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Table of Contents

CONNECTICUT REPORTS

Bruno *v.* Whipple (Order), 331 C 911 71
Deutsche Bank AG *v.* Sebastian Holdings, Inc., 331 C 379 63
Enforcement of foreign judgment; summary judgment; res judicata; collateral estoppel; certification from Appellate Court; whether Appellate Court correctly concluded that plaintiff's corporate veil piercing claim was not barred by res judicata; whether Appellate Court correctly concluded that individual defendant was not collaterally estopped from denying liability for foreign judgment rendered against defendant corporation.
Hodges *v.* Commissioner of Correction (Order), 331 C 912 72
Raspberry Junction Holding, LLC *v.* Southeastern Connecticut Water Authority, 331 C 364 . 48
Negligence; summary judgment; claim that defendant water authority, as municipal corporation engaged in proprietary function, was not immune from liability and had no authority, express or implied, to promulgate rules limiting its liability for negligence; claim that, if defendant had such authority, rule limiting liability would not be reasonable exercise of authority because defendant was not subject to regulations that might otherwise circumscribe its ability to set rates to cover liability costs.
Smith *v.* Commissioner of Correction (Order), 331 C 912 72
State *v.* Carey (Order), 331 C 913 73
State *v.* Purcell, 331 C 318 2
Risk of injury to child; motion to suppress; certification from Appellate Court; whether Appellate Court correctly determined that defendant's statements made during custodial interrogation did not constitute clear and unequivocal invocation of his right to counsel under standard set forth in Davis *v.* United States *(512 U.S. 452); ambiguous or equivocal requests for counsel, discussed; whether Appellate Court correctly determined that article first, § 8, of Connecticut constitution did not require police officers to cease questioning immediately and to clarify defendant's ambiguous or equivocal request for counsel during custodial interrogation.*
State *v.* Rivera (Order), 331 C 911 71
Volume 331 Cumulative Table of Cases 75

CONNECTICUT APPELLATE REPORTS

Cyganovich *v.* Cyganovich, 189 CA 164 . . . . . 42A
Dissolution of marriage; appeal from judgment of trial court resolving postjudgment motions of parties; whether trial court, in granting motion for modification of child support, improperly calculated defendant's modified child support obligation; whether defendant was entitled to modified child support in amount calculated according to formula applicable to split custody arrangement where parties had shared custody of child; whether record supported contention that parties spend equal amounts of money to support child.
Mountain *v.* Mountain, 189 CA 228 . . . . . 106A
Dissolution of marriage; whether trial court erred in denying postjudgment motion for modification of unallocated alimony and child support obligation; whether trial court erred in finding that there had been no substantial change in circumstances to support modification of unallocated alimony and child support obligation; reviewability of claim that trial court erred in finding that plaintiff failed to prove

(continued on next page)

that he was no longer able to meet financial obligations to defendant by borrowing money from his current wife.

State *v.* Euclides L., 189 CA 151 . . . . . 29A

Risk of injury to child; claim that trial court improperly failed to instruct jury that it should acquit defendant if it concluded that his use of force in caring for his daughter was accident; whether trial court's charge to jury was legally correct and adequately instructed jury on issue of accident; whether separate accident charge was required; whether trial court's general intent instruction adequately addressed issue of accident.

State *v.* Grasso, 189 CA 186 . . . . . 64A

Manslaughter in first degree with firearm; whether state failed to disprove beyond reasonable doubt claim that defendant acted in self-defense when she shot victim; whether evidence supported finding that defendant's use of deadly physical force was premature; unpreserved claim that defendant's rights to due process and to effective assistance of counsel were violated when trial court denied jury's request to rehear closing arguments of prosecutor and defense counsel; claim that defendant waived claim when defense counsel failed to object to court's proposed response to request of jury and affirmatively stated that he did not object to it.

State *v.* Mukhtaar, 189 CA 144 . . . . . 22A

Murder; motion to correct illegal sentence; whether court properly concluded that it lacked jurisdiction to consider issues raised in motion to correct illegal sentence; whether claims raised by defendant in motion to correct addressed pretrial proceedings and criminal trial and did not attack sentencing proceeding itself.

Williams *v.* State, 189 CA 172 . . . . . 50A

Negligence; claim that trial court framed issue of case too narrowly and improperly failed to consider all instances of negligence alleged in complaint; reviewability of claim that trial court improperly failed to consider certain statutes, state highway safety regulations, and standards in ruling on complaint.

Yuille *v.* Parnoff, 189 CA 124 . . . . . 2A

Conversion; statutory theft; alleged misappropriation of funds held in escrow pending resolution of parties' dispute over attorney's fees; claim that trial court abused its discretion by ordering defendant to commence trial after allowing his attorney to withdraw, without affording him time to obtain new counsel; claim that verdict in favor of plaintiff on counts of conversion and statutory theft was irreconcilably inconsistent with verdict in favor defendant on count alleging breach of fiduciary duty; claim that trial court improperly declined to submit special defense of waiver to jury.

Volume 189 Cumulative Table of Cases 113A

MISCELLANEOUS

Division of Criminal Justice—Notice of Job Opportunity 1B

Notice of Reprimand of Attorneys 3B

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CONNECTICUT REPORTS

Vol. 331

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* ROBERT JOHN PURCELL (SC 19980)

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

Syllabus

Convicted of three counts of risk of injury to a child, the defendant appealed to the Appellate Court, claiming, inter alia, that the trial court improperly denied his motion to suppress certain statements that he had made during a custodial interrogation on the ground that they were elicited from him by the police after he invoked his right to counsel. During the custodial interrogation, the defendant stated: "See, if my lawyer was here . . . then . . . we could talk. That's, you know, that's it." The defendant also stated shortly thereafter: "I'm supposed to have my lawyer here. You know that." In denying the defendant's motion to suppress, the trial court concluded that those statements were not an unambiguous invocation of his right to counsel and were susceptible to an interpretation inconsistent with a request for counsel when viewed in the context of the statements that preceded them. The Appellate Court affirmed the judgments of conviction, concluding that the defendant's rights under the fifth and fourteenth amendments to the federal constitution were not violated during the interrogation, as the defendant's references to counsel were not clear and unequivocal and would not have been understood by a reasonable police officer as an expression of a present desire to consult with counsel, the standard the United States Supreme Court adopted in *Davis* v. *United States* (512 U.S. 452), which held that, after a defendant has been informed of his rights under *Miranda* v. *Arizona* (384 U.S. 436), the police officers conducting a custodial interrogation have no obligation to stop and clarify a suspect's ambiguous invocation of his right to counsel. The Appellate Court also rejected the defendant's alternative, unpreserved claim that, if his statements were an ambiguous invocation of his right to counsel, the self-incrimination and the due process clauses of article first, § 8, of the Connecticut constitution required the officers to cease questioning immediately and to clarify that ambiguity. On the granting of certification, the defendant appealed to this court. *Held*:

1. The Appellate Court correctly determined that the defendant's statements did not constitute, under the standard set forth in *Davis*, an invocation of the right to counsel that would have required the police officers to cease the interrogation: the defendant's statements could not be considered a clear and unequivocal invocation of the right to counsel, as the defendant's first statement, "if my lawyer was here," was expressed in conditional terms, about a matter over which the defendant

was given control, the defendant's second statement regarding what he was "supposed to" do referred to the expectations of another person, most likely his attorney, and those statements could have been interpreted as an effort to explain that his hesitation to speak about the allegations against him reflected his attorney's advice rather than his own preferences; moreover, the phrase, "[y]ou know that," added to the ambiguity, as the officers, by virtue of their dialogue with the defendant during the interrogation, knew that the defendant had the right to have counsel present but also knew, based on the defendant's statements, that the defendant had previously been advised by counsel not to discuss the allegations.

2. The defendant's rights under article first, § 8, of the Connecticut constitution were violated when the police officers continued to question him after he ambiguously invoked his right to have counsel present without any attempt to clarify his request, the failure to clarify was harmful, and, accordingly, the Appellate Court's judgment was reversed and the case was remanded for a new trial: this court employed the multifactor approach that it first adopted in *State* v. *Geisler* (222 Conn. 672) and considered the text of the relevant state and federal constitutional provisions, relevant Connecticut, federal and sister state precedent, and this state's public policies concerning the protection of a suspect in a coercive interrogation environment in concluding that the standard in *Davis* did not adequately safeguard a suspect's right to counsel and that policy considerations supported a more protective rule that requires police officers conducting an interrogation to stop and clarify a suspect's ambiguous or equivocal request for counsel; accordingly, this court concluded, consistent with its prior precedent and the majority rule that governed prior to *Davis*, that article first, § 8, requires that, if a suspect makes an equivocal statement that arguably can be construed as a request for counsel, interrogation must cease except for narrow questions designed to clarify the earlier statement and the suspect's desire for counsel, or, alternatively, the officers conducting the interrogation may inform the suspect that they understand the suspect's statement to mean that he does not wish to speak with them without counsel and that they will terminate the interrogation, and, in either case, if the suspect thereafter clearly and unequivocally expresses a desire to continue without counsel present, the interrogation may resume; moreover, the state could not prevail on its claim that suppression was not an appropriate sanction on the basis that the police conducted themselves in objectively reasonable reliance on binding judicial precedent, and there was no claim that the statements were involuntary or untrustworthy, because, although, prior to the court's decision in this case, it was an open question whether this court would require the more protective stop and clarify rule under the state constitution, a good faith exception to suppression was incompatible with this court's case law, and this court rejected the state's

additional claim that the police substantially complied with the stop and clarify rule under the circumstances.

Argued September 20, 2018—officially released March 29, 2019*

Procedural History

Substitute information charging the defendant, in three cases, with four counts of the crime of risk of injury to a child, two counts of the crime of sexual assault in the second degree and one count of the crime of sexual assault in the first degree, brought to the Superior Court in the judicial district of New Haven, where the court, *O'Keefe*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the cases were tried to the jury; verdicts and judgments of guilty of three counts of risk of injury to a child, from which the defendant appealed to the Appellate Court, *Alvord*, *Keller* and *Dennis*, *Js.*, which affirmed the judgments of the trial court, and the defendant, on the granting of certification, appealed to this court. *Reversed*; *new trial.*

Richard Emanuel, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom were *Seth R. Garbarsky*, senior assistant state's attorney, and, on the brief, *Patrick J. Griffin*, state's attorney, for the appellee (state).

Opinion

McDONALD, J. In *Davis* v. *United States*, 512 U.S. 452, 459–60, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994), the United States Supreme Court determined that, after a defendant has been informed of his *Miranda* rights,[1] the police officers conducting a custodial interrogation have no obligation to stop and clarify an ambiguous invocation by the defendant of his right to have counsel present. Instead, they must cease interrogation only

* March 29, 2019, the date this opinion was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] See *Miranda* v. *Arizona*, 384 U.S. 436, 469–73, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

upon an objectively unambiguous, unequivocal invocation of that right. See id. The court recognized that this standard "might disadvantage some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate their right to counsel although they actually want to have a lawyer present." Id., 460.

This certified appeal requires us to decide whether the *Davis* standard was met in this case, and, if not, whether a more protective prophylactic rule is required under the Connecticut constitution. The defendant, Robert John Purcell, appeals from the Appellate Court's judgment affirming his conviction of three counts of risk of injury to a child in violation of General Statutes § 53-21. See *State* v. *Purcell*, 174 Conn. App. 401, 405, 440, 166 A.3d 883 (2017). We conclude that the defendant's statements during interrogation did not meet *Davis*' "clear and unequivocal" standard so as to require suppression of subsequent inculpatory statements under the federal constitution. We further conclude, however, that the Connecticut constitution does not condone a rule that could disadvantage the most vulnerable of our citizens. We hold that, to adequately safeguard the right against compelled self-incrimination under article first, § 8, of the Connecticut constitution,[2] police officers are required to clarify an ambiguous request for counsel before they can continue the interrogation. Because no such clarification was elicited in the present case and the failure to do so was harmful, we conclude that the defendant is entitled to a new trial.

The record reveals the following undisputed facts and procedural history. The complainant (victim)[3] is

[2] Article first, § 8, of the constitution of Connecticut provides in relevant part: "No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law . . . ."

[3] The defendant does not concede that the complainant was his "victim." However, we use that term to conform to the Appellate Court's recitation of facts, from which we quote at length in this opinion.

the nephew of the defendant by marriage. In September, 2013, the victim's mother found pictures on the victim's Nintendo DS game console that concerned her, including pictures of the clothed stomachs of the defendant and the victim's father and two pictures of circumcised penises.[4] She deleted the pictures and asked her husband to speak to the victim. The victim's father spoke to him about the Catholic Church's teachings about sexuality, which prompted the victim to acknowledge that he had had thoughts about boys but to assert that it was not his fault. He then stated that the defendant "has been having sex with me." The victim's parents reported the allegation to the police.

The victim had made a similar statement concerning the defendant to a school social worker, who reported the allegation to the Department of Children and Families. In subsequent interviews, the victim described several incidents that he claimed had occurred between 2010, when he was twelve years old, and 2013. The incidents were reported to have occurred in public restrooms and at the defendant's home. The incidents were said to include inappropriate touching and sexual acts.

In October, 2013, the defendant agreed to come to the Wallingford Police Department to discuss a complaint made against him, but he was not made aware of the nature of the allegations prior to arriving. Detective Michael Zerella and another Wallingford police officer conducted the interview. When it became apparent to the defendant that he was being accused of engaging in sexually inappropriate conduct with his nephew, the defendant explained incidents that he could think of that served as the basis of the complaint but maintained that nothing inappropriate had happened. Zerella wondered aloud whether the defendant was "a sick, per-

[4] The defendant is not circumcised.

verted person or, or stuff, stuff accidentally happened." Not long after this comment, the defendant announced that things were getting "a little bit too strange," and he terminated the interview.

On November 26, 2013, the defendant was arrested pursuant to the first of three warrants and charged with multiple counts of both sexual assault, first and second degree, and risk of injury to a child.[5] Later that day, Zerella and Wallingford Detective Sean Fairbrother conducted the custodial interrogation that gives rise to the issues in this certified appeal.

The Appellate Court's opinion accurately recounts the following facts relating to that interrogation. "Zerella began the interview by reading the defendant his *Miranda* rights and asking him to complete a *Miranda* waiver form. The defendant asked: 'I can still, after, after, after I initial that, I can still stop answering then?' Zerella replied: 'Oh, anytime you want. No problem.'

"After the defendant completed the *Miranda* waiver form, Zerella asked the defendant whether he knew why he had been arrested. The defendant explained that he had received a letter from the Department of Children and Families (department) informing him that he was being investigated for allegations of child abuse with respect to the victim. When Zerella asked what he discussed with the department, the defendant stated that he had never talked to anyone from the department. Zerella asked why, and the defendant explained: 'Well, I asked my lawyer, and he said, well, just not to, I, I think that's, I think that's all together wrong, but that's what he said.' He went on to elaborate that 'my lawyer

[5] The defendant was arrested pursuant to three separate warrants issued in Wallingford, Fairfield, and Stratford, each of which correlated to one or more sites of the charged conduct. Those arrests took place between November, 2013, and February, 2014. The three cases were transferred to the judicial district of New Haven, where the defendant acquiesced to consolidation of the cases for trial.

knows what's going on, you know? But, he says don't talk, I don't talk.' When Zerella asked him how he felt about that, the defendant stated: 'Well, it's like I said, I probably wouldn't be here now if I talked to them.' Zerella suggested that if he had elaborated more and been more forthcoming during the first interview, they might not be here. After some discussion about whether and why Zerella called him a pervert during the first interview, Zerella stated: 'Okay, well, we could, we could go on about the last interview if you want to, but—' The defendant interjected: '—I know, I know . . . let's . . . let's go on right, what, what more do you want to know?'

"After . . . [Zerella explained] that a judge and [a] prosecutor had found probable cause to arrest him, the defendant observed that it was because 'I didn't talk, that's why.' Zerella remarked: 'Well, you did, you did talk to me. You did tell me a few things.' The defendant agreed but acknowledged, 'not enough, I know.' . . . When Zerella asked the defendant to tell him some of the stories of his encounters with the victim, the defendant opined: 'I don't know the stories that he made up.'

"Fairbrother asked the defendant whether he knew the crime with which he was charged, and the defendant replied child abuse. Fairbrother explained that he was charged with sexual assault and risk of injury to a child. The defendant asked whether that means that the allegation is that he did something sexual with the victim, and Fairbrother said that it did. The defendant adamantly denied having sexual relations with the victim. When the detectives pressed him about whether there were any moments that could be misconstrued as inappropriate, the defendant responded: 'Well, yes, there's what, well, I, I, my lawyer said not to talk about it but, no . . . .' The detectives [responded, 'We'll leave it up to you' and 'Well, it's up to you'].

"The defendant observed that Zerella had told him that there was a picture of him naked on the victim's Nintendo DS during the first interview,[6] and he asked repeatedly whether the picture actually existed. When Zerella suggested that the defendant had personal knowledge that the picture existed, the defendant insisted that he did not and that he knew about the picture only because Zerella told him about it during the first interview. Zerella maintained that 'there's other, other things, there's other instances beside that,' and, after the defendant asked what, Zerella observed that 'you just said, there [is] stuff but my lawyer told me not to talk about it.' The defendant stated that he was referring to the picture. He further asked, 'what else is there,' and opined that he wanted to know 'what they are pressing against me.' Thereafter, the following exchange occurred:

" '[Zerella]: Alls I got to say is, tomorrow, when you go in to court, you're gonna look at a judge and a prosecutor. . . . And they're gonna look at all this stuff, all these allegations that were made against you. . . . That it's a, it's a very, very strong case against you. Very, very strong. They're gonna look at it and say, listen, this, this man, because they don't know you from Adam, but they're just gonna see you.

" '[The Defendant]: Right. Well, they're gonna know my name.

" '[Zerella]: As, as a, as a, as a mean, as a mean individual.

" '[The Defendant]: Right.

" '[Zerella]: In, in reality—

" '[Fairbrother]: As a predator.

[6] It appears that Zerella assumed that the pictures of circumcised penises in the victim's possession were of the defendant. The defense later established that the former did not depict the defendant because he is not circumcised.

" '[Zerella]: As a predator, who, who's technically not cooperating and not saying, yeah, this is, this is what happened, this is probably why he thinks, thinks the way he does or—

" '[The Defendant]: —*See, if my lawyer was here, I'd, then I'd, we could talk. That's, you know, that's it.*

" '[Zerella]: It's up to you. You could—

" '[The Defendant]: —I know it. I know, I know, I know it.

" '[Zerella]: You could . . . (a) talk to me or you could (b) not talk to me.

" '[The Defendant]: I know it but, I'm trying, you know I, *I'm supposed to have my lawyer here. You know that.*

" '[Zerella]: You don't, you don't have to, it's, it's—

" '[Fairbrother]: It's up to you.

" '[Zerella]: It's up to you, man. Some people talk to me without one, some people want one . . . it's all up to you, man . . . I'm just affording you that opportunity, that's all.

" '[Fairbrother]: The problem is that, at your age, you don't want to go to prison.

" '[The Defendant]: [indiscernible]

" '[Fairbrother]: Okay? You don't want to go to prison. If there was some inappropriate things with this child, something that can be explained, maybe you helped him go to the bathroom, maybe, you know, he makes some sort of crazy allegation or does some sort of craziness, he's not—

" '[Zerella]: —Maybe he—

" '[Fairbrother]: He doesn't have a hundred percent capacity.[7] If you're in a, now, now is the time to talk about it, now is [the time] to get your half out there.

" '[Zerella]: Yeah, maybe he came at you.

" '[Fairbrother]: —You know if—

" '[Zerella]: Maybe he came at you.

" '[Fairbrother]: You know, that, that's all we're offering you, the opportunity to, because it's the last time we're gonna be able to talk.

" '[Zerella]: That's all.

" '[Fairbrother]: You know, that's all, and, and, you know, if—

" '[The Defendant]: —Oh, geez, I don't know—

" '[Fairbrother]: —If you want to have an attorney—

" '[The Defendant]: —I, I don't think it's—

" '[Fairbrother]: —That's fine. You can, but—

" '[The Defendant]: —that's right, right or wrong, but, uh, real, really.

" '[Zerella]: Just, just affording you the opportunity, sir, because after, after today, you're never gonna be able to, to give me or any other cop your story. You're gonna let, a judge is gonna look at ya and say, some serious charges against you. You could go to jail for the rest of your life.

" '[The Defendant]: All right, now what's, what, what, what, uh, all right, I'll, I'll, I'll talk. Uh, what do you, what do you, what do you want to know? Tell, tell me, what do you want to know?'" (Emphasis in original;

[7] There was evidence submitted at trial that the victim had been diagnosed with autism. It appears that Fairbrother was likely referring to that condition.

footnotes added.) *State* v. *Purcell*, supra, 174 Conn. App. 418–23.

Thereafter, the custodial interrogation continued without further mention of counsel. Although the defendant did not admit to any of the acts alleged, he made statements that were used against him at trial.

During trial, the defendant moved to suppress certain statements that he had made during the interrogation, claiming that they had been elicited after he invoked his right to have counsel present. The trial court concluded that the defendant had not invoked his right to counsel in an unambiguous manner, because the statements were susceptible to another reasonable interpretation when viewed in context of the statements preceding them. Noting that "close is not good enough," the court denied the motion.

Following a jury trial, the defendant was convicted of three counts of risk of injury to a child—one count in violation of § 53-21 (a) (1) and two counts in violation of § 53-21 (a) (2).[8] The defendant was acquitted of four other counts—one count of sexual assault in the first degree, two counts of sexual assault in the second degree, and one count of risk of injury to a child. The trial court rendered judgments in accordance with the

[8] General Statutes § 53-21 (a) provides in relevant part: "Any person who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that . . . the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child, or (2) has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of (A) a class C felony for a violation of subdivision (1) or (3) of this subsection, and (B) a class B felony for a violation of subdivision (2) of this subsection, except that, if the violation is of subdivision (2) of this subsection and the victim of the offense is under thirteen years of age, such person shall be sentenced to a term of imprisonment of which five years of the sentence imposed may not be suspended or reduced by the court."

verdicts, imposing a total effective sentence of sixteen years imprisonment, execution suspended after nine years, and ten years probation. The defendant appealed from the trial court's judgments, challenging, among other things, the court's denial of his motion to suppress.

The Appellate Court affirmed the judgments of conviction. See id., 405, 440. The court concluded that the trial court properly denied the motion to suppress because the defendant's rights under the fifth and fourteenth amendments to the federal constitution were not violated during the interrogation. It reasoned that the defendant's references to counsel would not have been understood by a reasonable police officer as an expression of a present desire to consult with counsel. Id., 425–27. The court also rejected the defendant's alternative, unpreserved claim that, if his statements were an ambiguous invocation of his right to counsel, the self-incrimination and due process clauses of article first, § 8, of the Connecticut constitution required the officers to cease questioning immediately and to clarify that ambiguity. Id., 427–40; see *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989) (prescribing requirements to obtain review and to prevail on unpreserved constitutional claim); see also *In re Yasiel*, 317 Conn. 773, 781, 120 A.3d 1188 (2015) (modifying third prong of *Golding*). Nonetheless, the Appellate Court admonished law enforcement that the better practice is to clarify such issues at the time of interrogation rather than in after-the-fact arguments before the courts. *State* v. *Purcell*, supra, 174 Conn. App. 428, 440. The defendant's certified appeal to this court followed.[9]

[9] We granted certification to appeal, limited to the following issues: "1. Did the Appellate Court properly determine that the defendant's references to counsel during a custodial interrogation were ambiguous and equivocal and therefore did not constitute an invocation of his right to counsel?

