship between the plaintiff and S Co. ended in March, 2010; moreover, in applying the continuous representation doctrine, the trial court properly concluded that the events of this case implicated aspects of both a formal and a de facto termination of S Co.'s representation in March, 2010, namely, new counsel's filing of the in lieu of appearance, which signified the termination of S Co.'s representation of the plaintiff, the plaintiff's acknowledgment of the end of the attorney-client relationship, as evidenced by a letter she sent to S specifically noting that S Co. no longer represented her, and the plaintiff's hiring of new counsel, which indicated that she no longer relied on the professional judgment of S Co. to protect her legal interests.

2. The trial court did not abuse its discretion in denying the plaintiff's motion to reargue, in which she claimed that the court failed to take judicial notice of S Co.'s automatic appearance in the appeal in the dissolution action when it considered her continuous representation claim; the plaintiff failed to raise that issue during the trial and, instead, brought it to the trial court's attention for the first time after it had rendered its decision, and, therefore, she did not identify a principle of law or fact that the court had been presented with at trial but, rather, sought a second opportunity to litigate her claim regarding the applicability of the continuous representation doctrine.

Argued October 18, 2018—officially released March 12, 2019

*Procedural History*

Action to recover damages for, inter alia, legal malpractice, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Povodator*, *J.*, granted in part the defendants' motion to dismiss; thereafter, the court granted the motion to bifurcate the trial filed by the defendant Schoonmaker, George & Blomberg, P.C., and the matter was tried to the court; judgment for the defendant Schoonmaker, George & Blomberg, P.C.; subsequently, the court denied the plaintiff's motion to reargue, and the plaintiff appealed to this court. *Affirmed.*

*James H. Lee*, for the appellant (plaintiff).

*Scott S. Centrella*, with whom, on the brief, was *Timothy P. Moylan*, for the appellee (defendant Schoonmaker, George & Blomberg, P.C.).

*Opinion*

DiPENTIMA, C. J. The plaintiff, Ellen M. Manzo-Ill, appeals from the judgment of the trial court rendered in favor of the defendant Schoonmaker, George & Blomberg, P.C.,[1] after a trial before the court. The court concluded that the plaintiff's claims of legal malpractice and fraudulent misrepresentation were barred by the three year statute of limitations set forth in General Statutes § 52-577.[2] On appeal, the plaintiff claims that

[1] The plaintiff initially commenced this action against attorneys Samuel V. Schoonmaker III and John P. Ekberg III, and the law firm of Schoonmaker, George & Blomberg, P.C. On March 28, 2014, the court granted in part the defendants' motion to dismiss and dismissed the action as to the individual attorneys for lack of personal jurisdiction due to improper service of process. The plaintiff has not challenged that ruling in this appeal. Thus, we refer to the law firm as the defendant in this opinion.

[2] Both a legal malpractice action and a fraudulent misrepresentation action are subject to the three year statute of limitations set forth in § 52-577. *Straw Pond Associates, LLC* v. *Fitzpatrick, Mariano & Santos, P.C.*, 167 Conn. App. 691, 714, 145 A.3d 292, cert. denied, 323 Conn. 930, 150 A.3d 231 (2016) (legal malpractice); *Bridgeport Harbour Place I, LLC* v. *Ganim*, 131 Conn. App. 99, 175 n.85, 30 A.3d 703 (fraudulent misrepresentation), cert. granted on other grounds, 303 Conn. 904, 31 A.3d 1179 (2011) (appeal withdrawn January 27, 2012), and cert. granted on other grounds, 303 Conn. 905, 31 A.3d 1180 (2011) (appeal withdrawn January 26, 2012).

"Section 52-577 is a statute of repose in that it sets a fixed limit after which the tortfeasor will not be held liable and in some cases will serve to bar an action before it accrues. . . . [Section] 52-577 provides: No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of. This court has determined that [§] 52-577 is an occurrence statute, meaning that the time period within which a plaintiff must commence an action begins to run at the moment the act or omission complained of occurs. . . . Moreover, our Supreme Court has stated that [i]n construing our general tort statute of limitations . . . § 52-577, which allows an action to be brought within three years from the date of the act or omission complained of, we have concluded that the history of that legislative choice of language precludes any construction thereof delaying the start of the limitation period until the cause of action has

the court (1) misapplied our Supreme Court's holding in *DeLeo* v. *Nusbaum*, 263 Conn. 588, 821 A.2d 744 (2003), regarding the continuous representation doctrine and the tolling of the statute of limitations and (2) abused its discretion in denying her motion to reargue. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. In May, 2007, the plaintiff's then husband, Charles L. Ill III initiated a dissolution action, and, in June, 2007, the plaintiff hired the defendant to represent her. The dissolution court issued a memorandum of decision on August 19, 2008, dissolving the marriage between the plaintiff and Ill. See *Ill* v. *Manzo-Ill*, Superior Court, judicial district of Stamford-Norwalk, Docket No. FA-07-4011753-S (August 19, 2008).

On May 20, 2013, the plaintiff delivered the writ of summons and complaint to a state marshal, who made service on the defendant on June 10, 2013.[3] The operative complaint, dated August 28, 2014, set forth two causes of action against the defendant: legal malpractice[4] and fraudulent misrepresentation.[5] Generally, the

accrued or the injury has occurred. . . . The three year limitation period of § 52-577, therefore, begins with the date of the act or omission complained of, not the date when the plaintiff first discovers an injury." (Internal quotation marks omitted.) *Piteo* v. *Gottier*, 112 Conn. App. 441, 445, 963 A.2d 83 (2009); see also *Farnsworth* v. *O'Doherty*, 85 Conn. App. 145, 148–50, 856 A.2d 518 (2004).

[3] See General Statutes § 52-593a (a); *Tayco Corp.* v. *Planning & Zoning Commission*, 294 Conn. 673, 685, 986 A.2d 290 (2010) (service of process must be delivered to marshal for service prior to expiration of statute of limitations).

[4] "In general, the plaintiff in an attorney malpractice action must establish: (1) the existence of an attorney-client relationship; (2) the attorney's wrongful act or omission; (3) causation; and (4) damages." (Internal quotation marks omitted.) *Rosenfield* v. *Rogin, Nassau, Caplan, Lassman & Hirtle, LLC*, 69 Conn. App. 151, 157, 795 A.2d 572 (2002).

[5] "The essential elements of a cause of action in [fraudulent misrepresentation] are: (1) a false representation was made as a statement of fact; (2) it was untrue and known to be untrue by the party making it; (3) it was made

complaint alleged that the attorneys of the defendant law firm had "deviated from accepted professional standards directly causing [the plaintiff] to lose millions of dollars in what would have been her share of undiscovered marital assets. Worse yet, [the plaintiff] paid the [defendant] tens of thousands of dollars in legal fees and expenses for this deficient representation." Specifically, the complaint alleged that the defendant (1) was negligent in failing to conduct financial discovery as to the former employers of Ill, (2) was negligent and committed fraud with respect to Ill's testamentary interests, (3) was negligent during the dissolution trial and (4) was negligent during the posttrial proceedings.

On November 10, 2014, the defendant filed an answer and raised a statute of limitations defense, pursuant to § 52-577, as to both counts of the operative complaint. Approximately one month later, the defendant moved for summary judgment on the basis that the plaintiff's action was time barred. In its motion, the defendant argued that it had been replaced as the plaintiff's counsel on March 11, 2010, when the law firm of Tibbetts, Keating & Butler, LLC (successor counsel) filed an "in lieu of" appearance on behalf of the plaintiff. It further maintained that because the process initiating the present action was not delivered to the state marshal until May 20, 2013, and was not served on the defendant until June 10, 2013, more than three years after the defendant had been replaced by successor counsel, it was entitled to summary judgment. The defendant also argued that the continuous representation doctrine did not apply to this matter.

On January 29, 2015, the plaintiff filed a memorandum of law in opposition to the defendant's motion for summary judgment. She argued that the defendant had performed legal services after May 20, 2010, and, therefore,

to induce the other party to act upon it; and (4) the other party did so act upon the false representation to his injury." (Internal quotation marks omitted.) *Centimark Corp.* v. *Village Manor Associates Ltd. Partnership*,

her action was not barred by the statute of limitations. In support of her opposition, the plaintiff directed the court to the defendant's invoices indicating that legal work had been done on behalf of the plaintiff on May 20 and September 1, 2010. The plaintiff also argued that the continuous representation doctrine served to toll[6] § 52-577.

The court, *Povodator*, *J.*, issued a memorandum of decision denying the defendant's motion for summary judgment on April 28, 2015. Specifically, the court reasoned that the post-May 20, 2010 invoice and the parties' competing explanations thereof could not be resolved in the context of a motion for summary judgment.

On February 29, 2016, the defendant moved to bifurcate the trial pursuant to General Statutes § 52-205 and Practice Book § 15-1 so that its statute of limitations defense would be considered before the merits of the plaintiff's operative complaint. Over the plaintiff's objection, the court granted the motion to bifurcate on March 7, 2016.

The court conducted a three day trial on the defendant's statute of limitations defense on March 29, April 15 and July 6, 2016. On the first day, the defendant presented testimony from Paul Tusch, the attorney who represented Ill in the dissolution action; John P. Ekberg III, an attorney with the defendant from November, 1999 until April, 2012; and Aidan Welsh, an attorney with the defendant since 2006. At the conclusion of the testimony from the three witnesses, the defendant rested as to the issue of the statute of limitations. On

113 Conn. App. 509, 522, 967 A.2d 550, cert. denied, 292 Conn. 907, 973 A.2d 103 (2009).

[6] "Tolling does not enlarge the period in which to sue that is imposed by a statute of limitations, but it operates to suspend or interrupt its running while certain activity takes place." *Flannery* v. *Singer Asset Finance Co., LLC*, 312 Conn. 286, 311, 94 A.3d 553 (2014); see also *Romprey* v. *Safeco Ins. Co. of America*, 310 Conn. 304, 330, 77 A.3d 726 (2013).

April 15, 2016, the plaintiff was the only witness to testify. On July 6, 2016, the plaintiff presented testimony from Timothy Butler, an attorney with successor counsel, and recalled herself to testify.

On March 7, 2017, the court issued its memorandum of decision.[7] It found that in January, 2010, Attorney Samuel V. Schoonmaker III,[8] the attorney and partner at the defendant who had primary responsibility for representing the plaintiff in the dissolution action, wrote to her confirming his plan to retire, effective April 1, 2010. "In that letter, [Schoonmaker] further indicated that he did not wish to refer the file to someone else in his office. This was understood by the plaintiff to reflect the need for retention of new counsel, which she did obtain in March of 2010." Successor counsel filed an appearance in lieu of the defendant on March 11, 2010.

The court addressed the evidence of conversations between Schoonmaker and the plaintiff and successor counsel in the spring and summer of 2010. The court found that the thrust of Schoonmaker's post-May, 2010 conversations with the plaintiff related to her outstanding bill with the defendant. It further observed that

[7] At the outset of its memorandum of decision, the court noted that although the plaintiff had filed a denial in response to the defendant's statute of limitations defense, Practice Book § 10-57 "requires that matter in avoidance of a defense be affirmatively stated, as opposed to a simple denial which would put the defendant to its proof of defense." The court further observed that "[w]hile the lack of an appropriate pleading cannot be ignored, neither can it be ignored that there is no element of surprise to the defendant—at all times, the defendant has been on notice that this was an issue in the case, even if not properly pleaded . . . ." See also *Cruz* v. *Schoenhorn*, 188 Conn. App. 208, 212 n.5, A.3d (2019); cf. *Grimes* v. *Stutman*, Superior Court, judicial district of Middlesex, Docket No. CV-04-4000108-S (December 22, 2005) (plaintiff failed to properly raise continuous representation doctrine in reply to statute of limitations defense).

[8] The court noted that Schoonmaker had "passed away during the pendency of these proceeding [and] could not refute the testimony presented in court . . . ."

other aspects of the case likely were discussed but were not the primary reason for the communications. "With respect to the testimony of successor counsel relating to discussion he had with . . . Schoonmaker relating to the handling of the case, there is no affirmative evidence refuting that testimony. There is a negative inference available, however—while . . . Schoonmaker documented (in time records) his bill related conversations with the plaintiff (for which no charge was ever imposed), whatever discussions he may have had with successor counsel did not warrant any time record entries at all, with or without an associated fee for services."

The court also considered the evidence that the defendant had billed the plaintiff for services in late May, 2010, "including preparation of certain documents and legal research. The defendant did not dispute that on or about May 20, 2010, an attorney from the defendant . . . did, in fact, prepare an affidavit for use in connection [with] the marriage dissolution action (specifically in connection with a motion to open judgment), but disputed its value as probative of ongoing representation, emphasizing that it was purely factual in nature and intended for use by successor counsel."

The court noted the billing entry detailing a conversation between Schoonmaker and Tusch, Ill's attorney, that had occurred on September 1, 2010. "It reflects a conversation . . . concerning settlement. The testimony of successor counsel suggests that such a telephone call did occur—he testified that there had been problems with a payment from [Ill]; Mr. Schoonmaker said he would call [Tusch]; and payment was made shortly thereafter." Tusch testified, however, that such a telephone conversation did not occur. Ultimately, the court found that Schoonmaker did speak with Tusch on September 1, 2010, "but the purpose of the call was not to discuss anything of a substantive nature but,

rather, was likely to have been an informal call concerning a long overdue payment, sufficiently informal that . . . Tusch likely saw no need to memorialize the conversation in his time and billing records."

In November, 2010, the plaintiff sent a letter to Schoonmaker questioning some of the items contained in the defendant's invoice. Specifically, she wrote: "The second item in question which makes me suspect that there exists an error is that the invoice indicates that you have signed an affidavit on [May 20, 2010] which was signed and e-mailed to [an attorney employed by successor counsel]. On [May 20, 2010, the defendant] was no longer representing me given your January, 2010 letter to me in which you indicated that you would be retiring from your firm effective [April 1, 2010]. Your letter also indicated that you couldn't advise that other partners in your firm take on my case for the reason that so much had transpired in the case and the learning curve was too deep. As you're aware, I reacted as quickly as possible to your news and secured and retained alternate representation . . . to assume my case. [Successor counsel was] representing me in May, 2010. As a result, I am unclear as to why you would have signed an affidavit relative to my case in May, 2010 and thus, suspect a slight billing error."

The court ultimately found that the statute of limitations had not been tolled by the continuous representation doctrine. The court determined that the defendant's appearance was withdrawn by operation of law pursuant to Practice Book § 3-9[9] following the appearance

[9] Practice Book (2010) § 3-9 (a) provided: "An attorney or party whose appearance has been filed shall be deemed to have withdrawn such appearance upon failure to file a written objection within ten days after written notice has been given or mailed to such attorney or party that a new appearance has been filed in place of the appearance of such attorney or party in accordance with Section 3-8."

The current version of Practice Book § 3-9 (a) does not contain the ten day time period to file a written objection. We note that one Superior Court judge has concluded that the automatic withdrawal of an attorney provision

filed by successor counsel on March 11, 2010. It further concluded that "the representation by the defendant was not continuous but, rather, changed materially, effective no later than March 11, 2010. Effective that date, the defendant no longer was counsel of record in the pending litigation; the defendant no longer was 'the' legal advisor for the plaintiff. Instead, at most, the defendant as personified by . . . Schoonmaker was assisting successor counsel, providing advice to the plaintiff and/or new counsel. Absent an appearance in the pending litigation, it does not seem he had the ability to rectify anything, without reliance on successor counsel."

The court then specifically addressed the plaintiff's arguments regarding the applicability of the continuing representation doctrine. First, it set forth fifteen billing entries, post-March 11, 2010, on which the plaintiff had relied for the claim of continuous representation.[10] It then determined that most of these entries had "no

in the prior version of this rule of practice did not become effective until the expiration of that ten day period. See *Windels* v. *Hart Investment Properties*, Superior Court, judicial district of Fairfield, Docket No. CV-08-5019114-S (February 1, 2010) (49 Conn. L. Rptr. 354). For the purposes of this appeal, we need not address or consider the impact of the ten day provision, as it was not raised by the parties and does not affect our analysis or the outcome of this appeal.

[10] Specifically, the plaintiff had relied on the following fifteen billing items.

"1. March 26, 2010 entry for a telephone conversation with successor counsel 're: transition of file.'

"2. May 20, 2010 entry for telephone call with successor counsel, review of file, conference with 'SGY' re: affidavit and e-mail to successor counsel

"3. May 21, 2010 entry for telephone call with, and letter to, successor counsel

"4. May 24, 2010 entry for telephone message to and from successor counsel (indication of 'no charge')

"5. without a specific date, the May 31, 2010 invoice contained a billing for Westlaw research

"6. July 11, 2010 telephone conference with plaintiff 're: payment of her bill' and internal telephone conference and memo relating to status of payment (indication of 'no charge')

"7. September 1, 2010 telephone conference with attorney Tusch (counsel representing [Ill]) 're: status settlement.' (indication of 'no charge')

apparent possible 'substantive' quality" and that, during the transition from the defendant to successor counsel, "there would be some level of communication . . . ." (Citation omitted.)

The court accepted the defendant's explanation for the May, 2010 entries for fees associated with a legal research database as costs that had been incurred in the prior months. The court further found that, with respect to the fees charged to the plaintiff for the preparation of an affidavit, such charges were made in error by the defendant.[11]

With respect to Schoonmaker's interactions with successor counsel, the court determined that such conversations were informal in nature and constituted a blend

"8. October 25, 2010 telephone conference with plaintiff concerning her bill (indication of 'no charge')

"9. October 26, 2010 telephone conference with plaintiff concerning her bill (indication of 'no charge')

"10. October 27, 2010 telephone conference with plaintiff concerning her bill (indication of 'no charge')

"11. October 31, 2010 entry: 'Telephone call from [plaintiff]. She is sending a check and we are sending her the escrow money.' (indication of 'no charge')

"12. November 18, 2010 call to the plaintiff concerning her bill—'she said she would pay right away.' (indication of 'no charge')

"13. November 30, 2010 entry for receipt of payment of $17,908

"14. without a specific date, the January 31, 2011 invoice reflected a charge for 'outsourced photocopying'

"15. June 30, 2011 entry indicating 'write off' of the then existing balance of $847.22." (Footnote omitted.)

[11] The court explained: "Activity in May was shortly after there had been a transition to successor counsel by the plaintiff, and shortly after there had been the retirement from active participation in the [defendant] by . . . Schoonmaker. As reflected by the numerous time entries for telephone conferences with the plaintiff related to billing, the presumptive practice in the [defendant] was to record time entries whether or not there was an associated charge for time, so it was not unreasonable for there to have been erroneous billing (in the sense of charging for time) for the time spent on the file in May. What makes the claim of mistake persuasive is that this was not a self-serving change in position after litigation had been commenced; it was a response to the plaintiff's own letter challenging the billing, claiming it must have been a mistake in light of the cessation of representation, prior to May of 2010. And the defendant agreed, eventually writing off not only

of professional courtesy and ensuring an efficient transition from the defendant to successor counsel. Turning to the September 1, 2010 billing entry and the plaintiff's claim that Schoonmaker had engaged in settlement conversations with Tusch, the court found that this interaction "appears to have been a relatively ministerial issue of compliance with an existing settlement [specifically, the payment of money by Ill to the plaintiff] rather than working toward achieving a new settlement."

The court concluded that the defendant had met its burden of proving that its representation of the plaintiff ended on March 11, 2010, and, thus, the burden shifted to the plaintiff to establish that the continuing representation doctrine tolled the statute of limitations. It further found that the plaintiff had not proven by a preponderance of the evidence "that there had been continuous representation by [the] defendant extending to (or beyond) May 20, 2010, three years prior to the date on which a marshal was given process for serving on the intended defendants, the event which would have stopped the running of the statute of limitations under General Statutes § 52-593a. The action was not commenced within three years of the last act giving rise to the claimed legal malpractice and claimed misrepresentation, and the absence of an applicable basis for tolling requires the court to conclude that this action is barred by the statute of limitations."

On April 17, 2017, the plaintiff filed a motion to reargue pursuant to Practice Book § 11-11. She argued that the trial court had failed to take judicial notice of the appearance filed by the defendant in the appeal of the dissolution action. She claimed that the appellate appearance for that appeal, which had been filed on

the charges associated with the affidavit itself, but also the charges for [the legal research database] and also the charges for copying of the file in January of 2011."

October 23, 2008, and had not been withdrawn until June 9, 2010, should have been part of the court's consideration of her continuous representation argument. The plaintiff also requested that the court consider certain billing records that had been part of the summary judgment proceedings. The defendant filed an objection to the motion to reargue. The court denied the plaintiff's motion to reargue on April 27, 2017.[12] This appeal followed. Additional facts will be set forth as necessary.

I

The plaintiff first claims that the court misapplied the holding of our Supreme Court in *DeLeo* v. *Nusbaum*, supra, 263 Conn. 588, regarding the continuous representation doctrine and the tolling of the statute of limitations. Specifically, she argues that the court erroneously expanded the *DeLeo* rule with respect to the issue of whether the attorney-client relationship had ended. The defendant counters that the court properly interpreted and applied the principles of *DeLeo*. We agree with the defendant.

At the outset, we identify our standard of review. In *Straw Pond Associates, LLC* v. *Fitzpatrick, Mariano & Santos, P.C.*, 167 Conn. App. 691, 715, 145 A.3d 292, cert. denied, 323 Conn. 930, 150 A.3d 231 (2016), we stated that the question "of whether a party engaged in a continuing course of conduct that tolled the statute of limitations is a mixed question of law and fact." (Internal quotation marks omitted.) Under that standard of review, "we defer to any factual findings and credibility determinations made by the trial court, but we review the legal import of those findings de novo." *Jones* v. *State*, 328 Conn. 84, 101, 177 A.3d 534 (2018).

[12] The court concluded: "The plaintiff has not identified a principle of law missed or misapplied; she has not identified a misapprehension of facts; she has not identified any inconsistencies; and she has not identified any other basis on which the court should revisit its earlier decision. The motion therefore must be denied."

Our analysis begins with an examination of our Supreme Court's seminal decision in *DeLeo* in which the plaintiff filed an action against the defendants, the attorney and the law firm that previously had represented him in a dissolution action.[13] *DeLeo* v. *Nusbaum*, supra, 263 Conn. 589. He alleged that twelve acts or omissions by the defendants constituted negligence. Id., 590. The defendants filed an answer denying the plaintiff's allegations and raised a statute of limitations special defense. Id.

At the conclusion of the plaintiff's case, the defendants moved for a directed verdict, arguing that the statute of limitations barred the action. Id. With respect to the plaintiff's continuous representation doctrine claim, the trial court, operating without the benefit of any appellate authority, assumed that this doctrine was akin to the course of treatment rule in medical malpractice actions. Id., 591. The trial court determined that the attorney-client relationship had broken down irretrievably as a result of a June 22, 1993 letter the defendant sent to his wife stating: "[I]ncident[al]ly, you[r] lawyers have not only committed malpractice in handling this case but are guilty of billing fraud and [*m*]*y lawyer has not done much better*." (Emphasis added; internal quotation marks omitted.) Id., 592. Ultimately, the trial court concluded that the jury could not have found that a continuing attorney-client relationship between the parties existed three years prior to the commencement of the action sufficient to toll the statute of limitations and directed a verdict in favor of the defendants. Id., 593.

On appeal, the Supreme Court first noted that although the trial court did not have the benefit of any

[13] Our Supreme Court limited the holding of *DeLeo* to "cases in which an attorney is alleged to have committed malpractice during the course of litigation." *DeLeo* v. *Nusbaum*, supra, 263 Conn. 597 n.4.

Connecticut appellate authority adopting the continuous representation doctrine, the doctrine had "widespread support in other states." Id., 593–94. It further observed that in the interim between the trial court's decision and our Supreme Court's opinion, this court had recognized the continuous representation doctrine in *Rosenfield* v. *Rogin*, *Nassau*, *Caplan*, *Lassman & Hirtle*, *LLC*, 69 Conn. App. 151, 166, 795 A.2d 572 (2002). *DeLeo* v. *Nusbaum*, supra, 263 Conn. 594. It then endorsed seven rationales, five of which had been listed in *Rosenfield*, for adopting the continuous representation doctrine.[14] Id., 594–96. It remained mindful, however, of the purposes of statutes of limitations.[15] Id., 596. Ultimately, our Supreme Court joined "the majority of states that have adopted the continuous representation doctrine. . . . Under the rule we adopt today, a

[14] Specifically, our Supreme Court noted that (1) the continuing course of conduct and continuous treatment doctrines, both of which are similar to the continuing representation doctrine, are permitted in Connecticut, (2) requiring a client to bring a malpractice action prior to the termination of the attorney-client relationship would encourage the second-guessing of the attorney and force the client to obtain other legal opinions regarding the attorney's handling of the case, (3) a client could be forced into adopting inherently different litigation postures by both defending the attorney's actions in the appeal while also challenging those actions in a separate malpractice action, (4) the dangers of an extended time period to bring a malpractice action are lessened as a result of the memorialization of conduct in legal pleadings and hearing transcripts, (5) the doctrine prevents an attorney from postponing the inevitable event of defeat beyond the limitation period to protect against liability for his actions, (6) a client has the right to have confidence in his or her attorney's professional abilities and cannot be expected to question and assess the attorney's legal skills and (7) the doctrine furthers the goal of affording the attorney the opportunity to correct, avoid or mitigate the consequences of an apparent error. *DeLeo* v. *Nusbaum*, supra, 263 Conn. 594–96.

[15] "A statute of limitations or of repose is designed to (1) prevent the unexpected enforcement of stale and fraudulent claims by allowing persons after the lapse of a reasonable time, to plan their affairs with a reasonable degree of certainty, free from the disruptive burden of protracted and unknown potential liability, and (2) to aid in the search for truth that may be impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents or otherwise." (Internal quotation marks omitted.) *DeLeo* v. *Nusbaum*, supra, 263 Conn. 596.

plaintiff may invoke the doctrine, and thus toll the statute of limitations, when the plaintiff can show: (1) that the defendant continued to represent him with regard to the same underlying matter; *and* (2) either that the plaintiff did not know of the alleged malpractice *or* that the attorney could still mitigate the harm allegedly caused by that malpractice during the continued representation period." (Citation omitted; emphasis in original; footnotes omitted.) Id., 597.

Our Supreme Court then provided further guidance with respect to the doctrine. "With regard to the first prong, we conclude that the representation continues for the purposes of the continuous representation doctrine until either the formal or the de facto termination of the attorney-client relationship. The formal termination of the relationship occurs when the attorney is discharged by the client, the matter for which the attorney was hired comes to a conclusion, or a court grants the attorney's motion to withdraw from the representation. A de facto termination occurs if the client takes a step that unequivocally indicates that he has ceased relying on his attorney's professional judgment in protecting his legal interests, such as hiring a second attorney to consider a possible malpractice claim or filing a grievance against the attorney. Once such a step has been taken, representation may not be said to continue for purposes of the continuous representation doctrine. A client who has taken such a concrete step may not invoke this doctrine, because such actions clearly indicate that the client no longer is relying on his attorney's professional judgment but instead intentionally has adopted a clearly adversarial relationship toward the attorney. Thus, once *such a step has been taken*, representation does not continue for purposes of the continuous representation doctrine." (Emphasis added; footnotes omitted.) Id., 597–98.

The court emphasized the need for a clear standard for determining when an attorney-client relationship ends by way of formal or de facto termination and, thus, rejected the factor based approach that the trial court had employed. Id., 598–99. Under the facts of *DeLeo*, our Supreme Court concluded that there had not been a termination of the attorney-client relationship. Specifically, it determined that the letter from the plaintiff to his wife, stating that "you[r] lawyers have not only committed malpractice in handling this case but are guilty of billing fraud, and [m]y lawyer has not done much better" did not rise to the level of an unequivocal indication that the plaintiff had ceased relying on his attorney's professional judgment in protecting his legal interests. (Internal quotation marks omitted.) Id., 600. It then reversed the judgment and remanded the case for consideration of the second prong of the continuous representation doctrine and whether the plaintiff's action was barred by the statute of limitations. Id., 600–601.

*DeLeo* clearly established that the continuous representation doctrine does not apply following the termination of the attorney-client relationship. Id., 597, 599; see also *Straw Pond Associates, LLC* v. *Fitzpatrick, Mariano & Santos, P.C.*, supra, 167 Conn. App. 719. The plaintiff argues that the specific methods listed in *DeLeo* constitute the only valid methods to terminate an attorney-client relationship in establishing the first prong of the continuous representation doctrine. The plaintiff reads *DeLeo* too narrowly. As our Supreme Court established, the first prong of the continuous representation doctrine is whether the attorney continued to represent the plaintiff with regard to the same underlying matter. Id., 597. The court then identified the two types of termination, formal and de facto. Id. It did not, however, limit the methods to effectuate the termination of the representation to the few examples

provided. Instead, our Supreme Court instructed that the key issue is whether, under a formal or de facto termination, the relationship between the attorney and client had ended. Id., 600.

In the present case, Schoonmaker, by a January, 2010 letter, notified the plaintiff of his intention to retire from the practice of law, effective April 1, 2010. On March 11, 2010, successor counsel filed an in lieu of appearance on behalf of the plaintiff pursuant to Practice Book § 3-8.[16] Pursuant to our rules of practice, the appearance of the defendant was deemed to have been withdrawn. See Practice Book (2010) § 3-9 (a). One Superior Court judge has concluded that the filing of an in lieu of appearance by another law firm acts to terminate the attorney-client relationship for the purposes of the continuous representation doctrine. In *Windels* v. *Hart Investment Properties*, Superior Court, judicial district of Fairfield, Docket No. CV-08-5019114-S (February 1, 2010) (49 Conn. L. Rptr. 354), the defendant attorney moved for summary judgment on the basis of the statute of limitations. He argued that the filing of an in lieu of appearance by another law firm "operated as a withdrawal" of his appearance. The court, *Arnold*, *J.*, agreed, concluding that the defendant's appearance was deemed withdrawn by operation of Practice Book §§ 3-8 and 3-9. Id. We find *Windels* persuasive.

We find additional support for our conclusion in the authors' commentary in the Connecticut Practice

[16] Practice Book (2010) § 3-8 provided in relevant part: "Whenever an attorney files an appearance for a party . . . and there is already an appearance of an attorney . . . on file for that party, the attorney . . . filing the new appearance shall state thereon whether such an appearance is in place of or in addition to the appearance or appearances already on file. . . . Unless a written objection is filed within ten days after the filing of an in-lieu-of appearance, the appearance or appearances to be replaced by the new appearance shall be deemed to have been withdrawn . . . ."

Series: Connecticut Superior Court Civil Rules. Specifically, the commentary to § 3-9 recognized that "[i]f new counsel has appeared in lieu of the initial counsel, a motion to withdraw is not required." W. Horton et al., 1 Connecticut Practice Series: Connecticut Superior Court Civil Rules (2017–2018 Ed.) § 3-9, authors' comments, p. 369.[17]

In addition to the precepts of *DeLeo*, the plain language of the relevant rules of practice, the reasoning in *Windels*, and the authors' commentary in the Connecticut Practice Series guide our conclusion that the attorney-client relationship between the plaintiff and the defendant had ended in March, 2010. This result is further buttressed by the trial court's finding that Schoonmaker had informed the plaintiff of his plan to retire from the practice of law, effective April 1, 2010. He confirmed his intention by letter to the plaintiff dated January 13, 2010. The plaintiff subsequently sent Schoonmaker a letter in November, 2010, in which she questioned a May 20, 2010 billing entry. Specifically, she wrote: "*On* [*May 20, 2010, the defendant*] *was no longer representing me*, given your January, 2010 letter to me . . . . Your letter also indicated that you couldn't advise that other partners in your firm take on my case for the reason that so much had transpired in the case and the learning curve was too deep. As you're aware, I reacted as quickly as possible to your news and secured and *retained alternate representation*—[successor counsel]—to assume my case. [*Successor counsel was*] *representing me in May 2010*." (Emphasis added.)

[17] This commentary also notes that "[e]ffective January 1, 2017, a new appearance that is filed in lieu of an existing appearance is immediate. The amendment eliminates a prior 10-day delay for the filing of objections." W. Horton et al., 1 Connecticut Practice Series: Connecticut Superior Court Civil Rules, (2017–2018 Ed.) § 3-9, authors' comments, p. 369; see footnote 9 of this opinion.

We agree with the conclusion of the trial court that the events of this case implicate aspects of both a formal and a de facto termination in applying the continuous representation doctrine. The filing of the in lieu of appearance by successor counsel signified the termination of the defendant's representation of the plaintiff. Moreover, the plaintiff acknowledged the end of this attorney-client relationship, as evidenced by her November, 2010 letter to Schoonmaker questioning certain charges on her bill and specifically noting that the defendant no longer represented her. The letter also demonstrates that the plaintiff had hired successor counsel and no longer relied on the professional judgment of the defendant's attorneys to protect her legal interests. In short, we agree with the trial court that the evidence established that the attorney-client relationship between the plaintiff and the defendant terminated in March, 2010, thereby precluding the tolling of the statute of limitations through the doctrine of continuous representation after that date.[18] As the plaintiff failed to commence her action within three years from that date, we conclude that the court properly determined that her action was barred by the statute of limitations.

[18] We are mindful of our Supreme Court's explicit directive for "clear legal standards" in applying the continuous representation doctrine. *DeLeo* v. *Nusbaum*, supra, 263 Conn. 596. "Both legislative policy and the interests of justice are furthered by the elimination of unnecessary uncertainty regarding the date upon which plaintiffs' claims are barred by the statute of limitations. In the absence of a clear standard, a plaintiff's reasonable understanding of the facts that determine the tolling period may result in the expiration of his claim if a fact finder subsequently disagrees and determines that the tolling period ended earlier than the plaintiff had supposed. A plaintiff who is uncertain as to whether the doctrine applies likely will feel compelled to institute an action against his attorney, for fear that a court or a jury ultimately will conclude that the statute is not tolled. In such a situation, one of the primary purposes of the doctrine, fostering and preserving the attorney-client relationship, will be compromised." Id.

Although the factual circumstances of the present case were not specifically mentioned in *DeLeo*, our analysis and conclusion encompass the crucial question of whether the defendant's representation of the plaintiff had ended in March, 2010.

II

The plaintiff next claims that the court improperly denied her motion to reargue, filed pursuant to Practice Book § 11-11. Specifically, she argues that the court erred in failing to take judicial notice of the defendant's appearance in the appeal in the dissolution action. The defendant counters that the court properly denied the motion to reargue, as the plaintiff "was improperly using the vehicle of a motion to reargue in an attempt to reopen the trial record and admit new evidence [that] the [p]laintiff could have offered during the trial but did not." We agree with the defendant.

The following additional facts inform the resolution of this claim. On April 17, 2017, the plaintiff filed a motion to reargue, claiming that the trial court's memorandum of decision had failed to "take into account a crucial piece of factual evidence from the [c]ourt's own records, which the [c]ourt could have taken judicial notice of when making [its] decision." The plaintiff pointed to the fact that the defendant had an appearance in the appeal taken by Ill from the dissolution judgment. She further contended that this evidence established that the defendant's representation had not ended in March, 2010, but, rather, continued until June 9, 2010, the date the appeal was withdrawn, and, therefore, she had commenced her action within the three year statute of limitations.

In its objection, filed April 27, 2017, the defendant argued that the plaintiff had not requested the trial court to take judicial notice of the appearance in the dissolution appeal. It further contended that the plaintiff's efforts amounted to nothing more than "an attempt to get a second bite of the apple." In denying the plaintiff's motion, the court, inter alia, agreed with the defendant that a motion to reargue did not afford a party the opportunity to "augment the record after receiving an

unfavorable result on the record as presented during the trial."

We begin by setting forth our standard of review and the relevant legal principles. "The standard of review for a court's denial of a motion to reargue is abuse of discretion. . . . As with any discretionary action of the trial court . . . the ultimate [question for appellate review] is whether the trial court could have reasonably concluded as it did. . . . The purpose of a reargument is . . . to demonstrate to the court that there is some decision or some principle of law which would have a controlling effect, and which has been overlooked, or that there has been a misapprehension of facts. . . . It also may be used to address . . . claims of law that the [movant] claimed were not addressed by the court. . . . [*A*] *motion to reargue* [*however*] *is not to be used as an opportunity to have a second bite of the apple* . . . ." (Emphasis added; internal quotation marks omitted.) *Seaport Capital Partners, LLC* v. *Speer*, 177 Conn. App. 1, 16–17, 171 A.3d 472 (2017); see also *Hudson Valley Bank* v. *Kissel*, 303 Conn. 614, 624, 35 A.3d 260 (2012).

Here, the plaintiff claimed that the court erred in failing to take judicial notice of the defendant's automatic appearance[19] in the dissolution appeal. The plaintiff, however, failed to raise this matter during the trial and, instead, brought it to the court's attention, for the first time, after a decision had been rendered. Thus, she did not identify a principle of law or fact that the court had been presented with *at trial*. Instead, she sought a second opportunity to litigate her claim regarding the applicability of the continuous representation doctrine. In such circumstances, we decline to conclude that the court abused its discretion in denying the

[19] See Practice Book § 62-8 ("[c]ounsel of record for all parties appearing in the trial court at the time of the appellate filing shall be deemed to have appeared in the appeal").

motion to reargue. See *Mengwall* v. *Rutkowski*, 152 Conn. App. 459, 466, 102 A.3d 710 (2014) (trial court did not abuse discretion denying motion to reargue where movant offered only arguments available at time of original argument on motion to dismiss); *Fortin* v. *Hartford Underwriters Ins. Co.*, 139 Conn. App. 826, 843–44, 59 A.3d 247 (court properly denied motion to reargue where movant had presented numerous exhibits to court for first time even though exhibits previously had been available to the movant at trial and thus were not newly discovered evidence), cert. granted on other grounds, 308 Conn. 905, 61 A.3d 1098 (2013) (appeal withdrawn November 26, 2014); see, e.g., *Lynch* v. *Lynch*, 153 Conn. App. 208, 244–45, 100 A.3d 968 (2014) (no abuse of discretion in denying motion to reargue where movant did not ask court to consider overlooked legal authority or claim or to reconsider misapprehended fact but, instead, sought reevaluation of facts), cert. denied, 315 Conn. 923, 108 A.3d 1124, cert. denied, U.S. , 136 S. Ct. 68, 193 L. Ed. 2d 66 (2015). Accordingly, we conclude that the court did not abuse its discretion in denying the plaintiff's motion to reargue.

The judgment is affirmed.

In this opinion the other judges concurred.

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## THE BANK OF NEW YORK MELLON, TRUSTEE *v.* WILLIAM J. RUTTKAMP ET AL. (AC 40039)

Lavine, Alvord and Moll, Js.

*Syllabus*

The plaintiff bank, as trustee, sought to foreclose on a mortgage on certain real property of the defendants W and S. Prior to trial, W was defaulted for failure to plead and the defendant H Co. was defaulted for failure to disclose a defense. After the plaintiff filed a motion for summary

judgment directed to S as to liability only, S filed an answer and special defenses, alleging that the plaintiff lacked standing because it did not exist under its stated name, as well as a one count counterclaim alleging a violation of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.), due to the plaintiff's refusal to release a notice of lis pendens on the subject property following the court's earlier dismissal of the action. Thereafter, the plaintiff filed a motion for summary judgment as to S's counterclaim, which the trial court granted. Subsequently, the court granted the plaintiff's motion for summary judgment directed to S as to liability only. Thereafter, the court granted the plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon, from which S appealed to this court. *Held* that S could not prevail on her claim that the trial court lacked subject matter jurisdiction due to the plaintiff's lack of standing, which was based on her claim that the plaintiff brought this action under its corporate brand name and, thus, did not have the legal capacity to sue: given that S's counsel acknowledged, at oral argument before this court, that he could not refute certain evidence presented by the plaintiff demonstrating that it was a New York corporation under its stated name, S effectively abandoned her claim concerning the plaintiff's alleged lack of standing, and the record showed that the plaintiff is a legal entity with legal capacity to sue; moreover, S's claim that the trial court improperly rendered summary judgment in favor of the plaintiff on S's counterclaim was not reviewable, S having failed to brief the claim adequately.

Argued December 11, 2018—officially released March 12, 2019

*Procedural History*

Action to foreclose a mortgage on certain real property owned by the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Middlesex, where the named defendant was defaulted for failure to plead; thereafter, the defendant HOP Energy, LLC, was defaulted for failure to disclose a defense; subsequently, the court, *Morgan*, *J.*, dismissed the action for lack of subject matter jurisdiction; thereafter, the court granted the plaintiff's motion to open the judgment; subsequently, the defendant Shlomit Ruttkamp filed a counterclaim; thereafter, the court, *Domnarski*, *J.*, granted the plaintiff's motion for summary judgment as to the defendant Shlomit Ruttkamp's counterclaim; subsequently, the court, *Aurigemma*, *J.*, granted the plaintiff's motion for summary judgment as

to liability; thereafter, the court, *Aurigemma, J.*, granted the plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon, from which the defendant Shlomit Ruttkamp appealed to this court. *Affirmed.*

*John R. Williams*, for the appellant (defendant Shlomit Ruttkamp).

*Benjamin T. Staskiewicz*, for the appellee (plaintiff).

*Opinion*

MOLL, J. The defendant, Shlomit Ruttkamp,[1] appeals from the judgment of strict foreclosure rendered by the trial court in favor of the plaintiff and counterclaim defendant, The Bank of New York Mellon formerly known as The Bank of New York, as Trustee on Behalf of CIT Mortgage Loan Trust 2007-1. On appeal, the defendant claims that the trial court (1) lacked subject matter jurisdiction because of the plaintiff's alleged lack of standing and (2) improperly rendered summary judgment in favor of the plaintiff on the defendant's counterclaim, which alleged that the plaintiff wrongfully failed to release the notice of lis pendens it had recorded on the land records of the subject property. We affirm the judgment of strict foreclosure.

The following facts and procedural history are relevant to this appeal. On December 14, 2006, William J. Ruttkamp executed a promissory note, pursuant to which he promised to pay to the order of Accredited Home Lenders, Inc. (Accredited), the principal sum of $333,000. The note was secured by a mortgage, executed by William J. Ruttkamp and the defendant, on real

[1] William J. Ruttkamp and HOP Energy, LLC, d/b/a Valley Oil, were also named as defendants, but they were defaulted, for failure to plead and failure to disclose a defense, respectively, and are not participating in this appeal. Accordingly, in this opinion we refer to Shlomit Ruttkamp as the defendant unless otherwise noted.

property located at 510 McVeagh Road in Westbrook, in favor of Mortgage Electronic Registration, Inc., as nominee for Accredited. The note and mortgage were ultimately assigned to the plaintiff by virtue of an assignment dated December 30, 2009, and recorded on January 12, 2010. Beginning on August 1, 2009, and every month thereafter, William J. Ruttkamp failed to make monthly payments due pursuant to the note. As a result, the plaintiff commenced this foreclosure action in February, 2010. The initial complaint alleged that the plaintiff was a Delaware corporation. On April 26, 2010, the defendant filed a motion to dismiss for lack of subject matter jurisdiction, claiming that the plaintiff brought the action in its trade name only. On November 8, 2010, the court denied the motion to dismiss, reasoning that there was no evidence before it that the plaintiff's name was a trade name.

On May 6, 2011, the plaintiff filed a motion for summary judgment directed to the defendant as to liability only. In its memorandum of law in support thereof, the plaintiff stated: "The Bank of New York Mellon is the corporate brand of The Bank of New York Mellon Corporation and may also be used as a generic term to reference the corporation as a whole or its various subsidiaries." On October 26, 2011, the defendant filed an answer and special defenses, as well as an objection and memorandum of law in opposition to the plaintiff's motion for summary judgment. In both filings, the defendant claimed that the plaintiff lacked standing because, although the plaintiff alleged in its complaint that "it is a corporation duly authorized and validly existing under the laws of the State of Delaware," the Delaware Division of Corporations had no record of registration for any entity known as "The Bank of New York Mellon," while having a record of registration for an entity known as "The Bank of New York Mellon Corporation." On February 27, 2012, the court denied

the plaintiff's motion for summary judgment and concluded that, because the plaintiff brought this action under its corporate brand name and a brand name has no legal capacity to sue, the plaintiff had no standing. Thus, the court concluded that it lacked subject matter jurisdiction and dismissed the action.

On June 26, 2012, the plaintiff filed a motion to open the judgment of dismissal, stating that it had mistakenly represented in its memorandum of law in support of its motion for summary judgment that "The Bank of New York Mellon is . . . the corporate brand of The Bank of New York Mellon Corporation . . . ." The plaintiff claimed, rather, that it was a corporation organized by a special act of the New York state legislature and had been renamed "The Bank of New York Mellon." On July 30, 2012, over the defendant's objection, the court granted the plaintiff's motion to open the judgment of dismissal.

On September 26, 2012, the plaintiff filed a request for leave to file an amended complaint, in which it averred that it is a "corporation organized by special act of the New York state legislature . . . now known as The Bank of New York Mellon . . . ." On October 23, 2012, the court overruled the defendant's objection to the plaintiff's request for leave to amend. Meanwhile, on October 5, 2012, the defendant filed a motion to dismiss for lack of subject matter jurisdiction, contending that the plaintiff brought the action in its trade name and that there is no New York corporation named "The Bank of New York Mellon." On October 31, 2012, the court denied the defendant's motion to dismiss.

On August 22, 2014, the plaintiff filed a request for leave to file a second amended complaint, in which it averred that the plaintiff is "a corporation duly authorized and validly existing under the laws of the State of New York." On September 29, 2014, the court overruled

the defendant's objection thereto. On October 14, 2014, the defendant filed another motion to dismiss, again claiming that there is no New York corporation named "The Bank of New York Mellon" and that, therefore, the action should be dismissed on the basis of the plaintiff's lack of standing. On November 19, 2014, the plaintiff filed an objection to the defendant's motion to dismiss and attached a certification from the New York Banking Department certifying that the plaintiff is a corporation organized and operating under New York law. On December 1, 2014, the court denied the defendant's motion to dismiss.

On January 7, 2015, the plaintiff filed a motion for summary judgment directed to the defendant as to liability only.[2] On January 21, 2015, the defendant filed an answer and special defenses, in which the defendant, inter alia, persisted in her claim that the plaintiff does not exist under its stated name and, therefore, lacks standing. In addition, on January 26, 2015, the defendant filed a one count counterclaim, alleging a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., on the basis of the plaintiff's alleged refusal to file a release of the notice of lis pendens[3] on the subject property following the court's dismissal of the action on February 27, 2012.[4] On March 27, 2015, the plaintiff filed a motion for summary judgment as to the defendant's counterclaim, arguing that the lis pendens remained valid because the February 27, 2012 judgment of dismissal was vacated and, therefore, the plaintiff had no duty to release the lis

[2] The plaintiff also directed its motion to William J. Ruttkamp as to liability only; on February 8, 2016, the court granted the motion as to William J. Ruttkamp.

[3] The plaintiff alleged that, on or about February 24, 2010, the plaintiff recorded a notice of lis pendens in Volume 300 at Page 1011 of the Westbrook Land Records with respect to the subject property.

[4] The counterclaim does not cite any statutory authority other than CUTPA.

pendens. On April 21, 2015, the court granted the plaintiff's motion for summary judgment as to the defendant's counterclaim. The court reasoned that "[t]here is no genuine issue of fact raised in the counterclaim. . . . The lis pendens remained in effect after [the] dismissal since it was possible to open the dismissal within four months of its entry. In fact, the dismissal was set aside. For this reason there was no final decree. See *Lee* v. *Duncan*, 88 Conn. App. 319, [870 A.2d 1, cert. denied, 274 Conn. 902, 876 A.2d 12] (2005)."

On September 23, 2015, the defendant filed a memorandum of law in opposition to the plaintiff's January 7, 2015 motion for summary judgment. The defendant claimed that because the plaintiff did not offer any evidence to refute the defendant's special defenses, which included her challenge to the plaintiff's standing, the plaintiff's motion for summary judgment should be denied. On May 2, 2016, the court ultimately granted the plaintiff's motion for summary judgment directed to the defendant as to liability only. On December 23, 2016, the plaintiff moved for a judgment of strict foreclosure, which the court granted on January 9, 2017. This appeal followed.

The defendant first claims that the trial court lacked subject matter jurisdiction on the basis of the plaintiff's lack of standing. Specifically, the defendant claims that the plaintiff brought this action under its corporate brand name and, therefore, did not have the legal capacity to sue. The plaintiff, however, directs this court's attention to a certification from the New York Banking Department that the Bank of New York Mellon is a corporation organized under the laws of New York.[5] During oral argument before this court, the defendant's counsel acknowledged that he could not refute the

[5] Notably, such certification is the same document attached to the plaintiff's objection to the defendant's October 14, 2014 motion to dismiss.

plaintiff's evidence that it was a New York corporation under its stated name. Accordingly, the defendant effectively abandoned her claim that the court lacked subject matter jurisdiction on the basis of the plaintiff's purported lack of standing, and, after our review of the record, we conclude that the plaintiff is a legal entity with legal capacity to sue.

The defendant next claims that the court improperly rendered summary judgment in favor of the plaintiff on the defendant's counterclaim. Specifically, the defendant claims that the court's rendering of summary judgment was incorrect, as a matter of law, because the court's February 27, 2012 dismissal for lack of subject matter jurisdiction was a final judgment from which no appeal was taken and, as a result, the plaintiff should have released the lis pendens. We decline to review this claim. The defendant's argument in support of this claim, in her brief before this court, comprises only three sentences. The defendant argues conclusorily that the court's ruling was incorrect and that a lis pendens must be released, as a matter of law, solely by virtue of the fact that an action has reached final judgment and no appeal has been taken. The defendant does not address the statutory provisions governing notices of lis pendens or their discharges. See General Statutes §§ 49-8 and 52-325 through 52-326. The defendant also does not cite any authority to support her implicit proposition that a duty to release a lis pendens exists independent of our General Statutes. In short, the defendant's claim is inadequately briefed, and, thus, we decline to review it. See *Pryor* v. *Pryor*, 162 Conn. App. 451, 458, 133 A.3d 463 (2016).

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

In this opinion the other judges concurred.

# JOSEPHINE MILLER *v.* BOARD OF EDUCATION OF THE CITY OF BRIDGEPORT ET AL.
## (AC 40333)

Elgo, Bright and Moll, Js.

*Syllabus*

The plaintiff brought this action in May, 2015, against the defendants alleging claims for quantum meruit and unjust enrichment related to the payment for certain legal services she allegedly had provided. The plaintiff had brought an action alleging similar claims in 2010, which was dismissed by the trial court. This court affirmed that dismissal in October, 2013. During the pendency of the 2010 action, the plaintiff brought an action in 2012 alleging race discrimination claims, which was removed to federal court and dismissed. The plaintiff's appeal in that action was dismissed in October, 2014. The trial court granted the defendants' motion to dismiss the present action, concluding, inter alia, that the plaintiff could not avail herself of the accidental failure of suit statute (§ 52-592 [a]), which requires a new action for the same cause to be commenced within one year after the determination of the original action, because she had failed to commence the present action within one year after the determination of the 2010 action, which was the original action for purposes of § 52-592 (a). On the plaintiff's appeal to this court, *held* that the trial court properly granted the defendants' motion to dismiss the present action as untimely, the plaintiff having failed to file this action within the one year savings period: the 2010 action, in which the plaintiff raised claims sounding in quantum meruit and unjust enrichment like in the present action, was the original action for purposes of § 52-592, and the 2012 action, in which the plaintiff asserted race discrimination under a federal statute, was not for the same cause as the present action and, thus, its disposition had no bearing on the timeliness of the present action; accordingly, to take advantage of § 52-592, the plaintiff would have had to commence the present action within one year after the determination of the 2010 action, the dismissal of which this court affirmed on appeal in October, 2013, and because the plaintiff commenced the present action in May, 2015, which was outside the one year period, she could not take advantage of the savings statute.

Argued December 10, 2018—officially released March 12, 2019

*Procedural History*

Action to recover damages for, inter alia, quantum meruit, and for other relief, brought to the Superior

Court in the judicial district of Danbury, where the court, *Shaban*, *J.*, granted the plaintiff's motion to cite in the City of Bridgeport as a defendant; thereafter, the court, *Truglia*, *J.*, granted the defendants' motion to dismiss and rendered judgment thereon; subsequently, the court granted the defendants' motion to correct and issued a corrected memorandum of decision, and the plaintiff appealed to this court. *Affirmed.*

*Josephine S. Miller*, self-represented, the appellant (plaintiff).

*John P. Bohannon*, deputy city attorney, for the appellees (defendants).

*Opinion*

PER CURIAM. The plaintiff, Josephine Miller, appeals from the judgment rendered by the trial court following its granting of the motion to dismiss filed by the defendants, the Board of Education of the City of Bridgeport (board), Mark Anastasi, and the City of Bridgeport (city).[1] On appeal, the plaintiff claims that the trial court erred in dismissing the action as untimely because it was saved by the accidental failure of suit statute, General Statutes § 52-592 (a),[2] and, therefore, should have been allowed to proceed. We disagree and, accordingly, affirm the judgment of the trial court.

[1] For purposes of clarity, we refer to the board, Anastasi, and the city collectively as the defendants, and individually by name.

[2] 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 . . . 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 following facts and procedural history are relevant to this appeal. On June 23, 2010, the plaintiff, representing herself, commenced an action in the Superior Court seeking payment from the board for legal services she allegedly provided in 2010 to Andrew Cimmino, a defendant in an action brought in federal court; see *Lyddy* v. *Cimmino*, United States District Court, Docket No. 3:06CV01420 (CFD) (D. Conn.); whom the plaintiff alleged was entitled to a defense and indemnification by the board pursuant to General Statutes § 7-101a (a).[3] See *Miller* v. *Board of Education*, Superior Court, judicial district of Fairfield, Docket No. CV-10-6011406-S (2010 action). The claims raised by the plaintiff in the 2010 action sounded in quantum meruit and unjust enrichment. On July 10, 2012, the court dismissed the 2010 action on the basis of the plaintiff's failure to appear at trial. On July 24, 2012, the plaintiff filed a timely motion for reconsideration of the judgment of dismissal. On November 19, 2012, the trial court denied the plaintiff's motion for reconsideration. On December 10, 2012, the plaintiff appealed from the judgment of dismissal to this court, which affirmed the judgment on October 1, 2013. See *Miller* v. *Board of Education*, 146 Conn. App. 901, 75 A.3d 98 (2013) (per curiam).