"2. Did the Appellate Court properly determine that article first, § 8, of the Connecticut constitution does not require that police 'stop and clarify' an ambiguous or equivocal request for counsel?" *State* v. *Purcell*, 327 Conn. 959, 172 A.3d 800 (2017).

I

We begin with the line of United States Supreme Court cases that provide the framework for the issues in this appeal. In *Davis*, the court acknowledged that its precedent had established the following foundational principles: "The [s]ixth [a]mendment right to counsel attaches only at the initiation of adversary criminal proceedings . . . and before proceedings are initiated a suspect in a criminal investigation has no constitutional right to the assistance of counsel. Nevertheless, we held in *Miranda* v. *Arizona*, 384 U.S. 436, 469–73 [86 S. Ct. 1602, 16 L. Ed. 2d 694] (1966), that a suspect subject to custodial interrogation has the right to consult with an attorney and to have counsel present during questioning, and that the police must explain this right to him before questioning begins. The right to counsel established in *Miranda* was one of a series of recommended procedural safeguards . . . [that] were not themselves rights protected by the [c]onstitution but were instead measures to [e]nsure that the right against compulsory self-incrimination was protected. *Michigan* v. *Tucker*, 417 U.S. 433, 443–44 [94 S. Ct. 2357, 41 L. Ed. 2d 182] (1974); see U.S. Const., [amend. V] ([n]o person . . . shall be compelled in any criminal case to be a witness against himself).

"The right to counsel recognized in *Miranda* is sufficiently important to suspects in criminal investigations, we have held, that it requir[es] the special protection of the knowing and intelligent waiver standard. *Edwards* v. *Arizona*, [451 U.S. 477, 483, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981)]. . . . If the suspect effectively waives his right to counsel after receiving the *Miranda* warnings, law enforcement officers are free to question him. . . . But if a suspect requests counsel at any time during the interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation. [Id., 484–85].

This second layer of prophylaxis for the *Miranda* right to counsel, *McNeil* v. *Wisconsin*, 501 U.S. 171, 176 [111 S. Ct. 2204, 115 L. Ed. 2d 158] (1991), is designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights, *Michigan* v. *Harvey*, 494 U.S. 344, 350 [110 S. Ct. 1176, 108 L. Ed. 2d 293] (1990). To that end, we have held that a suspect who has invoked the right to counsel cannot be questioned regarding any offense unless an attorney is actually present. *Minnick* v. *Mississippi*, 498 U.S. 146 [111 S. Ct. 486, 112 L. Ed. 2d 489] (1990); *Arizona* v. *Roberson*, 486 U.S. 675 [108 S. Ct. 2093, 100 L. Ed. 2d 704] (1988). It remains clear, however, that this prohibition on further questioning—like other aspects of *Miranda*—is not itself required by the [f]ifth [a]mendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose. *Connecticut* v. *Barrett*, [479 U.S. 523, 528, 107 S. Ct. 828, 93 L. Ed. 2d 920 (1987)]." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Davis* v. *United States*, supra, 512 U.S. 456–58.

With regard to how a defendant may invoke this right, in *Miranda* v. *Arizona*, supra, 384 U.S. 444–45, the Supreme Court stated that if a defendant "indicates *in any manner* and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." (Emphasis added.) In *Edwards* v. *Arizona*, supra, 451 U.S. 484–85, the court referred to the requisite act by the defendant as "having expressed his desire to deal with the police only through counsel," and as having "clearly asserted his right to counsel . . . ." The court subsequently noted that the invocation of the *Miranda* right to counsel "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney . . . ." *McNeil* v. *Wisconsin*, supra, 501 U.S. 178.

Applying this precedent prior to the Supreme Court's 1994 *Davis* decision, the lower courts were divided on how to treat an ambiguous invocation of this right. Three approaches emerged: one required the immediate cessation of interrogation; one permitted questions limited to clarifying whether the defendant intended to invoke this right; and one permitted interrogation to continue unless a sufficiently clear invocation of the right was made. The second approach—stop and clarify—was adopted by the majority of the many courts to consider the issue. See *Davis* v. *United States*, supra, 512 U.S. 466 and n.1 (Souter, J., concurring); see also J. Ainsworth, "In a Different Register: The Pragmatics of Powerlessness in Police Interrogation," 103 Yale L.J. 259, 308 and n.254 (1993) (listing cases); S. Goings, comment, "Ambiguous or Equivocal Requests for Counsel in Custodial Interrogations After *Davis* v. *United States*," 81 Iowa L. Rev. 161, 162 n.7 (1995) (same). The Supreme Court acknowledged this divide; see *Connecticut* v. *Barrett*, supra, 479 U.S. 529–30 n.3; *Smith* v. *Illinois*, 469 U.S. 91, 96 and n.3, 105 S. Ct. 490, 83 L. Ed. 2d 488 (1984); but found it unnecessary to weigh in until *Davis*.

In *Davis*, the petitioner waived his rights to remain silent and to counsel in a military legal proceeding. See *Davis* v. *United States*, supra, 512 U.S. 454–55. More than one hour into the interview, the petitioner stated, " 'Maybe I should talk to a lawyer.' " Id., 455. The interviewing agents then explained that if the petitioner wanted a lawyer, they would stop questioning him, unless he clarified whether he was asking for a lawyer or was just making a comment about a lawyer. Id. In response, the petitioner stated, "No, I'm not asking for a lawyer," and then, "No, I don't want a lawyer." (Internal quotation marks omitted.) Id. The interview recommenced, but later the petitioner stated, "I think I want a lawyer before I say anything else." (Internal quotation marks omitted.) Id. The agents terminated the interview

at that point. Id. The United States Court of Military Appeals held that the petitioner's statement, " 'Maybe I should talk to a lawyer,' " was an ambiguous invocation of the right to counsel, and that the agents properly clarified the petitioner's wishes before proceeding further. Id., 456.

On appeal to the United States Supreme Court, the petitioner contended that an ambiguous invocation is sufficient to invoke *Edwards*' prohibition on further questioning, even for purposes of clarification. The court unanimously held that the judgment should be affirmed, but split five to four as to the effect of an ambiguous invocation under the court's precedent. The majority held that, "if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning. . . . Rather, the suspect must unambiguously request counsel. . . . Although a suspect need not speak with the discrimination of an Oxford don . . . he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect."[10] (Citations omitted; emphasis in

[10] In a subsequent case, the court held, also by a five to four margin, that "there is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel at issue in *Davis*." *Berghuis* v. *Thompkins*, 560 U.S. 370, 381, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010); see also id., 391 (Sotomayor, J., dissenting) ("The [c]ourt . . . concludes that a suspect who wishes to guard his right to remain silent against such a finding of 'waiver' must, counterintuitively, speak—and must do so with sufficient precision to satisfy a clear-statement rule that construes ambiguity in favor of the police. Both propositions mark a substantial retreat from the protection against compelled self-incrimination that *Miranda* . . . has long provided during custodial interrogation.").

original; internal quotation marks omitted.) Id., 459. Applying this rule, the majority concluded that the remark, " 'Maybe I should talk to a lawyer' . . . [i]s not a request for counsel . . . ." Id., 462. The view of the four concurring justices, which we address in further detail in part III of this opinion, was that the court's precedent of many decades supported the stop and clarify rule applied by the Court of Military Appeals. See id., 466–67 (Souter, J., concurring).

II

The first certified issue requires us to determine whether the defendant's statements during the interrogation constituted an invocation of his right to counsel under *Davis*.[11] The defendant contends that two statements—"See, if my lawyer was here . . . then . . . we could talk. That's, you know, that's it." And "I'm supposed to have my lawyer here. You know that."—are similar to, and have the same degree of clarity as, statements that other courts have deemed to meet *Davis*' standard. We disagree.

Since *Davis*, a clear, unequivocal invocation of the right to counsel has been found, even after a defendant has waived that right and cooperated to varying degrees with the interrogation, when a defendant has made an affirmative statement of present intent such as the fol-

[11] In *State* v. *Kono*, 324 Conn. 80, 82 n.3, 122–24, 152 A.3d 1 (2016), this court, following the approach we previously had adopted in *State* v. *Santiago*, 318 Conn. 1, 16 n.11, 122 A.3d 1 (2015), explained that it is appropriate to consider the state constitutional claim first when the issue presented is one of first impression under both the state and federal constitutions or the issue is not settled under the federal constitution to such an extent that we can predict to a reasonable degree of certainty how the United States Supreme Court would resolve the issue. See *State* v. *Kono*, supra, 82 n.3. In the present case, because we can predict to a reasonable degree of certainty how the United States Supreme Court would resolve the issue presented here under *Davis*, (that is, adversely to the defendant), it is appropriate to first explain why the defendant's claim fails under the federal constitution before turning to the state constitutional issue.

lowing: " 'Lawyer' " and " 'lawyer, this, this is done' "; *United States* v. *Monroe*, 264 F. Supp. 3d 376, 388 (D.R.I. 2017); " 'right now, what I need to do is sit down and talk to a lawyer first' "; *Sykes* v. *State*, 357 S.W.3d 882, 890 (Ark. 2009); " 'I answered some questions, but this has affected me, I don't want it to affect me more. What I am saying now is another question; I would need someone to advise me. . . . More questions for me? Well, I would like to, but I need someone to advise me' "; *Jimenez* v. *State*, 379 S.W.3d 762, 765 (Ark. App. 2010), review denied, Arkansas Supreme Court, Docket No. CR10-1298 (January 27, 2011); " 'I'm done talking to you. Go get my lawyer' "; *Jennings* v. *United States*, 989 A.2d 1106, 1112 (D.C. 2010); *Jennings* v. *United States*, supra, 1112–13 (statements met objective test even if tone might subjectively be viewed as sarcastic); " 'I'd like to have an attorney present during questioning' "; *Green* v. *State*, 69 So. 3d 351, 352 (Fla. App. 2011); " '[T]his is where I want my lawyer' " and " '[o]kay, this is where I would want my attorney involved' "; *State* v. *Person*, 140 Idaho 934, 941, 104 P.3d 976 (App. 2004), review denied, Idaho Supreme Court, Docket No. 29517 (December 20, 2004); " 'I'm in a situation where I feel like . . . I really need an attorney to . . . talk with, and for me' "; *Carr* v. *State*, 934 N.E.2d 1096, 1105 (Ind. 2010); " '[N]o lawyer, can't talk' " and " 'I can't talk without my lawyer' "; *State* v. *Poullard*, 863 So. 2d 702, 711 (La. App. 2003), writ denied sub nom. *State ex rel. Poullard* v. *State*, 896 So. 2d 995 (La. 2005).

When statements regarding the assistance or presence of counsel include one or more conditional or hedging terms, such as if, should, probably, or maybe, courts generally have deemed them ambiguous or equivocal. See, e.g., *United States* v. *Doe*, 60 F.3d 544, 546 (9th Cir. 1995) (statement by defendant's mother that " 'maybe he ought to see an attorney' " was not clear,

unambiguous request for counsel); *People* v. *Sauceda-Contreras*, 55 Cal. 4th 203, 219, 282 P.3d 279, 145 Cal. Rprt. 3d 271 (2012) (defendant's statement, " '[i]f you can bring me a lawyer, that way . . . I can tell you everything that I know and everything that I need to tell you and someone to represent me,' " was conditional, ambiguous, and equivocal); *People* v. *Gonzalez*, 34 Cal. 4th 1111, 1119, 1126, 104 P.3d 98, 23 Cal. Rptr. 3d 295 (statements by defendant–" 'That um, one thing I want to ask you to that, if for anything you guys are going to charge me I want to talk to a public defender too, for any little thing. Because my brother-in-law told me that if they're trying to charge you for this case you might as well talk to a public defender and let him know cause they can't [untranslatable]' "—were insufficient), cert. denied, 545 U.S. 1108, 125 S. Ct. 2552, 162 L. Ed. 2d 282 (2005); *People* v. *Shamblin*, 236 Cal. App. 4th 1, 20, 186 Cal. Rptr. 3d 257 (2015) (The "defendant's statement—'I think I probably should change my mind about the lawyer now. . . . I think I need some advice here'—contains language that is conditional ['should'] and equivocal ['I think' and 'probably'].[12] . . . [T]hese

[12] The post-*Davis* cases are split as to whether the mere use of the term "I think" renders the statement equivocal. Compare *Burket* v. *Angelone*, 208 F.3d 172, 198 (4th Cir.) ("I think I need a lawyer" does not constitute unequivocal request for counsel), cert. denied, 530 U.S. 1283, 120 S. Ct. 2761, 147 L. Ed. 2d 1022 (2000), *Ex parte Cothren*, 705 So. 2d 861, 866 (Ala. 1997) (defendant's statement " 'I think I want to talk to an attorney before I answer that' . . . is capable of equally plausible, differing interpretations and, therefore . . . is equivocal"), cert. denied, 523 U.S. 1029, 118 S. Ct. 1319, 140 L. Ed. 2d 482 (1998), *State* v. *Henness*, 79 Ohio St. 3d 53, 63, 679 N.E.2d 686 (" 'I think I need a lawyer' " was not unequivocal assertion of right to counsel), cert. denied, 522 U.S. 971, 118 S. Ct. 422, 139 L. Ed. 2d 323 (1997), and *State* v. *Jennings*, 252 Wis. 2d 228, 233–34, 647 N.W.2d 142 (2002) (" 'I think maybe I need to talk to a lawyer' " was not sufficiently clear post-*Davis*), with *Wood* v. *Ercole*, 644 F.3d 83, 91 (2d Cir. 2011) (" 'I think I should get a lawyer' " is sufficient), and *State* v. *Jackson*, 348 N.C. 52, 56–57, 497 S.E.2d 409 (" 'I think I need a lawyer present' " is invocation of right) (overruled in part on other grounds by *State* v. *Buchanan*, 353 N.C. 332, 340, 543 S.E.2d 823 [2001]), cert. denied, 525 U.S. 943, 119 S. Ct. 365, 142 L. Ed. 2d 301 (1998). We observe that, prior to *Davis*, this court concluded that a defendant's statement, " 'I think I better get a lawyer' could hardly be [a]

ambiguous qualifying words convey to a reasonable officer only that defendant might want to invoke his right to counsel, not that he is unambiguously expressing his desire to terminate the interview." [Footnote added.]), review denied, California Supreme Court, Docket No. S226608 (July 29, 2015); *State* v. *Morgan*, 559 N.W.2d 603, 608 (Iowa 1997) (statement that defendant " 'might need a lawyer' " was insufficient in light of *Davis*); *State* v. *Chesson*, 856 So. 2d 166, 173–75 (La. App. 2003) (statement to police officers while being transported that "he might—he felt like he should talk to an attorney" was equivocal and ambiguous), writ denied, 867 So. 2d 686 (La. 2004); *Commonwealth* v. *Molina*, 81 Mass. App. 855, 863, 867, 969 N.E.2d 738 (2012) (The defendant's statements—" 'truly, if I had known that this would be like this, I honestly would have brought an attorney because I truly don't even know what has happened; I haven't been informed of what has happened and I am being questioned about, really, I mean, it's like my rights are being violated because I am being questioned on something that I truly don't know' "—were ambiguous. "Although [the defendant] mentioned an attorney, he did not request one going forward. He said that he would have brought an attorney."), aff'd, 467 Mass. 65, 3 N.E.3d 583 (2014); *Davis* v. *State*, 313 S.W.3d 317, 341 (Tex. Crim. App. 2010) (statement, " 'I should have an attorney,' " was ambiguous because " 'should' could simply mean that [the] appellant believed having an attorney was in his best interests"), cert. denied, 565 U.S. 828, 132 S. Ct. 122, 181 L. Ed. 2d 45 (2011).

Statements referring to counsel's advice that the defendant not speak to the police, if made after the defendant has agreed to waive his right to counsel, also have been deemed not to be an unambiguous invocation

more clear" invocation of his right to counsel. *State* v. *Acquin*, 187 Conn. 647, 672, 448 A.2d 163 (1982), cert. denied, 463 U.S. 1229, 103 S. Ct. 3570, 77 L. Ed. 2d 1411 (1983).

of the right to have counsel present. Compare *People* v. *Thompson*, 50 Cal. 3d 134, 165, 785 P.2d 857, 785 Cal. Rptr. 309 (defendant's statements—" 'I don't even think I should be talking now. . . . [My public defender told me] not to say nothin' about the case or anything, unless I had a lawyer present. . . . And I agreed with him' " and " '[y]ou know, and, like I'm just going to go with what, you know, what the lawyer said because I . . . . What else can I say, well, really. I don't want to see [my girlfriend] here [in jail]' "—were not even an equivocal assertion of right to counsel, but only an explanation of why he was willing to proceed without counsel), cert. denied, 498 U.S. 881, 111 S. Ct. 226, 112 L. Ed. 2d 180 (1990), and *State* v. *Long*, 190 Wis. 2d 386, 397, 526 N.W.2d 826 (App. 1994) (" 'My attorney told me I shouldn't talk unless he is here,' was not a clear assertion of [the defendant's] desire to have counsel present. Rather, it was an indication of what [his] attorney told him not to do."), with *United States* v. *Cheely*, 36 F.3d 1439, 1448 (9th Cir. 1994) (defendant's statement that " 'my attorney does not want me to talk to you,' " in tandem with refusal to sign written waiver of right to attorney form, was unambiguous request for counsel), and *Lucas* v. *State*, 273 Ga. 88, 90, 538 S.E.2d 44 (2000) (defendant's statements prior to provision of *Miranda* rights—" '[M]y lawyer told me, the one I talked to, not to say nothing' " and " '[m]y attorney told me not to answer nothing' "—plainly demonstrated defendant's concern about being questioned without benefit of counsel, and reasonable police officer would have understood statements to be request for counsel to be present during questioning).[13]

Statements that could be interpreted as an expression of the defendant's reservation about whether speaking

[13] In a concurring opinion in *Lucas*, two justices concluded that these statements did not express an invocation of the right to counsel but, rather, an invocation of the right to remain silent. See *Lucas* v. *State*, supra, 273 Ga. 91 (Hunstein, J., concurring).

to the police without counsel is in his best interest also have been deemed not to express a clear, unequivocal invocation of the right to have counsel present. See, e.g., *Sykes* v. *State*, supra, 357 S.W.3d 891 (defendant's statements—" 'I don't feel like that I need to be discussing this at all,' 'I think it's really plumb ignorant to answer any questions right now,' " and " 'the best thing I can do is, for myself, is to shut the hell up and not talk about this without first talking to a lawyer' "—did not unambiguously and unequivocally indicate right to remain silent or right to counsel when defendant evidenced awareness of his *Miranda* rights and continued to talk to officer even though he knew it was against his best interest); *Midkiff* v. *Commonwealth*, 250 Va. 262, 267, 462 S.E.2d 112 (1995) (defendant's "statement, 'I'm scared to say anything without talking to a lawyer,' expresses [the defendant's] reservation about the wisdom of continuing the interrogation without consulting a lawyer; however, it does not clearly and unambiguously communicate a desire to invoke his right to counsel").

With this background in mind, we turn to the statements in the present case on which the defendant relies. See *State* v. *Anonymous*, 240 Conn. 708, 723, 694 A.2d 766 (1997) (whether defendant invoked right to counsel is question of law, reviewed de novo). We agree with the defendant that a police officer reasonably could interpret his statements as an invocation of his right to counsel. More specifically, his statements reasonably could be interpreted as a request to have his attorney present if the officers wanted him to discuss the specific incidents giving rise to the charges. A defendant may make a limited invocation of the right to counsel. See *Connecticut* v. *Barrett*, supra, 479 U.S. 529 (concluding that court could give effect to both defendant's unambiguous expression of desire to have counsel present before making written statement and unambiguous waiver of rights to remain silent and to have counsel present for oral statement).

However, the statements also are reasonably amenable to a different interpretation. The defendant's first statement, "if my lawyer was here," is expressed in conditional terms, about a matter over which the defendant was given control. The defendant's second statement refers to what he is "supposed to" do, which refers to the expectations of another, most likely his attorney. The existence of such expectations would be consistent with the defendant's preceding remarks. In those remarks, the defendant explained that he had declined to speak with the Department of Children and Families about the allegations only on his attorney's advice, even though the defendant himself believed that his interests would have been better served had he spoken to the department. As such, the statements on which the defendant relies to establish his invocation of his right to counsel reasonably could be interpreted as an effort to explain that his hesitation to speak about the allegations reflected his attorney's advice rather than his own preferences. Cf. *Commonwealth* v. *Molina*, supra, 81 Mass. App. 867 ("[t]he passage reads as though the defendant was using the specter of his rights as a way to control the interview: not asserting the rights, but mentioning them in order to avoid specific questions that he did not want to answer"); *State* v. *Long*, supra, 190 Wis. 2d 397 (statement that defendant's attorney told him not to talk unless attorney was present was not clear assertion of defendant's desire to have counsel present but indication of his attorney's advice). The officers' response can be seen as consistent with that interpretation, insofar as they underscored that it was up to the defendant, not his attorney, to decide whether he would answer their questions.[14]

[14] "[A]n accused's postrequest responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself. Such subsequent statements are relevant only to the distinct question of waiver." (Emphasis omitted.) *Smith* v. *Illinois*, supra, 469 U.S. 100.

The final phrase spoken by the defendant in this connection—"You know that"—added to the ambiguity. The officers undoubtedly knew that the defendant had a right to have counsel present. But they also knew, based on the defendant's statements, that the defendant previously had been advised by counsel not to discuss the incidents in question. Accordingly, because the statements at issue cannot be considered a clear and unequivocal invocation of his right to counsel, we conclude that the Appellate Court properly determined that the defendant's statements were not the type of expression necessary under *Davis* to require interrogation to cease.

III

We therefore turn to the second certified question, which requires us to decide whether the Appellate Court properly determined that article first, § 8, of the Connecticut constitution does not require the police to stop and clarify an ambiguous or equivocal request for the presence of counsel. Although we appreciate the Appellate Court's thoughtful analysis of the factors that guide the resolution of such a question, we conclude that countervailing considerations, not taken into account in that analysis, compel a different result.