Meanwhile, on August 6, 2012, while the plaintiff's motion for reconsideration in the 2010 action was pending, the plaintiff, representing herself, commenced another action in the Superior Court. See *Miller* v. *Board of Education*, Superior Court, judicial district of Danbury, Docket No. CV-12-6010257-S (2012 action). In

[3] General Statutes § 7-101a (a) provides in relevant part: "Each municipality shall protect and save harmless any municipal officer, whether elected or appointed, of any board, committee, council, agency or commission . . . or any municipal employee, of such municipality from financial loss and expense, including legal fees and costs, if any, arising out of any claim, demand, suit or judgment by reason of alleged negligence, or for alleged infringement of any person's civil rights, on the part of such officer of such employee while acting in the discharge of his duties."

the 2012 action, the plaintiff asserted race discrimination claims against the board and Anastasi, the city attorney, in his official and individual capacities, pursuant to 42 U.S.C. § 1981. The plaintiff did not raise, however, a claim of quantum meruit or unjust enrichment in the 2012 action and did not purport to file the 2012 action pursuant to § 52-592. On August 31, 2012, the board filed a notice of removal of the 2012 action to the United States District Court for the District of Connecticut. On July 30, 2014, the federal District Court ordered, among other things, that the 2012 action be dismissed with prejudice as a sanction pursuant to rule 11 of the Federal Rules of Civil Procedure for the plaintiff's knowingly making false allegations in the complaint. See *Miller* v. *Board of Education*, United States District Court, Docket No. 3:12CV01287 (JAM) (D. Conn. July 30, 2014). On September 27, 2014, the plaintiff filed a notice of appeal to the United States Court of Appeals for the Second Circuit. On December 10, 2014, the Second Circuit issued a mandate dismissing the plaintiff's appeal, effective October 29, 2014.

On May 6, 2015, the plaintiff commenced the present action against the board and Anastasi in his official and individual capacities, asserting claims sounding in quantum meruit and unjust enrichment. On August 17, 2015, after obtaining the court's permission, the plaintiff filed an amended complaint, which added the city as a defendant. On November 16, 2015, the defendants filed an answer and special defenses. On November 18, 2016, the defendants filed a motion to dismiss asserting, inter alia, that the present action was commenced beyond the one year savings provision of § 52-592 (a). On April 7, 2017, the trial court granted the defendants' motion to dismiss, concluding that (1) the plaintiff could not avail herself of § 52-592 (a) because the dismissal of the 2010 action resulted from the plaintiff's lack of diligence and her failure to appear at trial, and not one

of the grounds set forth in the statute to render it a qualifying failed action; and (2) even if the plaintiff could avail herself of § 52-592 (a), the plaintiff had failed to commence the present action within one year after the determination of the 2010 action, which was the original action for purposes of § 52-592 (a).[4] This appeal followed.

"We first set forth our standard of review governing motions to dismiss. Our standard of review of a trial court's findings of fact and conclusions of law in connection with a motion to dismiss is well settled. A finding of fact will not be disturbed unless it is clearly erroneous. . . . [W]here the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts . . . . Thus, our review of the trial court's ultimate legal conclusion and resulting [granting] of the motion to dismiss will be de novo. . . . A motion to dismiss admits all facts well pleaded and invokes any record that accompanies the motion, including supporting affidavits that contain undisputed facts." (Footnote omitted; internal quotation marks omitted.) *Stevenson* v. *Peerless Industries, Inc.*, 72 Conn. App. 601, 606, 806 A.2d 567 (2002).[5]

On appeal, the plaintiff claims that the trial court erroneously dismissed the present action as untimely. Specifically, she argues: (1) the court improperly concluded that § 52-592 (a) was not available to her based

[4] On April 10, 2017, the court issued a corrected memorandum of decision to correct a scrivener's error.

[5] "[A]lthough a motion to dismiss may not be the appropriate procedural vehicle for asserting that an action is not saved by . . . § 52-592, our Supreme Court has held that a court properly may consider a motion to dismiss in such circumstances when the plaintiff does not object to the use of the motion to dismiss." *Stevenson* v. *Peerless Industries, Inc.*, supra, 72 Conn. App. 606 n.6. In the present case, because the plaintiff did not object to the use of a motion to dismiss, the court properly decided the motion on the merits.

on its finding that the 2010 action was dismissed as a result of her lack of diligence and her failure to appear at trial; and (2) the court improperly concluded that, even if § 52-592 (a) were available to her, she failed to commence the present action within the one year savings period.[6] We conclude that, even if we assume, arguendo, that the plaintiff could avail herself of § 52-592 (a), she failed to commence the present action within the one year savings period.[7]

Section 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 . . . for

[6] In her appellate brief, the plaintiff also argues that the trial court failed to articulate its decision with respect to a constitutional argument that she raised. After filing this appeal, the plaintiff filed a motion for articulation, which the trial court denied. The plaintiff did not file a motion for review of the denial of her motion for articulation. To the extent that the plaintiff asserts that the court erred in denying her motion for articulation, we decline to review this claim. Pursuant to Practice Book § 66-5, "[t]he sole remedy of any party desiring the court having appellate jurisdiction to review the trial court's decision on the motion [for articulation] filed pursuant to this section . . . shall be by motion for review under Section 66-7." Thus, the plaintiff's "pursuit of review and remedy through appeal is . . . inappropriate." *Macellaio* v. *Newington Police Dept.*, 145 Conn. App. 426, 437–38, 75 A.3d 78 (2013).

[7] Because we disagree with the plaintiff's second argument, we need not address the merits of the plaintiff's first argument. In addition, as an alternative ground for affirmance, the defendants argue that the plaintiff lacks standing to bring a direct claim for indemnification under General Statutes § 7-101a against a municipality. We note that, although the defendants frame their argument as one of standing, the plaintiff did not assert a statutory claim under § 7-101a. Rather, her claims sound in quantum meruit and unjust enrichment, while relying on allegations that Cimmino was entitled to a defense and indemnity by the board pursuant to § 7-101a. On the basis of the record before us, we cannot conclude that the plaintiff lacked standing to assert the claims that she raised.

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." (Emphasis added.) "[U]nder the provisions of § 52-592 (a) 'original action' means the first action filed within the time allowed by the applicable statute of limitations." *Pintavalle* v. *Valkanos*, 216 Conn. 412, 419, 581 A.2d 1050 (1990). Section 52-592 (c) provides: "If an appeal is had from any such judgment to the Supreme Court or Appellate Court, the time the case is pending upon appeal shall be excluded in computing the time as above limited."

Here, the 2010 action, in which the plaintiff raised claims sounding in quantum meruit and unjust enrichment, is the "original action." The 2012 action, in which the plaintiff asserted race discrimination claims pursuant to 42 U.S.C. § 1981, was not for the "same cause" as the present action, in which the plaintiff again asserted claims sounding in quantum meruit and unjust enrichment, and, thus, the disposition of the 2012 action has no bearing on the timeliness of the present action under § 52-592 (a). See *Peabody N.E., Inc.* v. *Dept. of Transportation*, 250 Conn. 105, 118, 735 A.2d 782 (1999) (concluding that subsequent action in which plaintiff "relies upon the same facts, makes the same allegations, and seeks the same relief" is action for same cause).[8] Thus, to take advantage of § 52-592 (a), the plaintiff would

[8] The plaintiff argues that this court should overrule our Supreme Court's decisions in *Peabody N.E., Inc.* v. *Dept. of Transportation*, supra, 250 Conn. 105, and *Pintavalle* v. *Valkanos*, supra, 216 Conn. 412. "It is axiomatic that . . . this court [is] without authority to overrule the decisions of our Supreme Court." *West Hartford* v. *Murtha Cullina, LLP*, 85 Conn. App. 15, 24, 857 A.2d 354, cert. denied, 272 Conn. 907, 863 A.2d 700 (2004).

have had to commence the present action within one year after the "determination" of the 2010 action.

On December 10, 2012, after the trial court had denied her motion for reconsideration on November 19, 2012, the plaintiff appealed from the July 10, 2012 judgment dismissing the 2010 action, which this court affirmed on October 1, 2013. Excluding the time that the 2010 action was pending upon appeal; see § 52-592 (c); we conclude that the one year savings period under § 52-592 (a) expired in 2014.[9] Having commenced the present action in May, 2015, the plaintiff could not take advantage of the savings statute. Accordingly, we conclude that the court properly granted the defendants' motion to dismiss the present action as untimely and rendered judgment thereon.

The judgment is affirmed.

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## USSBASY GARCIA *v.* ROBERT COHEN ET AL. (AC 41079)

Lavine, Prescott and Bishop, Js.

*Syllabus*

The plaintiff tenant sought to recover damages from the defendants for negligence in connection with personal injuries she suffered when she fell on the rear exterior stairs of certain premises owned by the defendants. After the plaintiff submitted to the trial court a request to charge the jury and proposed jury interrogatories, the court declined to use the proposed charge and did not submit the interrogatories to the jury,

[9] In dismissing the present action, the trial court concluded that the one year savings period of § 52-592 (a) began to run on October 1, 2013, when this court affirmed the judgment dismissing the 2010 action. Thus, the court implicitly concluded that the savings period expired on October 1, 2014. We note that § 52-592 (c) provides that "the time the case is pending upon appeal shall be excluded in computing" the savings period, suggesting that the time between the entry of judgment and the filing of an appeal is included in such computation. Given that the parties have not addressed the effect of § 52-592 (c), and given that the present action is not saved pursuant to § 52-592 (a) regardless of whether the savings period expired on October 1, 2014, or some time prior thereto, we do not address the propriety of the court's conclusion that the savings period commenced on October 1, 2013.

which returned a general verdict for the defendants. The court rendered judgment in accordance with the verdict, from which the plaintiff appealed to this court. She claimed that the trial court improperly rejected her request to charge and failed to instruct the jury that the possessor of real property has a nondelegable duty to maintain the premises in a reasonably safe condition. *Held* that the general verdict rule precluded review of the plaintiff's claim on appeal; given that the defendants denied the plaintiff's allegation that they failed to maintain the stairs where she fell and pleaded special defenses alleging that she was comparatively negligent, that the jury returned a general verdict in favor of the defendants and that interrogatories were not submitted to the jury, this court did not know whether the trial court found that the defendants were not negligent or that the plaintiff was more than 50 percent negligent, and although the plaintiff requested interrogatories, she failed to object when the trial court did not submit her interrogatories to the jury, which was a functional equivalent of a failure to request interrogatories.

Argued January 3—officially released March 12, 2019

*Procedural History*

Action to recover damages for, inter alia, the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the action was withdrawn in part; thereafter, the matter was tried to the jury before *Dubay*, *J.*; verdict for the defendants; subsequently, the court denied the plaintiff's motions to set aside the verdict and for a new trial, and rendered judgment in accordance with the verdict, from which the plaintiff appealed to this court; thereafter, the court, *Dubay*, *J.*, issued an articulation of its decision. *Affirmed*.

*John Serrano*, for the appellant (plaintiff).

*Keith S. McCabe*, with whom, on the brief, was *Allison Reilly-Bombara*, for the appellees (defendants).

*Opinion*

LAVINE, J. The plaintiff, Ussbasy Garcia, appeals from the judgment of the trial court, rendered after a jury trial, in favor of the defendants, Robert Cohen and Diane N. Cohen. On appeal, the plaintiff claims that the court erred by rejecting her request to charge and failing to instruct the jury that the possessor of real property

has a nondelegable duty to maintain the premises. We affirm the judgment of the trial court.

The record discloses the following facts that the jury reasonably could have found on the basis of the evidence presented at trial. On January 19, 2014, the defendants owned the premises at 390 West Main Street, New Britain, where the plaintiff was a tenant in a second floor apartment. At approximately 11:45 that morning, the plaintiff was carrying a basket of laundry down the rear, exterior stairs of the premises when she fell and sustained serious injuries to her left leg and ankle.

The plaintiff commenced a defective premises action against the defendants in January, 2016.[1] The plaintiff alleged that her injuries were proximately caused by the defendants' negligence in that they failed to keep the stairs free of dirt and sand; permitted the steps to become pitted, worn, and uneven; and failed to warn of the slippery condition of the stairs. The defendants denied the material allegations of the complaint and alleged certain special defenses in that the plaintiff's injuries were the result of her own negligence.[2] The plaintiff denied the allegations of the special defenses.

At trial, Robert Cohen testified, among other things, that he owned several properties and that three or four

[1] The plaintiff's complaint sounded in three counts: common-law negligence, violation of the municipal housing code, and violation of the state housing code. Prior to trial, the plaintiff withdrew the counts alleging housing code violations.

[2] The defendants alleged that "the injuries and damages suffered by the plaintiff, if any, were the result of her own negligence and carelessness, in that she:

"a. Failed to watch where she was stepping;

"b. Failed to step over, away from or around the defective and dangerous condition she claims existed;

"c. Failed to be attentive to her surroundings; and

"d. Failed to exercise that degree of care that an ordinarily prudent person would have exercised while using the premises under the circumstances and conditions then existing."

people worked with him to maintain the premises. He hired a contractor to take care of the lawn and remove snow. The plaintiff submitted a request to charge[3] and proposed jury interrogatories.[4] The court declined to use the plaintiff's proposed charge and did not submit the interrogatories to the jury.[5] Following the presentation of evidence, the jury returned a verdict in favor of the defendants. The plaintiff thereafter filed a motion

[3] The plaintiff requested that the court charge that "[t]he defendant Robert Cohen, as the one in control of the premises, had what we call a nondelegable duty to maintain the safety of the premises. This means that he owed a duty to exercise ordinary care to maintain the premises in a reasonably safe condition. The plaintiff . . . had no duty to maintain the premises in a safe condition.

"Although the defendant may contract out the performance of that duty, he may not contract out ultimate legal responsibility. In other words, the defendant is responsible for the damages to which the plaintiff may be entitled as a result of his negligence, and he cannot escape liability for any such injury by claiming he had contracted with someone else to maintain the premises in a reasonably safe condition."

[4] The plaintiff filed the following proposed jury interrogatories:

"1. Were the plaintiff's fall and resulting injuries and losses caused by the defendants' negligence and carelessness in failing to maintain the steps of the rear staircase at the premises clean, clear and free of dirt and sand?

"2. Were the plaintiff's fall and resulting injuries and losses caused by the defendants' negligence and carelessness in allowing the surface of the steps of the rear staircase at the premises to become pitted, worn and uneven?

"3. Were the plaintiff's fall and resulting injuries and losses caused by her failure to exercise the degree of care that an ordinary person would have exercised while using the premises under the circumstances and conditions then existing?"

[5] The record discloses the following colloquy between the court and counsel for the plaintiff:

"The Court: . . . Any preliminary matters?

"[The Plaintiff's Counsel]: Just the fact that I had filed jury instructions—proposed jury instructions and jury interrogatories, and my understanding is the court is going to disallow those.

"The Court: Yeah, I don't think the interrogatories are necessary inasmuch as I'm . . . . I don't think the interrogatories are necessary, and I don't think that the nondelegable duty charge is necessary because I'm specifically charging the jury—or I intend to, specifically intend to, charge the jury on the duties that are owed to an invitee. Okay.

"[The Plaintiff's Counsel]: Very well. Thank you . . . for considering them."

to set aside the verdict on the ground that (1) the verdict was contrary to law in that the court failed to properly charge the jury in accordance with her request to charge, (2) the court failed to submit her proposed jury interrogatories to the jury, and (3) the verdict was against the evidence. The plaintiff also filed a motion for a new trial. The defendants objected to both the plaintiff's motion to set aside the verdict and her motion for a new trial. The court denied the plaintiff's motion to set aside the verdict and her motion for a new trial.

The plaintiff appealed and thereafter filed a motion for articulation with the trial court. The court granted the motion for articulation and stated: "The factual and legal basis for the court's not charging on nondelegable duty are set forth in [the] defendants' memorandum [of law] in support of [their] objection to [the] plaintiff's motion for a new trial . . . . The court specifically adopted the legal basis and factual analysis in its ruling. There was no evidence or argument that anyone other than the defendants [were] responsible for the maintenance of the stairway."

On appeal, the plaintiff claims that the court erred in refusing to give her proposed charge that the possessor of real property has a nondelegable duty to maintain the premises in a reasonably safe condition for invitees. During oral argument before us, we asked the parties whether the appeal was controlled by the general verdict rule and invited counsel to submit supplemental briefs on the question.[6] We now conclude that review of the plaintiff's appeal is precluded by the general verdict rule. See *Curry* v. *Burns*, 225 Conn. 782, 793, 626 A.2d 719 (1993) (general verdict rule applies on appeal to preclude certain claims).

[6] We sua sponte issued an order stating that "[t]he parties are hereby . . . permitted to file supplemental briefs of no more than ten pages on or before January 14, 2019, to address the following question: does the general verdict rule apply to the reviewability of the issues in this appeal?"

Our Supreme Court has held that "the general verdict rule applies to the following five situations: (1) denial of separate counts of a complaint; (2) denial of separate defenses pleaded as such; (3) denial of separate legal theories of recovery or defense pleaded in one count or defense, as the case may be; (4) *denial of a complaint and pleading of a special defense*; and (5) denial of a specific defense, raised under a general denial, that had been asserted as the case was tried but that should have been specially pleaded." (Emphasis added; internal quotation marks omitted.) *Tetreault* v. *Eslick*, 271 Conn. 466, 472, 857 A.2d 888 (2004). In the present case, the defendants denied the allegations of the complaint and pleaded special defenses.

"The general verdict rule provides that if a jury renders a general verdict for one party, and no party requests interrogatories, an appellate court will presume that the jury found every issue in favor of the prevailing party. . . . In circumstances in which a party has requested interrogatories that fail to flesh out the basis of the jury's verdict, this court has noted that the general verdict rule is still applicable because [i]t is not the *mere submission* of interrogatories that enables [the reviewing court] to make that determination; rather, it is the submission of properly framed interrogatories that discloses the grounds for the jury's decision. . . . [I]n a case in which the general verdict rule operates, if any ground for the verdict is proper, the verdict must stand; only if every ground is improper does the verdict fall. . . .

"On the appellate level, the rule relieves an appellate court from the necessity of adjudicating claims of error that may not arise from the actual source of the jury verdict that is under appellate review. In a typical general verdict rule case, the record is silent regarding whether the jury verdict resulted from the issue that the appellate seeks to have adjudicated. Declining in

such a case to afford appellate scrutiny of the appellant's claims is consistent with the general principle of appellate jurisprudence that it is the appellant's responsibility to provide a record upon which reversible error may be predicated." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Beckenstein Enterprises-Prestige Park, LLC* v. *Keller*, 115 Conn. App. 680, 685–86, 974 A.2d 764, cert. denied, 293 Conn. 916, 979 A.2d 488 (2009).

"Our Supreme Court has held that the general verdict rule applies, inter alia, to a situation in which there has been a denial of a complaint along with the pleading of a special defense." *Turturino* v. *Hurley*, 98 Conn. App. 259, 262, 907 A.2d 1266 (2006). That is precisely the situation in the present case. The defendants denied the plaintiff's allegation that they failed to maintain the stairs where she fell. They also pleaded special defenses that alleged that the plaintiff was comparatively negligent in several ways. The jury returned a general verdict in favor of the defendants. Interrogatories were not submitted to the jury. We, therefore, do not know whether it found that the defendants were not negligent or that the plaintiff was more than 50 percent negligent.

Although the plaintiff requested that interrogatories be submitted to the jury, the court did not do so and the plaintiff failed to object. See footnote 5 of this opinion. "This court has stated that the failure of the plaintiffs to object to jury deliberation without interrogatories is the functional equivalent of a failure to request interrogatories." (Internal quotation marks omitted.) *Malaguit* v. *Ski Sundown, Inc.*, 136 Conn. App. 381, 387, 44 A.3d 901, cert. denied, 307 Conn. 902, 53 A.3d 218 (2012). Moreover, the plaintiff has not claimed on appeal that the court erred by failing to submit her inter-

rogatories to the jury. For the foregoing reasons, the plaintiff's claim on appeal is not reviewable.[7]

The judgment is affirmed.

In this opinion the other judges concurred.

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## YISIAH LOPES *v.* MARYANNA FERRARI
## (AC 40988)

Keller, Bright and Moll, Js.

*Syllabus*

The plaintiff appealed to this court from the judgment of the trial court granting the parties joint legal custody of their minor child and giving the defendant final decision-making authority when the parties fail to agree on a disputed matter concerning the child. *Held*:

1. The trial court did not abuse its discretion when it denied the plaintiff's motion for the court to order the defendant to undergo a psychological evaluation; it was clear from the record that the plaintiff was engaged in a fishing expedition for which he was seeking the court's assistance, as the plaintiff specifically argued to the court that he was looking for an investigation but he set forth no facts to substantiate any of his concerns, other than the fact that the defendant was taking a daily medication that had been prescribed to her, which was not a basis for the court to order a psychological evaluation of the defendant.
2. The plaintiff could not prevail on his claim that the trial court's custody determination did not comply with the applicable statutes (§§ 46b-56 and 46b-56a [b]) in that the court failed to state that its orders were in the best interests of the child and the court's judgment essentially gave the defendant sole custody, against the presumption that joint custody is in the best interests of the child: under the plain language of § 46b-56 (b), the court was not required to assign any specific weight to any statutory fact and had to articulate the basis of its decision, and the court provided the parties with a ten page memorandum of decision, in which it specifically stated that it listened to the parties and witnesses, reviewed all the documents, and considered all of the statutory criteria, and set forth extensive orders regarding, inter alia, custody of the child, and although the court did not state specifically that it had considered

[7] The record discloses that shortly before the jury returned its general verdict, it sent a note to the court asking what would happen if it concluded that neither side was negligent. We, however, cannot presume that the jury decided the case on the basis of that conclusion when it resumed its deliberations.

the child's best interests or that it was entering orders that were in the child's best interests, it was clear from the court's decision that it considered the statute and the child's best interests, and, thereafter, rendered orders that it believed were in the child's best interests; moreover, if the plaintiff believed the court needed to further articulate its reasoning or best interests determination, he had the burden to request that the court do so, which he failed to do, and although the plaintiff contended that, by giving the defendant final decision-making authority, the court essentially gave her sole custody, such a contention was contrary to our case law holding that final decision-making authority in one parent is distinct from sole legal custody.

Argued January 4—officially released March 12, 2019

*Procedural History*

Application for custody of the parties' minor child, and for other relief, brought to the Superior Court in the judicial district of Waterbury where the court, *Ficeto*, *J.*, denied the plaintiff's motion for the defendant to undergo a psychological evaluation; thereafter, the matter was tried to the court, *Hon. Lloyd Cutsumpas*, judge trial referee; judgment granting, inter alia, joint legal custody to the parties; thereafter, the court granted the plaintiff's motion to reargue and reconsider but denied the relief requested therein, and the plaintiff appealed to this court. *Affirmed.*

*Dale R. Funk*, for the appellant (plaintiff).

*Michael K. Conway*, for the appellee (defendant).

*Opinion*

BRIGHT, J. The plaintiff, Yisiah Lopes, appeals from the judgment of the trial court granting the parties joint custody of their minor child and giving the defendant, Maryanna Ferrari, final decision-making authority when the parties fail to agree on a disputed matter concerning the child. On appeal, the plaintiff claims that (1) due to the court's denial of his motion requesting the court to order the defendant to undergo a psychological evaluation, the evidence was insufficient for the court to

make an accurate assessment of the child's best interests, and (2) the court's custody determination, as set forth in its memorandum of decision, fails to comply with General Statutes §§ 46b-56 and 46b-56a (b). We affirm the judgment of the trial court.

The following facts and procedural history are taken from the court's memorandum of decision or are part of the record. The parties, who are not married to each other, share a minor child. Approximately one week after the child's birth, the plaintiff filed an application for custody. The court referred the matter to the Family Relations Division (family relations) for a comprehensive evaluation.[1] The resulting report, thereafter, was made part of the record.[2] The court conducted an evidentiary hearing over the course of three days, and, after consideration of the statutory criteria, the court, in relevant part, awarded joint custody to the parties, with primary physical custody to the defendant. The court further ordered that the parties were to consult with each other on major decisions related to the child, but that the defendant had final decision-making authority when the parties were in disagreement. The plaintiff filed a motion to reargue and reconsider the court's determination. The court granted the motion, but it denied the relief requested. This appeal followed.

[1] A comprehensive evaluation is "an in-depth, nonconfidential assessment of the family system by the Family Relations Counselor. The information gathered by the counselor, the assessment of the family, and the resulting recommended parenting plan is shared with the parents and attorneys. This recommendation may be used to form the basis of an agreement. At the conclusion of the process, a report with recommendations is filed with the court." State of Connecticut Judicial Branch, Child Custody and Visitation for Unmarried Parents, available at https://www.jud.ct.gov/forms/grouped/family/cc_visitationUnmarriedParents.htm (last visited March 7, 2019).

[2] The comprehensive report was prepared by Family Relations Counselor Michael B. Elder. Rather than set forth Elder's findings in detail, which are concerning, we will say only that he found the defendant to be "very transparent," while concluding that the plaintiff "has not been as forthcoming."

I

The plaintiff first claims that due to the court's denial of his motion for a court-ordered psychological evaluation of the defendant, the evidence was insufficient for the court to make an accurate assessment of the child's best interests.[3] He argues that he expressed to the court his concern that the defendant was using prescription medication, namely, Xanax,[4] on a daily basis, and he requested, to no avail, that the court order her to undergo a psychological evaluation. He contends that the court improperly denied his motion. We disagree.

The following additional facts are relevant. On August 11, 2016, the plaintiff filed a "motion for psychological exam," requesting, pursuant to General Statutes § 46b-6,[5] that the court order the defendant to undergo a psychological examination. There were no factual allegations in the motion, and the only ground alleged by the plaintiff was that "he has concerns about [the defendant's] mental stability, and therefore the safety and well-being of the minor child while in the care of [the

[3] Although the plaintiff sets forth his statement of this issue as one concerning the sufficiency of the evidence, his claim more accurately is characterized as one challenging the propriety of the court's denial of his motion for a psychological examination. Accordingly, we will consider it as such.

[4] Xanax is a benzodiazepine used to treat anxiety and panic disorders. See Physician's Desk Reference (71st Ed. 2016) p. S-981.

[5] General Statutes § 46b-6 provides: "In any pending family relations matter the court or any judge may cause an investigation to be made with respect to any circumstance of the matter which may be helpful or material or relevant to a proper disposition of the case. Such investigation may include an examination of the parentage and surroundings of any child, his age, habits and history, inquiry into the home conditions, habits and character of his parents or guardians and evaluation of his mental or physical condition. In any action for dissolution of marriage, legal separation or annulment of marriage such investigation may include an examination into the age, habits and history of the parties, the causes of marital discord and the financial ability of the parties to furnish support to either spouse or any dependent child."

defendant].'' On October 26, 2016, the court heard argument on the plaintiff's motion.[6] During argument, the plaintiff told the court that he had concerns about the defendant's use of Xanax and her mental stability. He also expressed that he would be willing to pay for the defendant's examination. When the court explained that a psychological evaluation normally is not ordered solely because someone is taking a prescription medication, the plaintiff stated: ''I understand that, but being a concerned parent, my understanding is if you're taking something on a daily basis, I have concerns that why do you need to take it daily. And that's all I'm trying to do is just investigate, research. And I feel with the psychological evaluation, it would basically outline that situation, and we'll be done with it and move forward. That's what's holding everything up.'' Shortly thereafter, the court stated that the plaintiff would have an opportunity to express his concerns to family relations, and that if family relations saw any problems with the defendant's ability to parent, it would relay those concerns to the court. The court then denied the plaintiff's motion, without prejudice, on the ground that it heard nothing in argument that justified ordering the defendant to undergo a psychological examination. The court further noted that family relations could refer the matter back to the court to consider ordering such an examination if, when preparing its comprehensive evaluation, it saw a reason to do so.[7]

We review the court's denial of a motion for a physical or psychological examination under an abuse of discre-

[6] The court also heard argument on other motions that had been filed by the parties.

[7] The comprehensive evaluation report discusses the plaintiff's concerns about the defendant's use of Xanax, as well as the communications the family relations counselor had with the defendant's doctor's office about the defendant's use of the drug. The report reflects that the defendant's doctor had no reason to believe that the defendant was misusing the drug. The report did not suggest to the court that it order a psychological examination of the defendant, and the plaintiff never renewed his motion for one.

tion standard. See *Tevolini* v. *Tevolini*, 66 Conn. App. 16, 32, 783 A.2d 1157 (2001) (standard of review for denial of motion for physical examination in family matter is one of abuse of discretion); *In re Daniel C.*, 63 Conn. App. 339, 365, 776 A.2d 487 (2001) (standard of review for denial of motion for psychological examination in termination of parental rights case is one of abuse of discretion). "In reviewing claims that the trial court abused its discretion, great weight is given to the trial court's decision and every reasonable presumption is given in favor of its correctness. . . . We will reverse the trial court's ruling only if it could not reasonably conclude as it did." (Internal quotation marks omitted.) *Tevolini* v. *Tevolini*, supra, 32.

It is clear from a review of the plaintiff's motion and his oral argument before the trial court that the plaintiff was engaged in nothing short of a fishing expedition for which he was seeking the court's assistance. Indeed, he specifically argued to the court that he was looking for an investigation; he set forth no facts to substantiate any concerns, with the exception of the fact that the defendant was taking a daily prescription medication that, in fact, had been prescribed to her. On this basis, it was not an abuse of discretion for the court to deny the plaintiff's motion.

II

The plaintiff next claims that the court's custody determination, as set forth in its July 28, 2017 memorandum of decision, does not comply with §§ 46b-56 and 46b-56a (b). The plaintiff argues that (1) the court failed to state that its orders were in the best interests of the child, and (2) the court's judgment essentially gives the defendant sole custody, despite awarding the parties joint custody. We disagree with both arguments.

A

The plaintiff argues that the court's custody decision does not comply with § 46b-56 because the court failed

to articulate a basis for its decision by stating merely that it considered the best interests of the child. The plaintiff recognizes that the court is not required to assign any particular weight to any statutory factor, but he contends that the court specifically must find and articulate why its orders serve the child's best interests. We are not persuaded.

"We utilize an abuse of discretion standard in reviewing orders regarding custody and visitation rights . . . . In exercising its discretion, the court should consider the rights and wishes of the parents and may hear the recommendations of professionals in the family relations field, but the court must ultimately be controlled by the welfare of the particular child. . . . This involves weighing all the facts and circumstances of the family situation. Each case is unique. The task is sensitive and delicate, and involves the most difficult and agonizing decision that a trial judge must make. . . . The trial court has the great advantage of hearing the witnesses and in observing their demeanor and attitude to aid in judging the credibility of testimony. . . . Great weight is given to the conclusions of the trial court which had the opportunity to observe directly the parties and the witnesses. . . . A conclusion of the trial court must be allowed to stand if it is reasonably supported by the relevant subordinate facts found and does not violate law, logic or reason. . . . [T]he authority to exercise the judicial discretion under the circumstances revealed by the finding is not conferred upon this court, but upon the trial court, and . . . we are not privileged to usurp that authority or to substitute ourselves for the trial court. . . . A mere difference of opinion or judgment cannot justify our intervention. Nothing short of a conviction that the action of the trial court is one which discloses a clear abuse of discretion can warrant our interference." (Citations omitted; internal quotation marks omitted.) *Zilkha* v. *Zilkha*, 180 Conn. App. 143,

170–71, 183 A.3d 64, cert. denied, 328 Conn. 937, 183 A.3d 1175 (2018).

"Subsection (a) of § 46b-56 authorizes the Superior Court in any action involving the custody or care of minor children . . . to 'make or modify any proper order regarding the custody, care, education, visitation and support of the children . . . according to its best judgment upon the facts of the case and subject to such conditions and limitations as it deems equitable.' Subsection (b) of § 46b-56 provides in relevant part: 'In making or modifying any order as provided in subsection (a) of this section, the rights and responsibilities of both parents shall be considered and the court shall enter orders accordingly that serve the best interests of the child and provide the child with the active and consistent involvement of both parents commensurate with their abilities and interests. . . .' Subsection (b) contains a nonexhaustive list of possible orders, ending with a catchall provision permitting 'any other custody arrangements as the court may determine to be in the best interests of the child.' Subsection (c) of § 46b-56 provides in relevant part that '[i]n making or modifying any order as provided in subsections (a) and (b) of this section, the court shall consider the best interests of the child, and in doing so may consider, but shall not be limited to, one or more of [sixteen enumerated] factors . . . . The court is not required to assign any weight to any of the factors that it considers, but shall articulate the basis for its decision.' " (Footnote omitted.) Id., 168–70.

Under the plain language of § 46b-56 (b), the court is not required to assign any specific weight to any statutory factor, but it must articulate the basis of its decision. In this case, the court provided the parties with a ten page memorandum of decision. It specifically stated that it had listened to the parties and the witnesses, reviewed all the documents, and considered

all of the statutory criteria. The court then set forth extensive orders regarding, inter alia, custody, visitation, holiday access, child support, education support, medical insurance, and income tax. Although the court did not state specifically that it had considered the child's best interests, or that it was entering orders that were in the child's best interests, it is clear from the court's decision that it considered the statute and the child's best interests and, thereafter, rendered orders that it believed were in the child's best interests. In fact, there is nothing in the court's memorandum of decision to which the plaintiff points that would lead us to conclude otherwise.

Furthermore, if the plaintiff believes that the court needed to further articulate its reasoning or best interests determination, it was his burden to request that the court do so. See Practice Book §§ 61-10 and 66-5. Where the plaintiff believes that the court's findings were not detailed sufficiently, "our caselaw clearly directs that it is up to the plaintiff to request more detailed findings by means of an articulation. See *Blum* v. *Blum*, 109 Conn. App. 316, 331, 951 A.2d 587 ([w]hen the decision of the trial court does not make the factual predicates of its findings clear, we will, in the absence of a motion for articulation, assume that the trial court acted properly . . .), cert. denied, 289 Conn. 929, 958 A.2d 157 (2008)." (Internal quotation marks omitted.) *Hirschfeld* v. *Machinist*, 131 Conn. App. 364, 370–71 n.5, 27 A.3d 395, cert. denied, 302 Conn. 947, 30 A.3d 1 (2011). Accordingly, we are not persuaded by the plaintiff's argument.

B

The plaintiff next claims that the court's custody decision does not comply with § 46b-56a (b) because it effectively awarded sole custody to the defendant without setting forth the reason or basis for departing from

the statutory presumption in favor of joint custody. Specifically, he argues that by giving the defendant final decision-making authority, the court's judgment essentially gives the defendant sole custody, with no explanation for doing so. We disagree with the underlying premise of the plaintiff's claim that the court's order regarding final decision-making authority constituted an award of sole custody.

"There shall be a presumption, affecting the burden of proof, that joint custody is in the best interests of a minor child where the parents have agreed to an award of joint custody or so agree in open court at a hearing for the purpose of determining the custody of the minor child . . . . General Statutes § 46b-56a (b). This section does not mandate joint custody; it only creates a presumption that joint custody would be in the best interests of a minor child under certain circumstances. It is still for the trial court to decide whether joint custody has been agreed to by the parties. . . . Whether the parties have agreed to such an award is a question for the trial court." (Citation omitted; internal quotation marks omitted.) *Baronio* v. *Stubbs*, 178 Conn. App. 769, 776–77, 177 A.3d 600 (2017).

In the present case, both parties agreed to joint legal custody. The defendant, however, also requested primary physical custody and final decision-making authority.[8] It is clear that the court awarded joint legal

[8] The plaintiff, directing this court to the defendant's proposed orders and his own proposed orders, argues that "both parents agreed to joint custody. . . . However, the court . . . ordered: 'In the event of a dispute over any issue involving the child after consultation, the [defendant's] decision shall be controlling.' . . . In this case, ultimate authority to make all decisions regarding 'any issue involving the child' was given to [the defendant] by the [court] . . . . The court failed to articulate any reasons for rebutting the presumption in favor of joint custody."

We find the plaintiff's argument misleading. Although both parties agreed to joint legal custody, the defendant very clearly set forth in her proposed orders that she was requesting primary physical custody and final decision-making authority regarding major decisions.

custody of the child to the parties, and that it also awarded to the defendant primary physical custody and final decision-making authority on major issues. Although the plaintiff contends that by giving the defendant final decision-making authority, the court, essentially, gave her sole custody, without setting forth its reasons for doing so, such a contention is contrary to our case law.

As this court previously has held: "[F]inal decision making authority in one parent is distinct from sole legal custody. See *Desai* v. *Desai*, 119 Conn. App. 224, 230, 987 A.2d 362 (2010) (noting Appellate Court's rejection of argument that grant of ultimate decision-making authority to one parent is, in effect, order of sole custody); *Tabackman* v. *Tabackman*, 25 Conn. App. 366, 368–69, 593 A.2d 526 (1991) (rejecting argument that award of joint legal custody with ultimate decision-making authority in one parent is the functional equivalent of an award of sole custody)." (Internal quotation marks omitted.) *Baronio* v. *Stubbs*, supra, 178 Conn. App. 778 n.3. Accordingly, the plaintiff's claim has no merit.

The judgment is affirmed.

In this opinion the other judges concurred.

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## WILLIAM BETTS *v.* COMMISSIONER OF CORRECTION (AC 40587)

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

*Syllabus*

The petitioner, who had been convicted of, inter alia, risk of injury to a child, sought a writ of habeas corpus, claiming, inter alia, that his criminal trial counsel had provided ineffective assistance. The habeas court rendered judgment denying the habeas petition, from which the petitioner, on the granting of certification, appealed to this court. *Held:*

1. The petitioner's claim that his trial counsel did not give him adequate advice concerning the state's pretrial plea offer was unavailing:

   a. The habeas court correctly determined that the petitioner failed to establish that he was not advised of the maximum penalties for his pending charges or of his maximum exposure to punishment if he were found guilty on all charges, as neither the petitioner nor trial counsel recalled if they discussed the minimum and maximum penalties for each charge or his cumulative maximum exposure on all charges during their conversations about the plea offer, and, thus, the petitioner failed to establish that no such conversation had occurred, and the record was insufficient to support a finding that he met his burden to overcome the presumption that his trial counsel provided competent representation; moreover, the record supported the habeas court's conclusion that trial counsel had advised the petitioner as to the maximum possible penalties for all of the felony charges he faced, and the court, in rejecting the petitioner's claim that trial counsel had misadvised him about the potential penalties he might face, made a credibility based, factual determination regarding trial counsel's testimony that this court would not disturb on appeal.

   b. The petitioner could not prevail on his claim that his trial counsel rendered ineffective assistance by failing to advise him adequately as to the strength of the state's case against him: the habeas court found that trial counsel had advised the petitioner about the strength of the state's case, discussed with him the unlikely prospect of acquittal, and advised him that he should enter a guilty plea rather than proceed to trial, and those findings were supported by the record and the petitioner's testimony, in which he admitted that trial counsel had explained to him the pending charges and described what the state would need to prove in order to convict him, which witnesses it would likely call and what other evidence the state would likely offer at trial, including an inculpatory letter in which the petitioner described his sexual desire for the minor victim; accordingly, the habeas court appropriately concluded that trial counsel's explanation to the petitioner that the letter and eyewitness testimony of the victim's mother would be introduced by the state at trial was sufficient to inform the petitioner of the strength of the state's case against him.

2. The habeas court properly concluded that the petitioner was not prejudiced by trial counsel's allegedly inadequate advice in connection with the state's pretrial plea offer; that court credited trial counsel's testimony that the petitioner was adamant that his case be taken to trial rather than be resolved by a guilty plea because the petitioner was concerned about the collateral consequences of a third conviction for alleged sexual contact with a minor, which the petitioner feared would result in the violation of his probations for similar offenses, and the court properly declined to rely on the petitioner's testimony either that he was not properly advised by counsel, or that he probably would have accepted

the state's offer had he been given adequate advice, as the petitioner's testimony was equivocal at best and fell short of establishing that even if trial counsel's advice was inadequate, such advice prejudiced him by causing him not to accept a proposed guilty plea.

Argued December 6, 2018—officially released March 12, 2019

*Procedural History*

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

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

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

*Opinion*

SHELDON, J. The petitioner, William Betts, appeals from the judgment of the habeas court denying his amended petition for a writ of habeas corpus, in which he claimed that trial counsel in his underlying criminal prosecution rendered ineffective assistance by giving him constitutionally inadequate advice concerning the state's pretrial plea offer to recommend a lesser sentence in exchange for his guilty plea to certain charges, which he rejected before the start of trial. On appeal, the petitioner claims that the habeas court erred in ruling that (1) trial counsel did not give him inadequate advice concerning the state's pretrial plea offer, and (2) he was not prejudiced by such allegedly inadequate advice in connection with that offer. We disagree with both of the petitioner's claims and, therefore, affirm the judgment of the habeas court.

On May 19, 2005, the petitioner was convicted, after a jury trial, of one count each of risk of injury to a child in violation of General Statutes § 53-21 (a) (1), sexual assault in the third degree in violation of General Statutes § 53a-72a (a) (1) (a), assault in the third degree in violation of General Statutes § 53a-61, and interfering with an emergency call in violation of General Statutes § 53a-183b, and of two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2). On July 12, 2005, the petitioner was sentenced on his conviction of those charges, together with two resulting violations of probation to which he had pleaded guilty, to a total effective sentence of forty-three years incarceration, execution suspended after twenty-three years, followed by thirty-five years of probation. The petitioner appealed his conviction, which was affirmed by our Supreme Court on March 18, 2008. See *State* v. *Betts*, 286 Conn. 88, 942 A.2d 364 (2008).

The following facts, as described by our Supreme Court in its decision on the petitioner's direct appeal, are relevant to our disposition of this appeal. "On February 29, 2004, A.L.,[1] the thirteen year old victim, visited the home of T.H., her mother, as she did typically once every other week. During that visit, A.L. and the [petitioner], who was T.H.'s fiancé, watched television together in the living room while T.H. slept in a downstairs bedroom that she shared with the [petitioner]. A.L., who initially was sitting on the floor, then moved to [lie] down on the couch, at which time the [petitioner] put his hand in her shirt and touched her breasts before moving his hand down to rub her 'privates' with his right hand. A.L. told the [petitioner] to stop touching her or else she would kick him, and then started to bang on the floor to wake T.H. The [petitioner] stopped

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

briefly, but then lay on top of A.L. and continued to touch her and grab her breasts with even more force.

"At that time, T.H. entered the room, witnessed the [petitioner] lying on top of A.L., and began to yell at both of them; T.H. then ran downstairs intending to call the police. Thereafter, an argument ensued between T.H. and the [petitioner], at which point he called A.L. into the room and asked her to say that nothing had happened between them. A.L. complied with the [petitioner's] request and then left the room, at which point T.H. and the [petitioner] started arguing again about who was lying. At that point, A.L., who had overheard the conversation, became angry, returned to the room and told the [petitioner] to tell T.H. the truth. A.L. then told T.H. that the [petitioner] had 'rap[ed]' and 'sexually harass[ed]' her.

"T.H. then went back down to the bedroom to call the police. The [petitioner] followed her downstairs and began to choke, beat and spit on her. A.L. also tried to call the police, but was unable to do so because the telephone in the room was disconnected. The [petitioner] then stopped choking T.H., and she left the bedroom. At this time, A.L. gave T.H. a letter that the [petitioner] had written expressing his sexual desire for A.L. The [petitioner] then took the letter and hid it in the bedroom that T.H. and the [petitioner] shared before T.H. could read it.

"Thereafter, the police arrived at the house, and T.H. then gave the letter to Robin Gibson, a Manchester police officer who had responded to her call for help. Subsequently, the [petitioner] was arrested and charged with numerous counts of risk of injury to a child, sexual assault in the third degree, assault in the third degree, unlawful restraint in the first degree and interfering with an emergency call." (Footnotes omitted.) *State* v. *Betts*, supra, 286 Conn. 90–92.

The petitioner commenced this habeas corpus action on December 11, 2014, challenging the effectiveness of trial counsel in his underlying criminal prosecution. After a two day trial, the habeas court issued a memorandum of decision in which it made the following relevant factual findings. The petitioner was represented at trial by Attorney Bruce Lorenzen. Prior to trial, the state extended an offer to the petitioner that it would recommend a sentence of twenty years incarceration, execution suspended after eight years, followed by twenty years of probation, reserving to the petitioner the right to argue for a fully suspended sentence, if he would plead guilty to the principal charges then pending against him. The petitioner testified that during his discussions with Lorenzen concerning the state's offer, Lorenzen had explained to him each of the charges he was facing, the elements of those charges, and the evidence that would likely be adduced at trial to establish those elements.

The petitioner also testified that Lorenzen had discussed with him the terms of the state's offer and his own decision whether to go to trial. He claimed that he had rejected the offer because Lorenzen had told him that if he went to trial, the worst case scenario he would face in the event of a conviction would be a sentence of fifteen years incarceration. Importantly, the petitioner testified that he could not recall if Lorenzen had ever explained to him the minimum and maximum sentences he could receive for each offense with which he was charged. He expressed certainty, however, that Lorenzen had never informed him of the maximum exposure he would face if he were convicted of all charges and given the maximum possible consecutive sentence on each. He told the court that if he had known what his total exposure would be, he "probably would have" accepted the state's offer.

The petitioner conceded that Lorenzen had reviewed with him the letter that he had written to the minor victim, expressing his sexual desire for her, and discussed with him the negative impact that that letter had on his defense in the case. He also conceded that the trial court conducted a canvass of him regarding the plea offer before he rejected it. Finally, at the end of the petitioner's testimony, the habeas court questioned him directly to determine if he could remember whether Lorenzen had advised him of the maximum penalty for each of the charges he was facing, and of any mandatory minimum penalties. The petitioner responded that he could not recall if Lorenzen had so advised him.

As summarized by the habeas court in its memorandum of decision, Lorenzen testified that he too could not recall if he had ever explained to the petitioner the maximum penalties he would face if he were convicted on his pending misdemeanor charges at trial. He was certain, however, that he had explained to the petitioner the maximum penalties he would face on each of his pending felony charges. Lorenzen's exact language, when asked if he had explained to the petitioner the minimum and maximum penalties for each charge, was, "I don't necessarily recall walking him through one by one, particularly the lesser charges, but there was definitely discussion in terms of if you were convicted of the sex one, sex three, risk of injury, those are all serious charges, carry significant time, we're going to wind up in a place that's more than the offer." Lorenzen remembered presenting the plea offer to the petitioner on more than one occasion and explaining to him on each of those occasions the difficulties he would have of prevailing at trial, particularly on the risk of injury charges, which he considered the most difficult charges to defend against in the underlying prosecution. Lorenzen denied telling the petitioner that he would face, at worst, a sentence of fifteen years incarceration if he

were convicted at trial, and insisted that he had always advised the petitioner that accepting the state's offer would be in his best interest. Lorenzen finally noted that the petitioner was adamant about rejecting the plea offer and going to trial because he was concerned that otherwise he would be found to have violated his probations, both of which had been imposed upon him in connection with prior incidents involving sexual contact with minors. Lorenzen recalled that the petitioner's primary concern was that he not "be seen as a sex offender," as he believed he would be if he were convicted of a third sexually related offense.

The court ruled, on the basis of this evidence that the petitioner had failed to establish that Lorenzen's performance was constitutionally deficient because he had failed to prove that Lorenzen did not review with him the potential penalties he would face in the event of conviction, either separately or cumulatively. The court also ruled that Lorenzen had fully complied with his obligations as a reasonably competent defense attorney by advising the petitioner during plea negotiations during several judicial pretrials, advising him of the strength of the state's case, and advising him that he should enter a plea rather than proceed to trial. Finally, the court ruled that the petitioner had failed to establish prejudice, for it credited Lorenzen's testimony that the petitioner was adamant about not pleading guilty but going to trial. The court therefore concluded that the petitioner had failed to overcome the presumption of competent representation to establish deficient performance and failed to establish prejudice. Accordingly, the court denied the petitioner's amended petition for writ of habeas corpus. On June 8, 2017, the court granted the petitioner's petition for certification to appeal, and this appeal followed.

We begin by setting forth our standard of review. "The habeas court is afforded broad discretion in making its

factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Internal quotation marks omitted.) *Horn* v. *Commissioner of Correction*, 321 Conn. 767, 775, 138 A.3d 908 (2016).

The legal principles that govern an ineffective assistance claim are well settled. See *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "A claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . The second prong is . . . satisfied if the petitioner can demonstrate that there is a reasonable probability that, but for that ineffectiveness, the outcome would have been different." (Citation omitted; internal quotation marks omitted.) *Horn* v. *Commissioner of Correction*, supra, 321 Conn. 775–76.

Regarding the performance prong, "[j]udicial scrutiny of counsel's performance must be highly deferential. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Internal quotation marks omitted.) *Spearman* v. *Commissioner of Correction*,

164 Conn. App. 530, 539, 138 A.3d 378, cert. denied, 321 Conn. 923, 138 A.3d 284 (2016).

With these principles in mind, we turn to petitioner's argument that trial counsel rendered ineffective assistance by failing to advise him adequately concerning the state's guilty plea offer. Specifically, he claims that trial counsel did not advise him of the maximum possible penalty he could receive if he were convicted of each of his pending charges or of his maximum possible exposure to punishment if he were convicted of all such charges and sentenced to the maximum possible penalty on each, to be served consecutively. To the contrary, he claims that his counsel incorrectly advised him that the worst sentence he would receive if he were convicted at trial was a term of fifteen years incarceration. The petitioner further argues that counsel failed to advise him adequately as to the strength of the state's case. We disagree.

The petitioner first argues that counsel failed to explain to him the minimum and maximum penalties for each of the charges he faced as well as his total maximum exposure to punishment if he were convicted at trial. The petitioner's "awareness of the maximum sentence possible is an essential factor in determining whether to plead guilty . . . ." *State* v. *Childree*, 189 Conn. 114, 126, 454 A.2d 1274 (1983). Indeed, Practice Book § 39-19 provides in relevant part: "The judicial authority shall not accept the plea without first addressing the defendant personally and determining that he or she fully understands . . . (4) [t]he maximum possible sentence on the charge, including, if there are several charges, the maximum sentence possible from consecutive sentences and including, when applicable, the fact that a different or additional punishment may be authorized by reason of a previous conviction . . . ."

We agree with the habeas court that the petitioner failed to establish that he was not advised of the maximum penalties for each of his pending charges or of his maximum exposure to punishment if he were found guilty on all charges. Neither the petitioner nor trial counsel could recall if they discussed the minimum and maximum penalties for each such charge or his cumulative maximum exposure on all charges during their conversations about the plea offer. Accordingly, the court found that the petitioner had failed to establish that no such conversation had occurred, as the only evidence that was submitted on this issue was that neither the petitioner nor trial counsel could recall, after a period of thirteen years, if it had occurred. Therefore, the record was insufficient to support a finding that the petitioner met his burden to overcome the presumption that Lorenzen had provided competent representation in order to meet the performance prong of *Strickland*.

The petitioner also argues that the court erred in crediting Lorenzen's testimony that he was certain that he had advised the petitioner as to the maximum possible penalties for all of the felony charges he faced, which he claims to be clearly erroneous. "A court's determination is clearly erroneous only in cases in which the record contains no evidence to support it, or in cases in which there is evidence, but the reviewing court is left with the definite and firm conviction that a mistake has been made." (Internal quotation marks omitted.) *Considine* v. *Waterbury*, 279 Conn. 830, 858, 905 A.2d 70 (2006). That is simply not the case here. The record supports the court's conclusion that Lorenzen discussed with the petitioner the penalties associated with his felony charges, as established by Lorenzen's testimony that "there was definitely discussion in terms of if you were convicted of the sex one, sex three, risk of injury, those are all serious charges, carry significant

time . . . .” The petitioner’s argument that he was misadvised about the potential penalties he might face must also fail. On this score, the court credited Lorenzen’s testimony that he had never advised the petitioner that the worst sentence he would receive if he were convicted at trial was a term of fifteen years incarceration. This was a credibility based factual determination that this court will not disturb on appeal.

The petitioner next argues that trial counsel rendered ineffective assistance by failing adequately to advise him as to the strength of the state’s case against him, which assertedly impacted his decision to reject the state’s guilty plea offer. The petitioner argues that trial counsel was required to tell him that his conviction was a near certainty and that counsel’s advice that taking the plea was in his best interest was inadequate to express the strength of the state’s case. We disagree.

“As to the parameters of counsel’s advice to a defendant, this court, in *Vasquez* v. *Commissioner of Correction*, 123 Conn. App. 424, 437, 1 A.3d 1242 (2010), cert. denied, 302 Conn. 901, 23 A.3d 1241 (2011), commented: Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered. Determining whether an accused is guilty or innocent of the charges in a complex legal indictment is seldom a simple and easy task for a layman, even though acutely intelligent. . . . A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable. . . .

“In *Vasquez*, this court said, as well: On the one hand, defense counsel must give the client the benefit of counsel’s professional advice on this crucial decision of whether to plead guilty. . . . As part of this advice,

counsel must communicate to the defendant the terms of the plea offer . . . and should usually inform the defendant of the strengths and weaknesses of the case against him, as well as the alternative sentences to which he will most likely be exposed. . . . On the other hand, the ultimate decision whether to plead guilty must be made by the defendant. . . . And a lawyer must take care not to coerce a client into either accepting or rejecting a plea offer. . . . Counsel's conclusion as to how best to advise a client in order to avoid, on the one hand, failing to give advice and, on the other, coercing a plea enjoys a wide range of reasonableness because [r]epresentation is an art . . . and [t]here are countless ways to provide effective assistance in any given case. . . . Counsel rendering advice in this critical area may take into account, among other factors, the defendant's chances of prevailing at trial, the likely disparity in sentencing after a full trial as compared to a guilty plea (whether or not accompanied by an agreement with the government), whether defendant has maintained his innocence, and the defendant's comprehension of the various factors that will inform his plea decision." (Citations omitted; internal quotation marks omitted.) *Peterson* v. *Commissioner of Correction*, 142 Conn. App. 267, 273–74, 67 A.3d 293 (2013).

In support of his position, the petitioner compares trial counsel's advice in this case to that of trial counsel in *Lane* v. *Commissioner of Correction*, 129 Conn. App. 593, 20 A.3d 1265, cert. denied, 302 Conn. 915, 27 A.3d 368 (2011). In *Lane*, trial counsel had advised the petitioner that he had a "fifty-fifty chance" of winning at trial despite the state's very strong case that included three eyewitnesses because counsel, who believed that "you never know what a jury is going to do," had not recommended to the petitioner that he accept the plea offer. (Internal quotation marks omitted.) Id., 597–98. The court found that the challenged advice fell below

an objective standard of reasonableness. Id., 597. The deficient advice given to the petitioner in *Lane* by his trial counsel is clearly distinguishable from that given to the petitioner in the present case by Lorenzen in the prosecution here at issue. Here, unlike his counterpart in *Lane*, Lorenzen encouraged the petitioner to accept the state's offer, noting that it was in his best interest to do so. Lorenzen also discussed the difficulties of prevailing at trial, particularly on the risk of injury to a minor charges, which he described as the most difficult to defend against.

The petitioner also cites *Vasquez* v. *Commissioner of Correction*, supra, 123 Conn. App. 424, in support of this argument. In *Vazquez*, this court found that the petitioner's trial counsel's representation was not deficient where counsel fully discussed the state's plea offer with the petitioner as well as the elements of each charged offense and the evidence in the case that would likely be presented at trial to prove each such element. Id., 439–40. Here as well, the court found that Lorenzen advised the petitioner about the strength of the state's case, discussed with him the unlikely prospect of acquittal, and advised him that he should enter a guilty plea rather than proceed to trial. These findings are supported by our own review of the record and the petitioner's own testimony, in which he admitted that Lorenzen had explained the pending charges to him, and had described what the state would need to prove in order to convict him, which witnesses it would likely call for that purpose, and what other evidence the state would likely offer against him at trial, including, particularly, the inculpatory letter in which he described his sexual desire for the minor victim. The habeas court appropriately concluded that Lorenzen's explanation to the petitioner that that damning letter and the eyewitness testimony of the victim's mother would be introduced

against him at trial was sufficient to inform the petitioner of the strength of the state's case against him. For the foregoing reasons, we conclude that the habeas court did not err in finding that the petitioner failed to establish that Lorenzen's advice regarding the state's guilty plea offer was constitutionally inadequate.