It is well settled that the federal constitution sets the floor, not the ceiling, on individual rights. See *State* v. *Baccala*, 326 Conn. 232, 268, 163 A.3d 1, 23, cert. denied, U.S. , 138 S. Ct. 510, 199 L. Ed. 2d 408 (2017). "[I]n determining the contours of the protections provided by our state constitution, we employ a multifactor approach that we first adopted in [*State* v. *Geisler*, 222 Conn. 672, 685, 610 A.2d 1225 (1992)]. The factors that we consider are (1) the text of the relevant constitutional provisions; (2) related Connecticut precedents; (3) persuasive federal precedents; (4) persuasive precedents of other state courts; (5) historical insights into

the intent of [the] constitutional [framers]; and (6) contemporary understandings of applicable economic and sociological norms [otherwise described as public policies]." (Internal quotation marks omitted.) *State* v. *Taupier*, 330 Conn. 149, 175, 193 A.3d 1 (2018); see also *State* v. *Jenkins*, 298 Conn. 209, 262, 3 A.3d 806 (2010) (recognizing that these factors "may be inextricably interwoven [and] [n]ot every [such] factor is relevant in all cases" ([internal quotation marks omitted]).[15]

It is important to underscore that the question before us is not whether our state constitution provides a broader constitutional *right* than that afforded under the federal constitution. Cf. *State* v. *Asherman*, 193 Conn. 695, 711–15, 478 A.2d 227 (1984) (declining to construe right against compelled self-incrimination in article first, § 8, to extend to all nontestimonial evidence so as to preclude compelling defendant to submit to dental impressions), cert. denied, 470 U.S. 1050, 105 S. Ct. 1749, 84 L. Ed. 2d 814 (1985). Instead, the issue we decide is whether to adopt an additional layer of prophylaxis to prevent a significant risk of deprivation of those vital constitutional rights protected under *Miranda*. See *State* v. *Dickson*, 322 Conn. 410, 426 n.11, 141 A.3d 810 (2016) ("it is well established that courts have the duty not only to craft remedies for actual constitutional violations, but also to craft prophylactic constitutional rules to prevent the significant risk of a constitutional violation" [emphasis omitted]), cert. denied, U.S. , 137 S. Ct. 2263, 198 L. Ed. 2d 713 (2017); see also C. Rogers, "Putting Meat on Constitutional Bones: The Authority of State Courts To Craft Constitutional Prophylactic Rules Under the Federal Constitution," 98 B.U. L. Rev. 541, 545 (2018) (former

[15] For example, because the issue before us concerns the protection of *Miranda* rights—rights that were first recognized in 1966—historical insights into the intent of the framers as to this particular issue is not a relevant consideration.

chief justice of Connecticut Supreme Court explaining nature and purpose of court's power to adopt prophylactic rules). As another court aptly observed, "adoption of a different procedural safeguard than that prescribed by the [United States Supreme] Court is not even, in the strictest sense, a matter of constitutional interpretation. The *Miranda* right to counsel is not a right found in the [f]ifth [a]mendment, but instead a prophylactic rule fashioned by the [c]ourt to protect the right against coerced confessions." *State* v. *Risk*, 598 N.W.2d 642, 649 (Minn. 1999); see also A. Leavens, "Prophylactic Rules and State Constitutionalism," 44 Suffolk U. L. Rev. 415, 415 (2011) (arguing that, "even if states ought to defer to the Supreme Court concerning the meaning of cognate constitutional provisions, such deference is not required in considering the reach of prophylactic rules"); T. Saylor, "Prophylaxis in Modern State Constitutionalism: New Judicial Federalism and the Acknowledged, Prophylactic Rule," 59 N.Y.U. Ann. Surv. Am. L. 283, 308–309 (2003) (Pennsylvania Supreme Court justice arguing that "there is stronger justification for the employment of prophylactic rules to safeguard individual liberties from government intrusion by state as opposed to federal courts [because] one of the primary barriers to the United States Supreme Court's implementation of prophylactic rules—federalism—militates in favor of their consideration in state court. Simply put, the problem of over-inclusive Supreme Court rulemaking intruding into matters of state criminal law does not operate at the state level." [Footnote omitted.]). Accordingly, the nature of the question before us will inform our consideration of the *Geisler* factors.[16] Cf. *State* v. *Santiago*, 318 Conn. 1, 18 n.14,

[16] We note that an argument could be made that, when considering whether to adopt a prophylactic rule to protect an established constitutional right, we need not engage in a *Geisler* analysis. Some commentators have argued that the appropriate analytical process is a policy centered weighing process similar to the one, described subsequently in this opinion, that the Supreme Court relied on in *Davis*. See *Davis* v. *United* States, supra, 512 U.S. 458

122 A.3d 1 (2015) ("In some of our decisions, we have utilized the multifactor *Geisler* analysis to flesh out the general nature and parameters of the state constitutional provision at issue. Having done so, we proceeded to resolve the appellant's particular constitutional challenge according to the legal test and framework relevant and suited to that area of the law, rather than performing the substantive legal analysis under the somewhat artificial auspices of the six *Geisler* factors.").

With regard to the first of those factors, the constitutional text, this court previously has recognized that the text of the due process and self-incrimination clauses in article first, § 8, of our state constitution; see footnote 2 of this opinion; is not materially different from the

(noting that whether to adopt prohibition on further questioning "is . . . justified only by reference to its prophylactic purpose"); see also S. Klein, "Identifying and (Re)formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure," 99 Mich. L. Rev. 1030, 1061–63 (2001) (arguing that court first determines whether rule providing relief only when there is showing that right actually has been violated is effective, and, if not, whether the proposed rule will be effective without imposing unacceptable costs); T. Saylor, supra, 59 N.Y.U. Ann. Surv. Am. L. 299, 311–12 (citing other formulations of prerequisites and describing core of inquiry as cost/benefit assessment). However, even some commentators who favor such weighing processes argue that any unique state concerns must be considered. See T. Aleinikoff, "Constitutional Law in the Age of Balancing," 96 Yale L.J. 943, 1002–1004 (1987) (discussing potential alternatives to balancing, including focused examination of items such as "text, structure, precedent, consequences, history, intent, our 'ethical traditions' [and] notions of fundamental values" [footnote omitted]); T. Saylor, supra, 312–13 ("[j]ust as [under a primacy approach] state constitutional analysis should begin and end with the state constitution, unique state content, context, and sources should be deemed relevant in any balancing equation").

This court previously has considered the *Geisler* factors in deciding whether to adopt a prophylactic rule under our state constitution; see, e.g., *State* v. *Harris*, 330 Conn. 91, 114–31, 191 A.3d 119 (2018); *State* v. *Jenkins*, 298 Conn. 209, 259–82, 3 A.3d 806 (2010); *State* v. *Piorkowski*, 243 Conn. 205, 214–21, 700 A.2d 1146 (1997); see also *State* v. *Lawrence*, 282 Conn. 141, 158-77, 920 A.2d 236 (2007); and the parties in the present case have briefed this issue under *Geisler*. Neither party advocated for a different approach. Nonetheless, we note that the outcome would be the same under either approach.

corresponding clauses of the federal constitution. See *State* v. *Lockhart*, 298 Conn. 537, 551, 4 A.3d 1176 (2010); *State* v. *Ledbetter*, 275 Conn. 534, 562, 881 A.2d 290 (2005) (overruled in part on other grounds by *State* v. *Harris*, 330 Conn. 91, 131, 191 A.3d 119 [2018]), cert. denied, 547 U.S. 1082, 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2006); *State* v. *Asherman*, supra, 193 Conn. 712, 715. This court has also recognized, however, that the due process concerns that operate at the intersection between the right to counsel and the privilege against self-incrimination may require greater protection than that afforded by the federal constitution under some circumstances. In *State* v. *Stoddard*, 206 Conn. 157, 160, 164–72, 537 A.2d 446 (1988), this court declined to follow a recently decided United States Supreme Court case holding that efforts by counsel to contact an in-custody suspect have no bearing on the validity of that suspect's waiver of his *Miranda* rights. In reaching that conclusion, we relied on the fact that Connecticut "has had a long history of recognizing the significance of the right to counsel, even before that right attained federal constitutional importance." Id., 164.

Importantly for present purposes, this court explained the significance of that history to be as follows: "While this history specifically illuminates the right to counsel that attaches after the initiation of adversary judicial proceedings, it also informs the due process concerns raised by police interference with counsel's access to a custodial suspect. Cf. *State* v. *Ferrell*, 191 Conn. 37, 42 n.5, 463 A.2d 573 (1983).[17] In

[17] In *State* v. *Ferrell*, supra, 191 Conn. 45, this court held that, because the right to consult with counsel is meaningless if the accused cannot privately and freely discuss the case, statements obtained without affording the privacy required to effectuate *Miranda* rights may not be admitted into evidence against a defendant in the state's case-in-chief. The court emphasized that this holding was based not only on our interpretation of the fourteenth amendment to the United States constitution, but also on the alternative, independent state ground of the due process clause under article first, § 8, of the Connecticut constitution. Id., 45 n.12.

recently reiterating that *Miranda* warnings are independently required under the due process clause of article first, § 8, of the Connecticut constitution; *State* v. *Barrett*, 205 Conn. 437, 447, 534 A.2d 219 (1987); we recognized, once again, the unique ability of counsel to protect the rights of a client undergoing, or confronting the imminent possibility of, interrogation. Id., 447–48, quoting *Fare* v. *Michael C.*, 442 U.S. 707, 719, 99 S. Ct. 2560, 61 L. Ed. 2d 197 . . . .

"This recognition is in service of the traditional belief that an accused may be convicted only if exacting measures have been taken to [en]sure that the accused has been treated with the most scrupulous fairness by law enforcement officials. *State* v. *Ferrell*, supra, [191 Conn.] 41. Because counsel is uniquely prepared to assist a suspect in making an intelligent and knowing decision whether to speak or stand mute, we have concluded that questioning of a suspect must cease once a clear request for counsel has been made. *State* v. *Acquin*, 187 Conn. 647, 667, 448 A.2d 163 (1982), cert. denied, 463 U.S. 1229, 103 S. Ct. 3570, 77 L. Ed. 2d 1411 (1983). The decision in *Miranda* v. *Arizona*, supra, [384 U.S.] 444, itself the benchmark in this area of law, required fully effective means of ensuring a suspect's continuous right of access to counsel." (Citation omitted; footnote added; internal quotation marks omitted.) *State* v. *Stoddard*, supra, 206 Conn. 166.

This court's concern in *Stoddard* about police interference with access to counsel in this setting echoes the problem of allowing a police officer to press forward with interrogation in the face of a statement that a suspect reasonably believes to be an invocation of his right to have counsel present.[18] We find it significant in

[18] In the present case, the Appellate Court dismissed the significance of *Stoddard* on the ground that this court had since "clarified the narrow confines of *Stoddard* . . . ." *State* v. *Purcell*, supra, 174 Conn. App. 434. The Appellate Court is correct that this court declined to extend *Stoddard* to require the police to inform a juvenile suspect of his parent's efforts to

this regard that, in reliance on *Miranda* and its progeny, this court endorsed the stop and clarify rule and followed it for more than a decade prior to *Davis*. See *State* v. *Anderson*, 209 Conn. 622, 627–28, 553 A.2d 589 (1989); *State* v. *Barrett*, supra, 205 Conn. 448; *State* v. *Acquin*, supra, 187 Conn. 674–75. We reached this determination based on our conclusion that this rule was compelled under Supreme Court precedent. See *State* v. *Acquin*, supra, 675 (noting origin of stop and clarify rule in Fifth Circuit case law and concluding that Supreme Court's decision in "*Edwards* v. *Arizona*,

make contact; see *State* v. *Whitaker*, 215 Conn. 739, 751–52, 578 A.2d 1031 (1990); concluded that *Stoddard* did not require the court to adopt a per se rule that a waiver of counsel can occur only in the presence of counsel; see *State* v. *Piorkowski*, 243 Conn. 205, 217–21, 700 A.2d 1146 (1997); and that *Stoddard* did not require us to adopt a per se rule that the failure to record a defendant's confession violates his right to counsel. *State* v. *Lockhart*, supra, 298 Conn. 554. It is important to observe that, in each of these cases, the defendant was unable to offer persuasive precedent from this court or other courts, or compelling policy justifications for providing greater rights under our state constitution. In none of these cases did this court call into question the broader concerns articulated in *Stoddard* and its predecessors. See, e.g., *State* v. *Piorkowski*, supra, 217 (discussing *Stoddard* and noting that, although our state constitution "scrupulously protects the right of an individual's access to counsel, we always have recognized that the right to counsel is a personal right"). Moreover, the issue of whether a police officer can press forward with interrogation in the face of a statement that a suspect reasonably believes to be an invocation of his *Miranda* right to have counsel present is akin to the concern this court expressed in *Stoddard* regarding police interference with access to counsel.

The state asserts that, "[e]ven more telling, in *State* v. *Barrett*, [supra, 205 Conn. 447], this court rejected the claim 'that the due process clause contained in article first, § 8, of our state constitution require[d] a more expansive interpretation of the defendant's invocation of his [*Miranda*] right to counsel . . . .' " The state ignores the fact that we limited our holding in *Barrett* to "the circumstances of this case"; *State* v. *Barrett*, supra, 447; which presented the unusual circumstance in which the defendant unambiguously invoked his right to have counsel present for any written statement but similarly unambiguously waived his right to have counsel present for his oral statement. Id., 448–49. Indeed, following the language on which the state relies, this court acknowledged that the warnings required by *Miranda* "are independently required under the due process clause of article first, § 8, of the Connecticut constitution." Id., 447.

[supra, 451 U.S. 477] *must be read* to include this common-sense Fifth Circuit rule, which was implicitly approved by the majority, and specifically stated in Justice Powell's concurring opinion" [emphasis added]).

Since *Davis*, our appellate courts have not considered whether they would follow its modified legal standard as a matter of state constitutional law. This court did summarily reject an argument that the stop and clarify rule should apply to *pre*waiver statements as a matter of state constitutional law, premised on an assumption that *Davis* would control *post*waiver statements under our constitution. See *State* v. *Hafford*, 252 Conn. 274, 294 n.15, 746 A.2d 150, cert. denied, 531 U.S. 855, 121 S. Ct. 136, 148 L. Ed. 2d 89 (2000). Putting aside the difference in the claim presented, it is well settled that, in the absence of a complete and proper constitutional analysis, we would not follow such a determination but, rather, assess the matter anew under the requisite analytical process. See, e.g., *State* v. *Patel*, 327 Conn. 932, 939–40, 171 A.3d 1037 (2017); *State* v. *Piorkowski*, 243 Conn. 205, 214, 700 A.2d 1146 (1997); *State* v. *Barton*, 219 Conn. 529, 538–40, 594 A.2d 917 (1991).

Although this court has not previously addressed the precise question presently before us, many other jurisdictions have considered whether *Davis* should be followed under their state constitutions or common-law analogue. The numbers weigh in favor of the state's position, by approximately a two to one margin.[19] See

[19] The Appellate Court cited thirteen jurisdictions that adopted *Davis* under their respective state constitutions: California, Florida, Indiana, Iowa, Kansas, Mississippi, Montana, New Mexico, Tennessee, Texas, Washington, West Virginia, and Wisconsin. See *State* v. *Purcell*, supra, 174 Conn. App. 435–36. It also cited three jurisdictions that had endorsed *Davis* as a matter of state law; see id., 436 n.16; and two jurisdictions that had adopted *Davis* only for postwaiver requests for counsel. Id.

The parties agree that the majority of jurisdictions to consider this issue have resolved it in favor of the state's position. We note, however, that the

State v. *Purcell*, supra, 174 Conn. App. 435–36 and n.16 (citing cases). Six jurisdictions that have reached this question have concluded that *Davis* should not be followed as a matter of state law.[20] A seventh, West Virginia, strongly suggested that it would do so when the

numbers are not quite as lopsided as the Appellate Court suggested. In the Mississippi case cited by our Appellate Court, *Franklin* v. *State*, 170 So. 3d 481, 491 (Miss. 2015), only a plurality of the court endorsed *Davis*, and thus the case did not overrule that state court's earlier decision rejecting *Davis*, which we have cited in footnote 20 of this opinion. Insofar as the Appellate Court included jurisdictions that adopted *Davis*' standard for the question of an ambiguous invocation of the right to remain silent, such holdings would not necessarily dictate whether that standard would apply to an ambiguous invocation of the right to counsel. See, e.g., *State* v. *Farley*, 192 W. Va. 247, 256 n.12, 452 S.E.2d 50 (1994) (The court, after applying the rule in *Davis* to conclude that the ambiguous invocation of the right to remain silent does not offend the West Virginia constitution, noted: "By using *Davis* . . . as an analytical starting point, we do not mean to infer that we are adopting *Davis* as part of West Virginia's jurisprudence. . . . Given the coercive atmosphere, police pressure, secrecy, and the lack of sophistication of many criminal defendants, it would seem that an expression of reluctance to cooperate, *at least insofar as it relates to an expression of an interest in the assistance of a lawyer*, ought to be honored by the police. An approach, more consistent with *Miranda* itself, would be to follow the practice approved by a number of lower courts and, as urged by the concurring opinion in *Davis*, to require the interrogating officers to ask clarifying questions in order to clear up any ambiguity surrounding an interest in speaking with a lawyer. We note with interest that it took the Hawaii Supreme Court only three months to reject *Davis* in favor of the more reasonable stop-and-clarify approach." [Emphasis added.]). In addition, in an Iowa case, three justices wrote separately to raise the question of whether the court's prior case adopting *Davis* as a matter of state constitutional law has continued vitality. See *State* v. *Effler*, 769 N.W.2d 880, 894–97 (Iowa 2009) (Appel, J., specially concurring), cert. denied, 558 U.S. 1096, 130 S. Ct. 1024, 175 L. Ed. 2d 627 (2009).

[20] The following cases were decided under the jurisdiction's state constitution: *Steckel* v. *State*, 711 A.2d 5, 10–11 (Del. 1998); *State* v. *Hoey*, 77 Haw. 17, 36, 881 P.2d 504 (1994); *State* v. *Risk*, supra, 598 N.W.2d 648–49 (Minnesota); *Downey* v. *State*, 144 So. 3d 146, 151 (Miss. 2014); *State* v. *Charboneau*, 323 Or. 38, 58–60, 913 P.2d 308 (1996), cert. denied, 519 U.S. 1065, 117 S. Ct. 704, 136 L. Ed. 2d 625 (1997). The Appellate Court's tally of four omitted the Mississippi case; see footnote 19 of this opinion; and discounted the New Jersey case. We include *State* v. *Chew*, 150 N.J. 30, 62–63, 695 A.2d 1301 (1997), in our tally because the mere fact that the right against self-incrimination under New Jersey law rests on a common-law privilege dating

question was presented; see footnote 19 of this opinion; and other jurisdictions have found other ways to minimize the potential harshness of the *Davis* rule.[21] Ultimately, however, our concern is not the numerical tally of states but the persuasiveness of the decisions in those states. See *State* v. *Dickson*, supra, 322 Conn. 431 ("We recognize that a number of courts have concluded otherwise. Nevertheless, we conclude that this is an issue for which the arc of logic trumps the weight of authority."); *State* v. *Jenkins*, supra, 298 Conn. 262 ("a proper *Geisler* analysis does not require us simply to tally and follow the decisions favoring one party's state constitutional claim; a deeper review of those decisions' underpinnings is required because we follow only persuasive decisions" [internal quotation marks omitted]).

A review of these cases reveals that, in large measure, they simply endorse the reasoning of the majority or concurring opinion in *Davis*; see, e.g., *State* v. *Owen*, 696 So. 2d 715, 719 (Fla.) (finding reasoning of *Davis* majority persuasive), cert. denied, 522 U.S. 1002, 118 S. Ct. 574, 139 L. Ed. 2d 413 (1997); *State* v. *Hoey*, 77 Haw. 17, 36, 881 P.2d 504 (1994) (adopting reasoning of *Davis* concurrence); rely on the soundness of the rule adopted in that jurisdiction before *Davis*; see, e.g., *Steckel* v. *State*, 711 A.2d 5, 10–11 (Del. 1998) (following

to the state's origin, rather than a constitutional provision; see *State* v. *Fary*, 19 N.J. 431, 435, 117 A.2d 499 (1955); does not make the court's position any less significant in our view.

[21] Even some jurisdictions purporting to apply federal law have mitigated the harshness of *Davis*' rule though various approaches. See, e.g., *People* v. *Kutlak*, 364 P.3d 199, 206 (Colo. 2016) (assessing ambiguity of request by totality of circumstances, including "the speech patterns of the accused," "the accused's behavior during interrogation," and "the accused's youth, criminal history, background, nervousness or distress, and feelings of intimidation or powerlessness"); *State* v. *Anderson*, 258 So. 2d 44, 48, (La. App. 2017) (citing pre-*Davis* case law in support of rule that, "[i]In analyzing whether there has been a direct, clear, unequivocal, and unambiguous request for counsel, *courts must give a broad, rather than narrow, interpretation to the suspect's request*" [emphasis added]).

clarification approach); *Downey* v. *State*, 144 So. 3d 146, 151 (Miss. 2014) (same); or both; see, e.g., *State* v. *Chew*, 150 N.J. 30, 63, 695 A.2d 1301 (1997) ("[g]iven the narrow balance for the *Davis* majority's analysis, we believe it prudent to continue to apply our [stop and clarify] precedent"). We therefore independently consider the merits of *Davis*.

Before we commence that process, we explain why it is appropriate to undertake such a review. Since this court adopted *Geisler*, we generally have assumed that the federal precedent factor weighs against the defendant if the United States Supreme Court has squarely decided the issue to the contrary under the federal constitution; see, e.g., *State* v. *Piorkowski*, supra, 243 Conn. 216; or the federal courts are unanimous that the court would reach such a decision. See, e.g., *State* v. *Lockhart*, supra, 298 Conn. 550 and n.6; *State* v. *Ledbetter*, supra, 275 Conn. 561. We have not considered the merits of the on point decision itself. However, there are compelling reasons to reconsider that approach, at least as applied to the circumstances of the present case. When, as in the present case, the issue to be decided is largely policy driven, it seems highly appropriate to consider the soundness of the policy rationale supporting the Supreme Court's decision.[22] See, e.g.,

[22] The state asserts that the federal precedent *Geisler* factor necessarily favors the state because *Davis* adopted a bright-line rule, and that the view of the four concurring justices in *Davis* is irrelevant because "the rule in *Davis* is a judicially prescribed prophylaxis, not a constitutional command . . . and nothing in the opinion of the concurring justices sheds any light on article first, § 8, of the Connecticut constitution." In our view, the fact that the *Davis* rule is not a constitutional command affords more freedom to depart from federal precedent, not less. See *Miranda* v. *Arizona*, supra, 384 U.S. 490 ("[s]tates are free to develop their own safeguards for the privilege, so long as they are fully as effective as those [required by *Miranda* for] informing accused persons of their right of silence and in affording a continuous opportunity to exercise it"). With regard to the view of the concurring justices in *Davis*, the question they raised as to whether the majority's rule was a departure from Supreme Court precedent—precedent that this court had followed—is necessarily a relevant consideration, as is any other concern they raised relevant to public policy considerations.