The petitioner next claims that the habeas court erred in ruling that he was not prejudiced by counsel's allegedly inadequate advice concerning the state's plea offer. In support of this argument, the petitioner reiterates his arguments as to counsel's allegedly deficient performance and contends that we must assess his expressed insistence upon going to trial in light of Lorenzen's allegedly inadequate advice concerning the potential costs and benefits of entering the proposed plea. We agree with the habeas court that the petitioner did not prove that he was prejudiced by Lorenzen's allegedly inadequate advice.

"Pretrial negotiations implicating the decision of whether to plead guilty is a critical stage in criminal proceedings . . . and plea bargaining is an integral component of the criminal justice system and essential to the expeditious and fair administration of our courts. . . .

"To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result

of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." (Internal quotation marks omitted.) *Mahon* v. *Commissioner of Correction*, 157 Conn. App. 246, 253–54, 116 A.3d 331, cert. denied, 317 Conn. 917, 117 A.3d 855 (2015).

In the present case, the habeas court credited Lorenzen's testimony that the petitioner was adamant that his case be taken to trial rather than be resolved by a guilty plea because he was concerned about the collateral consequences of a third conviction based on alleged sexual contact with a minor, which he feared would result in the violation of his probations for similar offenses. In so doing, the court declined to rely on the petitioner's testimony either that he was not properly advised by counsel, as discussed previously, or that he "probably" would have accepted the state's offer had he been given such proper advice. As for the petitioner's latter claim, in particular, the habeas court duly noted that the petitioner's testimony was equivocal at best, falling short of establishing that even if Lorenzen's advice was inadequate, which the court had already rejected, such advice had prejudiced the petitioner by causing him not to accept a proposed guilty plea, which it was in his best interest to accept. In light of these factual findings as to the true reasons for the petitioner's decision to reject the state's plea offer and go to trial, the habeas court did not err in ruling that the petitioner failed to establish that he was prejudiced by the allegedly deficient performance of his trial counsel.

The judgment is affirmed.

In this opinion the other judges concurred.

# STATE OF CONNECTICUT *v.* JOSE RUIZ
## (AC 40668)

DiPentima, C. J., and Alvord and Beach, Js.

*Syllabus*

The defendant appealed to this court from the judgment of the trial court revoking his probation and sentencing him to a term of seven and one-half years incarceration, execution suspended after four years, and three years of probation, following his arrest for violating a condition of his probation. The defendant was on probation in connection with his conviction of assault in the first degree and carrying a pistol without a permit, and as a condition of his probation, he was required not to violate any criminal law of the United States, this state or any other state or territory. During his probation period, the defendant was arrested and charged with attempt to commit robbery in the first degree, threatening in the second degree and breach of peace in the second degree in connection with an incident in which the defendant allegedly accosted W at a store, threatened him with a weapon and chased him through the store's parking lot and nearby streets. When the police took a statement from W following that incident, he indicated that someone had tried to rob him with a gun at the store and that, if he saw the person again, he could identify him. Thereafter, a police officer returned to the store with W to conduct a one-on-one showup identification of the defendant, who was removed from the police cruiser and made to stand next to it with a spotlight shining directly on him. W immediately identified the defendant as the perpetrator. The identification occurred within approximately twenty minutes of the officer's initial arrival at the store and approximately forty-five minutes after W first had reported the incident to the police. The trial court denied the defendant's motion to suppress the identification, concluding that, although the identification procedure used by police was suggestive, it was not unnecessarily suggestive. Thereafter, the trial court held a hearing on the defendant's violation of probation charge, during which it heard testimony from three witnesses, including W, who recounted the events of the incident. Following the hearing, the court revoked the defendant's probation, concluding that although there was insufficient evidence to support a finding that the defendant had committed robbery or attempted robbery, the evidence was sufficient to support a finding that he had committed an act of threatening in the second degree in violation of a condition of his probation. On the defendant's appeal to this court, *held*:

1. The defendant could not prevail on his claim that the trial court improperly denied his motion to suppress the one-on-one showup identification, which was based on his claim that the identification procedure was unnecessarily suggestive and unreliable because the actions by the police

served to convince W that the defendant was the individual who had accosted and chased him: W reported the incident within moments of when it occurred, the defendant was apprehended by police shortly thereafter, W had provided the police with an accurate description of the defendant prior to the identification, and once W viewed the defendant he immediately stated with certainty that the defendant was the individual who had tried to rob him at gunpoint; moreover, although the actions by the police were to some degree suggestive, this court in addressing similar facts has held that such actions do not constitute a due process violation, and given the small amount of time that elapsed between when the incident occurred and when the one-on-one showup identification was conducted, the identification procedure was not unnecessarily suggestive inasmuch as there was an exigency to provide W with an opportunity to identify the defendant while his memory of the incident was still fresh and to assist the police in determining whether they had apprehended the correct individual.

2. The defendant's claim that the trial court improperly found that he violated a condition of his probation because there was insufficient evidence to support its finding that he committed an act of threatening in the second degree in violation of statute (§ 53a-62 [a] [1]) was unavailing, as that finding was not clearly erroneous; as a condition of his probation, the defendant was required not to violate any criminal law of the United States, this state or any other state or territory, and, on the basis of W's testimony, which the court found to be credible, there was sufficient evidence to find that the defendant had committed the crime of threatening in the second degree by threatening W with a weapon, or an item resembling a weapon, and chasing him a significant distance, causing him to experience what the court characterized as great and understandable fear, and irrespective of whether there were inconsistencies between W's testimony and other evidence in the record, determinations of credibility are solely within the purview of the trial court.

3. The trial court did not abuse its discretion in revoking the defendant's probation; although that court, in revoking the defendant's probation, did not find that the defendant committed robbery or attempted robbery, it did find that his actions in chasing W and threating W with a weapon, or what appeared to be a weapon, were nonetheless "quite scary," and despite concluding that there were sufficient grounds to incarcerate the defendant for the seven and one-half years remaining on his previous sentence, the court decided in its discretion to suspend the sentence after four years.

Argued January 2—officially released March 12, 2019

*Procedural History*

Information charging the defendant with violation of probation, brought to the Superior Court in the judicial

district of New Haven, where the court, *Blue*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the matter was tried to the court; judgment revoking the defendant's probation, from which the defendant appealed to this court. *Affirmed*.

*Mary Boehlert*, assigned counsel, for the appellant (defendant).

*Lisa A. Riggione*, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Brian K. Sibley*, *Jr.*, senior assistant state's attorney, for the appellee (state).

*Opinion*

DiPENTIMA, C. J. The defendant, Jose Ruiz, appeals from the judgment of the trial court revoking his probation and imposing a sentence of seven and one-half years incarceration, execution suspended after four years, and three years of probation. On appeal, the defendant claims that the trial court (1) improperly denied his motion to suppress the one-on-one showup identification on the ground that the identification procedure was not unnecessarily suggestive, (2) improperly found that he violated his probation, and (3) abused its discretion in revoking his probation. We are not persuaded and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are necessary for our resolution of this appeal. On July 13, 2012, the defendant was convicted of three counts of assault in the first degree in violation of General Statutes § 53a-59 (a) (3) and one count of carrying a pistol without a permit in violation of General Statutes § 29-35 (a), and was sentenced to twelve years incarceration, execution suspended after fifty-four months, and three years of probation. The defendant was released from incarceration on June 12, 2014, and placed on probation. As a

condition of his probation, the defendant was not to violate the criminal laws of the United States, the state of Connecticut or any other state or territory.

On November 22, 2015, as a result of an incident at a Dunkin' Donuts in New Haven, the defendant was arrested and charged with attempt to commit robbery in the first degree in violation of General Statutes §§ 53a-49 and 53a-134, threatening in the second degree in violation of General Statutes § 53a-62 and breach of peace in the second degree in violation of General Statutes § 53a-181. Following the defendant's arrest, his probation officer, Ada Casanova, on December 3, 2015, applied for an arrest warrant on the ground that the defendant had violated a condition of his probation. The next day, the application was granted and the arrest warrant was issued. The defendant denied the violation of probation charge and, on February 28, 2017, filed a motion to suppress the one-on-one showup identification that occurred shortly after the alleged incident on the ground that the identification procedure was unnecessarily suggestive.

On May 23, 2017, the court held a hearing on the defendant's motion to suppress. Following testimony from one witness, Police Officer Jason Santiago, and oral argument, the court concluded that although the identification procedure used by the police was suggestive, it was not "unnecessarily suggestive." After the court ruled on the defendant's motion, the hearing on the defendant's violation of probation charge commenced.

During the violation of probation hearing, the court heard testimony from three witnesses, Lawrence Welch, Casanova, and the first assistant clerk for the judicial district of New Haven, and also incorporated and considered Santiago's testimony from the earlier hearing on the motion to suppress. Following argument, the

court found that the state had proven, by a preponderance of the evidence, that the defendant had violated his probation when "he accosted . . . Welch at the Dunkin' Donuts . . . and threatened him in various verbal ways and, at one point, displayed in a threatening manner a . . . weapon with a black handle . . . and chased . . . Welch a great distance . . . causing . . . Welch a great and very understandable fear." Although the court concluded that there was insufficient evidence to support a finding that the defendant had committed robbery or attempted robbery, it determined that the evidence was sufficient to support a finding that the defendant had committed an act of threatening in the second degree in violation § 53a-62 (a) (1). The court revoked the defendant's probation and sentenced him to seven and one-half years incarceration, execution suspended after four years, and three years of probation. This appeal followed. Additional facts will be set forth as needed.

I

The defendant claims that the trial court improperly denied his motion to suppress the one-on-one showup identification because the identification procedure was unnecessarily suggestive and unreliable. We conclude that the identification procedure was not unnecessarily suggestive.

We begin our analysis by setting forth our standard of review. "The test for determining whether the state's use of an unnecessarily suggestive identification procedure violates a defendant's federal due process rights derives from the decisions of the United States Supreme Court in *Neil* v. *Biggers*, 409 U.S. 188, 196–97, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), and *Manson* v. *Brathwaite*, 432 U.S. 98, 113–14, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). As the court explained in *Brathwaite*, fundamental fairness is the standard underlying due process,

and, consequently, reliability is the linchpin in determining the admissibility of identification testimony . . . . Thus, the required inquiry is made on an ad hoc basis and is two-pronged: first, it must be determined whether the identification procedure was unnecessarily suggestive; and second, if it is found to have been so, it must be determined whether the identification was nevertheless reliable based on examination of the totality of the circumstances. . . . Furthermore, [b]ecause the issue of the reliability of an identification involves the constitutional rights of an accused . . . we are obliged to examine the record scrupulously to determine whether the facts found are adequately supported by the evidence and whether the court's ultimate inference of reliability was reasonable. . . . Nevertheless, [w]e will reverse the trial court's ruling [on evidence] only [when] there is an abuse of discretion or [when] an injustice has occurred . . . and we will indulge in every reasonable presumption in favor of the trial court's ruling. . . . Because the inquiry into whether evidence of pretrial identification should be suppressed contemplates a series of [fact bound] determinations, which a trial court is far better equipped than this court to make, we will not disturb the findings of the trial court as to subordinate facts unless the record reveals clear and manifest error. . . . Finally, the burden rests with the defendant to establish both that the identification procedure was unnecessarily suggestive and that the resulting identification was unreliable." (Citations omitted; internal quotation marks omitted.) *State* v. *Harris*, 330 Conn. 91, 101–102, 191 A.3d 119 (2018).[1]

[1] Furthermore, we note that it remains an unresolved question whether the due process protection against an unduly suggestive identification procedure applies in a violation of probation proceeding. See *State* v. *Daniels*, 248 Conn. 64, 80 n.16, 726 A.2d 520 (1999), overruled in part on other grounds by *State* v. *Singleton*, 274 Conn. 426, 876 A.2d 1 (2005). We need not, however, decide that issue in this case, as it was not a basis for the court's denial of the motion to suppress and neither party has addressed it on appeal. See *State* v. *Bouteiller*, 112 Conn. App. 40, 45 n.4, 961 A.2d 995 (2009).

The following additional facts are relevant to this claim. During the hearing on the defendant's motion to suppress, Santiago stated that on November 22, 2015, he was an officer with the New Haven Police Department and that, at sometime between 6 a.m. and 6:30 a.m., he was dispatched to the area of 291 Ferry Street in New Haven, following a report that a patron at a Dunkin' Donuts had been robbed. Santiago was informed that the victim, Welch, had described the suspect as a Hispanic male, with a tattoo under his eye, wearing dark clothing. Upon his arrival at the Dunkin' Donuts, Santiago entered the store with another officer and saw the defendant "causing a disturbance." After the officers entered the store, the defendant went into the bathroom, and the store employees indicated that they wanted the individual removed from the premises. Santiago knocked on the bathroom door and ordered the defendant to come out, but he did not comply. Santiago opened the door and saw the defendant "just standing there." Immediately, Santiago noticed that the defendant was a Hispanic male, with a tattoo under his eye, dressed in dark clothing. The defendant was detained, handcuffed and placed in the back of one of the police cruisers in the parking lot.[2]

After he had detained the defendant, Santiago went to Welch's home and took his statement. Welch told the officer that "he was at Dunkin' Donuts and somebody attempted to rob him by indicating that [he] had a gun." Welch also indicated in his statement that if he saw the defendant again, he would be able to identify him. Accordingly, Santiago and Welch went back to the Dunkin' Donuts to conduct a one-on-one showup identification of the defendant. When they arrived in the parking lot, Santiago asked officers to remove the defendant

[2] The defendant was patted down for weapons, given that the initial complaint indicated that a robbery had occurred. No weapons, however, were located on the defendant's person or in the vicinity of the Dunkin' Donuts.

from the police cruiser to have him stand next to the vehicle. Santiago then aimed the spotlight on his cruiser directly at the defendant. The moment that Welch saw the defendant, he stated "without a doubt . . . this is the [individual] who tried to rob me at gunpoint." Santiago further testified that the identification of the defendant occurred within approximately twenty minutes of the officer's initial arrival at the Dunkin' Donuts and approximately forty-five minutes after Welch first had reported the incident to the police.

The defendant claims that the trial court improperly found that the one-on-one showup identification procedure was not unnecessarily suggestive because the actions by the police in this instance served to convince Welch that the defendant was the individual who had accosted and chased him. Specifically, the defendant contends that because he was detained in a police cruisier, in an area of the parking lot "away from any general population," Welch was presented with an initial impression of the defendant as a criminal. Furthermore, the defendant argues that because he was made to stand next to a police cruiser, in handcuffs, flanked by police officers, with a bright light shone on him, Welch was compelled to identify him as the culprit.

A review of existing precedent reveals that our courts have maintained, for some time, that an unnecessarily suggestive identification procedure is one that "gives rise to a very substantial likelihood of irreparable misidentification." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Marquez*, 291 Conn. 122, 139, 967 A.2d 56, cert. denied, 558 U.S. 895, 130 S. Ct. 237, 175 L. Ed. 2d 163 (2009). "[G]enerally a one-to-one confrontation between a [witness] and the suspect presented to him for identification is inherently and significantly suggestive because it conveys the message to the [witness] that the police believe the suspect is guilty. . . . We also have recognized, however, that the

existence of exigencies may preclude such a procedure from being *unnecessarily* suggestive. . . .

"In the past, when we have been faced with the question of whether an exigency existed, we have considered such factors as whether the defendant was in custody, the availability of the victim, the practicality of alternate procedures and the need of police to determine quickly if they are on the wrong trail. . . . We have also considered whether the identification procedure provided the victim with an opportunity to identify his assailant while his memory of the incident was still fresh." (Emphasis in original; internal quotation marks omitted.) *State* v. *Revels*, 313 Conn. 762, 772–73, 99 A.3d 1130 (2014), cert. denied, U.S. , 135 S. Ct. 1451, 191 L. Ed. 2d 404 (2015).

Here, Welch reported the incident within moments of when it occurred, and the defendant was apprehended by the police shortly after they responded to the call. Moreover, prior to the showup identification, Welch had provided the police with an accurate description of the defendant, indicating that the suspect was a Hispanic male, with a tattoo under his eye, wearing dark clothing. Upon communicating to Santiago that he could identify the individual responsible if given the opportunity, Welch was brought back to the Dunkin' Donuts within forty-five minutes to an hour of when he first reported the incident. Once Welch viewed the defendant, he immediately stated with certainty that this was the individual who had "tried to rob [him] at gunpoint." Although the actions by the police in this instance were to some degree suggestive, this court in addressing similar facts has held that such actions do not constitute a due process violation. See, e.g., *State* v. *Dakers*, 155 Conn. App. 107, 115, 112 A.3d 819 (2015) (presence of police, even with defendant in handcuffs, is not unnecessarily suggestive). Further, given the small amount of time that elapsed between when the incident

occurred and when the one-on-one showup identification was conducted, we conclude that the identification procedure was not *unnecessarily* suggestive inasmuch as there was an exigency to provide Welch with an opportunity to identify the defendant while his memory of the incident was still fresh and to assist the police in determining whether they had apprehended the correct individual. See, e.g., *State* v. *Aviles*, 154 Conn. App. 470, 481, 106 A.3d 309 (2014) (showup identification procedure not unnecessarily suggestive when identification made shortly after robbery), cert. denied, 316 Conn. 903, 111 A.3d 471 (2015); *State* v. *Sparks*, 39 Conn. App. 502, 510, 664 A.2d 1185 (1995) (same); see also *State* v. *Smith*, 105 Conn. App. 278, 297 n.5, 937 A.2d 1194 (showup identification forty-five minutes to one hour after incident may not have been unnecessarily suggestive on basis of exigent circumstances), cert. denied, 286 Conn. 909, 944 A.2d 980 (2008). Thus, the court did not err in denying the defendant's motion to suppress the one-on-one showup identification on the ground that the identification procedure was not unnecessarily suggestive.[3]

II

The defendant next claims that the court improperly found that he violated a condition of his probation because there was insufficient evidence to support the finding that he committed an act of threatening in the second degree in violation of § 53a-62 (a) (1). Specifically, the defendant argues that this finding was predicated entirely on Welch's testimony, which the court erred in crediting because it was inconsistent with other evidence in the record. We are not convinced.

[3] Because we conclude that the identification procedure was not unnecessarily suggestive, we do not reach the issue of reliability. See *State* v. *Outing*, 298 Conn. 34, 55, 3 A.3d 1 (2010), cert. denied, 562 U.S. 1225, 131 S. Ct. 1479, 179 L. Ed. 2d 316 (2011).

We first set forth our well settled standard of review. "This court may reverse the trial court's initial factual determination that a condition of probation has been violated only if we determine that such a finding was clearly erroneous. . . . A finding of fact is clearly erroneous when there is no evidence 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." (Internal quotation marks omitted.) *State* v. *Megos*, 176 Conn. App. 133, 140–41, 170 A.3d 120 (2017).

The following additional facts are relevant to this claim. During the violation of probation hearing, Welch testified that, on November 22, 2015, he was at a Dunkin' Donuts in New Haven, sitting at a table and drinking a coffee, when the defendant, who was sitting at a nearby table, made him "feel uncomfortable." Welch stood up and went to exit the store. The defendant followed him and cut him off at the door. The defendant then approached Welch, made him feel uneasy and threatened him. When asked to explain what happened next, Welch stated: "So, what happened next is he threatened me and I didn't take kindly to that. So I—he lunged at me and when I went to approach to defend myself, he jumped back and lifted up his shirt, and I saw a black handle in his waist, and he says we can do this right, let's not do it here, let's go over here." Welch backed his way out of the Dunkin' Donuts into the parking lot, and the defendant continued to follow him. At some point, two bystanders yelled at the defendant to stop. He turned around and told one of them to be quiet. While the defendant was turned around, Welch took off running. The defendant chased after him until Welch reached a police barracks substation and was able to

hide behind a brick wall. When Welch no longer saw the defendant following him, he ran back to his residence and called the police. Welch testified that he told the police that an individual had confronted him at a Dunkin' Donuts and then chased after him through the parking lot and nearby streets. He could not remember whether he had told the police that the individual had attempted to rob him. After he called the police, an officer responded to his home within approximately one-half hour. Welch provided a statement to the officer, and together they went back to the Dunkin' Donuts to ascertain whether Welch could identify an apprehended individual as the same person who had threatened and chased him earlier that morning.[4]

In examining this evidence adduced during the violation of probation hearing, we cannot conclude that the trial court's finding that the defendant violated a condition of his probation was clearly erroneous. As stated previously in this opinion, a condition of the defendant's probation was that he not violate any of the criminal laws of the United States, this state, or any other state or territory. Pursuant to § 53a-62 (a) (1), "[a] person is guilty of threatening in the second degree when . . . [b]y physical threat, such person intentionally places or attempts to place another person in fear of imminent serious physical injury . . . ." On the basis of Welch's testimony, which the court found to be credible, there was sufficient evidence to find that the defendant threatened Welch with a weapon, or an item resembling a weapon, and chased him a significant distance, causing Welch to experience "a great and understandable fear." Irrespective of whether there were inconsistencies between Welch's testimony and other evidence in

[4] Welch identified the officer that responded to his home as the same officer, Santiago, who had testified during the motion to suppress hearing. He also identified, in court, the defendant as the individual that he identified to officers on November 22, 2015.

the record,[5] determinations of credibility are solely within the purview of the trial court. See *State* v. *D'Haity*, 99 Conn. App. 375, 381–82, 914 A.2d 570 ("[w]e must defer to the trier of fact's assessment of the credibility of [a witness] that is made on the basis of its firsthand observation of [his] conduct, demeanor and attitude" [internal quotation marks omitted]), cert. denied, 282 Conn. 912, 924 A.2d 137 (2007). We conclude, therefore, that the court did not improperly find that the defendant violated his probation by committing an act of threatening in the second degree in violation of § 53a-62 (a) (1).

III

Finally, the defendant claims that the trial court abused its discretion in revoking his probation because he was amenable to rehabilitation and did not pose a threat to public safety. We do not agree.

"If a violation [of a condition of probation] is found, a court must next determine whether probation should be revoked because the beneficial aspects of probation are no longer being served. . . . As a general matter, a trial court possesses, within statutorily prescribed limits, broad discretion in sentencing matters in revocation of probation hearings. . . . On appeal, we will disturb a trial court's sentencing decision only if that discretion clearly has been abused." (Citations omitted; internal quotation marks omitted.) *State* v. *Shakir*, 130 Conn. App. 458, 469–70, 22 A.3d 1285, cert. denied, 302 Conn. 931, 28 A.3d 345 (2011).

[5] The defendant argues that Welch's testimony conflicted with his initial statement to the police insofar as he told officers that he had been robbed but later testified that he was not robbed and, instead, only felt threatened. Moreover, the defendant contends that Welch's description of him to the police was inaccurate because he stated that the defendant had a tattoo of a "tear drop" under his eye, when, in fact, the defendant's tattoo is of a "musical note."

In revoking the defendant's probation, the court noted that although it could not find that the defendant committed robbery or attempted robbery, his actions were nonetheless "quite scary." The court then repeated its finding that the defendant not only chased Welch, but threatened him with a weapon, or at the very least with an item that appeared to be a weapon. Additionally, despite concluding that there were sufficient grounds to incarcerate the defendant for the seven and one-half years remaining on his previous sentence, the court decided in its discretion to suspend the sentence after four years.[6] In light of the court's factual findings and its consideration of the entire record, we conclude that the court did not abuse its discretion in revoking the defendant's probation.

The judgment is affirmed.

In this opinion the other judges concurred.

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## IN RE MALACHI E.*
## (AC 41875)

Lavine, Bright and Moll, Js.

*Syllabus*

The respondent mother appealed to this court from the judgment of the trial court terminating her parental rights with respect to her minor child. She claimed that the trial court erred with respect to the dispositional phase of the proceedings in that it improperly determined that

[6] In deciding to afford the defendant a future opportunity of probation, the court stated that it agreed with Casanova's opinion that, although the defendant should be required to serve a period of incarceration given the seriousness of the offenses at issue, he should also be given a chance to resume probation with certain additional conditions.

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

the termination of her parental rights was in the best interest of the child. *Held*:

1. The respondent mother could not prevail on her claim that the trial court erred when it relied entirely on its adjudicatory determination that she had failed to achieve sufficient personal rehabilitation in determining whether the termination of her parental rights was in the best interest of the child; that court did not rely entirely on its adjudicatory determination in making its dispositional determination, as the court unambiguously made its best interest determination by considering, in addition to the mother's failure to rehabilitate, the seven factors prescribed by statute (§ 17a-112 [k]), including the past effect of the mother's conduct on the child, her then present ability to care for the child, the effect of the mother's prospective ability to rehabilitate in order to care for the child, the need for permanency, continuity, and stability in the child's life, and the child's need to end the period of uncertainty, and it expressly stated that it was making its determination considering multiple other factors pertaining to the child, and that it had balanced the child's needs against the benefits of maintaining a connection with the mother.
2. The trial court's best interest determination was factually supported and legally correct, and was not clearly erroneous; there was an abundance of evidence presented to support that court's determination that termination of the respondent mother's parental rights was in the best interest of the child, including the court's unchallenged factual findings regarding the mother's parental defects, the likelihood that those defects would continue into the future, and the need for the child to have stability in his life, and although the mother relied on other findings that were more favorable to her position, specifically, that the child was being cared for by the child's grandmother in the same residence as the mother and that the mother was making progress in her rehabilitation, those facts did not provide a basis to reverse the trial court's determination, as this court declined to place more emphasis on certain of the trial court's findings to reach a conclusion on appeal that differed from that of the trial court.

Argued January 11—officially released March 6, 2019**

*Procedural History*

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of Hartford, Juvenile Matters, where the respondent father was defaulted for failure to appear; thereafter, the matter was tried to the

** March 6, 2019, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

court, *C. Taylor*, *J.*; judgment terminating the respondents' parental rights, from which the respondent mother appealed to this court. *Affirmed*.

*Joshua Michtom*, assistant public defender, for the appellant (respondent mother).

*Benjamin A. Abrams*, assistant attorney general, with whom were *Benjamin Zivyon*, assistant attorney general, and, on the brief, *George Jepsen*, attorney general, for the appellee (petitioner).

*Opinion*

BRIGHT, J. The respondent mother appeals from the judgment of the trial court terminating her parental rights with respect to her minor child, Malachi E.[1] On appeal, the respondent claims that the court erred in determining that the termination of her parental rights was in the best interest of the child because (1) the court relied entirely on its adjudicatory determination that the respondent had failed to achieve sufficient personal rehabilitation, and (2) there was no evidence to support its determination that the termination of her parental rights was in the best interest of the child.[2] We affirm the judgment of the trial court.

The following facts, which the court found by clear and convincing evidence, none of which the respondent challenges on appeal, and procedural history are relevant to the resolution of this appeal. The child was born in December, 2015, and is the respondent's only child. The child, the respondent, and the child's maternal grandmother (grandmother) have lived together in a

[1] The court also terminated the parental rights of John Doe, the unknown father to the child, because he previously had been defaulted for failure to appear. In light of the fact that John Doe has not appealed from the judgment of the trial court, we refer in this opinion to the respondent mother as the respondent.

[2] The child's attorney, pursuant to Practice Book § 67-13, adopted the respondent's brief on appeal.

two family home owned by the grandmother since the child's birth. On May 5, 2016, the grandmother reported to Monique Frey, a parent educator, who was employed by the Catholic Charities Nurturing Families Program and was working with the respondent, that she was concerned about the safety of the child. In particular, the grandmother reported that the respondent is an alcoholic, is aggressive when she is drunk, is depressed and has bipolar disorder, and that the child had fallen off of a bed on two occasions. Frey then reported the grandmother's concerns to the Department of Children and Families (department). On that same date, personnel from the department went to the respondent's residence to discuss the report, but the respondent was defensive and refused to cooperate.

On May 6, 2016, the grandmother reported to the department that the respondent began drinking alcohol after its personnel had departed from the residence. The grandmother also elaborated on her prior report, stating that the respondent has a prior history of drinking alcohol and smoking marijuana, that she suffers from blackouts when she drinks, and that she appropriately cares for the child when she is sober. On that same date, the department's personnel returned to the respondent's residence. Upon their arrival, the respondent became verbally and physically aggressive, and expressed a suicidal intent. As a result, she was taken to Hartford Hospital for a seventy-two hour hold and a mental health assessment. On May 7, 2016, the respondent was discharged from Hartford Hospital.

On May 9, 2016, personnel from the department met with the respondent regarding the future supervision of the child. At the meeting, the respondent admitted that she had a long history of substance abuse and mental health issues, that she had been in and out of treatment for many years, that she had not been taking her prescribed medications for over a year, and that

the child had fallen off a bed. The respondent agreed to submit to a substance abuse and mental health assessment at Wheeler Clinic, and to comply with any recommendations stemming therefrom. She also agreed to permit the grandmother to be the primary caretaker of the child until the respondent had made progress in her treatment, and that she would have only supervised contact with the child.

On June 20, 2016, the petitioner, the Commissioner of Children and Families, filed a neglect petition on behalf of the child and an addendum in which she claimed that the child had been denied proper care and attention as a result of the respondent's substance abuse, mental health issues, and the incidents in which the child had fallen from a bed. On June 21, 2016, Wheeler Clinic reported that the respondent had refused to comply with its recommendation that she participate in individual counseling or trauma-focused therapy to address her history of abuse and trauma. The next day, the grandmother reported to the department that the respondent continued to drink alcohol on the weekends. On August 4, 2016, the respondent, who was represented by counsel, appeared in court and denied the allegations of the neglect petition. The respondent then refused two subsequent recommendations for additional counseling services at Wheeler Clinic. On September 6, 2016, the grandmother reported to the department that the respondent had been intoxicated over the weekend and, consequently, the respondent was hospitalized first at Hartford Hospital, and then at the Institute of Living.

On September 12, 2016, the petitioner filed a motion for temporary custody of the child that was supported by an affidavit attested to by a social worker. Therein, the petitioner alleged, on the basis of the same facts as the neglect petition, that the child was in physical danger from his surroundings, that immediate removal

was necessary to ensure his safety, and that reasonable efforts had been made to eliminate the need to remove the child. On the same date, the court granted the motion for temporary custody, pending a hearing that was scheduled for September 16, 2016, and ordered specific steps for the respondent's rehabilitation. On September 13, 2016, the petitioner filed an amended neglect petition.

On September 16, 2016, the respondent appeared in court with counsel, she agreed that the motion for temporary custody could be sustained, and the court issued specific steps for the respondent's rehabilitation. On approximately the same date, the child was removed from the custody of the respondent and placed in the care of the grandmother, who lived in the same residence. Since that time, the grandmother has continued to care for the child "full-time," and the respondent has maintained frequent contact and visits with the child, which have been supervised by the grandmother.

On November 8, 2016, the respondent entered a plea of nolo contendre to the neglect petition. On that same date, the court issued final specific steps for the respondent's rehabilitation. In accordance with the specific steps, the respondent was referred to several service providers, including Radiance Innovative Services, and engaged in services to address her mental health and alcohol use. Nevertheless, she achieved limited progress and continued to minimize her issues with alcohol and her history of trauma.

On May 4, 2017, a meeting was held among the respondent, a clinician from Radiance Innovative Services, and the department's personnel. At the meeting, the clinician reported that the respondent never expressed any accountability or responsibility for past incidents, denied being intoxicated and claimed to have had just one drink when she was out at dinner with a friend,

refused an offer of shelter or sober living housing because she wanted to retain her freedom, continued to minimize her issues with her alcohol use, and stated that alcohol was not an issue for her. On May 18, 2017, the department referred the respondent to the Therapeutic Family Time Program; however, on June 6, 2017, it learned that the respondent had been discharged for her failure to complete the intake process.

On June 13, 2017, the petitioner filed a motion to review a permanency plan that recommended the termination of the respondent's parental rights and subsequent adoption of the child. On June 28, 2017, the department's personnel conducted a home visit during which the respondent adamantly refused to participate in any additional programs, and said that the department could keep the child. During that same visit, the grandmother confirmed that the petitioner was drinking alcohol the day prior to the May 4, 2017 meeting.

In August and September, 2017, the department started facilitating weekly supervised visits at its office. During that time, the respondent reported to the department that she had been consistently attending therapy, working on her issues, and was making progress in her treatment. She expressed an interest in reunification with the child and recognized that she had made some mistakes. On September 13, 2017, the clinician reported that the respondent was more stable and was doing well and, as a result, the frequency of her sessions was reduced from weekly to biweekly. On September 20, 2017, Frey reported that their recent sessions had been "okay" compared to prior sessions and that the respondent expressed an interest in ending the process so that she could parent the child.

On October 15, 2017, the court granted the petitioner's motion to review and approved the permanency plan. On October 16, 2017, the petitioner filed a petition

to terminate the respondent's parental rights with respect to the child. The petitioner claimed, among other things, that the child had been found to be neglected and that the respondent had failed to achieve the required degree of personal rehabilitation. On November 16, 2017, the respondent appeared in court and denied the allegations of the petition.

On June 5, 2018, after a one day trial, the court issued a memorandum of decision in which it granted the petition to terminate the respondent's parental rights. The court made extensive findings of fact and concluded that the petitioner had met her burden to establish by clear and convincing evidence that statutory grounds for termination existed and that termination was in the best interest of the child.

With respect to the statutory grounds for termination, the court determined that the child previously had been adjudicated neglected and that the respondent had failed to achieve a sufficient degree of personal rehabilitation because she failed to comply fully with the specific steps for her rehabilitation that were ordered by the court on September 12 and 16, and November 8, 2016. In particular, the court determined that the respondent had not, and would not, overcome her mental health and substance abuse problems within a reasonable time so that she would "be able to serve as a safe, responsible, and nurturing parent for [the child] . . . ." The court also determined that termination of the respondent's parental rights was in the best interest of the child because, in light of the importance of long-term stability and the need for expedient custodial determinations, the respondent had not been, and would not be able to be, a safe, responsible, and nurturing parent for the child. This appeal followed. Additional facts will be set forth as necessary.

Before discussing the respondent's claims, we briefly set forth the legal principles that govern our review.

"Proceedings to terminate parental rights are governed by [General Statutes] § 17a-112. . . . Under [that provision], a hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and the dispositional phase. During the adjudicatory phase, the trial court must determine whether one or more of the . . . grounds for termination of parental rights set forth in § 17a-112 [(j) (3)] exists by clear and convincing evidence. The commissioner . . . in petitioning to terminate those rights, must allege and prove one or more of the statutory grounds." (Internal quotation marks omitted.) *In re Egypt E.*, 327 Conn. 506, 526, 175 A.3d 21, cert. denied sub nom. *Morsy E.* v. *Commissioner, Dept. of Children & Families*, U.S. , 139 S. Ct. 88, 202 L. Ed. 2d 27 (2018). "Also, as part of the adjudicatory phase, the department is required to prove, by clear and convincing evidence, that it has made reasonable efforts . . . to reunify the child with the parent, unless the court finds . . . that the parent is unable or unwilling to benefit from reunification . . . ." (Internal quotation marks omitted.) *In re Elijah C.*, 326 Conn. 480, 500, 165 A.3d 1149 (2017); see General Statutes § 17a-112 (j) (1).

"If the trial court determines that a statutory ground for termination exists, then it proceeds to the dispositional phase." (Internal quotation marks omitted.) *In re Elijah C.*, supra, 326 Conn. 500. "In the dispositional phase of a termination of parental rights hearing, the trial court must determine whether it is established by clear and convincing evidence that the continuation of the respondent's parental rights is not in the best interest of the child. In arriving at this decision, the court is mandated to consider and make written findings regarding seven factors delineated in [§ 17a-112 (k)].[3]

[3] General Statutes § 17a-112 (k) provides: "Except in the case where termination of parental rights is based on consent, in determining whether to terminate parental rights under this section, the court shall consider and shall make written findings regarding: (1) The timeliness, nature and extent of services offered, provided and made available to the parent and the child

. . . The seven factors serve simply as guidelines for the court and are not statutory prerequisites that need to be proven before termination can be ordered. . . . There is no requirement that each factor be proven by clear and convincing evidence." (Footnote added; internal quotation marks omitted.) *In re Athena C.*, 181 Conn. App. 803, 811, 186 A.3d 1198, cert. denied, 329 Conn. 911, 186 A.3d 14 (2018); see *In re Nevaeh W.*, 317 Conn. 723, 740, 120 A.3d 1177 (2015). "In the dispositional phase . . . the emphasis appropriately shifts from the conduct of the parent to the best interest of the child. . . . The best interests of the child include the child's interests in sustained growth, development, well-being, and continuity and stability of [his or her] environment." (Internal quotation marks omitted.) *In re Athena C.*, supra, 811. "Because a respondent's fundamental right to parent his or her child is at stake, [t]he statutory criteria must be strictly complied with before

by an agency to facilitate the reunion of the child with the parent; (2) whether the Department of Children and Families has made reasonable efforts to reunite the family pursuant to the federal Adoption and Safe Families Act of 1997, as amended from time to time; (3) the terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, and the extent to which all parties have fulfilled their obligations under such order; (4) the feelings and emotional ties of the child with respect to the child's parents, any guardian of such child's person and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties; (5) the age of the child; (6) the efforts the parent has made to adjust such parent's circumstances, conduct, or conditions to make it in the best interest of the child to return such child home in the foreseeable future, including, but not limited to, (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions, and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child; and (7) the extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act of any other person or by the economic circumstances of the parent."

termination can be accomplished and adoption proceedings begun." (Internal quotation marks omitted.) *In re Elijah C.*, supra, 326 Conn. 500.

On appeal, the respondent does not contest the court's determination with respect to the adjudicatory phase, namely, that she had failed to achieve rehabilitation, or any of the court's factual findings. Instead, the respondent claims that the court erred with respect to the dispositional phase because it improperly determined that the termination of her parental rights was in the best interest of the child. We now turn to each of the respondent's claims that challenge the court's best interest determination.

I

The respondent first claims that the court erred because it relied entirely on the respondent's failure to achieve rehabilitation in determining whether the termination of her parental rights was in the best interest of the child. In particular, the respondent argues that the court conflated the adjudicatory phase with the dispositional phase when it improperly failed to "perform a separate analysis of [the child's] best interests," as required by § 17a-112 (j) (2), because the court "entirely substituted the [respondent's] failure to rehabilitate as the basis for its best interests determination." We disagree.

We first set forth the applicable standard of review and specific legal principles that govern our analysis of this claim. "The interpretation of a trial court's judgment presents a question of law over which our review is plenary. . . . As a general rule, judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The

judgment should admit of a consistent construction as a whole." (Internal quotation marks omitted.) *In re James O.*, 322 Conn. 636, 649, 142 A.3d 1147 (2016).

Our Supreme Court repeatedly has held that the adjudicatory phase is separate from the dispositional phase. "It is axiomatic that, once a child has been adjudicated neglected, the dispositional decision must be based on the best interest of the child and that the interest of the child and the parent may diverge." *In re Natalie S.*, 325 Conn. 833, 847, 160 A.3d 1056 (2017); see *In re Baby Girl B.*, 224 Conn. 263, 280, 618 A.2d 1 (1992) ("[o]ur statutes and caselaw make it crystal clear that the determination of the child's best interests comes into play only after statutory grounds for termination of parental rights have been established by clear and convincing evidence" [emphasis omitted; internal quotation marks omitted]); *In re Jessica M.*, 217 Conn. 459, 466 n.5, 586 A.2d 597 (1991) (statute permitting the termination of parental rights "expressly requires the court to find, in addition to the existence of an enumerated ground for termination, that such termination is in the best interests of the child").

Although the emphasis shifts from the parent to the child in the dispositional phase; *In re Athena C.*, supra, 181 Conn. App. 811; a trial court is not required to blind itself to any parental deficiencies that also were considered during the adjudicatory phase. Our precedents establish that the consideration of the parent's circumstances, including the parent's degree of rehabilitation, is proper during the dispositional phase.[4] Indeed,

[4] This court consistently has affirmed a trial court's best interest determination that was based, at least in part, on the court's previous findings relating to a parent's failure to rehabilitate. See, e.g., *In re Savannah Y.*, 172 Conn. App. 266, 281–82, 158 A.3d 864 (affirming trial court's best interest determination that was "largely based upon the respondent's chronic mental health and substance abuse issues"), cert. denied, 325 Conn. 925, 160 A.3d 1067 (2017); *In re Harmony Q.*, 171 Conn. App. 568, 574–75, 157 A.3d 137 (rejecting claim that trial court erred in making best interest determination on ground that court improperly determined that respondent failed to reha-

the respondent explicitly recognizes in her brief on appeal that the determinations made in the adjudicatory and dispositional phases "may often be so intertwined that the former leads almost inexorably to the latter . . . ." Nevertheless, she argues that the court improperly failed to make the required best interest determination because it relied entirely on her failure to rehabilitate. We disagree with the respondent's interpretation of the court's decision.

The court made the following relevant findings and determinations with respect to the adjudicatory phase and the dispositional phase. In reaching its determination that the respondent had failed to achieve a sufficient degree of personal rehabilitation, which is unchallenged on appeal, the court found that the respondent had failed to comply fully with nine of the seventeen specific steps that were ordered by the court on September 12 and 16, and November 8, 2016.[5] The

bilitate), cert. denied, 325 Conn. 915, 159 A.3d 232 (2017); *In re Gianni C.*, 129 Conn. App. 227, 237–38, 19 A.3d 233 (2011) (affirming trial court's best interest determination that was made, in part, on the basis of respondent's failure to rehabilitate within reasonable time period); *In re Sole S.*, 119 Conn. App. 187, 193–94, 986 A.2d 351 (2010) (affirming trial court's best interest determination that was made, in part, on the basis of psychologist testimony that it "would be in the child's best interest to give [the respondent] more time to achieve personal rehabilitation"); *In re Janazia S.*, 112 Conn. App. 69, 99–100, 961 A.2d 1036 (2009) (affirming trial court's best interest determination that was made, in part, on the basis of "abundant evidence of the respondent parents' ongoing struggles with criminal behavior and addiction").

[5] Specifically, the court found that the respondent had failed to comply fully with the following nine steps: (1) to keep appointments with the department and to cooperate with home visits by the department and the representative for the child; (2) to take part in parenting and individual counseling; (3) to submit to substance abuse assessments and to follow the recommendations regarding treatment; (4) to submit to random drug testing; (5) not to use illegal drugs or abuse alcohol or medicine; (6) to cooperate with service providers recommended for counseling, services, and substance abuse assessment or treatment; (7) to sign releases allowing the department to communicate with her service providers to check attendance, cooperation, and progress toward identified goals; (8) to secure and maintain adequate housing and legal income; and (9) to take all psychotropic medication as prescribed.

court found that the respondent had "been unable to correct the factors that led to the initial commitment of her child, insofar as she is concerned. The clear and convincing evidence reveals that from the date of commitment through . . . the time of trial, [the respondent] ha[d] not been available to take part in her son's life in a safe, nurturing, and positive manner, and, based on her issues of mental health, substance abuse, parenting deficits, and a failure to complete and benefit from counseling and services, she will never be consistently available to [the child]."

The court further found that, although the respondent had attended "various referrals and programs for counseling" and that she was making progress in her rehabilitation treatment, she had "failed to show any consistent and adequate benefit from these referrals," and she had "failed to improve her parenting ability to acceptable standards as far as her child's safety and emotional needs are concerned." The court also found that the petitioner "ha[d] demonstrated, by clear and convincing evidence, that [the respondent] cannot exercise the appropriate judgment necessary to keep [the child] safe and healthy and to maximize his abilities to achieve," that "it is patently clear that [the respondent was] not in a better position to parent her child than she was at the time of [the child's] commitment, and still remains without the qualities necessary to successfully parent him," and that "[g]iven th[e] respondent's history of mental health and substance abuse issues, it is reasonable to infer that she will remain besieged by these issues for some extensive time, and that she will not be physically available to serve as a custodial resource for [the child] during the time frame for rehabilitation contemplated in § 17a-112 (j) (3) (B) [(ii)]."

In reaching its determination that the termination of the respondent's parental rights was in the best interest of the child, the court first made the required findings

as to each of the statutory factors provided by § 17a-112 (k). In sum, it determined that (1) the petitioner had made available timely, appropriate, and comprehensive reunification services to the respondent, (2) the petitioner had made reasonable efforts to reunify the respondent and the child, (3) the respondent had failed to comply with nine of the seventeen court ordered specific steps, (4) the respondent has a strong relationship and bond with the child, (5) the child was twenty-nine months old, (6) the respondent had been unable or unwilling to make a realistic and sustained effort to conform her conduct to acceptable parental standards, and (7) there was no unreasonable conduct by any party that prevented the respondent from maintaining a relationship with the child. In doing so, the court incorporated, in a summary fashion, the same factual findings that led to its conclusion in the adjudicatory phase that the respondent had failed to comply with the specific steps and that she failed to benefit from those services. For instance, the court, consistent with its earlier findings, found that although the respondent had "complete[d] some programs . . . these programs failed to [affect] sufficient change . . . to correct [the respondent's] inability to appropriately parent [the child]."

The court then outlined that it had "examined multiple relevant factors, including the child's interests in sustained growth, development, well-being, stability, and continuity of his environment; his length of stay in foster care; the nature of his relationships with his foster parent and his biological parents; and the degree of contact maintained with [the respondent]," and that it had "balance[d] the child's intrinsic needs for stability and permanency against the benefits of maintaining a connection with [the respondent]."

The court then found that "[t]he clear and convincing evidence shows that [the respondent] ha[d] demonstrated mental health issues, substance abuse issues,

parenting deficits, and a failure to fully benefit from counseling and services," that she "was unable to appropriately address these issues by the time of the filing of the [termination of parental rights] petition," that "[h]er ability to care for her son remained as poor at the time of the . . . trial as it was at the inception of the case," that she "remained incapable of being a safe, nurturing, and responsible parent for [the child]," that "despite her referrals and services, [the respondent] ha[d] failed to rehabilitate herself sufficiently to be a safe, nurturing, and responsible parent for [the child]," and that "too much time ha[d] already elapsed to justify giving [the respondent] further time to show her rehabilitation."

The court further found that "the time that the [respondent] need[s] to attempt to rehabilitate . . . as [a] safe, nurturing, and responsible [parent], if that were possible, is time that the child cannot spare," that the respondent's parental performance shows that she "lacks the attributes and characteristics necessary to fulfill a valid parental role," that the respondent's failure to address her issues in a timely manner "clearly and convincingly show[s] that it is unlikely that [she] will ever be able to conform [her] individual behaviors to appropriate parental standards or be able to serve as a safe, nurturing, and responsible [parent] for [the child]," that given her "individual behaviors and performances so far, [the] court [could not] foresee either respondent parent in this case ever having the ability or the patience to follow the regimen necessary for their child to maximize his abilities and achievements," that her "inability to remain sober and to comply with treatment requirements speaks volumes of her lack of ability to parent her son and to keep [the child] safe in the long run," and that the child "can no longer wait for permanency, continuity, and stability in his life."

The court then outlined the principles of long-term stability and the exigency of termination of parental rights proceedings and concluded that "the clear and convincing evidence in this case establishes that [the child] is entitled to the benefit of ending, without further delay, the period of uncertainty he has lived with as to the unavailability of [the respondent] as [caretaker]. . . . Having balanced [the child's] individual and intrinsic needs for stability and permanency against the benefits of maintaining a connection with the [respondent], the clear and convincing evidence in this case establishes that the child's best interests cannot be served by continuing to maintain any legal relationship to the [respondent]."

The foregoing discussion makes clear that, contrary to the respondent's claim, the court did not rely entirely on its adjudicatory determination in making its dispositional determination. Instead, the court unambiguously made its best interest determination considering, not only the respondent's failure to rehabilitate, but also the seven statutory factors prescribed by § 17a-112 (k), the past effect of the respondent's conduct on the child, her then present ability to care for the child, the effect of the respondent's prospective ability to rehabilitate in order to care for the child, the need for permanency, continuity, and stability in the child's life, and the child's need to end the period of uncertainty. Further, the court expressly stated that it was making its determination considering multiple other factors pertaining to the child, and that it had balanced the child's needs against the benefits of maintaining a connection with the respondent. Therefore, we conclude that the court did not rely solely on the respondent's past failures to achieve rehabilitation in determining whether the termination of her parental rights was in the best interest of the child.

II

The respondent also claims that there was no evidence to support the court's determination that termination of her parental rights was in the best interest of the child. The respondent argues that, contrary to the court's determination, the evidence presented relating to her unique circumstances demonstrates that this is the rare case in which termination was not warranted. In particular, the respondent argues that termination was improper because the court found, among other things, that the child is currently being cared for by the grandmother in the same residence in which the respondent resides, and the respondent was making progress in her rehabilitation treatment. We disagree.

We first set forth the applicable standard of review that governs our analysis of this claim. "[A]n appellate tribunal will not disturb a trial court's finding that termination of parental rights is in a child's best interest unless that finding is clearly erroneous. . . . On appeal, our function is to determine whether the trial court's conclusion was factually supported and legally correct. . . . In doing so, however, [g]reat weight is given to the judgment of the trial court because of [the court's] opportunity to observe the parties and the evidence. . . . We do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. . . . [Rather] every reasonable presumption is made in favor of the trial court's ruling." (Citation omitted; internal quotation marks omitted.) *In re Davonta V.*, 285 Conn. 483, 488, 940 A.2d 733 (2008); see also *In re Brayden E.-H.*, 309 Conn. 642, 657, 72 A.3d 1083 (2013).[6]

[6] We note that our Supreme Court has clarified that a trial court's ultimate conclusion that a ground for termination of parental rights has been proven presents a question of evidentiary sufficiency. See *In re Shane M.*, 318 Conn. 569, 587–88, 122 A.3d 1247 (2015) (clarifying standard of review); see also *In re Egypt E.*, supra, 327 Conn. 525–26 ("[a]lthough the trial court's subordinate factual findings are reviewable only for clear error, the court's ultimate conclusion that a ground for termination of parental rights has been proven

"[T]he balancing of interests in a case involving termination of parental rights is a delicate task and, when supporting evidence is not lacking, the trial court's ultimate determination as to a child's best interest is entitled to the utmost deference. . . . Although a judge [charged with determining whether termination of parental rights is in a child's best interest] is guided by legal principles, the ultimate decision [whether termination is justified] is intensely human. It is the judge in the courtroom who looks the witnesses in the eye, interprets their body language, listens to the inflections in their voices and otherwise assesses the subtleties that

presents a question of evidentiary sufficiency" [internal quotation marks omitted]).

Since *In re Shane M.*, our Supreme Court has not had occasion to apply the evidentiary sufficiency standard of review to a court's best interest determination. As a result, this court has either declined to decide whether to apply the evidentiary sufficiency standard of review to a best interest claim; see, e.g., *In re Elijah G.-R.*, 167 Conn. App. 1, 29–30 n.11, 142 A.3d 482 (2016); *In re Nioshka A. N.*, 161 Conn. App. 627, 637 n.9, 128 A.3d 619, cert. denied, 320 Conn. 912, 128 A.3d 955 (2015); or has continued to apply the clearly erroneous standard of review. See, e.g., *In re Angelina M.*, 187 Conn. App. 801, 803–804, A.3d (2019) (clearly erroneous); *In re Gabriella C.-G.*, 186 Conn. App. 767, 770, A.3d (2018) (clearly erroneous), cert. denied, 330 Conn. 969, A.3d (2019); contra *In re Athena C.*, supra, 181 Conn. App. 809, 815–17 (evidentiary sufficiency).

We see no reason why the standard of review applicable to the adjudicatory phase would also not apply to the dispositional phase, particularly in cases, as in the present case, in which the court's factual findings are uncontested; however, we decline to apply the evidentiary sufficiency standard instead of the clearly erroneous standard of review for the following reasons. First, we decline to adopt a standard of review for a best interest determination that our Supreme Court has yet to adopt. Second, both parties on appeal agree that the clearly erroneous standard of review applies to the present claim. Third, the evidence in the present case supports the court's determination under either standard because, as articulated by this court in *In re Nioshka A. N.*, "if the evidence upon which we have relied in finding that the trial court's best interest determination was not clearly erroneous were considered under the evidentiary sufficiency standard, and, thus, was construed in the light most favorable to upholding the trial court's best interest determination . . . that evidence, so construed, would be sufficient to prove by clear and convincing evidence that termination of the respondent's parental rights was in the best interest of the child." (Citation omitted.) *In re Nioshka A. N.*, supra, 161 Conn. App. 637 n.9.

are not conveyed in the cold transcript." (Internal quotation marks omitted.) *In re Nevaeh W.*, supra, 317 Conn. 740.

In the present case, there was an abundance of evidence presented to support the court's determination that termination of the respondent's parental rights was in the best interest of the child. On the basis of the evidence presented, the court found that the following facts had been proven by clear and convincing evidence. The respondent had not been, and would not be, a safe, responsible, and nurturing parent for the child. The respondent's mental health issues, substance abuse issues, parenting deficits, and a failure to fully benefit from counseling and services are antagonistic to the best interest of the child. The child required permanency, continuity, and stability in his life, and an end to the period of uncertainty. The court also made additional findings as to the seven factors mandated under § 17a-122 (k), including that the respondent had failed to comply with a majority of the court ordered specific steps and that she had been unable or was unwilling to make a realistic and sustained effort to conform her conduct to acceptable parental standards. The respondent does not challenge any of the court's factual findings on appeal.

Affording the utmost deference to the court's decision, we conclude that the court's best interest determination was not clearly erroneous. The combination of the court's unchallenged factual findings regarding the respondent's parental defects, the likelihood that those defects would continue into the future, and the need for the child to have stability in his life, support the court's determination. Although the respondent directs our attention to other findings that are more favorable to her position, specifically, that the child is being cared for by the grandmother in the same residence as the

respondent and that the respondent was making progress in her rehabilitation, these facts do not provide us a basis to reverse the court's determination. We decline the respondent's invitation to place more emphasis on certain of the court's findings so that we might reach a conclusion on appeal that differs from that of the trial court.

Therefore, we conclude that the court's best interest determination was factually supported and legally correct.

The judgment is affirmed.

In this opinion the other judges concurred.

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## STATE OF CONNECTICUT *v.* DOVANTE GRAY-BROWN (AC 41385)

Alvord, Prescott and Flynn, Js.