State v. *Stoddard*, supra, 206 Conn. 168–71 (in pre-*Geisler* decision, this court examined objections to rule requiring police to inform defendant of counsel's efforts to communicate with suspect articulated in United States Supreme Court's decision rejecting rule to determine whether rule should be adopted under our state constitution). Indeed, as we previously noted, many of our sister states have rested their decisions solely on that basis. Moreover, if the Supreme Court decision under consideration results in a significant departure from precedent that this court has followed, as in this instance, this court has the responsibility to examine the Supreme Court's reasons for doing so to aid us in our determination as to whether we should invoke the state constitution to stay the course or follow the Supreme Court and adopt the change. See, e.g., *State* v. *Marsala*, 216 Conn. 150, 160–69, 579 A.2d 58 (1990) (pre-*Geisler* decision in which court examined soundness of reasons articulated in United States Supreme Court's decision adopting good faith exception to exclusionary rule to determine whether rule is incompatible with our state constitution). In addition, if the factual assumptions or legal underpinnings of a prior decision have been materially undermined by events since the Supreme Court considered the matter, it is appropriate for us to reconsider the merits of the decision. Although we could address many of these matters under other *Geisler* factors, particularly, economic and sociological considerations, we conclude that the more logical approach is to consider the merits of a policy driven Supreme Court decision separate from other policy considerations.

In doing so, we consider whether the underpinnings of the Supreme Court's decision are so flawed or inconsistent with this state's case law or public policies that the decision should not be followed as a matter of state law. Cf. *State* v. *Cardenas-Alvarez*, 130 N.M. 386, 391,

25 P.3d 225 (2001) (recognizing that state court may diverge from federal constitutional precedent in interpreting analogous provision of state constitution if, among other reasons, there is " 'a flawed federal analysis' "); *Morris* v. *Brandenburg*, 356 P.3d 564, 573 (N.M. App. 2015) (citing state cases rejecting United States Supreme Court decisions that had been widely criticized as weakening right " 'beyond a point which may be countenanced under our state constitution,' " or as " 'unpersuasive and incompatible with state constitutional standards,' " or that had been criticized in legal literature as " 'devoid of a reasoned basis in constitutional doctrine' "), aff'd, 376 P.3d 836 (N.M. 2016).

As we previously indicated, *Davis* was decided by a five to four margin. See *Davis* v. *United States*, supra, 512 U.S. 452. The majority viewed the standard it articulated to be consistent with the court's precedent. Id., 458–60. However, prior to *Davis*, this court had interpreted the court's precedent as endorsing the stop and clarify rule. See *State* v. *Acquin*, supra, 187 Conn. 674–75. This means that we agreed with the interpretation of the court's precedent articulated by the *Davis* concurrence. See *Davis* v. *United States*, supra, 467–70 (Souter, J., concurring). Consistent with that view, this court itself subsequently characterized *Davis* as a change in the law, in that it "narrowed" the holding in *Miranda* "that when an accused person 'indicates in any manner at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning,' and the police must stop the interrogation." *State* v. *Anonymous*, supra, 240 Conn. 720. The fact that *Davis* narrowed constitutional safeguards deemed by this court to be of "independent" significance under our state constitution; see *State* v. *Barrett*, supra, 205 Conn. 447; *State* v. *Ferrell*, supra, 191 Conn. 45 n.12; weighs against following *Davis* in the absence of countervailing considerations.

The *Davis* majority also justified its rule in relation to the two sides of the *Miranda* equation—balancing the need to protect suspects from an inherently coercive interrogation environment against the need for effective law enforcement. See *Davis* v. *United States*, supra, 512 U.S. 460–61. With regard to the suspect's side of the equation, the *Davis* majority recognized that "requiring a clear assertion of the right to counsel might disadvantage some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate their right to counsel *although they actually want to have a lawyer present.*" (Emphasis added.) Id., 460. Nonetheless, it reasoned that "the primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves. [F]ull comprehension of the rights to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process." (Internal quotation marks omitted.) Id.

There are at least three flaws with this logic. The first flaw is that it incorrectly assumes that all suspects fully comprehend their *Miranda* rights and the effect of invoking them. Despite the ubiquity of *Miranda* warnings in television dramas that may lead the public to believe that everyone knows their rights, the evidence gathered since *Davis* is to the contrary. See generally D. Dearborn, " 'You Have the Right to an Attorney,' but Not Right Now: Combating *Miranda*'s Failure by Advancing the Point of Attachment Under Article XII of the Massachusetts Declaration of Rights," 44 Suffolk U. L. Rev. 359, 364–87 (2011); R. Rogers et al., " 'Everyone Knows Their *Miranda* Rights': Implicit Assumptions and Countervailing Evidence," 16 Psychol. Pub. Policy & L. 300, 307–311 (2010); R. Rogers et al., "The Language of *Miranda* Warnings in American Jurisdictions: A Replication and Vocabulary Analysis," 32 Law & Hum. Behav. 124 (2008) (analyzing verbal com-

prehension of *Miranda* warnings). "[S]ocial science has demonstrated that suspects do not have a full appreciation of either their rights or the effect of a waiver when they choose to speak to the police. . . . Social science has also found a disparity between the reading level required to comprehend the *Miranda* warnings and the reading levels of suspects who are expected to understand the warnings on their own. The evidence proves many warnings demand a greater educational background than many suspects possess. . . . Even assuming a custodial suspect understands the literal meaning of the words contained in the warnings, the constitutional principles embedded in those words are far from obvious. This unfortunate dynamic disproportionately impacts vulnerable populations, including juveniles, the disabled, and individuals for whom English is not their first language. Yet even the [well educated] have difficulty understanding their *Miranda* warnings." (Footnotes omitted; internal quotation marks omitted.) D. Dearborn, supra, 373–75.

Beyond that, the question of whether suspects *understand* their *Miranda* rights is largely distinct from the question of whether they know the unequivocal manner in which they would have to *exercise* those rights to give them effect, a piece of significant information that is not shared with them when they are given the warnings or before they are asked to waive their rights. With regard to the particular concern in the present case, although *Davis* requires a suspect to invoke his right to counsel clearly and unequivocally, almost 70 percent of defendants questioned in one study had no appreciation for the precision required to request counsel and stop interrogation.[23] See R. Rogers et al., supra, 16 Psy-

[23] The study also reflected that more than 30 percent of defendants inaccurately believe that questioning can continue until their lawyers are physically present, and that a substantial minority do not believe they will have the opportunity to confer with counsel in private, thereby vitiating a primary advantage of seeking counsel. See R. Rogers et al., supra, 16 Psychol. Pub. Policy & L. 311.

chol. Pub. Policy & L. 308 (defendants agreeing that, in seeking legal assistance, it means the same thing if you say, " 'I want a lawyer,' " or " 'I might want a lawyer' "); see also R. Rogers, "A Little Knowledge Is a Dangerous Thing . . . Emerging *Miranda* Research and Professional Roles for Psychologists," 63 Am. Psychologist 776, 777 (2008) (conservatively estimating that 318,000 suspects waive all their *Miranda* rights annually while failing to comprehend even 50 percent of representative *Miranda* warnings).

The second flaw in the *Davis* majority's logic is expressly acknowledged—that the underinclusiveness of its rule would disadvantage those individuals who are most likely to be subject to the very coercive pressures against which *Miranda* was intended to protect. See *Davis* v. *United States*, supra, 512 U.S. 470 n.4 (Souter, J., concurring) ("Social science confirms what common sense would suggest, that individuals who feel intimidated or powerless are more likely to speak in equivocal or nonstandard terms when no ambiguity or equivocation is meant. See W. O'Barr, Linguistic Evidence: Language, Power, and Strategy in the Courtroom [1982] 61–71 . . . ."). The *Davis* majority rule is akin to providing fewer life preservers to passengers on board a boat who cannot swim or have conditions that make swimming difficult than to those without such impairments.

A third, related flaw involves the *Davis* majority's failure to appreciate that its rule would disproportionately disadvantage certain suspect or quasi-suspect classes, who more commonly rely on indirect speech patterns.[24] "Sociolinguistic research has demonstrated

[24] The *Davis* majority's approach also is problematic in cases in which the defendant requires a translator, as he may make a statement that is subject to different interpretations in translation. See, e.g., *United States* v. *De La Jara*, 973 F.2d 746, 750–51 (9th Cir. 1992) (noting that interpreter offered three possible interpretations of defendant's statements, and that "the meaning of [the defendant's] statement is crucial, as the alternate translations have different legal effects"); see also *Vargas-Salguero* v. *State*,

that discrete segments of the population—particularly women and ethnic minorities—are far more likely than others to adopt indirect speech patterns." J. Ainsworth, supra, 103 Yale L.J. 261; see also id., 317–18 ("[O]ne researcher has observed that indirect speech patterns are common within African-American spoken language. In his pragmatic analysis of Black English, Thurmon Garner described what he termed a 'strategy of indirection' by speakers as a linguistic mechanism to avoid conflict." [Footnotes omitted.]). For example, hedges in speech, such as "I think," "I suppose," "maybe," or "perhaps," may be used to convey either that the speaker is uncertain about the statement or that the speaker prefers not to confront the addressee with a bald assertion. See id., 276. As we observed in part II of this opinion, hedges are one type of such indirect speech that commonly is treated as equivocation or ambiguity under *Davis*.

With regard to the other side of the *Miranda* equation, the *Davis* majority reasoned that its rule was necessary for effective law enforcement. It posited that "if we were to require questioning to cease if a suspect makes a statement that might be a request for an attorney . . . [p]olice officers would be forced to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he has not said so, with the threat of suppression if they guess wrong." (Emphasis omitted.) *Davis* v. *United States*, supra, 512 U.S. 461. This reasoning is premised on a false choice, between requiring an unambiguous invocation of the right to counsel and permitting an ambiguous invocation of that

237 Md. App. 317, 337, 185 A.3d 793 (2018) (The defendant's statement, translated from Spanish, "has two components that we need to unpack: the conditional opening ['if I am being accused of something'] followed by the request itself ['I better want an attorney']. The first half of the sentence stated a condition, and a colloquial preface or qualifier can render a statement ambiguous. But the statement's ultimate clarity depends on its context." [Emphasis omitted.]).

right to require the termination of interrogation. The court ignores that the stop and clarify approach provides a sensible middle ground, allowing law enforcement to dispel ambiguity and avoid guesswork as to the suspect's actual intent. See *Davis* v. *United States*, United States Supreme Court Briefs, October Term, 1993, Government's Brief, p. 24 ("[t]he 'clarification' rule has the simple virtue of permitting the officer to solve that dilemma by seeking further information to ascertain the suspect's choice").

The *Davis* majority's disregard of the stop and clarify approach in considering the needs of law enforcement is particularly difficult to understand in light of the position taken by the government and law enforcement amici in that very case. The government and the amici curiae Americans for Effective Law Enforcement, Inc., International Association of Chiefs of Police, Inc., National District Attorneys Association, Inc., and National Sheriffs' Association all urged the court to adopt the stop and clarify rule, asserting that it struck the appropriate balance between the rights of suspects and the needs of law enforcement.[25] See *Davis* v. *United States*, supra, 512 U.S. 467 n.2 (Souter, J., concurring). The fact that a majority of jurisdictions had applied such a rule for many years before *Davis* suggests that there was an ample body of practical experience on which the amici could base their position.

The *Davis* majority did concede that a stop and clarify approach often would be "good police practice." Id., 461. Of course, that fact, in and of itself, would not compel such a practice as constitutionally mandated. See *United States* v. *Kahn*, 415 U.S. 143, 155 n.15, 94

[25] In its brief in *Davis*, the government went so far as to assert that the stop and clarify rule was the *only* approach that comported with the balance underlying *Miranda* and *Edwards*, and that a rule permitting clarifying questions provides a bright line for the police and the courts to follow. See *Davis* v. *United States*, United States Supreme Court Briefs, supra, p. 23.

S. Ct. 977, 39 L. Ed. 2d 225 (1974) (in fourth amendment context, police officers need not follow best practice in order for search to pass constitutional muster); *State* v. *Marquez*, 291 Conn. 122, 145, 967 A.2d 56 (test for determining whether identification procedure is unnecessarily suggestive "is *not* a 'best practices' test" [emphasis in original]), cert. denied, 558 U.S. 895, 130 S. Ct. 237, 175 L. Ed. 2d 163 (2009). Nonetheless, the majority's concession undermines its supposition that a more protective rule would unduly hamper effective law enforcement.

In sum, we find the reasoning of the *Davis* majority to lack a sound basis in legal doctrine or law enforcement objectives. For the reasons that follow, we also conclude that policy considerations that the *Davis* majority was not fully aware of, or did not acknowledge, support the more protective stop and clarify rule.

The prophylactic rules adopted in *Miranda* and *Edwards* were intended as a countermeasure against the inherently coercive nature of custodial interrogations. See *Miranda* v. *Arizona*, supra, 384 U.S. 457–58 ("It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. . . . Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." [Footnote omitted.]); *Michigan* v. *Harvey*, supra, 494 U.S. 350 ("*Edwards* thus established another prophylactic rule designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights"). However, there is reason to question whether these rules have proved adequate to the task. See generally D. Dearborn, supra, 44 Suffolk U. L. Rev. 364–87. As we previously noted, studies show that many people do not have an

accurate understanding of the protections afforded under *Miranda* or the manner for, and consequences of, invoking those rights. In addition, as one commentator has observed, "[w]hat the [United States Supreme] Court did not (and perhaps could not) realize was that the forms of psychological coercion it sought to address would simply be refined and replaced with equally sinister forms of manipulation." Id., 364–65. This problem has been exacerbated by the holding in *Davis*. By permitting interrogation to continue in the face of an ambiguous invocation of the right to counsel, the police officers faced with such an invocation have been emboldened to employ a wide range of tactics designed to deflect suspects from clearly invoking their right to an attorney. See W. White, "Deflecting a Suspect from Requesting an Attorney," 68 U. Pitt. L. Rev. 29, 31, 41 (2006) (noting that most lower courts have interpreted *Davis* to allow interrogators to employ such tactics).

The court in *Miranda* explained that the purpose of the warnings is to "show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it." *Miranda* v. *Arizona*, supra, 384 U.S. 468. However, by allowing the police to continue interrogating a suspect who has made a statement that he reasonably believes to be a request to have counsel present, the suspect reasonably would infer that the police do not intend to recognize his privilege. See *Davis* v. *United States*, supra, 512 U.S. 472–73 (Souter, J., concurring). Such a reasonable inference might not only dissuade subsequent efforts to renew that privilege, but also deter attempts to invoke other privileges. By contrast, as one commentator observed, "properly administered and narrowly limited questions designed to discern a suspect's intent will not likely be viewed as coercive. In fact, it is more likely that such questions will impress upon the individual that the police are prepared to honor his choice but must first determine

whether a choice has been made." (Footnote omitted.) W. Holly, "Ambiguous Invocations of the Right To Remain Silent: A Post-*Davis* Analysis and Proposal," 29 Seton Hall L. Rev. 558, 590–91 (1998).

The court in *Miranda* also recognized the possibility of a coercive custodial interrogation resulting in a false confession. See *Miranda* v. *Arizona*, supra, 384 U.S. 447, 455 n.24. The magnitude of this problem, however, was not known then, or even at the time *Davis* was decided. See *Lapointe* v. *Commissioner of Correction*, 316 Conn. 225, 326, 112 A.3d 1 (2015) (discussing role of social science research and advent of DNA testing in revealing scope of phenomenon); see also *State* v. *Perea*, 322 P.3d 624, 641 (Utah 2013) ("[i]n the 1990s, little research had been conducted on the phenomenon of false confessions"). Since *Davis*, the Supreme Court has recognized that "the pressure of custodial interrogation is so immense that it can induce a frighteningly high percentage of people to confess to crimes they never committed. *Corley* v. *United States*, 556 U.S. 303, 321 [129 S. Ct. 1558, 173 L. Ed. 2d 443] (2009) . . . ." (Citations omitted; internal quotation marks omitted.) *J. D. B.* v. *North Carolina*, 564 U.S. 261, 269, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011). Imposing an additional prophylactic measure may assist a system of criminal justice to prevent such results, without unduly hampering legitimate law enforcement efforts. See *State* v. *Francis*, 322 Conn. 247, 266, 140 A.3d 927 (2016) ("[t]he value of any prophylactic rule . . . must be assessed not only on the basis of what is gained, but also on the basis of what is lost" [internal quotation marks omitted]).

Recognizing that the promises that dwell within *Miranda* can only be achieved by honoring the premises upon which it rests, we determine that there are compelling reasons to conclude that *Davis*' standard does not adequately safeguard *Miranda*'s right to the advice of

counsel during a custodial interrogation. We therefore hold that, consistent with our precedent and the majority rule that governed prior to *Davis*, our state constitution requires that, "if a suspect makes an equivocal statement that arguably can be construed as a request for counsel, interrogation must cease except for narrow questions designed to clarify the earlier statement and the suspect's desire for counsel." (Internal quotation marks omitted.) *State* v. *Anderson*, supra, 209 Conn. 627–28. Interrogators confronted with such a situation alternatively may inform the defendant that they understand his statement(s) to mean that he does not wish to speak with them without counsel present and that they will terminate the interrogation. In either case, if the defendant thereafter clearly and unequivocally expresses a desire to continue without counsel present, the interrogation may resume. See, e.g., *State* v. *Acquin*, supra, 187 Conn. 660, 669–70 (after defendant indicated that he wanted attorney and further clarification was sought, defendant later stated that "it wasn't really an attorney that he wanted," just someone he could trust, and asked for psychiatrist who worked with prisoners at his jail to be present).

Applying that standard to the present case, we conclude that the defendant's rights under article first, § 8, of the Connecticut constitution were violated when the police officers continued to question him after the defendant ambiguously invoked his right to have counsel present. The officers' response did not seek clarification of the defendant's intent. Rather, they attempted to convince the defendant that it was against his interests not to continue the interview. See *United States* v. *March*, 999 F.2d 456, 461–62 (10th Cir.) ("clarifying questions must be purely ministerial, not adversarial, and cannot be designed to influence the subject not to invoke his rights"), cert. denied, 510 U.S. 983, 114 S. Ct. 483, 126 L. Ed. 2d 434 (1993); *Thompson* v. *Wain-*

wright, 601 F.2d 768, 772 (5th Cir. 1979) ("the limited inquiry permissible after an equivocal request for legal counsel may not take the form of an argument between interrogators and suspect about whether having counsel would be in the suspect's best interests").

The state makes no argument in its brief to this court that this constitutional violation was harmless beyond a reasonable doubt. See, e.g., *State* v. *Newton*, 330 Conn. 344, 353, 194 A.3d 272 (2018) (if defendant demonstrates that constitutional violation exists, defendant is entitled to prevail unless state proves that violation was harmless beyond reasonable doubt). Instead, it contends that suppression is not required on the grounds that (1) the sanction of exclusion does not apply because the police conducted themselves in objectively reasonable reliance on binding judicial precedent, and there is no claim that the statements were involuntary or untrustworthy, and (2) the police substantially complied with the stop and clarify rule and, in doing so, did not coerce or intimidate him. We are not persuaded by any of these contentions.

Prior to our decision today, it was an open question whether this court would require a more protective rule under our state constitution. See *State* v. *Pinder*, 250 Conn. 385, 417, 736 A.2d 857 (1999) (finding it unnecessary to reach defendant's claim that state constitution requires police to ask clarifying questions when its federal counterpart does not); *State* v. *Anonymous*, supra, 240 Conn. 717 n.11 (declining to reach claim under state constitution because defendant did not provide independent analysis). Although we may assume that the officers were acting in good faith, we agree with the defendant that such a "good faith" type exception is incompatible with our case law. See *State* v. *Marsala*, supra, 216 Conn. 169–71 (rejecting good faith exception to warrant requirements); see also *State* v. *Brown*, 331 Conn. 258, 275–76, A.3d (2019) (affirming that

court's rejection of good faith rule in *Marsala* was categorical and not amenable to case-by-case application). As we previously have stated, we do not agree that the police officers substantially complied with the clarification rule.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the judgments of the trial court and to remand the case to that court for a new trial.

In this opinion the other justices concurred.

RASPBERRY JUNCTION HOLDING, LLC *v.* SOUTHEASTERN CONNECTICUT WATER AUTHORITY
(SC 19974)

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

Syllabus

The plaintiff sought to recover damages from the defendant municipal water authority, S Co., for the loss of revenue resulting from the interruption of water service at its hotel property. The plaintiff alleged that the interruption was caused by S Co.'s negligence in its maintenance and operation of a pumping station. S Co. had been created by a special act of the General Assembly (33 Spec. Acts 478, No. 381 [1967]) that set forth S Co.'s powers and duties, including the power to be sued and the power to make rules for the "sale of water and the collection of rents and charges therefor." S Co. thereafter adopted rules governing its water service, including a rule limiting its liability for its negligence in supplying water. Citing that rule, S Co. moved for summary judgment on the ground that it was immune from liability for the plaintiff's damages and that the rule was a proper exercise of its authority under the special act's grant of power to make rules for the sale of water and the collection of rents and charges. The plaintiff opposed the motion, claiming that S Co., as a municipal corporation engaged in a proprietary function, was not immune from suit and that the special act did not provide any authority, express or implied, to promulgate rules that waive liability for negligence. The trial court recognized that, generally, S Co. could be sued like a private water company but that, as an administrative agency, it had the power to promulgate regulations having the force

and effect of law. The court, relying on authority from other jurisdictions, determined that reasonable rates for the provision of water services depended in part on a rule limiting liability, enforceable only to the extent that ordinary negligence was involved. The trial court therefore found that S Co.'s rule limiting liability for service outages was a reasonable exercise of its rule-making authority, and, because the plaintiff alleged only ordinary negligence, the rule limiting S Co.'s liability was enforceable as to the plaintiff's action. In light of this conclusion, the court did not address S Co.'s alternative ground for summary judgment, granted S Co.'s motion for summary judgment, and rendered judgment thereon, from which the plaintiff appealed. *Held* that the trial court improperly granted S Co.'s motion for summary judgment on the ground that S Co. had the authority to promulgate a rule that limited its liability for disruptions to water service, and, accordingly, the judgment was reversed and the case was remanded for consideration of the defendant's alternative ground for summary judgment: it was clear, from the text of the special act, that the legislature did not expressly empower the defendant to promulgate a rule immunizing itself from liability for the failure to supply water, and the defendant's authority to limit its liability for the negligent disruption of water could not be necessarily implied, as there was no textual or rational basis in the special act to infer that such authority was necessary to effectuate any other authority expressly conferred, the imposition of liability for the disruption of water service would not impair S Co.'s authority to set rates and sell water, or impair the ability of S Co. to set rates sufficient to cover costs, and S Co. was not subject to comprehensive regulation of its rates, services and facilities by the state's public utilities regulatory authority and, therefore, faced no impediment to setting rates sufficient to cover the cost of insurance or its liability in the absence of insurance; moreover, S Co.'s reliance on both the special act's catchall provision granting S Co. the power to do all things necessary or convenient to carry out the provisions of the special act and the act's statement of purpose did not provide S Co. with authority to limit its liability for the disruption of water service.