*Syllabus*

Convicted of the crimes of felony murder, robbery in the first degree and carrying a pistol without a permit in connection with the shooting death of the victim, the defendant appealed, claiming, inter alia, that the trial court improperly denied his motion to suppress certain evidence that the police had seized from the bedroom of his home. The defendant and a friend, G, had arranged a drug deal with the victim in order to rob the victim of drugs and money. During the robbery, the defendant shot and killed the victim. Subsequently, the police went to the apartment where the defendant lived with his mother, C, and her husband at about six o'clock in the morning to execute an arrest warrant for the defendant. C told the police that the defendant was not home and gave the officers verbal consent to search the home for him, including his bedroom. A detective, L, thereafter obtained a consent form from his vehicle and observed C as she read and signed the consent form before the police began to search the bedroom. The police seized from the bedroom an empty ammunition tray, rubber gloves and an electronic scale. *Held*:

1. The trial court properly denied the defendant's motion to suppress the evidence that the police seized during their search of his bedroom, as that court's findings that C had actual authority to consent to the search of the defendant's bedroom and that her consent was voluntary were

not clearly erroneous: C and her husband presumptively had actual authority to consent to the search, as they were the leaseholders of the apartment and the parents of the defendant, all of the twelve police officers who came to the home, except L and two other detectives, left before C consented to the search of the bedroom, C was unaware of whether weapons were being carried by the officers, who obtained verbal and written consent from C, and L reviewed the consent form with her; moreover, the officers did not forcefully enter the home, there was no evidence that they roused C out of bed, pointed their handguns at anyone or used loud or threatening language, there was no evidence that C initially refused to consent to the search or that the officers implied that they would obtain a warrant upon her refusal to consent, and C did not suggest that her decision to let the officers into her apartment was anything but the product of her own free will; furthermore, the court's conclusion that the defendant did not establish sufficiently exclusive control of his bedroom so as to render C's consent ineffective was supported by the evidence, as his bedroom door, which was not always locked, was not locked at the time of the search, C testified that she regularly entered the bedroom to clean the floor and that the defendant had never told her that she was not allowed in the room, and although C testified that the defendant helped pay bills and rent, which could tend to show that he had exclusive control over the room, C did not provide concrete details about those financial contributions.

2. The defendant's claim that the trial court abused its discretion by admitting into evidence the ammunition tray, latex gloves and electronic scale was unavailing, as that court reasonably concluded that the evidence the police seized from the defendant's bedroom was relevant and that its probative value outweighed any undue prejudice; the ammunition tray was probative to show that the defendant stored and used nine millimeter bullets, such as those that were used in the victim's murder, the latex gloves were relevant to explain why none of the DNA evidence or fingerprints collected at the shooting scene were attributable to the defendant, and the electronic scale was corroborative of G's testimony that the defendant participated in the scheme to rob the victim of drugs and money, and tended to demonstrate that the defendant was involved in the sale of drugs, which made his involvement in a scheme to steal drugs more likely, and the items were not unduly prejudicial and were not likely to arouse the emotions of the jury.

3. The evidence was insufficient to prove that the firearm used in the underlying crime had a barrel of less than twelve inches in length, which was required to sustain the defendant's conviction of carrying a pistol without a permit in violation of statute (§ 29-35 [a]): the testimony of F, a police officer who used the generic term handgun to describe a spent shell casing, was not evidence from which the jury could have reasonably concluded that the firearm used in the victim's shooting had a barrel

that was less than twelve inches in length, F did not testify that the spent shell casings found at the crime scene came from a handgun, the state presented no evidence that shell casings are ejected only from handguns and that the shell casings could not have come from a firearm with a barrel length of twelve inches or more, and the state's ballistics expert did not testify that bullets found at the crime scene had been fired from a handgun; moreover, any inference that a sawed-off gun barrel that was seized from the basement of the defendant's home was connected to the firearm used in the victim's shooting would amount to speculation, as there was no evidence as to what type of firearm the sawed-off barrel came from, when the gun barrel was sawed off, if the remaining portion of the barrel would be less than twelve inches in length or whether the firearm would still be capable of firing without the sawed-off portion, and L's testimony that the sawed-off barrel could fit into a .22 caliber weapon did not tie the barrel to the evidence that was found at the crime scene or to any specific type of firearm; furthermore, the type of ammunition that was used in the victim's shooting did not help to establish that the length of the barrel of the firearm was less than twelve inches, and G's testimony was too vague and imprecise to permit a jury reasonably to infer that the defendant had used a firearm with a barrel length of less than twelve inches to shoot the victim.

4. The trial court properly declined the defendant's request to give the jury a third-party culpability instruction, which the defendant claimed was necessary due to the presence of a partial fingerprint of a third person on the rental car that the victim had driven to the crime scene; the defendant did not establish a direct connection between the third party and the offense with which the defendant was charged, as the fingerprint could have been left from innocuous activity rather than by someone involved in the victim's shooting, and there was no other evidence that tended to show that the third party was involved in the victim's shooting or had a motive to commit the crime, or that the third party's involvement necessarily exculpated the defendant.

5. The trial court did not abuse its discretion when it declined to question a juror, who had been dismissed after the jury returned its verdict, about the defendant's claim that the juror became aware that the defendant was incarcerated when the juror saw him being transported to court by a correctional officer during the first week of trial; it was within the court's discretion, especially in light of the limitations of the applicable rule of practice (§ 42-33) and the state's interest in preventing juror harassment, to decline to question the dismissed juror after the court conducted a hearing, evaluated the evidence from the hearing and determined that the defendant's allegations were not credible.

Argued October 10, 2018—officially released March 12, 2019

*Procedural History*

Substitute information charging the defendant with the crimes of felony murder, robbery in the first degree and carrying a pistol without a permit brought to the Superior Court in the judicial district of Fairfield, where the court, *Kahn*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the matter was tried to the jury; verdict and judgment of guilty, from which the defendant appealed. *Reversed in part; judgment directed.*

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

*Laurie N. Feldman*, deputy assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Colleen P. Zingaro*, senior assistant state's attorney, for the appellee (state).

*Opinion*

PRESCOTT, J. The defendant, Dovante Gray-Brown, appeals from the judgment of conviction, rendered after a jury trial, of felony murder in violation of General Statutes § 53a-54c, robbery in the first degree in violation of General Statutes § 53a-134 (a) (1) and carrying a pistol without a permit in violation of General Statutes § 29-35 (a). The defendant claims on appeal that (1) the trial court improperly denied his motion to suppress several items of evidence taken from his bedroom because his mother lacked authority to consent to a search of his bedroom, (2) the court abused its discretion by admitting those same items into evidence because they were not relevant and were more prejudicial than probative, (3) there was insufficient evidence to prove, as required for the crime of carrying a pistol without a permit, that the defendant possessed a firearm that had a gun barrel less than twelve inches in length, (4) the court improperly denied the defendant's

request for a third-party culpability instruction, and (5) the court improperly refused to question a juror regarding an issue of juror partiality that was raised after conviction. We agree with the defendant that there was insufficient evidence to prove, as required by § 29-35 (a), that the length of the barrel of the firearm used to commit the crime was less than twelve inches. Accordingly, we reverse the judgment of conviction as to that count with direction to render a judgment of acquittal on the charge of carrying a pistol without a permit. We are not persuaded, however, by the remainder of the defendant's claims and, accordingly, affirm the judgment of conviction in all other respects.

The facts, as could have been reasonably found by the jury, and procedural history, are as follows. The defendant and his friend, Dominick Gonzalez, arranged a drug deal with the victim, Dewayne Gardner, Jr., in order to rob him of drugs and money. Gonzalez knew the victim because the victim regularly supplied him with drugs that he then resold. Gonzalez asked the victim to meet him at 178 Poplar Street in Bridgeport so that he could purchase drugs from him.

In the early morning of December 16, 2013, the victim, believing he was going to sell narcotics to Gonzalez, drove a rental car to 178 Poplar Street. Prior to the meeting, the victim had exchanged text messages with Gonzalez. Gonzalez texted the victim that he was on his way to make the purchase and later texted that he had arrived at 178 Poplar Street. Gonzalez, however, had sent these text messages from several miles across town. Gonzalez, who was unable to get a ride to the agreed upon location, did not want to inform the victim that the defendant would be engaging in the transaction because the victim trusted Gonzalez more than the defendant.

In addition to exchanging text messages with the victim, Gonzalez was also in contact with the defendant.

Gonzalez exchanged more than one dozen calls with the defendant between 12:30 a.m. and 3 a.m. The defendant was at his home on 1022 Hancock Avenue in Bridgeport during these calls. Hancock Avenue runs parallel to Poplar Street, with direct access to 178 Poplar Street through a vacant lot. The victim was in his car when the defendant arrived, with a firearm, to carry out the robbery. During the robbery, the defendant fired multiple gunshots into the car from the front passenger side, striking the victim.

Gonzalez later called the defendant to see if he had succeeded in the robbery. The defendant admitted to Gonzalez that he had shot the victim. The defendant also told Gonzalez that, after shooting the victim and fleeing the scene, he returned to take the victim's phone in order to dispose of it.

The police were called to the scene to respond to a report of a car accident. After being shot, the victim apparently attempted to flee the scene, but his vehicle hit a parked car at 211 Poplar Street. The police found an unspent nine millimeter bullet and two spent shell casings in the street at 178 Poplar Street. In the victim's car, they found bulletholes, bullets, and shell casings showing that a gunman had shot into the car from the passenger side. The victim sat dead in the driver's seat, with multiple gunshot wounds.

Although the victim habitually carried a cell phone and money with him, no wallet, money, cell phone, or drugs, other than a small amount of marijuana, were found in the car. A pocket of the victim's pants was turned inside out.

After obtaining the victim's phone records, the police spoke with Gonzalez and seized his phone for evidence. The police arrested Gonzalez on a charge of felony murder on December 21, 2013. Gonzalez initially lied to the police to protect himself and the defendant, but

eventually cooperated with police and testified at trial pursuant to a plea deal.

Gonzalez told police that they could find ammunition that he and the defendant had been trying to sell in the basement of the multifamily house in which the defendant lived on the third floor. After obtaining consent from the owner of the house, the police searched the basement and did, in fact, find ammunition, as well as the sawed off barrel of a gun. A few days later, after obtaining consent from the defendant's mother to search the defendant's bedroom, the police found, inter alia, an electronic scale, rubber gloves, and a Remington ammunition tray for nine millimeter bullets in his room.

Forensic testing of the bullets and casings found at the crime scene indicated that they were fired from the same firearm. The bullets and casings were manufactured, however, by three different companies and differed in metal, shape and stampings.

The defendant eventually was charged with felony murder, robbery in the first degree and carrying a pistol without a permit. On November 30, 2016, the jury found the defendant guilty of all charges. On the conviction of felony murder, the court, *Kahn*, *J.*, sentenced the defendant to forty-five years of incarceration and five years of special parole. Additionally, the court sentenced the defendant to a concurrent ten year term of incarceration on the count of robbery and a concurrent five year term of incarceration for carrying a pistol without a permit. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the trial court improperly denied his motion to suppress evidence collected from his bedroom because the police illegally had

searched his room without a search warrant. Specifically, the defendant contends that the trial court improperly concluded that his mother had the authority to consent to the search of his bedroom and that she did so voluntarily. According to the defendant, the warrantless entry by police into his bedroom violated his constitutional rights, and, therefore, the evidence seized from this search should have been suppressed. We disagree.

In its oral decision on the defendant's motion to suppress, the court found the following additional facts. At approximately 6 a.m. on January 11, 2014, police officers arrived at the defendant's residence to execute an arrest warrant for the defendant charging him with felony murder. Approximately eight detectives and four uniformed officers arrived at the residence.

The defendant's mother, Claudette Brown, opened the door. The officers advised her that they had a warrant to arrest the defendant on the charge of felony murder. Brown told them that he was not home and gave the officers verbal consent to search the home for him. After searching the apartment and not locating the defendant, many of the law enforcement officers departed in an attempt to find the defendant at his girlfriend's house, where Brown said he might be. The only officers who remained at the defendant's residence were Lieutenant Christopher Lamaine and two police detectives.

Brown identified the defendant's bedroom to the officers. Lamaine noticed that the door was open and that the inside of the room was visible.[1] Brown was coopera-

[1] The record is unclear as to whether Lamaine observed that the defendant's bedroom door was open when the officers first arrived to the apartment, or after the initial search for the defendant.

tive and gave permission to the officers to search the bedroom. Brown was calm and did not have difficulty communicating with the officers. Brown was aware that the police were investigating the homicide for which they had obtained an arrest warrant for her son. Although the officers carried weapons at the time of the search, at no point did they unholster their weapons during their initial search for the defendant or during the subsequent search of his bedroom.

After Brown gave verbal consent to search the defendant's bedroom, Lamaine left the apartment to retrieve a consent form from his vehicle, which Brown subsequently signed.[2] After reviewing the form with Brown, and observing her reading and signing it, the officers began to search the defendant's bedroom. The detectives seized a number of items from the bedroom, including an ammunition tray, gloves, and an electronic scale.

We turn next to the well established law and standard of review that governs the defendant's claim. "A warrantless search is not unreasonable under either the fourth amendment to the constitution of the United States or article first, § 7, of the constitution of Connecticut if a person with authority to do so has freely consented to the search. . . . The state bears the burden of proving that the consent was free and voluntary

[2] The form stated: "I, Claudette Brown, having been informed of my constitutional right not to have a search conducted without a search warrant and my right to refuse to consent to such a search, I do hereby consent to have the following members conduct a complete search of my residence, place of business, garage and/or place located at 1022 Hancock [Avenue], third floor, Bridgeport, Connecticut." The notice further stated that "these officers are authorized to take from the aforesaid mentioned location such materials or other property as they may desire and examine and perform tests on any and all items seized." It also states that "this written permission is being given by me to the above named officers voluntarily and without duress, threats, intimidation, or promises of any kind." The notice was then signed by Brown and two of the detectives or officers as witnesses.

and that the person who purported to consent had the authority to do so. . . . The state must affirmatively establish that the consent was voluntary; mere acquiescence to a claim of lawful authority is not enough to meet the state's burden. . . . The question whether consent to a search has in fact been freely and voluntarily given, or was the product of coercion, express or implied, [as well as whether the individual providing consent possessed the requisite authority] is a question of fact to be determined from the totality of all the circumstances. . . . As a question of fact, it is . . . to be decided by the trial court upon the evidence before that court together with the reasonable inferences to be drawn from that evidence." (Internal quotation marks omitted.) *State* v. *Azukas*, 278 Conn. 267, 275, 897 A.2d 554 (2006).

"On appeal, we apply a familiar standard of review to a trial court's findings and conclusions in connection with a motion to suppress. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . The conclusions drawn by the trial court will be upheld unless they are legally and logically inconsistent with the evidence. . . . Because a trial court's determination of the validity of a . . . [seizure] implicates a defendant's constitutional rights, however, we engage in a careful examination of the record to ensure that the court's decision was supported by substantial evidence." (Internal quotation marks omitted.) *State* v. *Douros*, 90 Conn. App. 548, 553–54, 878 A.2d 399, cert. denied, 276 Conn. 914, 888 A.2d 85 (2005).

"In order for third-party consent to be valid, the consenting party must have possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected. . . . The authority that justifies the third party consent rests on mutual use of

the property by persons who have joint access or control for most purposes, so that any of the inhabitants has the right to permit the inspection in his own right, and the others have assumed the risk that any of the cohabitants might permit the common area to be entered. . . .

"We also note that the overwhelming majority of the cases hold that a parent may consent to a police search of a home that is effective against a child, if a son or a daughter, whether or not still a minor, is residing in the home with the parents . . . . To overcome this authority, the child must establish sufficiently exclusive possession of the room to render the parent's consent ineffective. . . . Factors that [our Supreme Court] previously [has] considered when evaluating whether a child has established sufficiently exclusive possession of the room include: whether the child is paying rent; who has ownership of the home; whether the door to the bedroom is generally kept closed; whether there is a lock on the door; whether other members of the family use the room; and whether other members of the family had access to the room for any reason." (Citations omitted; internal quotation marks omitted.) *State* v. *Azukas*, supra, 278 Conn. 277–78.

In its oral decision on the motion to suppress, the trial court relied on *State* v. *Douros*, supra, 90 Conn. App. 548, to support its conclusion that the defendant's mother had the authority to permit the police to search the defendant's bedroom.[3] *Douros* is factually analogous to the present case. In *Douros*, after the adult

[3] If a person who does not have actual authority consents to a search, the search may still be valid under the doctrine of apparent authority. The United States Supreme Court has recognized an apparent authority doctrine, under which "a warrantless entry is valid when based upon the consent of a third party whom the police, at the time of the entry, reasonably believe to possess common authority over the premises, but who in fact does not do so." *Illinois* v. *Rodriguez*, 497 U.S. 177, 179, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990). The defendant argues that the trial court decided the motion to suppress on the basis of the doctrine of apparent authority, rather than

defendant fled the scene of a domestic dispute, his mother gave the police permission to search his bedroom. Id., 551–52. This court held that there was evidence to support the trial court's finding that the defendant's mother exercised sufficient control over his bedroom to validly consent to a search of it by the police. Id., 555. In *Douros*, the defendant's mother owned the house in which the defendant and his mother resided. Id., 555–56. Additionally, she stated that she had access to the room and gave the police permission to search the room. Id., 552. This court concluded that the evidence supported the trial court's factual findings. Id., 556.

In the present case, the trial court's finding that Brown had actual authority to consent to the search of the defendant's bedroom is not clearly erroneous. She and her husband were the leaseholders of the apartment and the parents of the defendant and, thus, presumptively had actual authority to consent to a search. In order to refute this presumption, the defendant must establish sufficiently exclusive possession of the room to render the parent's consent ineffective.[4] To establish that he had exclusive control over the room, the defendant argued that the door to his room had a lock. His

actual authority, because it relied on *Douros*, which the defendant argues is an apparent authority case. We are not persuaded by the defendant's argument that *Douros* was decided on the doctrine of apparent authority. See *State* v. *Azukas*, supra, 278 Conn. 280 n.6. The court in *Douros*, and the trial court in the present case, decided their respective cases on the basis of the consenting party's actual authority. Therefore, we do not undergo an analysis of the reasonableness of the officer's inquiry as required by the apparent authority doctrine. See generally *State* v. *Buie*, 312 Conn. 574, 94 A.3d 608 (2014).

[4] Our Supreme Court's decision in *State* v. *Azukas*, supra, 278 Conn. 278, imposes a burden shifting framework in circumstances in which "a son or daughter, whether or not still a minor, is residing in the home with the parents . . . ." In such circumstances, our Supreme Court has concluded that the child must overcome the presumptive authority of a parent to consent to search with sufficient evidence that the child has exclusive possession of the bedroom.

bedroom door, however, was not always locked and was not locked at the time of the search. Brown testified that she regularly entered the defendant's bedroom to clean the floor and that the defendant had never told her that she was not allowed in the room. Although she would knock if he was home, if the defendant was not home and the door was unlocked, she would enter the room. Brown also testified that the defendant "chipped in" with bills and rent, which could tend to show that he had exclusive control over the room. Brown did not, however, provide concrete details about these financial contributions, such as whether the defendant paid a fixed amount of rent. In sum, the court's conclusion that Brown had actual authority to consent to the police search was supported by the evidence. Further, the court's conclusion that the defendant did not establish sufficiently exclusive control of his bedroom that would render Brown's consent ineffective was supported by the evidence.

We next review the court's finding that the consent to search was voluntarily given. The defendant argues that, under the totality of the circumstances, Brown's consent was not valid because she had been coerced to give her consent. Specifically, the defendant argues that Brown's consent was coerced because the search occurred in the early morning and twelve police officers were present at the house.

The trial court's finding that Brown's consent was voluntary was supported by the evidence and, therefore, not clearly erroneous. Although twelve officers initially arrived at the home, that number reflected the fact that they had come to arrest someone who they believed to be armed and responsible for a homicide. All of the officers except Lamaine and two police detectives left the house before the consent to the search occurred. Brown was unaware as to whether the officers carried weapons. The officers obtained both verbal and written

consent from Brown, and Lamaine reviewed the consent form with her.

Although the officers arrived at about six o'clock in the morning, the officers did not forcefully enter the home. There is no evidence that the officers roused Brown out of bed in the middle of the night, broke down the door in the early hours of the morning, pointed their handguns at anyone or used loud or threatening language. See *State* v. *Reynolds*, 264 Conn. 1, 45, 836 A.2d 224 (2003), cert. denied, 541 U.S. 908, 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004). Additionally, there is no evidence that Brown initially refused to consent to the search or that the officers implied that they would obtain a warrant upon her refusal to consent to the search. Cf. *State* v. *Brunetti*, 279 Conn. 39, 57, 70, 901 A.2d 1 (2006), cert. denied, 549 U.S. 1212, 127 S. Ct. 1328, 167 L. Ed. 2d 900 (2007). Finally, Brown did not herself suggest, during her testimony or otherwise, that her decision to let the officers into her apartment was anything but the product of her own free will. See *State* v. *Reynolds*, supra, 45–46. Therefore, the court properly denied the defendant's motion to suppress the evidence seized by the police from the defendant's room.

II

The defendant next claims that the trial court abused its discretion by admitting into evidence the ammunition tray,[5] latex gloves, and electronic scale[6] found in the defendant's bedroom because the items were not relevant and, even if relevant, they were more prejudicial than probative. We disagree.

[5] An ammunition tray is a tray designed to store bullets. Each hole in the tray is designed to hold one round of ammunition. The tray is a part of the packaging that is often included with the purchase of rounds of ammunition.

[6] An electronic scale is customarily used by narcotics sellers to weigh narcotics in order to package and sell them. See *State* v. *McNeil*, 154 Conn. App. 727, 731, 106 A.3d 320, cert. denied, 316 Conn. 908, 111 A.3d 884 (2015).

The following additional facts are relevant to this claim. During Lamaine's testimony, the defendant objected to the admission into evidence of the ammunition tray, latex gloves, and electronic scale, arguing that they were not relevant and were unduly prejudicial. Specifically, the defendant argued that the Remington brand ammunition tray, which was empty when police seized it, was not relevant because the bullets recovered at the crime scene were not made by Remington. Further, the defendant argued that the scale did not have relevance to the present case because, although it may have been relevant to a drug related crime, it did not relate to the murder of the victim. The defendant further argued that the plastic gloves were not relevant because they could be used for many legal purposes, and the defendant had been training for employment in the health care field.

The state argued that the items were relevant and more probative than prejudicial because the ammunition tray linked the defendant to the bullets found in the basement and at the crime scene, the scale tended to prove that the defendant was meeting the victim to steal drugs, which could later be resold, and the gloves tended to explain why the defendant's DNA and fingerprints were not found at the crime scene. The court agreed, ruling that the items were relevant and that their probative value outweighed their prejudicial effect.

"Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . Evidence is relevant if it tends to make the existence or nonexistence of any other fact more probable or less probable than it would be without such evidence. . . . To be relevant, the evidence need not exclude all other possibilities; it is sufficient if it tends to support the conclusion [for which it is offered], even to a slight degree. . . . Evidence is not rendered inadmissible

because it is not conclusive. All that is required is that the evidence tend[s] to support a relevant fact even to a slight degree, so long as it is not prejudicial or merely cumulative. . . .

"Although relevant, evidence may be excluded by the trial court if the court determines that the prejudicial effect of the evidence outweighs its probative value. . . . Of course, [a]ll adverse evidence is damaging to one's case, but it is inadmissible only if it creates undue prejudice so that it threatens an injustice were it to be admitted. . . . The test for determining whether evidence is unduly prejudicial is not whether it is damaging to the defendant but whether it will improperly arouse the emotions of the jury. . . . Reversal is required only [if] an abuse of discretion is manifest or [if an] injustice appears to have been done." (Citations omitted; internal quotation marks omitted.) *State* v. *Wilson*, 308 Conn. 412, 429–30, 64 A.3d 91 (2013).

In the present case, we agree with the court that the empty ammunition tray was probative to show that the defendant stored and used nine millimeter bullets such as those that were used in the underlying murder. Lamaine testified that it appeared that nine millimeter bullets would fit in the empty Remington ammunition tray. Thus, the empty ammunition tray found in the defendant's bedroom provided a potential link to the nine millimeter bullets and shell casings that were found at the scene of the shooting, as well as the ammunition seized from the basement of the defendant's home. Moreover, the fact that the ammunition tray was manufactured by Remington, but none of the bullets or shell casings found at the scene were made by Remington, does not vitiate the probative value of the ammunition tray because the assortment of bullets in the basement and at the crime scene tended to demonstrate that the defendant did not use bullets from a single manufacturer. In sum, the empty ammunition tray tended to

demonstrate that these items were all connected to the defendant.

We also agree that the latex gloves were relevant to explain why none of the DNA evidence or fingerprints collected at the scene was attributable to the defendant. Gonzalez testified that the defendant wore gloves when he committed robberies. A forensic scientist, called as a witness by the state, testified that gloves could prevent the transfer of fingerprints. Additionally, a forensic scientist, called by the defense, admitted that gloves could prevent the transfer of DNA. Therefore, the defendant's possession of latex gloves provided an explanation for the absence of his DNA and fingerprints at the crime scene and was, therefore, highly probative.

Finally, the presence of an electronic scale in the defendant's bedroom tended to demonstrate that the defendant was involved in the sale of drugs and was corroborative of Gonzalez' testimony that the defendant participated in the scheme to rob the victim of drugs and money. Although the defendant argues that a scale was not needed for this particular robbery, it was nonetheless relevant to show that he sold drugs, making his involvement in a scheme to steal drugs more likely.

Although damaging to the defendant, these items were not unduly prejudicial. The admission of the electronic scale, which tends to show that the defendant was involved in the sale of drugs, was unlikely to shock the jury because Gonzalez later testified, without objection, that the defendant used and sold drugs. Gonzalez also testified, without objection, that the defendant carried firearms and wore gloves during robberies to prevent leaving evidence that would connect him to the crime. Thus, these items were not likely to arouse the emotions of the jury any more than the testimony provided by Gonzalez. Moreover, there is nothing inherent in the nature of the items that would likely overcome

the reason of, or, " 'improperly arouse the emotions' " of the jury. *State* v. *Wilson*, supra, 308 Conn. 430. Therefore, the court reasonably concluded that the evidence was relevant and that its probative value outweighed any undue prejudice to the defendant.

III

The defendant next claims that there was insufficient evidence to sustain his conviction of carrying a pistol without a permit under § 29-35 (a). Specifically, the defendant argues that the state failed to introduce sufficient evidence from which the jury reasonably could have concluded beyond a reasonable doubt that the length of the barrel of the firearm used to commit the crime was less than twelve inches. In support of his insufficiency claim, the defendant points to the fact that there were no known eyewitnesses to the shooting and that the firearm used to shoot the victim was never found. Additionally, the defendant argues that the jury was not presented with other circumstantial evidence from which it reasonably could have inferred that the length of the barrel of the firearm used to commit the crime was less than twelve inches.

In response, the state contends that the following circumstantial evidence presented to the jury permitted it reasonably to infer beyond a reasonable doubt that the defendant had used a firearm with a barrel less than twelve inches in length to shoot the victim: (1) testimony that the spent casings at the scene were fired from a handgun; (2) the sawed-off barrel the police discovered in the defendant's basement; (3) the ballistics evidence recovered at the crime scene and ammunition found in the defendant's basement; (4) the fact that the crime scene bullets and casings came from the same gun; and (5) testimony that Gonzalez and the defendant carried guns whenever they sold drugs, the defendant

was a "stickup guy," and, in a prior robbery, the defendant used a .22 caliber revolver. We agree with the defendant that the evidence was insufficient to prove beyond a reasonable doubt that he violated § 29-35 (a).

"The standard of review we apply to a claim of insufficient evidence is well established. In reviewing the sufficiency of the evidence to support a criminal conviction we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"We note that the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt." (Citation omitted; internal quotation marks omitted.) *State* v. *Perkins*, 271 Conn. 218, 246, 856 A.2d 917 (2004).

"Because [t]he only kind of an inference recognized by the law is a reasonable one [however] . . . any such inference cannot be based on possibilities, surmise or conjecture. . . . It is axiomatic, therefore, that [a]ny [inference] drawn must be rational and founded upon the evidence. . . . [T]he line between permissible inference and impermissible speculation is not always easy to discern. When we infer, we derive a conclusion

from proven facts because such considerations as experience, or history, or science have demonstrated that there is a likely correlation between those facts and the conclusion. If that correlation is sufficiently compelling, the inference is reasonable. But if the correlation between the facts and the conclusion is slight, or if a different conclusion is more closely correlated with the facts than the chosen conclusion, the inference is less reasonable. At some point, the link between the facts and the conclusion becomes so tenuous that we call it speculation. When that point is reached is, frankly, a matter of judgment." (Internal quotation marks omitted.) *State* v. *Reynolds*, supra, 264 Conn. 93.