Argued November 13, 2018—officially released April 9, 2019

Procedural History

Action to recover damages sustained as a result of the alleged negligence of the defendant, and for other relief, brought to the Superior Court in the judicial district of New London, where the court, *Vacchelli*, *J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed. *Reversed*; *further proceedings*.

Santa Mendoza, for the appellant (plaintiff).

Stephanie S. Berry, with whom were *Ryan L. McLean* and, on the brief, *Lloyd L. Langhammer*, for the appellee (defendant).

Opinion

McDONALD, J. The dispositive question in this appeal is whether the special act creating the defendant, Southeastern Connecticut Water Authority, authorized the defendant to promulgate a rule immunizing itself from liability for failures or deficiencies in its supply of water to its customers. The plaintiff, Raspberry Junction Holding, LLC, appeals from the trial court's judgment rendering summary judgment in favor of the defendant on the basis of such a rule. We reverse the judgment of the trial court.

The record reveals the following undisputed facts and procedural history. The defendant was created in 1967 by a special act of the General Assembly as a body politic and corporate of the state, designated to perform the "essential government function" of planning, operating, and maintaining a water supply system for the benefit of the southeastern Connecticut planning region. 33 Spec. Acts 478, No. 381 (1967) (special act).[1] Section 14 of that act sets forth the powers and duties conferred on the defendant, including "the power: (a) to sue and be sued . . . (i) to make . . . rules for the sale of water and the collection of rents and charges therefor . . . (m) to fix rates and collect charges . . . such as to provide revenues sufficient at all times to pay . . . the princip[al] and interest on the bonds or notes of the authority together with the maintenance of proper reserves, in addition to paying . . . the

[1] The special act has been amended several times since 1967. See, e.g., 37 Spec. Acts 222, No. 133 (1973); Public Acts 2002, No. 02-76. The changes effected by those amendments, however, are not relevant to this appeal. All references herein are to the 1967 special act.

expense of operating and maintaining the properties of the authority together with proper reserves for depreciation, maintenance and contingencies and all other obligations and indebtedness of the authority . . . (p) to do all things necessary or convenient to carry out the powers expressly given in this act . . . .'' 33 Spec. Acts 481, 483–84, No. 381, § 14 (1967).

On the basis of the authority purportedly granted to it by § 14 of the special act, the defendant adopted ''Rules Governing Water Service,'' including rule 5, entitled ''SUPPLY OF WATER.'' Rule 5 provides in relevant part: ''It is expressly agreed that the [defendant] shall not be liable for a deficiency or failure in the supply of water or the pressure thereof for any cause whatsoever, or for any damage caused thereby, or for the bursting or breaking of any main or service pipe or any attachment to the [defendant's] property. . . .''[2]

In 2016, the plaintiff commenced the present action against the defendant, seeking damages on the basis of a loss of water service at The Bellissimo Grande Hotel in North Stonington, operated by the plaintiff. In its one count complaint, the plaintiff alleged that the hotel lost water service for several days in June, 2015, due to the explosion of a hydropneumatic tank at a pumping station operated by the defendant as a result of the defendant's negligent construction, operation, inspection or maintenance of the tank and its valves. The plaintiff further alleged that the water outage caused the plaintiff to lose revenue due to its inability to rent rooms and the need to give refunds to hotel guests during the water outage.

The defendant moved for summary judgment on two grounds. First, it contended that rule 5 immunized it

[2] The record does not reflect whether rule 5 was adopted when the defendant initially adopted its rules governing service in 1969, or some time thereafter.

from liability for the plaintiff's damages, and that the rule was a proper exercise of its authority under the special act's grant of power to make "rules for the sale of water and the collection of rents and charges therefor." See 33 Spec. Acts 483, No. 381, § 14 (i) (1967). Second, it contended that, because the plaintiff was seeking damages for monetary loss only, the claim is barred by the common-law economic loss doctrine.[3] The plaintiff opposed the motion, arguing that the defendant, as a municipal corporation engaged in a proprietary function, is not immune from suit and has no authority, express or implied, to promulgate rules that waive liability for negligence. The plaintiff also argued that the economic loss doctrine does not apply under the circumstances presented.

The trial court rendered summary judgment in favor of the defendant. The court recognized that the defendant's authority to promulgate rule 5 depended on an express or implied grant in the special act. It further recognized that, as a general matter, the defendant could be sued like a private water supply company. Nonetheless, it reasoned that, unlike a private company, the defendant is an administrative agency that has the power to promulgate regulations having the force and effect of law. On the basis of that conclusion, the court focused its analysis exclusively on the question of whether a rule limiting a water company's liability for service outages was a reasonable exercise of the defendant's rule-making authority. Finding no Connecticut

[3] The economic loss doctrine or rule, generally characterized, reflects the principle that a plaintiff cannot sue in tort for purely monetary loss unaccompanied by physical injury or property damage. See generally *Lawrence* v. *O & G Industries, Inc.*, 319 Conn. 641, 661 n.15, 126 A.3d 569 (2015); Black's Law Dictionary (9th Ed. 2009) p. 590. We have found it unnecessary thus far to decide whether "we should adopt the economic loss doctrine as a categorical bar to claims of economic loss in negligence cases without property damage or physical injury." (Internal quotation marks omitted.) *Lawrence* v. *O & G Industries, Inc.*, supra, 648 n.8.

authority on this question, it relied on authority from other jurisdictions holding that reasonable rates required for such services depend in part on a rule limiting liability. It also noted that other jurisdictions generally have held that such limitations on liability are enforceable only to the extent of ordinary negligence. Because the present case alleged only ordinary negligence, the court held that rule 5 was enforceable as to the present action.[4] In light of this conclusion, the court did not address the applicability of the economic loss doctrine. The plaintiff appealed from the trial court's judgment to the Appellate Court, and, pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1, we transferred the appeal to this court.

On appeal, the plaintiff renews its claim that rule 5 is unenforceable because the special act does not expressly or impliedly grant to the defendant the power to promulgate a rule limiting its liability otherwise established when it acts in its proprietary capacity. The plaintiff further asserts that rule 5 would not be a reasonable exercise of authority because the defendant is not subject to regulation that might otherwise circumscribe its ability to set rates to cover liability costs.[5] In response, the defendant contends that rule 5 was validly promulgated pursuant to the special act's express grant of power to set reasonable rates for service and make rules for the sale of water. Alternatively, the defendant asserts that such authority is properly implied because

[4] The trial court recognized that rule 5 purported to limit the defendant's liability beyond that caused by ordinary negligence but noted that the fact that the rule may be unenforceable in other circumstances would not be dispositive in the present case.

[5] The plaintiff also claims that the defendant, as a municipal corporation, is liable, pursuant to General Statutes § 52-557n (a) (1) (B), for damages caused by its negligence in the performance of its proprietary function of selling water. See *Martel* v. *Metropolitan District Commission*, 275 Conn. 38, 53, 881 A.2d 194 (2005). We do not reach this issue as governmental immunity was not a basis for the defendant's motion for summary judgment.

it is necessary to carry into effect its stated purpose under the special act of benefitting the people of its region and the state, and for the improvement of their health, welfare and prosperity. The defendant also argues that rule 5 is enforceable because it is essential to its duty to set reasonable rates.

We conclude that the defendant lacked authority to promulgate a rule, such as rule 5, that immunizes it from liability for disruptions to water service. Therefore, we do not reach the issue of whether rule 5 would be a reasonable exercise of such authority.

"Our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Internal quotation marks omitted.) *Boone* v. *William W. Backus Hospital*, 272 Conn. 551, 559, 864 A.2d 1 (2005). Because the resolution of the issue concerning the defendant's authority to promulgate rule 5 presents a question of statutory interpretation over which we also exercise plenary review, we are guided by settled principles of construction. See *Hicks* v. *State*, 297 Conn. 798, 800–801, 1 A.3d 39 (2010) (setting forth process of ascertaining legislative intent pursuant to General Statutes § 1-2z, and noting that, "[w]hen construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature" [internal quotation marks omitted]).

In considering whether the legislature, through the special act, conferred on the defendant the authority to immunize itself from liability for failures or deficiencies in its water supply, we also must be mindful of certain settled principles that inform the nature and source of the defendant's powers. By virtue of the special act, the defendant is a municipal corporation. See, e.g., *Monroe* v. *Middlebury Conservation Commission*, 187 Conn. 476, 483, 447 A.2d 1 (1982); *Rocky Hill Convalescent Hospital, Inc.* v. *Metropolitan District*, 160

Conn. 446, 450, 280 A.2d 344 (1971); see also *Sachem's Head Property Owners' Assn.* v. *Guilford*, 112 Conn. 515, 517–18, 152 A. 877 (1931) (explaining attributes of municipal corporation). As a creation of the state, a municipal corporation has no inherent legislative authority. See, e.g., *Monroe* v. *Middlebury Conservation Commission*, supra, 484. Rather, "[i]t can exercise only such powers as are expressly granted or necessarily implied to enable it to carry into effect the objects and purposes of its creation." Id. "In determining whether a municipality has the authority to adopt a challenged . . . provision, we do not search for a statutory prohibition against such an enactment; rather, we must search for statutory authority for the enactment." (Internal quotation marks omitted.) *Simons* v. *Canty*, 195 Conn. 524, 530–31, 488 A.2d 1267 (1985).

It is clear from the text of the special act that the legislature did not expressly empower the defendant to promulgate a rule immunizing itself from liability for the failure to supply water. To the contrary, § 14 specifically provides that the defendant may "be sued . . . ." See 33 Spec. Acts 481, No. 381, § 14 (a) (1967). This provision appears to incorporate long-standing, common-law principles, since codified in large part, dictating the contours of a municipality's liability and immunities. See *Considine* v. *Waterbury*, 279 Conn. 830, 841–44, 905 A.2d 70 (2006) (setting forth common-law principles of municipal immunity and recognizing that General Statutes § 52-557n codified common-law rule and exceptions to immunity). One such principle provides that a political subdivision is immune from liability when it is engaged in the performance of a public duty for the public's benefit but may be subject to liability for negligent acts committed in its proprietary capacity. Id., 842; see General Statutes § 52-557n (a) (1);[6] *Martel* v. *Metropolitan District Commission*, 275

[6] General Statutes § 52-557n (a) (1) provides in relevant part: "Except as otherwise provided by law, a political subdivision of the state shall be liable

Conn. 38, 56, 881 A.2d 194 (2005) (requiring inextricable link or inherently close connection between specific allegations of negligence and alleged proprietary function). "[I]t is assumed that all legislation is interpreted in light of the common law at the time of its enactment." (Internal quotation marks omitted.) *State* v. *Courchesne*, 296 Conn. 622, 669, 998 A.2d 1 (2010); see also *Pacific Ins. Co., Ltd.* v. *Champion Steel, LLC*, 323 Conn. 254, 265, 146 A.3d 975 (2016) ("[i]t is axiomatic that the legislature is presumed to be aware of the common law when it enacts statutes"). Indeed, "[i]n determining whether . . . a statute abrogates or modifies a [common-law] rule the construction must be strict, and the operation of a statute in derogation of the common law is to be limited to matters *clearly brought within its scope*." (Emphasis added; internal quotation marks omitted.) *Rumbin* v. *Utica Mutual Ins. Co.*, 254 Conn. 259, 265, 757 A.2d 526 (2000); see *Kuchta* v. *Arisian*, 329 Conn. 530, 535, 187 A.3d 408 (2018) (because grant of municipal authority to enact zoning regulations is in derogation of common law, "this grant of authority should receive a strict construction and is not to be extended, modified, repealed or enlarged in its scope by the mechanics of [statutory] construction" [internal quotation marks omitted]).

for damages to person or property caused by . . . (B) negligence in the performance of functions from which the political subdivision derives a special corporate profit or pecuniary benefit . . . ." Section 52-557n was enacted almost two decades after the legislature enacted the special act. See Public Acts 1986, No. 86-338, § 13.

At oral argument before this court, the defendant asserted that the preface to subdivision (1), the phrase "[e]xcept as otherwise provided by law," acknowledges that a municipal corporation with the power to promulgate rules having the force and effect of law can adopt such rules to bar liability otherwise imposed by statute. We disagree. Although this savings clause includes common-law doctrines that implicate the liabilities and immunities of municipalities; see *Grady* v. *Somers*, 294 Conn. 324, 334, 984 A.2d 684 (2009); the statute prescribes the rule, and, therefore, a coequal governmental body must also prescribe the exception, or at least the legislature must clearly delegate the power to do so to another body with legislative powers.

One example of such a clear expression is found in § 28 of the special act. That section immunizes the defendant's members from personal liability for torts committed while acting within the scope of their authority. See 33 Spec. Acts 492, No. 381, § 28 (1967) ("[n]either the members of the authority, nor any person acting in its behalf, while acting within the scope of their authority, shall be subject to any personal liabilities resulting from the erection, construction, reconstruction, maintenance or operation of the properties or any of the improvements of the authority or from carrying out any of the powers expressly given in this act").[7] There is no other language in the special act expressly addressing the subject of liability or immunity.

The defendant's reliance on the special act's express grant of power to "make . . . rules for the sale of water" and to "fix rates . . . to provide revenues sufficient [to meet its financial obligations]"; 33 Spec. Acts 483–84, No. 381, § 14 (i) and (m) (1967); reflects a fundamental misunderstanding of the clarity required to evidence such an express grant. See *Marchesi* v. *Board of Selectmen*, 309 Conn. 608, 618, 72 A.3d 394 (2013) ("it is a well settled principle of statutory construction that the legislature knows how to convey its intent expressly" [internal quotation marks omitted]). The degree of clarity required to manifest such an express

[7] Such a clear expression would abrogate the common-law rule. See *Sanzone* v. *Board of Police Commissioners*, 219 Conn. 179, 193, 592 A.2d 912 (1991) (at common law, "municipal officers were liable for their own torts"); *Gordon* v. *Bridgeport Housing Authority*, 208 Conn. 161, 165, 544 A.2d 1185 (1988) (at common law, municipal employees faced "the same personal tort liability as private individuals").

Insofar as the defendant argues that the plaintiff cannot rely on section 28 because it is limited on appeal to the language in the special act that it relied on before the trial court, namely, the defendant's authority to "be sued," the defendant confuses a claim with authority or evidence in support of a claim. Even if a party fails to bring such authority or evidence to an appellate court's attention, the court would be free to consider any such relevant matter.

intent would be especially high given the language of the special act that unambiguously makes the defendant amenable to suit. See 33 Spec. Acts 481, No. 381, § 14 (a) (1967).

Moreover, even if we were to assume, without deciding, that the grant of authority to "make . . . rules for the sale of water" indicates an intent to confer lawmaking authority on the defendant,[8] providing immunity to the defendant for its negligent disruption of water service would not expressly constitute a rule "for the sale of water." The relationship between the sale of water and liability for disruption to water service is too attenuated. If the defendant's construction prevailed, every municipality and municipal corporation authorized to regulate a given matter would have express authority to immunize itself for its negligence in the performance of those matters. Such an absurd result would largely obliterate § 52-557n and its common-law foundation. See footnote 6 of this opinion.

Because there is no explicit authorization in the special act, rule 5 can stand only if the defendant's authority to immunize itself from negligent disruption of water supply can be "necessarily implied to enable it to carry into effect the objects and purposes of its creation." *Monroe* v. *Middlebury Conservation Commission*, supra, 187 Conn. 484. In considering this question, we underscore that "[m]unicipal corporations are more strictly limited in respect to their implied power than private corporations. The test of their right by implica-

[8] Cf. General Statutes § 7-130d (b) (empowering authority that was created by municipal ordinance as public body politic and corporate of state under General Statutes § 7-130b "to make and, from time to time, amend and repeal bylaws, rules and *regulations* not inconsistent with general law to carry out its purposes" [emphasis added]); General Statutes § 7-148 (b) and (c) (requiring municipality to exercise powers conferred on it by ordinance when exercise has effect of creating permanent local law of general applicability and conferring power to regulate various matters).

tion to exercise any particular power is the necessity of such power, not its convenience." *Wallingford* v. *Wallingford*, 15 Conn. Supp. 344, 347 (1948); see also *City Council* v. *Hall*, 180 Conn. 243, 248, 429 A.2d 481 (1980). "Necessary implication refers to a logical necessity; it means that no other interpretation is permitted by the words of the [statute] construed; and so has been defined as an implication which results from so strong a probability of intention that an intention contrary to that imputed cannot be supported." *United States* v. *Jones*, 204 F.2d 745, 754 (7th Cir.), cert. denied, 346 U.S. 854, 74 S. Ct. 67, 98 L. Ed. 368 (1953). "If there is reasonable doubt as to the existence of the power, it does not exist. . . . Any doubt or ambiguity arising out of the question as to whether or not a municipal corporation has certain powers by implication must be resolved in favor of the public." (Citations omitted.) *Wallingford* v. *Wallingford*, supra, 347; see also *Pratt* v. *Litchfield*, 62 Conn. 112, 118, 25 A. 461 (1892).

We find no textual or rational basis to infer that such authority is necessary to effectuate any other authority expressly conferred. Liability for the negligent disruption of water supply services would not impair the defendant's *authority* to set rates and sell water. Nor is there any basis to conclude that the impact of such liability would impair the defendant's ability to set rates sufficient to cover costs, the sole limitation imposed under the special act.[9] The defendant readily could minimize the impact of such liability by engaging in the common business practice of procuring insurance, which would allow the defendant to plan its business and pass along its costs to the consumer.

Moreover, the defendant is not subject to comprehensive regulation of its rates, services, and facilities by

[9] The defendant repeatedly mischaracterizes the special act as requiring it to set "reasonable" rates, but the special act simply requires rates to be sufficient to cover operating expenses.

this state's public utilities regulatory authority. See 33 Spec. Acts 490, No. 381, § 24 (1967).[10] It faces no impediment to setting rates sufficient to cover the cost of insurance or its liability in the absence of insurance. It is not compelled to serve customers regardless of their ability to pay for services. As such, the case law from other jurisdictions on which the trial court relied, which involved water authorities subject to such regulatory restrictions and thus implicated a corresponding public policy justification for the right to limit liability, are inapposite.[11] See *Los Angeles Cellular Telephone Co.* v. *Superior Court*, 65 Cal. App. 4th 1013, 1018, 76 Cal. Rptr. 2d 894 (1998) ("it is an equitable trade-off—the

[10] Section 24 of the special act provides in relevant part that "[n]either the public utilities commission nor any other board or commission of like character shall, unless expressly authorized herein, have jurisdiction over the authority in the management and control of its properties or operations or any power over the regulations of the rates fixed or charges collected by the authority. . . ." 33 Spec. Acts 490, No. 381, § 24 (1967). There is no provision in the special act expressly granting to the public utilities commission power over the rates fixed or charges collected by the defendant. Cf. 33 Spec. Acts 482, No. 381, § 14 (d) (1967) (expressly granting public utilities commission authority to approve any purchase by defendant of existing water supply systems).

[11] Other cases cited by the defendant in support of its position that its authority to promulgate rule 5 derives from the defendant's power to set reasonable rates for service and to make rules for the sale of water are similarly inapposite. In those cases, the regulated utility was protected by a liability limiting policy adopted by the regulatory commission pursuant to its broad supervisory and regulatory powers. See *Waters* v. *Pacific Telephone Co.*, 12 Cal. 3d 1, 4, 10, 523 P.2d 1161, 114 Cal. Rptr. 753 (1974) (award of damages against regulated public utility is contrary to policy of limiting liability that was adopted by regulatory commission); *Danisco Ingredients USA, Inc.* v. *Kansas City Power & Light Co.*, 267 Kan. 760, 765–68, 986 P.2d 377 (1999) (determining that regulatory commission had authority to approve liability limiting tariffs as integral part of its rate-making process); *Bulbman, Inc.* v. *Nevada Bell*, 108 Nev. 105, 106–10, 825 P.2d 588 (1992) (regulated public utility was immune from negligence action on basis of generally applicable liability limiting tariff promulgated by public service commission); see also *Landrum* v. *Florida Power & Light Co.*, 505 So. 2d 552, 553–54 (Fla. App.) (setting forth public policy of Florida that recognizes validity of liability limiting tariffs approved by that state's regulatory commission), review denied, 513 So. 2d 1061 (Fla. 1987).

power to regulate rates and to set them below the amount an unregulated provider might otherwise charge requires a concomitant limitation on liability"); see also *Fax Telecommunicaciones, Inc.* v. *AT&T*, 138 F.3d 479, 489 (2d Cir. 1998) (liability limitation provisions serve two goals—prevention of price discrimination among rate payers and preservation of regulatory agencies' roles in deciding reasonable rates for public utilities and services); *Adams* v. *Northern Illinois Gas Co.*, 211 Ill. 2d 32, 57, 809 N.E.2d 1248 (2004) ("Liability limitations reflect: the status of public utilities as regulated monopolies whose operations are subject to extensive restrictions; the requirements of uniform, nondiscriminatory rates; and the goal of universal service, achieved through the preservation of utility prices that virtually all customers can afford. . . . The underlying theory of liability limitations is that, because a public utility is strictly regulated, its liability should be defined and limited so that it may be able to provide service at reasonable rates. A reasonable rate is in part dependent on a rule limiting liability. . . . The goal is to secure reasonable and just rates for all without undue preference or advantage to any. Since that end is attainable only by adherence to the approved rate, based upon an authorized classification, that rate represents the whole duty and the whole liability of the company." [Citations omitted; internal quotation marks omitted.]).

Finally, the defendant cites both the special act's catchall provision, granting it the power to "do all things necessary or convenient to carry out the powers expressly given in this act"; 33 Spec. Acts 484, No. 381, § 14 (p) (1967); and its statement of purpose, creating the defendant to benefit the people of its region and the state and to improve their health, welfare and prosperity; 33 Spec. Acts 481, No. 381 § 1 (1967); but does not explain how either provides the requisite authority. We previously explained why it is not necessary to

immunize the defendant from liability to carry out the powers granted and that mere convenience is not enough. Moreover, we previously have required a clearer relationship between a general statement of purpose and the authority claimed. See *Kuchta* v. *Arisian*, supra, 329 Conn. 544–45 (This court noted the expansive safety and aesthetic purposes of zoning regulations but concluded that "[t]he mere fact that a broader interpretation of advertising might more fully accomplish these purposes does not permit us to ignore the meaning of the term compelled under the applicable rules of construction. We are obliged to construe the grant of authority narrowly, as it is in derogation of common-law property rights."). Indeed, it is hardly conceivable that the legislature would have delegated to one of its creations the wholesale power to establish its own public policy with regard to its exposure to liability by virtue of such aspirational terms. See generally *Simons* v. *Canty*, supra, 195 Conn. 532 ("[w]e have consistently rejected claims that municipalities may exercise important functions based solely on their power to promote good government"). The legislature has established the public policy of this state with regard to municipal liability, and, "[i]n areas where the legislature has spoken . . . the primary responsibility for formulating public policy must remain with the legislature." *State* v. *Whiteman*, 204 Conn. 98, 103, 526 A.2d 869 (1987).

We conclude that the trial court improperly granted the defendant's motion for summary judgment on the basis of immunity under rule 5. Therefore, the trial court must consider the defendant's alternative ground for summary judgment on the basis of the economic loss doctrine.

The judgment is reversed and the case is remanded for further proceedings in accordance with the preceding paragraph.

In this opinion the other justices concurred.

DEUTSCHE BANK AG *v.* SEBASTIAN HOLDINGS, INC., ET AL.
(SC 20037)
(SC 20038)

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

Syllabus

The plaintiff bank brought the present action against the defendant corporation, S Co., and the individual defendant V, S Co.'s sole shareholder and director, seeking to enforce a foreign judgment. The plaintiff previously brought an action in England against S Co., seeking to recover damages for money owed to it for various trading losses that S Co. incurred after it opened certain trading accounts with the plaintiff. The English court rendered judgment for the plaintiff and awarded it damages and interest. Thereafter, in a postjudgment proceeding, the English court awarded the plaintiff litigation costs and held V, who was not a party to the English action, personally liable for the payment of those costs. In the present action, the plaintiff sought to pierce the corporate veil of S Co. and to hold V liable for the English judgment. Thereafter, S Co. and V filed a motion for summary judgment, claiming that the doctrine of res judicata barred the plaintiff's corporate veil piercing claim on the ground that the plaintiff was required to raise that claim in the English action. The plaintiff filed a separate motion for summary judgment, asserting that the court in the English action had made certain factual findings definitively establishing that V was the alter ego of S Co. and that V therefore was collaterally estopped from denying that he was personally liable for the judgment in the English action. The trial court denied both motions, and the parties filed separate appeals with the Appellate Court, which affirmed the trial court's denial of the parties' motions for summary judgment. The Appellate Court concluded that the plaintiff's corporate veil piercing claim was not barred by res judicata because that claim was different in nature from the breach of contract claims asserted in the English action. The Appellate Court also concluded that V was not collaterally estopped from denying liability for the judgment in the English action because the court's factual findings regarding V's control over S Co. were nonessential to the judgment in the English action. On the granting of certification, the parties filed separate appeals with this court from the Appellate Court's judgment. *Held* that the Appellate Court properly affirmed the decision of the trial court; this court concluded, following a careful examination of the appellate record and consideration of the arguments presented, that the Appellate Court's opinion sufficiently addressed the issues presented, and, accordingly, this court

adopted that opinion as the proper statement of the issues and the applicable law concerning those issues.

Argued October 10, 2018–officially released April 9, 2019

Procedural History

Action seeking, inter alia, the enforcement of a foreign judgment, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the case was transferred to the Complex Litigation Docket; thereafter, the court, *Genuario, J.*, denied the plaintiff's motion for summary judgment and the defendants' motion for summary judgment, from which the plaintiff and the defendants filed separate appeals to the Appellate Court, *Alvord*, *Bentivegna* and *Pellegrino*, *Js.*, which affirmed the trial court's decision, and the plaintiff and the defendants, on the granting of certification, filed separate appeals with this court. *Affirmed.*

Wesley W. Horton, with whom were *Karen L. Dowd* and *Wyatt R. Jansen*, and, on the brief, *Michael S. Taylor*, *Charles W. Pieterse*, *Thomas P. O'Connor*, *Richard M. Zaroff*, pro hac vice, and *Ira S. Zaroff*, pro hac vice, for the appellants in SC 20037 and appellees in SC 20038 (defendants).

David G. Januszewski, with whom were *Thomas D. Goldberg*, and, on the brief, *Bryan J. Orticelli* and *Sheila C. Ramesh*, pro hac vice, for the appellee in SC 20037 and appellant in SC 20038 (plaintiff).

Opinion

PER CURIAM. These interlocutory appeals require us to determine the preclusive effect, if any, to give in the present action to the findings and judgment rendered by the Queen's Bench Division of the High Court of Justice of England and Wales (English court) in a prior action (English action) brought by the plaintiff, Deutsche Bank AG, against the named defendant, Sebastian Holdings, Inc. (Sebastian). The English

action, tried to the bench in a judicial proceeding lasting forty-five days, resulted in a $243,023,089 judgment, plus interest, against Sebastian in November, 2013. Unable to collect on its English judgment, the plaintiff commenced the present action in Connecticut to enforce the English judgment against Sebastian and the individual defendant, Alexander Vik, who at all relevant times has been the sole shareholder and sole director of Sebastian. In its Connecticut action, the plaintiff seeks to pierce Sebastian's corporate veil and hold Vik personally liable, as Sebastian's alter ego, for his corporation's judgment debt. Each of the parties claims an entitlement in the present case to a preclusive effect that inures to their respective advantage as a result of the final judgment rendered in the English action. The present appeals arise out of the unsuccessful efforts of each of the parties to persuade the trial court that this action must be decided in its respective favor on the basis of the alleged preclusive effect of the English judgment. The Appellate Court agreed with the trial court that none of the parties is entitled to the claimed preclusive effect. *Deutsche Bank AG* v. *Sebastian Holdings, Inc.*, 174 Conn. App. 573, 585–86, 166 A.3d 716 (2017). We affirm the judgment of the Appellate Court.

A brief overview of the facts and proceedings provides sufficient background for present purposes. Sebastian, a corporation organized under the laws of Turks and Caicos Islands, opened a series of trading accounts with the plaintiff between 2006 and 2008. Numerous agreements were entered into between the plaintiff and Sebastian with respect to these accounts, including the "FX" Prime Brokerage Agreement, the "FX" ISDA Master Agreement, the Pledge Agreement dated November 28, 2006, and the "Said Letter of Authority," among others. As the global financial crisis unfolded in the autumn of 2008, one or more of these accounts experienced massive trading losses, and the plaintiff issued margin calls

totaling hundreds of millions of dollars. Vik caused payments to be made covering some, but not all, of the required amounts. In early 2009, the plaintiff commenced the English action against Sebastian to recover the balance of its losses allegedly caused by Sebastian's failure to honor its contractual agreements. Sebastian counterclaimed, alleging that the plaintiff had mishandled the accounts to Sebastian's financial detriment. The English action terminated in a judgment awarding the plaintiff $243,023,089, plus interest, and rejecting all of Sebastian's counterclaims.[1] Sebastian failed to pay any portion of the judgment debt.

The plaintiff commenced the present action on December 13, 2013, to enforce the English judgment against Sebastian and Vik personally.[2] The complaint contains two counts. The first count seeks a judgment declaring that the plaintiff is entitled to "pierce the corporate veil" of Sebastian because Vik is Sebastian's alter ego and, as such, is jointly and severally liable for all sums due under the English action—an amount that now exceeds $325 million. Count two seeks to enforce the English judgment against Vik personally under the Uniform Foreign Money Judgments Recognition Act, as adopted in Connecticut. See General Statutes § 52-604 et seq. The parties filed cross motions for summary judgment based on two very different legal theories about the putative preclusive effect of the English judgment. Sebastian and Vik argued that the doctrine of res judicata barred the present action because the plaintiff

[1] In a postjudgment proceeding held pursuant to § 51 of the Senior Courts Act, the English court held Vik, who was not a party to the English action, personally liable for the payment of £36,204,891 of the plaintiff's litigation costs and expenses. See Senior Courts Act, 1981, c. 54, § 51.

[2] The complaint alleges that Vik resides at a home in Greenwich for a substantial number of months each year and conducts the business operations of Sebastian from that location. The defendants filed a motion to dismiss on the basis of forum non conveniens at an earlier stage of the litigation, which was denied by the trial court on June 4, 2014.

could have brought its veil piercing claim against Vik and Sebastian as part of the English action, but failed to do so. The plaintiff's motion for summary judgment was predicated on the doctrine of collateral estoppel. The plaintiff argued that the English court made certain essential factual findings "definitively establish[ing] . . . Vik as [Sebastian's] alter ego," which were entitled to preclusive effect in the present action.

The trial court denied both motions for summary judgment and the Appellate Court affirmed the interlocutory ruling of the trial court.[3] See *Deutsche Bank AG* v. *Sebastian Holdings, Inc.*, supra, 174 Conn. App. 592. The Appellate Court determined that the plaintiff's veil piercing claim was not barred by the doctrine of res judicata because the plaintiff "is not seeking to relitigate a claim of contractual liability that previously was decided in the English judgment" but, rather, "to enforce the unsatisfied English judgment against Vik under a corporate veil piercing theory." Id., 585. The Appellate Court aptly noted that requiring the plaintiff to have pursued its veil piercing claim "in the English action would produce an unjust result, as the plaintiff would have been required to have anticipated that Sebastian would refuse to satisfy the English judgment." Id. As for the alleged collateral estoppel effect of the English court's factual findings regarding Vik's domination and control over Sebastian, the Appellate Court held that those findings "were nonessential" to the English court's judgment because of the predicate finding that the plaintiff had not "breach[ed] any duties it owed to Sebastian . . . ." Id., 589. The Appellate Court also found that the factual findings made by the English court in the postjudgment costs proceeding held pursuant to § 51 of the Senior Courts Act; see footnote 1 of this opinion; were not entitled to preclu-

[3] See *Santorso v. Bristol Hospital*, 308 Conn. 338, 346 n.7, 63 A.3d 940 (2013) (interlocutory appeal may be taken from denial of motion for summary judgment based on res judicata or collateral estoppel).

sive effect because the issues in the present action are "not identical to those issues that were before the English court" and "§ 51 proceedings do not afford the parties the same procedural safeguards as the parties were afforded when they litigated the underlying merits in the English action or that the parties are afforded in the present case." *Deutsche Bank AG* v. *Sebastian Holdings, Inc.*, supra, 590–91.

We granted the parties' petitions for certification to appeal from the judgment of the Appellate Court to determine whether the plaintiff was entitled to summary judgment on the basis of collateral estoppel or Sebastian and Vik were entitled to summary judgment on the basis of res judicata. See *Deutsche Bank AG* v. *Sebastian Holdings, Inc.*, 327 Conn. 966, 174 A.3d 192 (2017); *Deutsche Bank AG* v. *Sebastian Holdings, Inc.*, 327 Conn. 967, 173 A.3d 954 (2017).

After carefully examining the record on appeal and considering the briefs and arguments of the parties, we have concluded that the judgment of the Appellate Court should be affirmed. The Appellate Court's opinion sufficiently addresses the certified questions, and there is no need for us to repeat the discussion contained therein.[4] We therefore adopt the Appellate Court's opinion as the proper statement of the issues and the applicable law concerning those issues. See, e.g., *Brenmor Properties, LLC* v. *Planning & Zoning Commission*, 326 Conn. 55, 62, 161 A.3d 545 (2017); *Recall Total Information Management, Inc.* v. *Federal Ins. Co.*, 317 Conn. 46, 51, 115 A.3d 458 (2015).

The judgment of the Appellate Court is affirmed.

[4] Another case may some day present this court with the opportunity to address more extensively the application of res judicata principles to a case in which a judgment creditor seeks to enforce a money judgment, obtained against a business entity, by piercing the corporate veil to reach the assets of an individual defendant. We do not engage in that undertaking here due to inadequacies in the record.

ORDERS

CONNECTICUT REPORTS

VOL. 331

LISA BRUNO *v.* REED WHIPPLE ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 186 Conn. App. 299 (AC 40282), is denied.

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

James P. Sexton, in support of the petition.

Laura Pascale Zaino and *Stephen P. Fogerty*, in opposition.

Decided March 27, 2019

STATE OF CONNECTICUT *v.* ELVIN G. RIVERA

The defendant's petition for certification to appeal from the Appellate Court, 187 Conn. App. 813 (AC 39816), is granted, limited to the following issue:

"Did the Appellate Court correctly conclude that the trial court properly precluded the defendant from cross-examining the state's key witness about the specific facts underlying that witness' prior misdemeanor convictions?"

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

Alice Osedach, assistant public defender, in support of the petition.

James M. Ralls, assistant state's attorney, in opposition.

Decided March 27, 2019

SOJOURNAL HODGES *v.* COMMISSIONER OF CORRECTION

The petitioner Sojournal Hodges' petition for certification to appeal from the Appellate Court, 187 Conn. App. 394 (AC 40652), is denied.

Daniel Fernandes Lage, assigned counsel, in support of the petition.

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

Decided March 27, 2019

DEVON SMITH *v.* COMMISSIONER OF CORRECTION

The petitioner Devon Smith's petition for certification to appeal from the Appellate Court, 187 Conn. App. 857 (AC 40747), is denied.

Justine F. Miller, assigned counsel, in support of the petition.

Michele C. Lukban, senior assistant state's attorney, in opposition.

Decided March 27, 2019

STATE OF CONNECTICUT *v.* ALANNA R. CAREY

The defendant's petition for certification to appeal from the Appellate Court, 187 Conn. App. 438 (AC 40868), is granted, limited to the following issue:

"Did the Appellate Court correctly conclude that the allegedly improper admission of Mark Manganello's hearsay testimony was harmless?"

Jennifer B. Smith, assigned counsel, in support of the petition.

Rocco A. Chiarenza, assistant state's attorney, in opposition.

Decided March 27, 2019

Cumulative Table of Cases
Connecticut Reports
Volume 331

(Replaces Prior Cumulative Table)

Anderson *v.* Dike (Order) . . . 910
Bank of America, National Assn. *v.* Liebskind (Order) . . . 907
Becue *v.* Becue (Order) . . . 902
Boria *v.* Commissioner of Correction (Order) . . . 902
Boucher *v.* Saint Francis GI Endoscopy, LLC (Order) . . . 905
Bruno *v.* Whipple (Order) . . . 911
Buie *v.* Commissioner of Correction (Order) . . . 905
Cannatelli *v.* Statewide Grievance Committee (Order) . . . 903
Citibank, N.A., Trustee *v.* Stein (Order) . . . 903
CitiMortgage, Inc. *v.* Pritchard (Order) . . . 906
Connecticut Community Bank, N.A. *v.* Kiernan (Order) . . . 911
Costello *v.* Goldstein & Peck, P.C. (Order) . . . 908
Deutsche Bank AG *v.* Sebastian Holdings, Inc. . . . 379
Enforcement of foreign judgment; summary judgment; res judicata; collateral estoppel; certification from Appellate Court; whether Appellate Court correctly concluded that plaintiff's corporate veil piercing claim was not barred by res judicata; whether Appellate Court correctly concluded that individual defendant was not collaterally estopped from denying liability for foreign judgment rendered against defendant corporation.
Federal National Mortgage Assn. *v.* Buhl (Order) . . . 906
Fingelly v. Fairfield (Order) . . . 904
Gabriel *v.* Mount Vernon Fire Ins. Co. (Order) . . . 903
Gould *v.* Stamford . . . 289
Workers' compensation; single-member limited liability companies; denial and dismissal of claim for concurrent employment benefits pursuant to provision (§ 31-310) of Workers' Compensation Act (§ 31-275 et seq.) by Workers' Compensation Commissioner; appeal to Compensation Review Board; board's affirmance of commissioner's decision; whether board, in upholding commissioner's decision, properly reasoned that, because limited liability company of which plaintiff was only member allegedly did not maintain appropriate corporate formalities, its status as limited liability company had to be disregarded; whether chairman of Workers' Compensation Commission had authority to adopt conclusive presumption that members of single-member limited liability companies are not their employees for purposes of act; whether board incorrectly concluded that plaintiff was not employee of limited liability company and, therefore, was not entitled to concurrent employment benefits pursuant to § 31-310.
Ham *v.* Commissioner of Correction (Order) . . . 904
Hodges *v.* Commissioner of Correction (Order) . . . 912
In re Tresin J. (Order) . . . 909
Jacobson *v.* Commissioner of Correction (Order) . . . 901
Karagozian *v.* USV Optical, Inc. (Order) . . . 904
Margarita O. *v.* Irazu (Order) . . . 908
Raspberry Junction Holding, LLC *v.* Southeastern Connecticut Water Authority . . . 364
Negligence; summary judgment; claim that defendant water authority, as municipal corporation engaged in proprietary function, was not immune from liability and had no authority, express or implied, to promulgate rules limiting its liability for negligence; claim that, if defendant had such authority, rule limiting liability would not be reasonable exercise of authority because defendant was not subject to regulations that might otherwise circumscribe its ability to set rates to cover liability costs.
Rivera *v.* Commissioner of Correction (Order) . . . 901

Smith *v.* Commissioner of Correction (Order). 912
Soto *v.* Bushmaster Firearms International, LLC 53
Wrongful death action pursuant to statute (§ 52-555) against defendant manufacturers, distributors, and sellers of semiautomatic rifle used in school shooting; claim that defendants negligently entrusted to civilian consumers assault rifle that is suitable for use only by military and law enforcement personnel; claim that defendants violated Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.) through sale or wrongful marketing of rifle; motion to strike plaintiffs' complaint; claim that all of plaintiffs' claims were barred by Protection of Lawful Commerce in Arms Act (PLCAA) (15 U.S.C. §§ 7901 through 7903 [2012]); whether trial court correctly concluded that plaintiffs did not plead legally sufficient cause of action based on negligent entrustment under state common law; whether trial court improperly struck plaintiffs' claims under CUTPA on ground that plaintiffs lacked standing because they were third-party victims who did not have consumer or commercial relationship with defendants; claim that prudential concerns supported restriction of CUTPA standing to persons who have direct business relationship with alleged wrongdoer; whether statute of limitations applicable to wrongful death claims or whether statute of limitations applicable to CUTPA claims applied to cause of action for wrongful death predicated on CUTPA violation; whether plaintiffs' wrongful death claims predicated on theory that any sale of military style assault weapons, such as rifle in question, represented unfair trade practice were time barred; whether plaintiffs' wrongful death claims predicated on theory that defendants violated CUTPA by advertising and marketing rifle in unethical, oppressive, immoral, and unscrupulous manner were time barred; claim, as alternative ground for affirming trial court's judgment, that exclusivity provision of Connecticut Product Liability Act (§ 52-572n [a]) barred plaintiffs' CUTPA claims that were predicated on defendants' allegedly wrongful advertising and marketing of rifle; whether personal injuries resulting in death that are alleged to have resulted directly from wrongful advertising and marketing practices are cognizable under CUTPA; whether PLCAA barred plaintiffs' wrongful death claims predicated on theory that defendants violated CUTPA by marketing rifle in question to civilians for criminal purposes; whether trial court correctly concluded that CUTPA, as applied to plaintiffs' allegations, fell within PLCAA's "predicate" exception to immunity for civil actions alleging that firearms manufacturer or seller knowingly violated state or federal statute "applicable" to "sale or marketing" of firearms, and violation was proximate cause of harm for which relief was sought; review of text of predicate exception and legislative history of PLCAA to determine whether Congress intended to preclude actions alleging that firearms manufacturer or seller violated state consumer protection laws by promoting its firearms for illegal, criminal purposes; whether CUTPA qualified as predicate statute under PLCAA insofar as it applied to wrongful advertising and marketing claims; whether congressional statement of findings and purposes set forth in PLCAA lent support for this court's conclusion that Congress did not intend PLCAA to preclude plaintiffs' wrongful advertising and marketing claims brought pursuant to CUTPA; whether construing statute of general applicability such as CUTPA to be predicate statute would lead to absurd results; whether extrinsic indicia of congressional intent supported conclusion that CUTPA, as applied to plaintiffs' claims, qualified as predicate statute under PLCAA.
State *v.* Brown 258
Burglary; larceny; conspiracy; attempt; criminal mischief; criminal trover; possession of burglar tools; motions to suppress; motion to dismiss; whether trial court properly granted motion to dismiss on basis of its conclusion that state obtained defendant's prospective and historical cell phone data from his telecommunications carrier in violation of statute ([Rev. to 2009] § 54-47aa); application of fourth amendment principles relating to disclosure of certain cell phone data set forth in United States Supreme Court's decision in Carpenter *v.* United States *(138 S. Ct. 2206), discussed; whether suppression of cell phone data was appropriate remedy when records were obtained in violation of defendant's fourth amendment rights and in violation of § 54-47aa; whether good faith exception to exclusionary rule was applicable to unconstitutional disclosure of historical cell phone data; whether trial court correctly determined that state failed to meet its burden of proving that inevitable discovery doctrine was applicable, under facts of case, to witness' statement to police and potential trial testimony implicating defendant in charged crimes.*

State *v.* Bumgarner-Ramos (Order) 910
State *v.* Carey (Order) 913
State *v.* Daniel B. 1
Attempt to commit murder; certification from Appellate Court; sufficiency of evidence; whether Appellate Court properly construed substantial step subdivision of attempt statute (§ 53a-49 [a] [2]) to require inquiry to focus on what already has been done rather than on what remains to be done to complete the substantive crime in determining whether defendant's conduct constituted substantial step in course of conduct planned to culminate in his commission of murder.
State *v.* Davis. 239
Criminal possession of pistol; carrying pistol without permit; conditional plea of nolo contendere; claim that trial court improperly denied defendant's motion to suppress handgun that gave rise to charges against defendant; whether anonymous 911 call in which caller claimed to have seen young man with handgun was sufficient to give rise to reasonable suspicion that defendant had been engaged in criminal activity; factors for determining whether anonymous tip has sufficient indicia of reliability under Navarette *v.* California *(572 U.S. 393), discussed.*
State *v.* Fernando V.. 201
Sexual assault second degree; risk of injury to child; certification from Appellate Court; claim that Appellate Court improperly determined that trial court had abused its discretion in precluding testimony of complainant's boyfriend regarding complainant's behavior on ground that such testimony was cumulative of other evidence presented at trial; reviewability of state's unpreserved claim that testimony of complainant's boyfriend was properly excluded; whether improper exclusion of witness' testimony was harmless error when case turned solely on credibility of complainant's testimony.
State *v.* Jones (Order). 909
State *v.* Joseph B. (Order) 908
State *v.* Juarez (Order) 910
State *v.* Patel (Order) 906
State *v.* Purcell. 318
Risk of injury to child; motion to suppress; certification from Appellate Court; whether Appellate Court correctly determined that defendant's statements made during custodial interrogation did not constitute clear and unequivocal invocation of his right to counsel under standard set forth in Davis *v.* United States *(512 U.S. 452); ambiguous or equivocal requests for counsel, discussed; whether Appellate Court correctly determined that article first, § 8, of Connecticut constitution did not require police officers to cease questioning immediately and to clarify defendant's ambiguous or equivocal request for counsel during custodial interrogation.*
State *v.* Rivera (Order) 911
State *v.* Santiago (Order) 902
Trocki *v.* Borusiewicz (Order) 907
U.S. Bank National Assn. *v.* Wolf (Order) 901
Wethersfield *v.* PR Arrow, LLC (Order) 907

CONNECTICUT APPELLATE REPORTS

Vol. 189

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

DARCY YUILLE *v.* LAURENCE V. PARNOFF ET AL.
(AC 40381)

Keller, Prescott and Pellegrino, Js.