"Moreover, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . In evaluating evidence, the [finder] of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [finder of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . .

"[A]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [finder of fact], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty." (Citation omitted;

internal quotation marks omitted.) *State* v. *Perkins*, supra, 271 Conn. 246–47.

Finally, "[w]e . . . emphasize the weighty burden imposed on the state by the standard of proof beyond a reasonable doubt. Under bedrock principles of our criminal justice system, it is obviously not sufficient for the state to prove simply that it is more likely than not that the defendant was convicted of [the offense], or even that the evidence is clear and convincing that he was so convicted. . . . Our Supreme Court has described the beyond a reasonable doubt standard as a subjective state of near certitude . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Tenay*, 156 Conn. App. 792, 810, 114 A.3d 931 (2015).

We now turn to the essential elements of the offense. Section 29-35 (a) provides in relevant part: "No person shall carry any pistol or revolver upon his or her person, except when such person is within the dwelling house or place of business of such person, without a permit to carry the same issued as provided in section 29-28 . . . ." "[T]o obtain a conviction for carrying a pistol without a permit, the state [is] required to prove beyond a reasonable doubt that the defendant (1) carried a pistol, (2) for which he lacked a permit, (3) while outside his dwelling house or place of business. . . .

"The term pistol and the term revolver . . . as used in [General Statutes §§] 29-28 to 29-38, inclusive, mean any firearm having a barrel less than twelve inches in length. General Statutes § 29-27. In cases in which a violation of § 29-35 is charged, the length of the barrel is . . . an element of [the] crime and must be proven beyond a reasonable doubt. . . . We observe, however, that, like the other essential elements of the offense, the length of the barrel of a pistol or revolver may be proven by circumstantial, rather than direct, evidence. Direct numerical evidence is not required to establish

the length of the barrel of a handgun in question." (Citations omitted; internal quotation marks omitted.) *State* v. *Covington*, 184 Conn. App. 332, 340, 194 A.3d 1224, cert. granted on other grounds, 330 Conn. 933, 195 A.3d 383 (2018).

Next, we examine the circumstantial evidence presented at trial from which the state contends a jury reasonably could conclude that the firearm carried by the defendant had a barrel length of less than twelve inches. First, the state cites Officer Thomas Flaherty's testimony that the shell casings "were fired from a handgun." The state argues that "Officer Flaherty's testimony alone, that the bullet casings were shot from a 'handgun,' satisfies the element."[7]

The state, however, takes this testimony out of context. The following exchange occurred between the prosecutor and Officer Flaherty:

"Q. And with regard to the spent casings, can you describe to the jury what that means?

"A. Rounds that were fired from a handgun. There's—a projectile discharged from the firearm. It's just the

[7] The state relies on *State* v. *Miles*, 97 Conn. App. 236, 242, 903 A.2d 675 (2006), for the proposition that testimony that a "handgun" was used in the commission of the offense is enough to establish beyond a reasonable doubt that the firearm had a barrel of less than twelve inches. See also *State* v. *Williams*, 231 Conn. 235, 252, 645 A.2d 999 (1994), overruled in part on other grounds by *State* v. *Murray*, 254 Conn. 472, 487, 757 A.2d 578 (2000); *State* v. *Covington*, supra, 184 Conn. App. 345; *State* v. *Fleming*, 111 Conn. App. 337, 347, 958 A.2d 1271 (2008), cert. denied, 290 Conn. 903, 962 A.2d 794 (2009); *State* v. *Williams*, 48 Conn. App. 361, 370–72, 709 A.2d 43, cert. denied, 245 Conn. 907, 718 A.2d 16 (1998). The state places far more weight on *Miles* than it will bear. In *Miles*, and the other cases cited previously, there was testimony by an eyewitness who actually saw the firearm that was used during the commission of the offense and described it to be a "handgun," a small pistol, or otherwise described how the firearm was handled or stored in a way such that it was likely to have a barrel length of less than twelve inches. Here, there was no eyewitness who observed the firearm used by the defendant and stated that it could be held in one hand or concealed in a small space.

shell casing itself that, after a—after being fired, it's going to be in the area of—where the shots were fired."

When Officer Flaherty used the word "handgun," he was speaking in general terms. Indeed, in the very next sentence, he refers more generally to a "firearm." In context, Officer Flaherty was not testifying that the spent shell casings found at the scene came specifically from a handgun. The state did not present any evidence that shell casings are ejected only from handguns and that the shell casings could not have come from a firearm with a barrel length of twelve inches or more. Moreover, the state's ballistics expert did not testify that the bullets found at the crime scene had been fired from a handgun. The use of the generic term "handgun" during Officer Flaherty's testimony to describe a spent shell casing for the jury was not evidence from which the jury could have reasonably concluded that the firearm used in the crime in this case had a barrel that was less than twelve inches in length.

Next, the state argues that the jury could infer that the defendant carried a short-barreled firearm because the police seized a sawed-off gun barrel from his basement. In its brief, the state argues that "[t]he sawed-off barrel in his basement showed that [the defendant] had customized a long-barreled gun into a short-barreled gun." There is no evidence, however, that connects the gun barrel found in the basement to any firearm carried by the defendant or used to shoot the victim. The state's ballistics expert did not testify about the gun barrel. There is no evidence as to what type of firearm the barrel came from, when the gun barrel was sawed off, if the remaining portion of the barrel would be less than twelve inches in length, or whether the firearm would still be capable of firing without the sawed-off portion. The only testimony regarding what type of firearm the barrel came from was during the

following colloquy between the prosecutor and Lamaine:

"Q. Detective, do you have any knowledge as to what type of weapon that barrel could fit into?

"A. I believe it was a .22 caliber.

"Q. Do you want to look at it?

"A. May I look at it?

"Q. Yeah.

"A. Refresh my recollection. It's been a while. I don't see any markings. I mean, if you want to draw my attention to some but—

"Q. No. I just thought you might know.

"A. No.

"Q. But that particular item is meant to fit into a gun; correct?

"A. It is a gun barrel that's been sawed off, yes."

Lamaine's testimony simply establishes only that it was, in fact, a sawed-off gun barrel. This testimony does not tie the barrel to the evidence found at the crime scene or to any specific type of firearm whatsoever. Further, there was no testimony that a .22 caliber firearm was capable of shooting nine millimeter bullets, such as those recovered from the scene. Thus, any inference that the gun barrel was connected to the firearm used in the shooting would amount to sheer speculation.

The state also asserts that the jury was entitled to infer that the length of the barrel of the firearm used to commit the shooting was less than twelve inches from the ballistics evidence found at the crime scene and in the defendant's basement. We are not persuaded. The state's expert in the field of firearm and tool mark

examinations provided no testimony about the types of firearms that use nine millimeter ammunition or the barrel lengths of such firearms. Therefore, the type of ammunition, without more, does not help to establish that the length of the barrel of the firearm used to commit the offense was less than twelve inches.

Finally, the state relies on certain portions of Gonzalez' testimony as circumstantial evidence that the barrel of the firearm was less than twelve inches. Specifically, the state relies on Gonzalez' acknowledgment that the defendant was a stickup guy in response to a question by defense counsel, and his testimony that the defendant had used a .22 caliber revolver in a prior robbery and that he and the defendant kept guns on them "[j]ust in case." Specifically, the state argues that the jury could infer from this testimony that the defendant carried a handgun that he could easily conceal and, thus, that the gun used in the shooting must have had a barrel less than twelve inches in length.

Regarding Gonzalez' acknowledgment that the defendant was a stickup guy, the state cites to *Augustine* v. *State*, 201 Miss. 277, 291, 28 So. 2d 243 (1946), to contend that "the common understanding of 'stick-up' is a hold-up, usually by use of a pistol."[8] Therefore, the state asserts, Gonzalez' acknowledgment that the defendant was a stickup guy supports a finding that the gun used by the defendant was a pistol or a gun with a barrel length less than twelve inches. We are not persuaded by this argument. The word "stickup" is commonly understood as meaning a robbery with the use of *any* weapon. See, e.g., Black's Law Dictionary (10th Ed. 2014) p. 1640 (defining "stickup" as "[a]n armed robbery in which the victim is threatened by the use of weapons"). Therefore, testimony that the defendant was a

[8] We note that the Mississippi Supreme Court cited no authority for this common understanding. Moreover, this case was decided almost seventy-five years ago and common parlance changes over time and geographic areas.

stickup guy was not circumstantial evidence from which the jury reasonably could infer that the length of the gun barrel of the firearm used to commit the offense was less than twelve inches.

We are also unpersuaded that Gonzalez' testimony that the defendant used a revolver in a prior robbery and kept a gun on him "[j]ust in case" was evidence from which the jury reasonably could infer that the defendant had used a revolver or other short-barreled firearm in the present case. Testimony that the defendant merely carried a "gun" on him, with no specificity regarding the size of the firearm, is not probative of whether the firearm used in the present case was a handgun with a barrel length of less than twelve inches. Moreover, Gonzalez' testimony that the defendant possessed a .22 caliber revolver is actually inconsistent with the ballistics evidence collected at the crime scene. That evidence suggests that a nine millimeter firearm was used. Consequently, the defendant's prior possession of a .22 caliber revolver lacks probative value regarding the type of firearm used in the present case. The testimony of Gonzalez is simply too vague and imprecise to permit a jury reasonably to infer that the defendant used a firearm with a barrel length of less than twelve inches to shoot the victim in the present case.

In sum, the jury reasonably could not have concluded beyond a reasonable doubt that the firearm used by the defendant in the underlying crime had a barrel of less than twelve inches in length. We therefore conclude that there was insufficient evidence to prove the required elements under § 29-35 and the defendant's conviction on that charge must be reversed.

IV

The defendant next claims that the court improperly declined his request to give a third-party culpability instruction to the jury. We disagree.

The following additional facts are relevant to this claim. The police found two fingerprints on the column along the passenger door of the victim's car. The location of the fingerprints suggested that "somebody [had been] reaching in [to the car]." One of the fingerprints matched with someone named Allen Garrett through the Automated Fingerprint Identification System.[9] The defendant offered no other information about Garrett into evidence.

Prior to the close of evidence, the defendant submitted a written request for a third-party culpability instruction. The court held a charge conference in which it heard argument on the defendant's request for a third-party culpability instruction. The defendant argued that, on the basis of the presence of Garrett's fingerprint on the victim's vehicle, he was entitled to a third-party culpability instruction. The court denied the defendant's request for a third-party culpability instruction, concluding that "the factual predicate for [it did] not exist."[10]

"In determining whether the trial court improperly refused a request to charge, [w]e . . . review the evidence presented at trial in the light most favorable to supporting the . . . proposed charge. . . . A request to charge which is relevant to the issues of [a] case and which is an accurate statement of the law must be given. . . . If, however, the evidence would not reasonably support a finding of the particular issue, the trial court has a duty *not* to submit it to the jury. . . . Thus, a trial court should instruct the jury in accordance with

[9] The Automated Fingerprint Identification System is a database of all the images of the fingerprints taken either during an arrest booking procedure or fingerprints submitted for background checks through job application procedures. The database is kept in the state police bureau of identification.

[10] The court however, did not preclude the defendant from arguing during closing arguments that the presence of Garrett's fingerprint raised a reasonable doubt regarding the defendant's guilt.

a party's request to charge [only] if the proposed instructions are reasonably supported by the evidence. . . .

"It is well established that a defendant has a right to introduce evidence that indicates that someone other than the defendant committed the crime with which the defendant has been charged. . . . The defendant must, however, present evidence that directly connects a third party to the crime. . . . It is not enough to show that another had the motive to commit the crime . . . nor is it enough to raise a bare suspicion that some other person may have committed the crime of which the defendant is accused. . . .

"The admissibility of evidence of third party culpability is governed by the rules relating to relevancy. . . . Relevant evidence is evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence. . . . Accordingly, in explaining the requirement that the proffered evidence establish a direct connection to a third party, rather than raise merely a bare suspicion regarding a third party, we have stated: Such evidence is relevant, exculpatory evidence, rather than merely tenuous evidence of third party culpability [introduced by a defendant] in an attempt to divert from himself the evidence of guilt. . . . In other words, evidence that establishes a direct connection between a third party and the charged offense is relevant to the central question before the jury, namely, whether a reasonable doubt exists as to whether the defendant committed the offense. Evidence that would raise only a bare suspicion that a third party, rather than the defendant, committed the charged offense would not be relevant to the jury's determination. A trial court's decision, therefore, that third party culpability evidence proffered by the defendant is admissible, necessarily entails a determination that the proffered evidence is relevant to the jury's

determination of whether a reasonable doubt exists as to the defendant's guilt. . . .

"[I]f the evidence pointing to a third party's culpability, taken together and considered in the light most favorable to the defendant, establishes a direct connection between the third party and the charged offense, rather than merely raising a bare suspicion that another could have committed the crime, a trial court has a duty to submit an appropriate charge to the jury." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Arroyo*, 284 Conn. 597, 607–10, 935 A.2d 975 (2007).

In the present case, the trial court concluded that a third-party culpability instruction was not warranted by a partial fingerprint of a third person on the vehicle in the absence of other evidence connecting that person to the crime. The fingerprint could have been left from innocuous activity, rather than from someone involved in the commission of the crime. Although there was no direct evidence as to the ownership of the vehicle the victim used on the night of the shooting, the victim was known to use rental cars, and, in such instances, third parties would readily have had access to the same car. With nothing more, a partial fingerprint on the outside of the car door does not satisfy the requirement that there be a *direct* connection between a third party and the crime.

The present case is factually analogous to *State* v. *James*, 141 Conn. App. 124, 136–37, 60 A.3d 1011, cert. denied, 308 Conn. 932, 64 A.3d 331 (2013). In *James*, two pieces of evidence, a hat with a "mixed sample" of DNA and multiple fingerprints lifted from a car, were linked to the defendant, as well as unidentified persons. Id. 136–37. The hat was a "mixed sample," meaning that more than one person, including the defendant, had

contributed to its DNA profile. Id. The car had fingerprints of the defendant and his accomplice, as well as five fingerprints that did not belong to them. Id., 136. Prior to closing arguments, the defendant requested a third-party culpability charge on the basis of this information, which the trial court denied. Id., 137. This court ultimately held that "when viewed in a light most favorable to the defendant, the proffered DNA and fingerprint evidence only *indirectly* and *tenuously* implicated third parties without directly absolving or exculpating the defendant, [and] the court did not abuse its discretion by refusing to give a third party culpability instruction." (Emphasis added.) Id., 138–39. As in *James*, the fingerprint evidence relating to Garrett only *indirectly* and *tenuously* implicated him in this case.

There simply was no other evidence that could tend to show that Garrett was somehow involved in the commission of the victim's murder, had a motive to commit the crime, or that his involvement necessarily exculpated the defendant from involvement as well. Thus, even when we consider this evidence in the light most favorable to the defendant, it did not establish a direct connection between the third party and the charged offense. Accordingly, we conclude that the trial court properly determined that the defendant was not entitled to a jury instruction on third-party culpability.

V

The defendant's final claim on appeal is that the court improperly declined to question a juror regarding an issue of juror partiality that was raised after the jury returned its verdict. Specifically, the defendant claims that the court's inquiry was inadequate under *State* v. *Brown*, 235 Conn. 502, 668 A.2d 1288 (1995), and that the court should have summoned the identified juror back to court and questioned him regarding the event

that gave rise to a question about his partiality. We disagree.

The following additional facts are relevant to this claim. On January 27, 2017, after the defendant was found guilty, but prior to sentencing, he filed a motion for a hearing. The defendant claimed in that motion that a juror had seen him being transported to court by a correctional officer during the first week of trial and thus became aware that he was incarcerated. This knowledge, the defendant argues, violated his constitutional right to the presumption of innocence. The court granted the motion in part and a hearing was held on the issue.

At the hearing, the defendant testified to the following facts. A juror, who was driving a truck behind the defendant, saw the defendant while he was being transported to court in a prisoner transport vehicle. During transport, the defendant was wearing an orange jumpsuit, shackles and handcuffs, and was traveling in a light gray sedan with no markings and windows that were not tinted.[11] The defendant was sitting across the seat with his back to the driver's side door and his legs up. When he saw the defendant, the juror covered his face with a folder and slowed his vehicle in order to put distance between the two cars. The defendant first testified that this interaction took five to six minutes, but on cross-examination, stated it was likely just over a minute. He also testified that he immediately told his attorney about the incident. His attorney, however, did not remember the defendant informing him of the incident and had no notes recounting it.

After the hearing, the court denied the defendant's request to question the juror who allegedly saw him

[11] After the hearing had concluded, but before sentencing, the court contacted marshals at the Department of Correction and determined that the windows were, in fact, tinted. The court noted that this information did not affect the outcome of the hearing.

being transported to court. The court found that the defendant was not credible, and that even if the facts alleged by the defendant were to be believed, there was no basis for further inquiry.

We turn to the law that governs the defendant's claim.[12] "Jury impartiality is a core requirement of the right to trial by jury guaranteed by the constitution of Connecticut, article first, § 8, and by the sixth amendment to the United States constitution. . . . In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors. . . . The modern jury is regarded as an institution in our justice system that determines the case solely on the basis of the evidence and arguments given [it] in the adversary arena after proper instructions on the law by the court. . . . Consideration [by the jury] of extrinsic evidence is presumptively prejudicial because it implicates the defendant's constitutional right to a fair trial before an impartial jury. . . .

"In the past, [our Supreme Court has] recognized that the trial court has broad discretion to determine the form and scope of the proper response to allegations of jury misconduct. . . . In exercising that discretion, the trial court must zealously protect the rights of the accused. . . . We have limited our role, on appeal, to a consideration of whether the trial court's review of alleged jury misconduct can fairly be characterized as an abuse of its discretion. . . . Even with this circumscribed role, we have reserved the right to find an abuse of discretion in the highly unusual case in which such

[12] Although we examine the defendant's claim under the rubric of juror misconduct, we recognize that even if the defendant's version of events were true, these events would not constitute misconduct by a juror, but are more properly characterized as implicating the juror's partiality. See generally *Daley* v. *J.B. Hunt Transport, Inc.*, 187 Conn. App. 587, A.3d (2019) (contrasting juror misconduct from questions of juror competency).

an abuse has occurred. . . . The trial judge's discretion, which is a legal discretion, should be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." (Citations omitted; internal quotation marks omitted.) Id., 522–24.

"Although both the state and a criminal defendant have an interest in impartial jury trials . . . after a jury verdict has been accepted, other state interests emerge that favor proceedings limited in form and scope. The state has a strong interest in the finality of judgments . . . and in protecting the privacy and integrity of jury deliberations, preventing juror harassment and maintaining public confidence in the jury system." (Citations omitted.) Id., 531.

Finally, Practice Book § 42-33 provides: "Upon inquiry into the validity of a verdict, no evidence shall be received to show the effect of any statement, conduct, event or condition upon the mind of a juror nor any evidence concerning mental processes by which the verdict was determined. Subject to these limitations, a juror's testimony or affidavit shall be received when it concerns any misconduct which by law permits a jury to be impeached." Therefore, a trial court must proceed carefully in examining jurors regarding their verdict for fear of straying into an improper examination of the mental processes used by the jurors in reaching their verdict. Cf. *State* v. *Johnson*, 288 Conn. 236, 264–65, 951 A.2d 1257 (2008).

In the present case, the court held a hearing regarding the alleged misconduct and concluded that the defendant's allegations were not credible. The court simply did not believe that the defendant told his attorney about the alleged incident or that the incident happened at all. After listening to testimony from the defendant and reviewing cases cited by counsel, the trial court

held that there was "no factual or legal basis to conduct any further inquiry into [the] matter, nor [was] there a factual or legal basis for either the relief requested, which [was] further inquiry of . . . the juror who allegedly saw the defendant in a vehicle . . . [and] a motion for a new trial." The court concluded that, even if the allegations were credited, the defendant was essentially in a civilian vehicle, that due to his position in the vehicle, his shackles and handcuffs would not have been visible, and that it was unclear whether his clothing would have been visible.

The defendant relies on *State* v. *Brown*, supra, 235 Conn. 502, to argue that the court was required to summon the juror for questioning. *Brown*, however, is not factually similar to the present case. In *Brown*, an anonymous letter was sent to a judge alleging jury misconduct in a case over which the judge had presided. Id., 519–20. Defense counsel learned of the letter on the day of sentencing. Id., 520. At that time, the defendant orally amended his motion for a new trial to include the alleged jury misconduct. Id., 520–21. The court heard brief argument on both the defendant's motion for a judgment of acquittal and motion for a new trial, and subsequently denied both motions. Id., 521. On appeal, the defendant argued that the trial court had violated his state and federal constitutional rights by failing to conduct an evidentiary hearing to investigate the allegations of jury misconduct in the letter. Id. Our Supreme Court held that, although an evidentiary hearing was not required, "in the circumstances of this case, the trial court improperly failed to conduct *any inquiry whatsoever* specifically addressing the allegations of jury misconduct contained in the letter." (Emphasis added.) Id.

*Brown* was "one of [the] highly unusual cases of an abuse of discretion." Id., 524. "Although written anonymously, the letter was accurately addressed to the judge

who had presided over the defendant's trial and contained accurate information about the defendant and the charges involved in the case. The letter also contained specific and facially credible allegations of jury exposure to racially derogatory remarks regarding the defendant allegedly made by court officials, and named as the source of these allegations a person who was accurately identified as a juror." Id., 524–25.

In the present case, and unlike *Brown*, the court held a hearing regarding the alleged juror misconduct and determined that the defendant's allegations were *not* credible. It was well within the discretion of the court, especially considering the limitations of Practice Book § 42-33 and the state's interest in preventing juror harassment, to decline to question a dismissed juror after evaluating the evidence from the hearing and determining that the allegations of misconduct simply were not credible. *Brown* does not require the court to conduct a full evidentiary hearing, and certainly does not require the court always to question a juror. Therefore, the court did not abuse its discretion by declining to question the juror regarding the alleged incident and by denying the defendant's request for a new trial.

The judgment is reversed only as to the conviction of carrying a pistol without a permit in violation of § 29-35 (a) and the case is remanded with direction to render judgment of not guilty on that charge; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

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*tional distress claims were barred by applicable two year statute of limitations (§ 52-584); whether continuing course of conduct doctrine tolled statute of limitations; claim that trial court improperly granted motion for summary judgment as to invasion of privacy by intrusion on seclusion claims; whether alleged tortious conduct of defendants established claim of intrusion of seclusion; whether plaintiff proved intentional intrusion on his solitude or seclusion that would be highly offensive to reasonable person; claim that trial court improperly granted motion for summary judgment as to intentional infliction of emotional distress claims; whether defendants' conduct was sufficiently extreme and outrageous to form basis for intentional infliction of emotional distress claim; whether trial court properly rendered summary judgment in favor of defendant water company as to CUTPA claim; whether plaintiff failed to allege and demonstrate that he suffered ascertainable loss; whether punitive damages and attorney's fees are sufficient to fulfill ascertainable loss requirement under CUTPA; whether emotional distress constitutes ascertainable loss of money or property for purposes of CUTPA.*

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# NOTICES OF CONNECTICUT STATE AGENCIES

## Department of Social Services

## Notice of Proposed Medicaid State Plan Amendment (SPA)

### SPA 19-I: Inpatient Hospital Payments – Annual Adjustment Factor Updates to Account for DRG Grouper Version Changes

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

**Changes to Medicaid State Plan**

Effective on or after April 15, 2019, as described below, SPA 19-I will amend Attachment 4.19-A of the Medicaid State Plan to modify inpatient hospital reimbursement under the All Patient Refined Diagnosis-Related Group (APR-DRG) system.

Specifically, the State Plan will be updated to include an adjustment factor in the 3M APR-DRG reimbursement methodology. The adjustment factor is calculated make overall DRG payment levels under grouper version 36 comparable to the overall payment levels under the prior version, in the aggregate. If necessary to make payment levels comparable, there may be a different adjustment factors for each hospital peer group.

This SPA will also specify that DSS will implement each new grouper version on the January 1st after the version becomes available and will update the applicable adjustment factor(s) every January 1st so that overall payment levels from each DRG grouper version are designed to be comparable to the overall payment levels under the previous version, in the aggregate.

**Fiscal Impact**

DSS estimates that this SPA will increase annual aggregate expenditures by approximately $78.4 million in Federal Fiscal Year (FFY) 2019 and $171 million in FFY 2020.

**Obtaining SPA Language and Submitting Comments**

This SPA is posted on the DSS web site at this link: http://portal.ct.gov/dss. Scroll down to the bottom of the webpage and click on ''Publications'' and then click on ''Updates.'' Then click on ''Medicaid State Plan Amendments''. The proposed SPA may also be obtained at any DSS field office or the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Medical Policy Unit, Department of Social Services, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105 (Phone: 860-424-5067). Please reference ''SPA 19-I: Inpatient Hospital Payments – Annual Adjustment Factor Updates to Account for DRG Grouper Version Changes''.

Anyone may send DSS written comments about the SPA. Written comments must be received by DSS at the above contact information no later than April 11, 2019.

## Department of Social Services

## Notice of Proposed Medicaid State Plan Amendment (SPA)

### SPA 19-M: One-Time Inpatient Hospital Supplemental Payment

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

**Changes to Medicaid State Plan**

Effective on or after April 15, 2019, as described below, SPA 19-M will amend Attachment 4.19-A of the Medicaid State Plan to implement a one-time inpatient hospital supplemental payment.

Specifically, a one-time supplemental payment will be made to each hospital subject to the 3M All Patient Refined Diagnosis Related Grouper (APR-DRG) inpatient reimbursement methodology. The payment is intended to offset the aggregate reduction in payments that resulted from implementation of version 36 of the DRG grouper. Payment amounts will be calculated by repricing each hospital's paid claims for dates of discharge from October 1, 2018 through April 14, 2019 using the applicable adjustment factor calculated to make overall hospital DRG payment levels under grouper version 36 comparable to the levels prior to version 36. That adjustment factor is the same factor that will be used as part of the DRG payment methodology effective on or after April 15, 2019, which is being proposed to be added to the Medicaid State Plan by SPA 19-I. The hospital's repriced claims will be subtracted from actual paid claims to determine the supplemental payment amount to each hospital.

**Fiscal Impact**

DSS estimates that this SPA will increase annual aggregate expenditures by approximately $92.7 million in Federal Fiscal Year (FFY) 2019 and $0 in FFY 2020.

**Obtaining SPA Language and Submitting Comments**

This SPA is posted on the DSS web site at this link: http://portal.ct.gov/dss. Scroll down to the bottom of the webpage and click on ''Publications'' and then click on ''Updates.'' Then click on ''Medicaid State Plan Amendments''. The proposed SPA may also be obtained at any DSS field office or the Town of Vernon Social Services Department, or upon request from DSS (see below).

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Anyone may send DSS written comments about the SPA. Written comments must be received by DSS at the above contact information no later than April 11, 2019.

# NOTICES

## Notice of Reprimand of Attorney

Pursuant to Practice Book § 2-54, notice is hereby given that on January 23, 2019 in docket number FBT-CV18-6077182-S John W. Mills, juris number 403688 of New Haven, CT was reprimanded.

The Court (Bellis, J.)

## Notice Vacating Suspensions of Attorney

The order of administrative suspensions of James Bhandary-Alexander (aka: James Nicholas Alexander), with Juris #427066, for calendar years 2009-2018 are ordered vacated. Said orders entered in error due to a duplicate issuance of a juris number (juris #425829).

David Sheridan
*Presiding Judge*
Date: March 4, 2019