Syllabus

The plaintiff sought to recover damages for, inter alia, conversion and statutory theft from the defendant P, who had represented the plaintiff in an arbitration matter, claiming that P had misappropriated funds that had been held in escrow pending resolution of a dispute of the parties concerning attorney's fees in the arbitration matter. After the jury returned a verdict in favor of the plaintiff on the counts alleging conversion and statutory theft, the trial court rendered judgment in part for the plaintiff, from which P appealed to this court. *Held*:

1. P could not prevail on his claim that the trial court abused its discretion by ordering him to commence trial after allowing his attorney to withdraw, without affording him time to obtain new counsel: the court specifically found that P was responsible for the breakdown in the attorney-client relationship by refusing to cooperate with his attorney and to give the attorney the authorization necessary to work on the case, P, who had been informed that the court would consider a current letter from a medical provider stating that it would jeopardize P's physical or mental well-being to appear in court, did not attach a letter containing such a

statement to his motion to remove the case from the trial list, at the time the case was ordered for trial it was three and one-half years old, the issues presented were not complex, and, as a matter of docket management, the court had the discretion to schedule the matter for trial; accordingly, under the circumstances here and on the basis of the continuing pattern of dilatory behavior evidenced by P, the court did not abuse its discretion by ordering that the parties commence trial.

2. P could not prevail on his claim that the verdict in favor of the plaintiff on the counts of conversion and statutory theft was irreconcilably inconsistent with the verdict in his favor on the count alleging breach of fiduciary duty, which was based on his claim that the jury could not have found a conversion or theft of the funds at issue without also finding that he had a fiduciary obligation to the plaintiff to maintain those funds for her benefit; although the jury had answered no to an interrogatory that asked whether it found that P had advanced his own interest, to the detriment of the plaintiff, acting as her attorney, P failed to negate the reasonable hypothesis that the jury concluded that he was not acting as the plaintiff's attorney at the time that he converted the funds, and, thus, the jury's answer to the interrogatory could be harmonized with the verdict.

3. P's claim that the trial court improperly declined to submit his special defense of waiver to the jury was unavailing; there having been no evidence in the case to support a finding that the plaintiff had waived her right to recover the disputed funds, the trial court properly declined to submit the special defense of waiver to the jury.

Argued November 13, 2018—officially released April 9, 2019

Procedural History

Action to recover damages for, inter alia, conversion, and for other relief, brought to the Superior Court in the judicial district of Fairfield where the court, *Radcliffe, J.*, bifurcated the case as to the defendant Barbara A. Parnoff; thereafter, the matter was tried to a jury; verdict and judgment in part for the plaintiff, from which the named defendant appealed to this court. *Affirmed.*

John R. Williams, for the appellant (named defendant).

Kenneth M. Rozich, for the appellee (plaintiff).

Opinion

PRESCOTT, J. The defendant, Laurence V. Parnoff[1] (Parnoff), appeals from the judgment rendered, following a jury trial, in favor of the plaintiff, Darcy Yuille, on the counts of Yuille's complaint alleging conversion and statutory theft. On appeal, Parnoff claims that (1) the trial court abused its discretion by ordering him to commence trial on extremely short notice, (2) the verdict in Yuille's favor on counts one and two is irreconcilably inconsistent with the verdict in Parnoff's favor on count three, and (3) the court improperly declined to submit any of the special defenses to the jury. We disagree and, accordingly, affirm the judgment of the trial court.[2]

The following facts, as set forth in the prior opinions of this court in *Parnoff* v. *Yuille*, 139 Conn. App. 147, 57 A.3d 349 (2012) (*Parnoff I*), cert. denied, 307 Conn. 956, 59 A.3d 1192 (2013) and *Parnoff* v. *Yuille*, 163 Conn. App. 273, 136 A.3d 48 (*Parnoff II*), cert. denied, 321 Conn. 902, 138 A.3d 280 (2016), and procedural history are relevant to our resolution of the defendant's claims.[3] In 1998, Yuille retained Parnoff to represent her in an action against Bridgeport Hospital. *Parnoff I*, supra, 152. The parties' fee agreement provided for a contingent fee of 40 percent. Id. On June 29, 2004, an arbitration panel awarded Yuille $1,096,032.93 in damages. Id., 153. Parnoff sent an invoice to Yuille that included an

[1] Barbara A. Parnoff was also named as a defendant in this action. On February 7, 2017, the trial court bifurcated this matter as to Barbara A. Parnoff, with the matter proceeding only as against Laurence V. Parnoff.

[2] In her brief, Yuille claimed, as an alternative ground for affirming the judgment of the trial court, that Parnoff's appeal was untimely, as it was filed more than twenty days after the verdict was accepted. Yuille withdrew this claim during oral argument before this court, and, therefore, we need not consider it in this opinion.

[3] The trial court in this matter took judicial notice of the prior Appellate Court opinions.

attorney's fee representing 40 percent of the gross settlement proceeds. Id. Yuille objected to the fee and Parnoff subsequently brought an action against Yuille to recover the fee. Id., 154. Parnoff's action alleged breach of contract, quantum meruit and bad faith. Id., 154–55. Following a trial, the jury found in favor of Parnoff on the breach of contract counts and, thus, did not reach the quantum meruit count. Id., 157–58.

On appeal, this court held that the parties' fee agreement exceeded the cap contained in General Statutes § 52-251c and, therefore, was unenforceable as against public policy. Id., 169, 172. This court reversed the judgment in favor of Parnoff on the breach of contract counts and ordered that those counts be dismissed on remand. Id., 173. The trial court later rendered judgment for Yuille on the quantum meruit count, which this court affirmed on appeal, concluding that an attorney "who is barred from contract recovery because of the contract's failure to comply with the fee cap statute cannot recover under the doctrine of quantum meruit." *Parnoff II*, supra, 163 Conn. App. 275, 277.

In 2013, Yuille commenced the present action alleging that Parnoff had misappropriated funds that had been held in escrow pending resolution of the parties' fee dispute. The operative amended complaint alleged conversion, statutory theft pursuant to General Statutes § 52-564,[4] and breach of fiduciary duty. At the conclusion of the evidence, the court denied Parnoff's motion for a directed verdict. The jury returned a verdict in favor of Yuille on the counts alleging conversion and statutory theft, and for Parnoff on the count alleging breach of fiduciary duty. The court subsequently rendered judgment for Yuille on the conversion and statutory theft counts in the total amount of $1,480,336.37.

[4] General Statutes § 52-564 provides: "Any person who steals any property of another, or knowingly receives and conceals stolen property, shall pay the owner treble his damages."

Parnoff then filed the present appeal. Additional facts will be set forth as necessary.

I

Parnoff first claims that the court abused its discretion by ordering that he commence trial after allowing his attorney to withdraw, without affording him time to obtain new counsel. We disagree.

We first set forth our standard of review. "The trial court has a responsibility to avoid unnecessary interruptions, to maintain the orderly procedure of the court docket, and to prevent any interference with the fair administration of justice. . . . In addition, matters involving judicial economy, docket management [and control of] courtroom proceedings . . . are particularly within the province of a trial court. . . . Accordingly, [a] trial court holds broad discretion in granting or denying a motion for a continuance. Appellate review of a trial court's denial of a motion for a continuance is governed by an abuse of discretion standard that, although not unreviewable, affords the trial court broad discretion in matters of continuances." (Citations omitted; internal quotation marks omitted.) *Peatie* v. *Wal-Mart Stores, Inc.*, 112 Conn. App. 8, 12, 961 A.2d 1016 (2009).

The following facts are necessary for the resolution of this claim. Yuille commenced this action in 2013. There was little activity in the case between December 4, 2013, when Parnoff filed his answer and special defenses, and January 26, 2017, when the court, *Bellis, J.*, ordered that trial was to begin on January 31, 2017.[5] On January 30, 2017, Yuille filed a reply to Parnoff's special defenses. Also on January 30, 2017, counsel for

[5] The order provided: "This matter is on trial. Trial management reports are to be filed by 5 p.m. on Monday, January 30, 2017. Proposed stipulations of fact are to be filed by Tuesday at 9 a.m. Each party is to bring all exhibits, premarked for identification, on Tuesday morning."

Yuille filed a motion to continue the case until March 1, 2017, on the ground that he had only recently been retained by Yuille. The court denied Yuille's motion, stating: "The defendants, indeed all parties were fully aware that their case was exposed to trial on one hour's notice as their counsel at the time were all told and agreed to same when the court granted yet another continuance in a very old case. As it turned out, the parties were given [five] days notice of their trial date rather than the one hour's notice."

On January 30, 2017, Attorney Michael S. Lynch, on behalf of the law firm of Bai, Pollock, Blueweiss & Mulcahey, P.C. (law firm), filed a motion to withdraw the law firm's appearance as counsel for Parnoff and Barbara A. Parnoff. The basis for the motion was that "the attorney-client relationship [did] not exist in that there [was] a severe breakdown in communication between attorney and clients and the attorney is not authorized to represent or act on behalf of the clients." Specifically, after noting the complicated history between these parties and the disputed attorney's fees, the motion indicated that in December, 2016, Parnoff had advised in writing that the law firm was required to obtain his authorization prior to performing any further work on his file. After attending the status conference in which the matter was ordered to trial, Lynch indicated that he repeatedly requested authorization from Parnoff to work on the file; Parnoff, however, did not provide the necessary authorization. Under these circumstances, Lynch and the law firm requested permission to withdraw their appearance in this matter.

At the hearing on the motion to withdraw on February 2, 2017, the court, *Bellis*, *J.*, stated: "[B]efore I hear from either or both of the Parnoffs, I just want to point out that the case is very old, that there's been four trial dates in it, and there will not be a continuance of the trial date. I do note that . . . there was a motion for

stay that was filed back in September, 2015, asking for a stay for the purposes of the *Parnoff* v. *Yuille* case to be decided as opposed to any other case, and so there was a brief stay but that was years into the case.

"So when the case was last continued, counsel at the time on both sides were informed that I would reluctantly grant . . . that latest continuance but that when the decision was issued by the Connecticut Supreme Court, that the case would be on one hour's notice and it would . . . immediately proceed to trial because, quite frankly, I did not want to continue the case the last time.

"So here we are. The case is on trial. It will not be continued again due to the age of the case and the many continuance requests . . . ."

Over the course of the hearing on the motion to withdraw, Lynch reiterated what he had stated in his motion, namely, that he did not have the ability to defend Parnoff because Parnoff had not authorized him to do the work. The court questioned Parnoff regarding whether he would cooperate with counsel; Parnoff, however, did not provide a clear response to the court's questions. The court considered a letter from Parnoff to Attorney Charles Fleischmann of the law firm, dated December 14, 2016, in which Parnoff notified the law firm that it should not perform any further work for which he would be billed without his written approval. The court also considered a series of emails from Lynch to Parnoff in which Lynch notified Parnoff of the court's January 26, 2017 order setting deadlines for the filing of trial management reports and proposed stipulations of fact. Parnoff, however, had not authorized Lynch to proceed.

At the conclusion of the hearing on the motion to withdraw, the court stated: "Well . . . I'm going to find good cause to grant the motion. I'm going to find that

there is a breakdown in the relationship and communications, and I'm going to find further that it was caused, Attorney Parnoff, by your refusal to cooperate with your attorney based on the information and evidence before me, and that you put Attorney Lynch in a no-win position where he was not given—where he was attempting to do what was required to do to defend you properly, and that you—your instructions to him were to not do anything and you did not respond, so there is not any way that he can properly represent you based on all this information."[6] Before court adjourned on February 2, 2017, Parnoff indicated that he was going to try to find an attorney to represent him during the trial but that he did not know how long it was going to take. In response, the court stated that "[i]t was your choice not to cooperate with your attorney and not to give him authorization to do what needed to be done, so because of that I'm not going to continue the case."

On February 3, 2017, Parnoff informed the court that he was on medication and was not practicing as a commissioner of the Superior Court. The court stated that it had previously informed all counsel that, with respect to a continuance, it would consider a current letter from a medical provider indicating that it would jeopardize Parnoff's physical or mental well-being to appear in court. Such a letter was not provided to the court. The court also noted that Parnoff had an active law license and remained a commissioner of the Superior Court.[7]

[6] On appeal, Parnoff has not challenged the court's conclusion that he was to blame for the breakdown in the attorney-client relationship.

[7] The transcript reveals the following colloquy:

"The Court: [W]hat I don't have is a letter from a medical provider. As I told your counsel at the time, what I do not have is a letter from your medical provider saying that it would jeopardize your physical or mental health or well-being to appear at court, because that is the standard. Everyone—we all, we—all of us have different conditions, but—

"[Parnoff]: Your Honor, I—

"The Court: —there is—no, Mr. Parnoff, you can't interrupt me. You know better. So right now you have an active license and right now you are a commissioner of the Superior Court, so that's just how it is. You haven't

On February 7, 2017, Barbara A. Parnoff filed a motion for a continuance in which she requested that the matter be removed from the trial list in order for her to find an attorney to represent her in the matter. The same day, Parnoff filed a motion to remove the case from the trial list to allow reasonable time for trial preparation. In his motion, Parnoff stated that he had worked on this case with Attorney Paul Pollock of the law firm, who had retired, and Fleischmann, who had not responded to his December, 2016 letter. He indicated that he first learned that this case was ordered to trial on January 26, 2017, when he was in court on an unrelated matter. Parnoff did not state in the motion, however, that he was going to find another attorney to represent him. He stated, rather, that "[n]either the undersigned nor his wife have any experience as defense attorneys or in defense litigation and both have long-standing medical conditions for which treatment is continuing . . . ." Parnoff attached, as an exhibit to his motion, a letter from an outpatient mental health treatment coordinator indicating that Parnoff had a medical appointment scheduled for February 7, 2017.

Prior to jury selection on February 7, 2017, the court, *Radcliffe*, *J.*, considered Parnoff's motion to remove the case from the trial list. At that time, Parnoff described this motion as "a motion to get the thing off the trial list; to stop with the proceedings and . . . have [this matter] placed on a trial list in a period of time that unrepresented people who thought they were being represented for the last three or four years have an opportunity to get trial counsel." Judge Radcliffe initially referred both motions to Judge Bellis, as she had previously ruled on these issues. After consulting with Judge Bellis, however, Judge Radcliffe bifurcated the matter as to Barbara A. Parnoff and ordered that jury

offered your resignation, so you are a commissioner of the Superior Court and I'm talking to you as a commissioner of the Superior Court."

selection would begin that afternoon in the case against Parnoff. The evidence in the case against Parnoff commenced on February 14, 2017, almost two weeks after the date that Judge Bellis had set for the commencement of trial.

In support of his argument that the trial court abused its discretion by ordering him to commence trial on extremely short notice, Parnoff points out that this was a complex case and both sides had promptly requested that the matter be continued. He contends that the case was old because of the many collateral appeals and that the prior continuance requests were appropriate. He further argues that a continuance would not have had an adverse impact upon the witnesses or the reliability of the evidence, and that he had submitted medical evidence demonstrating his inability to cope with the complexity of the matters at hand. Finally, Parnoff contends that the denial of the continuance had a devastating impact upon his ability to defend the action. Specifically, Parnoff contends that throughout all of the lawsuits and appeals over the years originating from this set of facts, he had never represented himself. He contends that, in addition to the disputed funds at issue, this case also involved his license to practice law, and that he should not have been expected to represent himself in the matter.

On the basis of our review of the record, we disagree with Parnoff that the court abused its discretion by ordering this matter to trial. It is important to note that six years had elapsed between June 29, 2004, the date that Yuille received her arbitration award in this matter; *Parnoff I*, supra, 139 Conn. App. 153; and July 26, 2010, the date that Parnoff misappropriated the funds that had been placed in escrow pending resolution of the parties' dispute. Another six and one-half years had passed before the court's January 26, 2017 order directing that this matter was scheduled for trial. During this

time, in addition to *Parnoff I*, supra, 147, and *Parnoff II*, supra, 163 Conn. App. 273, Yuille had also filed a grievance against Parnoff, alleging that he had violated the Rules of Professional Conduct by transferring and commingling the funds; this proceeding resulted in a formal reprimand being issued against Parnoff. *Disciplinary Counsel* v. *Parnoff*, 324 Conn. 505, 511, 513, 152 A.3d 1222 (2016). Moreover, Parnoff, an attorney with an active law license, as noted by the trial court, was a party to all of this litigation and would have had firsthand knowledge of the underlying proceedings and complicated history involving the disputed funds.

In the present case, the court specifically found that Parnoff was responsible for the breakdown in the attorney-client relationship by refusing to cooperate with Lynch and to give him the authorization necessary to work on the case. It was for this reason the court stated that it was not going to grant a continuance to Parnoff after granting Lynch's motion to withdraw. Parnoff was informed that the court would consider a current letter from a medical provider stating that it would jeopardize his physical or mental well-being to appear in court. Although Parnoff attached a letter to his motion to remove the case from the trial list, that letter indicated that Parnoff had an appointment on February 7, 2017, and did not state that it would jeopardize Parnoff's physical or mental well-being to appear in court.

At the time this case was ordered for trial, it was over three and one-half years old and the parties' fee dispute had been the subject of multiple related lawsuits. Prior to the court's January 26, 2017 order, this case had previously been set down for trial on September 24, 2014, September 24, 2015, and November 17, 2015. Five pretrial conferences had also been scheduled.[8] Moreover, despite the complicated history of this

[8] The file reflects that pretrial conferences were scheduled on April 23, 2015, May 14, 2015, June 4, 2015, July 15, 2015, and August 4, 2015.

case, the issues presented in this matter were not complex. The court had the discretion, as a matter of docket management, to schedule this matter for trial. See *Peatie* v. *Wal-Mart Stores, Inc.*, supra, 112 Conn. App. 12.

Under these circumstances, and on the basis of the continuing pattern of dilatory behavior evidenced by Parnoff, we conclude that the court did not abuse its discretion by ordering that the parties commence trial.

II

Parnoff next claims that the verdict in Yuille's favor on the counts alleging conversion and statutory theft is irreconcilably inconsistent with the verdict in Parnoff's favor on the count alleging breach of fiduciary duty, and that he is, therefore, entitled to have the verdict set aside. We disagree.

The following facts are necessary for the resolution of this claim. The operative complaint alleged conversion, statutory theft, and breach of fiduciary duty. The factual basis for each of these causes of action was the same. Specifically, Yuille alleged that in 1998, she retained Parnoff to represent her in an action against her employer. After prevailing in this action and receiving an arbitration award in the amount of $1,096,032.93, she learned that her fee agreement with Parnoff, pursuant to which Parnoff was to receive a fee of 40 percent of her recovery, violated a state statute. She, therefore, disputed Parnoff's entitlement to a fee of $438,413.17. On November 16, 2004, Yuille agreed that Parnoff could pay himself $125,000 from the 40 percent he was claiming as a fee, on the condition that the balance of the fee would be held in escrow pending resolution of the fee dispute. That same day, Parnoff established an account in his name as trustee for Yuille in which he placed the balance of the disputed fee.[9]

[9] According to the complaint, on November 16, 2004, Parnoff deposited the sum of $971,032.93 into the trust account, representing the balance remaining from the original award of $1,096,032.93 less the $125,000 that

According to Yuille's complaint, in March, 2005, Parnoff commenced an action against her claiming that she had breached her contract with him by refusing to pay him the full 40 percent contingency fee provided in the parties' retainer agreement. Following trial in that case, the jury awarded Parnoff $252,044.27. On July 13, 2010, the court rendered judgment in accordance with the verdict. Yuille alleged that despite the automatic stay provisions of Practice Book § 61-11, and the fact that the entitlement to the disputed funds remained undecided pending appeal of Parnoff's prior action, on July 26, 2010, Parnoff transferred the sum of $363,960.87 from the escrow account to his personal account, thus misappropriating the funds from the 2004 arbitration award. Yuille further alleged that as a result of the decisions by this court in *Parnoff I*, supra, 139 Conn. App. 147, and *Parnoff II*, supra, 163 Conn. App. 273, she was entitled to the full amount of the funds that Parnoff held in escrow prior to the July 26, 2010 transfer.

At the conclusion of the trial, the jury returned a verdict for Yuille in the amount of $363,960.87 on the conversion count and $1,091,882.61 on the statutory theft count, for a total of $1,455,843.48 in damages.[10] The jury returned a verdict for Parnoff on the count alleging breach of fiduciary duty. An interrogatory submitted to the jury on the breach of fiduciary duty count asked: "Do you find that the defendant, Laurence V. Parnoff, advanced his own interest, to the detriment of the plaintiff, Darcy Yuille, acting as her attorney?" The jury responded "NO" in response to this interrogatory.

Parnoff paid himself. On or about the same date, Parnoff disbursed payments for costs and payment to Yuille for her share of the proceeds, leaving a balance remaining in the trust account of $313,413 as the amount of the disputed fee.

[10] The jury awarded treble damages on the statutory theft count, pursuant to § 52-564. See footnote 4 of this opinion. Yuille also recovered prejudgment interest in the amount of $24,492.89 for a total judgment of $1,480,336.37, subject to postjudgment interest.

According to Parnoff, the sole basis for Yuille's conversion and statutory theft claims was that the specific funds in question had been sequestered in his Interest on Lawyers' Trust Account for her benefit, and that he thereafter took those funds from that account and placed them in his personal account. Parnoff contends that the jury could not have found a conversion or theft of those funds without also finding that he had a fiduciary obligation to Yuille to maintain those funds for her benefit.[11] Parnoff argues that, because the verdict is irreconcilable and inconsistent, it must be set aside and a new trial ordered.

"When a claim is made that the jury's answers to interrogatories in returning a verdict are inconsistent, the court has the duty to attempt to harmonize the answers." (Internal quotation marks omitted.) *Suarez* v. *Dickmont Plastics Corp.*, 242 Conn. 255, 270, 698 A.2d 838 (1997). "The role of an appellate court where an appellant seeks a judgment contrary to a general verdict on the basis of the jury's allegedly inconsistent answers to such interrogatories is extremely limited. . . . To justify the entry of a judgment contrary to a general verdict upon the basis of answers to interrogatories, those answers must be such in themselves as conclusively to show that as [a] matter of law judgment could only be rendered for the party against whom the general verdict was found; they must [negate] every

[11] "The tort of [c]onversion occurs when one, without authorization, assumes and exercises ownership over property belonging to another, to the exclusion of the owner's rights." (Internal quotation marks omitted.) *Deming* v. *Nationwide Mutual Ins. Co.*, 279 Conn. 745, 770, 905 A.2d 623 (2006). "Statutory theft under § 52-564 is synonymous with larceny under General Statutes § 53a-119. . . . Conversion can be distinguished from statutory theft as established by § 53a-119 in two ways. First, statutory theft requires an intent to deprive another of his property; second, conversion requires the owner to be harmed by a defendant's conduct. Therefore, statutory theft requires a plaintiff to prove the additional element of intent over and above what he or she must demonstrate to prove conversion." (Internal quotation marks omitted.) Id., 771.

reasonable hypothesis as to the situation provable under the issues made by the pleadings; and in determining that, the court may consider only the issues framed by the pleadings, the general verdict and the interrogatories, with the answers made to them, without resort to the evidence offered at the trial." (Citation omitted; internal quotation marks omitted.) Id., 269–70. "A verdict that is inconsistent or ambiguous should be set aside." *Kregos* v. *Stone*, 88 Conn. App. 459, 470, 872 A.2d 901, cert. denied, 275 Conn. 901, 882 A.2d 672 (2005).

In the present case, the interrogatory submitted to the jury asked whether it found that Parnoff had advanced his own interest, to the detriment of Yuille, *acting as her attorney*. Parnoff has not negated the reasonable hypothesis that the jury concluded that he was not acting as Yuille's attorney at the time that he converted the funds. In fact, Yuille's complaint alleged that, on November 16, 2004, after the parties' fee dispute arose, Parnoff established an account in his name as trustee for Yuille in which he placed the balance of the disputed fee and that Parnoff had sued Yuille to recover the full 40 percent of the contingency fee in March, 2005. It was a reasonable hypothesis for the jury to believe that at the time Parnoff converted the funds in 2010, he was no longer acting as Yuille's attorney. Accordingly, because the jury's answer to the interrogatory can be harmonized with the verdict, Parnoff cannot prevail on his claim that the verdict is irreconcilably inconsistent.

III

Parnoff's final claim is that the court improperly declined to submit his special defense of waiver to the jury.[12] We disagree.

[12] Although the defendant contends that the court improperly refused to submit any of his special defenses to the jury, his argument on appeal concerns only his claim of waiver. We, therefore, limit our consideration

The following facts are necessary for the resolution of this claim. On December 4, 2013, Parnoff filed his answer and special defenses. The special defenses alleged, inter alia, that Yuille's claims were barred by the doctrines of equitable estoppel, unjust enrichment, res judicata and collateral estoppel. The special defenses also alleged that Yuille had failed to mitigate damages, had breached the implied covenant of good faith and fair dealing, and had waived possession of the funds by failing to file a counterclaim or seek affirmative relief to obtain a right to the possession of the funds.[13] On January 30, 2017, in response to the court's order, Yuille filed a reply to Parnoff's special defenses.

On February 14, 2017, after the trial had commenced, Parnoff filed an amended answer and special defenses. In addition to the allegations contained in the December 4, 2013 special defenses, the amended special defenses alleged that Yuille's claims were barred by the doctrine of unclean hands, the applicable statutes of limitations and the doctrine of accord and satisfaction. The amended special defenses also alleged that any amounts due to Yuille should be reduced and set off by certain

of this issue to whether the court properly refused to submit his special defense of waiver to the jury.

[13] In the operative special defense of waiver, Parnoff alleged: "[Yuille] waived possession of the funds having failed to file a counterclaim or seek affirmative relief to obtain a right to the possession or continued escrow of the funds." Parnoff did not allege any facts in connection with this special defense. See *McCann Real Equities Series XXII, LLC* v. *David McDermott Chevrolet, Inc.*, 93 Conn. App. 486, 491, 890 A.2d 140 ("[F]acts must be pleaded as a special defense when they are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action. Practice Book § 10-50" [internal quotation marks omitted]), cert. denied, 277 Conn. 928, 895 A.2d 798 (2006).

When instructing the jury, the court charged that "[Yuille] is under no obligation or was not before bringing this case, as she had a right to do, to file any counterclaim seeking to recover monies which were part of an award which had been rendered on her behalf as the result of an arbitration proceeding and on which you have received evidence in this case." Parnoff did not object to this charge.

other sums. Yuille did not file a reply to the amended answer and special defenses.[14]

Prior to the start of the evidence, the court indicated that it would charge the jury on Parnoff's special defenses if they were supported by the evidence; the court commented, however, that it "[had not] seen anything that [it] could really charge on at [that] point." During a break in the cross-examination of Yuille, the court again indicated that it would submit Parnoff's special defenses to the jury if there was any evidence to support them.[15] During the court's charge to the jury, the court stated that "there are various defenses which were raised here by way of a special defense in which [Parnoff] made claims that notwithstanding the claims made by [Yuille] that she could not recover for . . . one or more of these bases. And the court has examined

[14] Prior to closing arguments, the court stated that "the operative pleadings are the amended complaint of February 14, 2017, the amended answer and special defenses of February 13, 2017, and of course the reply pleading remains the same."

[15] The transcript reveals the following colloquy:

"The Court: However what I indicated was the issue here involves—this lawsuit—

"[Parnoff]: Yeah.

"The Court: —involves monies that were put into an escrow account—

"[Parnoff]: Yes.

"The Court: —to which you have no claim. And involves the right to the ownership of those monies. There are three counts: conversion, statutory theft and breach of fiduciary duty. Those are the only claims that are before this jury.

"[Parnoff]: There's special defenses too, Your Honor. And there's also the question of credibility.

"The Court: There are no claims by way of special defenses, by way of counterclaim—

"[Parnoff]: No.

"The Court: —for any monies.

"[Parnoff]: No. Absolutely.

"The Court: And I have looked at some of the special defenses that you filed, and that you've attempted to file at the eleventh hour, and I think we already dealt with some of those. And I'll deal with them when they come up. If in fact there is ever any evidence in this case to support any of the special defenses, we'll deal with that."

the special defenses. And I am not going to instruct you on, nor should you consider, any of the special defenses raised in this case.'' The court then proceeded to charge on the claims raised by Yuille, namely, conversion, statutory theft and breach of fiduciary duty.[16]

On appeal, Parnoff argues that he is entitled to a new trial based on the court's failure to charge on the special defense of waiver.[17] He contends that he was denied the right to have the jury decide an issue of fact fairly presented by the pleadings and the evidence. Specifically, Parnoff refers to defendant's exhibit L, an affidavit signed by Yuille in a prior related action, *Parnoff* v. *Mooney*, Superior Court, judicial district of Fairfield, Docket No. CV-04-4001683-S. In this affidavit, Yuille averred that she hired Attorney Laura Mooney in 1996 in connection with a workplace injury she sustained in 1995 while employed at Bridgeport Hospital. In 1997, Yuille authorized Mooney to pursue a bad faith claim against the hospital for its bad faith handling of her workers' compensation claim. In 1998, Yuille retained Parnoff to represent her in a wrongful termination claim. Yuille averred that, to her recollection, she did not authorize Parnoff to bring a bad faith claim, as she

[16] When the court asked if there were any exceptions to the charge, Parnoff did not object to the failure to charge on the special defenses. He did question the court's instruction regarding whether he had a right to recover based on the prior Appellate Court opinions. This instruction is not at issue in the present appeal. He then questioned whether it was necessary to tell the jury that it should not consider the special defenses. After the court explained that it had to do that because it had initially told the jury that there was an answer and special defenses, Parnoff responded: "I see. I see what your reasoning is."

[17] At oral argument before this court, counsel for Parnoff stated that he "[did not] believe" that Parnoff filed a request to charge on the special defenses. Prior to closing argument at the trial court, however, the court commented that Parnoff had submitted a series of requests to charge. The requests, if any, are not in the court file or in the appendices to Parnoff's brief. In any event, Parnoff never took any steps to rectify the record, to the extent he believes, contrary to counsel's representation at oral argument, that he submitted such requests.

had already hired Mooney to handle that claim. She later learned, however, that Parnoff had also brought a bad faith claim on her behalf.

According to the affidavit, after Parnoff advised Yuille of the arbitration award in her favor on the bad faith claim he had brought, Yuille advised Parnoff that the contingency fee of 40 percent that he was seeking to collect was too high. The affidavit further states that "[i]n any event, I told Parnoff that any fee from the award should be split between him and Mooney, since it was my understanding that they were working together and he had used her work to prosecute my case." After Parnoff refused to share the fee, she asked that the fee from the award be held in escrow pending resolution of the fee dispute. On the basis of this affidavit, Parnoff contends that Yuille waived any claim that she might have against him and in favor of Mooney, who was not a party to this action.[18] We disagree with Parnoff that this affidavit constitutes evidence in support of his special defense of waiver.

"It is well established that waiver is the intentional relinquishment or abandonment of a known right or privilege." (Internal quotation marks omitted.) *Worth Construction Co.* v. *Dept. of Public Works*, 139 Conn. App. 65, 70, 54 A.3d 627 (2012). "[T]o determine the presence of waiver, there must be evidence of intelligent and intentional action by the [plaintiff] of the right claimed to be waived. . . . It must be shown that the party understood its rights and voluntarily relinquished them anyway. . . . Each case should be considered upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the party that is waiving its rights." (Internal quotation marks omitted.) Id., 71.

[18] Parnoff also refers to defendant's exhibit M, a page of a transcript from the prior proceeding, in which Yuille indicated that half of Parnoff's fee should be paid to Mooney, as support for his claim that the court improperly declined to charge the jury regarding waiver.

The affidavit by Yuille directing that Parnoff split the fee with Mooney does not constitute an intentional relinquishment or abandonment of Yuille's rights regarding the disputed funds. At best, Yuille's statement in her affidavit is an assertion that Parnoff and Mooney should split the fee *to which they were legally entitled* rather than split the fee that violated the statutory cap on contingent fees contained in § 52-251c. Moreover, as the court correctly pointed out when discussing this affidavit at trial, "[t]here is no claim by Attorney Mooney in this case—Attorney Mooney is not a party in this case, nor is she claiming any title, as far as this court is aware, to any of the monies that were contained in the certificate of deposit account and were later deposited in a personal account by the defendant."[19] With regard to whether Yuille had waived her right to the disputed funds, the court was presented with evidence that Yuille had retained counsel and defended her interest in the disputed funds from the inception of the lawsuit in *Parnoff I*, supra, 139 Conn. App. 147, through the denial of certification by the Supreme Court in *Parnoff II*, supra, 163 Conn. App. 273.

"In determining whether the trial court improperly refused to give a requested charge, we 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 a party's request to charge [only] if the proposed instructions are reasonably supported by the evidence."

[19] Mooney testified that following a prior lawsuit, she had been paid and was not seeking any additional compensation by way of any legal fee in this action.

(Citation omitted; internal quotation marks omitted.) *National Publishing Co.* v. *Hartford Fire Ins. Co.*, 287 Conn. 664, 671, 949 A.2d 1203 (2008). Because the evidence in this case did not support a finding that Yuille had waived her right to recover the disputed funds, we conclude that the court properly declined to submit that special defense to the jury. See id.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ABDUL MUKHTAAR
(AC 41550)

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

Syllabus

The defendant, who had been convicted of the crime of murder in connection with the shooting death of the victim, appealed to this court from the trial court's dismissal of his motion to correct an illegal sentence. In his motion, he had alleged that his sentence was illegal because the same trial judge presided over his probable cause hearing and the criminal trial, the trial judge was biased and did not order a competency examination, and there were inconsistent statements by witnesses during the criminal investigation and trial. At the hearing on his motion, he also claimed that his sentence was illegal because the police had lost and destroyed evidence before the criminal trial and that he was the victim of implicit bias. On appeal, he claimed that the court improperly concluded that it lacked jurisdiction to consider the issues raised in his motion. *Held* that the trial court properly dismissed the defendant's motion to correct an illegal sentence; because the claims raised by the defendant in his motion to correct an illegal sentence concerned the pretrial proceedings and the criminal trial, and did not attack the sentencing proceeding itself, and his claims of bias likewise were not limited to the evidence of the sentencing proceeding, nor did they concern an illegal sentence or a sentence imposed in an illegal manner, the trial court properly determined that it lacked jurisdiction to consider the defendant's motion to correct an illegal sentence.

Argued January 22—officially released April 9, 2019

Procedural History

Information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Gormley*, *J.*; verdict and judgment of guilty, from which the defendant appealed to the Supreme Court, which affirmed the judgment; thereafter, the court, *Devlin*, *J.*,dismissed the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Affirmed.*

Abdul Mukhtaar, self-represented, the appellant (defendant).

Michele C. Lukban, senior assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *C. Robert Satti, Jr.*, supervisory assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. The self-represented defendant, Abdul Mukhtaar, appeals from the judgment of the trial court dismissing his motion to correct an illegal sentence filed pursuant to Practice Book § 43-22.[1] On appeal, he argues that the court improperly dismissed this motion. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are necessary for the resolution of this appeal. The defendant was convicted of murder in violation of General Statutes § 53a-54a and sentenced to fifty years incarceration. See *State* v. *Mukhtaar*, 253 Conn. 280, 281–82, 750 A.2d

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

1059 (2000).[2] Our Supreme Court affirmed the judgment of conviction on direct appeal. See id., 282.[3]

The defendant filed the motion to correct an illegal sentence that is the subject of the present appeal on

[2] Our Supreme Court set forth the following facts underlying the defendant's conviction. "At approximately 4 p.m. on February 14, 1996, Benjamin Sierra, Jr., was driving his parents' car on Fairfield Avenue in Bridgeport. While stopped at a red light at the intersection of Fairfield and Iranistan Avenues, Sierra spotted two young women, Tracey Gabree and Terri Horeglad, with whom he was acquainted, standing at a nearby pay telephone. Sierra waved to Gabree and Horeglad and they approached and entered Sierra's car. Horeglad sat in the front passenger seat and Gabree sat in the back seat.

"Gabree asked Sierra for a cigarette. Sierra then turned around and gave her a cigarette and a light. Sierra asked Gabree and Horeglad where they were going and one of them responded that they were homeless and just wanted to get warm.

"When Sierra turned back toward the front of the car, he observed that his vehicle was blocked by a tan car that was facing the wrong direction on Fairfield Avenue. At that moment, Gabree shouted: 'Oh shit, Kareem!' Gabree then fled from Sierra's car. A man, later identified by Sierra and Gabree as the defendant, emerged from the tan car and approached the passenger side of Sierra's car, where Horeglad remained seated. Sierra jumped out of his car and asked the defendant what was wrong. The defendant, who did not respond, pulled out what appeared to be a .32 or .38 caliber chrome plated revolver and fired four shots at Horeglad, each of which entered the right side of her body. Horeglad died as a result of the gunshot wounds." *State* v. *Mukhtaar*, supra, 253 Conn. 282–83.

[3] Thereafter, the defendant pursued a variety of claims for relief, including a request for sentence review; *State* v. *Mukhtaar*, Superior Court, judicial district of Fairfield, Docket No. CR-96-116888, 2003 WL 22708180 (October 28, 2003), a 2001 habeas action; *Mukhtaar* v. *Commissioner of Correction*, 113 Conn. App. 114, 964 A.2d 1251, cert. denied, 291 Conn. 913, 969 A.2d 175 (2009); a 2008 habeas petition; *Mukhtaar* v. *Commissioner of Correction*, 158 Conn. App. 431, 119 A.3d 607 (2015); a 2013 motion to correct an illegal sentence; *State* v. *Mukhtaar*, Superior Court, judicial district of Fairfield, Docket No. CR-96-261380, 2013 WL 5614541 (September 20, 2013); a petition for a new trial; *Mukhtaar* v. *Smriga*, Superior Court, judicial district of Fairfield, Docket No. CV-13-4044407-S, 2013 WL 6439645 (November 12, 2013); and a 2015 motion to correct an illegal sentence; *State* v. *Mukhtaar*, 179 Conn. App. 1, 177 A.3d 1185 (2017). Additionally, the defendant's 2014 petition for a writ of habeas corpus remains pending before the habeas court; *Mukhtaar* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-14-4006364-S.

January 19, 2018. In this motion, the defendant alleged that his sentence was illegal because (1) Judge Gormley had presided over both the defendant's probable cause hearing[4] and the criminal trial, (2) Judge Gormley was biased, (3) Judge Gormley did not order a competency examination pursuant to General Statutes (Rev. to 1997) § 54-56d[5] and (4) there were inconsistent statements by witnesses during the criminal investigation and trial.

On February 14, 2018, the court conducted a hearing on the defendant's motion. In addition to the claims set forth in his motion, the defendant also claimed that his sentence was illegal because the Bridgeport Police Department lost and destroyed evidence before the criminal trial and that he was the victim of implicit bias. One week later, the court, *Devlin*, *J.*, issued a memorandum of decision dismissing the defendant's motion to correct an illegal sentence. After setting forth the relevant law, the court concluded: "None of the six claims raised by the defendant concerns his sentence or the manner in which it was imposed. To the contrary, his claims regarding judicial bias, lack of competency examination, implicit bias, inconsistent statements, lost evidence and that the same judge presided over the [probable cause hearing] and trial, all concern the underlying conviction and not the defendant's sentence. Accordingly, this court lacks jurisdiction to consider these claims." This appeal followed. Additional facts will be set forth as necessary.

On appeal, the defendant claims that the court improperly concluded that it lacked jurisdiction to consider the issues raised in his motion to correct an illegal sentence. The state counters, inter alia, that all of the

[4] See General Statutes (Rev. to 1995) § 54-46a.

[5] At the hearing for the motion to correct an illegal sentence, the court inquired if the defendant's criminal counsel had requested a competency hearing at the defendant's trial. The defendant represented that no such request had been made.

defendant's issues focus on the events that occurred prior to his sentencing, and therefore the court properly dismissed the motion to correct. We agree with the state.

At the outset, we identify our standard of review. "Our determination of whether a motion to correct falls within the scope of Practice Book § 43-22 is a question of law and, thus, our review is plenary." (Internal quotation marks omitted.) *State* v. *Anderson*, 187 Conn. App. 569, 584, A.3d (2019); see also *State* v. *Delgado*, 323 Conn. 801, 810, 151 A.3d 345 (2016); *State* v. *Robles*, 169 Conn. App. 127, 131, 150 A.3d 687 (2016), cert. denied, 324 Conn. 906, 152 A.3d 544 (2017).

Next, we set forth the legal principles pertaining to the trial court's jurisdiction following a judgment of conviction. "The Superior Court is a constitutional court of general jurisdiction. In the absence of statutory or constitutional provisions, the limits of its jurisdiction are delineated by the common law. . . . It is well established that under the common law a trial court has the discretionary power to modify or vacate a criminal judgment before the sentence has been executed. . . . This is so because the court loses jurisdiction over the case when the defendant is committed to the custody of the commissioner of correction and begins serving the sentence. . . . Because it is well established that the jurisdiction of the trial court terminates once a defendant has been sentenced, a trial court may no longer take any action affecting a defendant's sentence unless it expressly has been authorized to act. . . . [Practice Book] § 43-22 embodies a common-law exception that permits the trial court to correct an illegal sentence or other illegal disposition. . . . Thus, if the defendant cannot demonstrate that his motion to correct falls within the purview of § 43-22, the court lacks jurisdiction to entertain it. . . . *[I]n order for the court to have jurisdiction over a motion to correct an illegal*

sentence after the sentence has been executed, the sentencing proceeding [itself] . . . must be the subject of the attack. . . .

"[A]n illegal sentence is essentially one [that] either exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory. By contrast . . . [s]entences imposed in an illegal manner have been defined as being within the relevant statutory limits but . . . imposed in a way [that] violates [a] defendant's right . . . to be addressed personally at sentencing and to speak in mitigation of punishment . . . or his right to be sentenced by a judge relying on accurate information or considerations solely in the record, or his right that the government keep its plea agreement promises . . . . These definitions are not exhaustive, however, and the parameters of an invalid sentence will evolve . . . as additional rights and procedures affecting sentencing are subsequently recognized under state and federal law." (Emphasis added; internal quotation marks omitted.) *State* v. *Anderson*, supra, 187 Conn. App. 583–84; see also *State* v. *Evans*, 329 Conn. 770, 778–80, 189 A.3d 1184 (2018), cert. denied, U.S. , S. Ct. , L. Ed. 2d (2019); *State* v. *Parker*, 295 Conn. 825, 833–39, 992 A.2d 1103 (2010); see generally *State* v. *Lawrence*, 281 Conn. 147, 153–59, 913 A.2d 428 (2007); *State* v. *McNellis*, 15 Conn. App. 416, 443–44, 546 A.2d 292, cert. denied, 209 Conn. 809, 548 A.2d 441 (1988).

Next, we turn to the specific allegations contained in the defendant's motion to correct an illegal sentence. He claims that his sentence was illegal because Judge Gormley had presided over the probable cause hearing and the criminal trial, two of the state's witnesses had provided inconsistent statements during the criminal investigation and trial proceedings, Judge Gormley did

not order a competency hearing on behalf of the defendant either "pre or post trial,"[6] and the Bridgeport Police Department had lost and destroyed evidence prior to the criminal trial. These contentions do not attack the sentencing proceeding but, rather, concern the pretrial proceedings and the criminal trial. "[I]n order for the court to have jurisdiction over a motion to correct an illegal sentence after the sentence has been executed, the sentencing proceeding, and not the [proceedings] leading to the conviction, must be the subject of the attack." (Internal quotation marks omitted.) *State* v. *Cruz*, 155 Conn. App. 644, 651, 110 A.3d 527 (2015); see also *State* v. *St. Louis*, 146 Conn. App. 461, 466–67, 76 A.3d 753, cert. denied, 310 Conn. 961, 82 A.3d 628 (2013).

The remaining two allegations of the defendant, that there was an implicit bias against him because he is African-American and the victim was Caucasian, and that Judge Gormley was biased as evidenced by his failure to order a competency hearing, likewise are not limited to the events of the sentencing proceeding. Additionally, they do not fit within the definitions of either an illegal sentence or a sentence imposed in an illegal manner. See *State* v. *Anderson*, supra, 187 Conn. App. 583–84; see also *State* v. *Evans*, supra, 329 Conn. 779. We iterate that "[t]he claims that may be raised in a motion to correct an illegal sentence are strictly limited

[6] We note that a claim regarding a defendant's competency at the sentencing proceeding; see General Statutes § 54-56d (a); or a claim that the court failed to inquire, sua sponte, into a defendant's competency at the sentencing proceeding when there is sufficient evidence at that proceeding to raise a reasonable doubt as to whether that defendant can understand the proceeding or assist in his or her defense therein; *State* v. *Yeaw*, 162 Conn. App. 382, 389–90, 131 A.3d 1172 (2016); would fall within the jurisdiction of the trial court for the purpose of a motion to correct an illegal sentence filed pursuant to Practice Book § 43-22. In the present case, however, the defendant's claims regarding the lack of a competency hearing extend beyond the events of the sentencing proceeding and, therefore, are outside of the trial court's jurisdiction.

to improprieties that may have occurred at the sentencing stage of the proceeding. . . . Thus . . . for the trial court to have jurisdiction to consider the defendant's claim of an illegal sentence, the claim must fall into one of [several specific] categories of claims that, under the common law, the court has jurisdiction to review." (Internal quotation marks omitted.) *State* v. *Walker*, 187 Conn. App. 776, 784, A.3d (2019). For these reasons, we conclude that the trial court properly determined that it lacked jurisdiction to consider the defendant's motion to correct an illegal sentence.

The judgment is affirmed.

STATE OF CONNECTICUT *v.* EUCLIDES L.*
(AC 40032)

Alvord, Prescott and Eveleigh, Js.

Syllabus

Convicted of the crime of risk of injury to a child, the defendant appealed to this court. The defendant's conviction stemmed from an incident in which his four month old daughter sustained bruising to her face that was caused when the defendant held her face while trying to suction mucus from her nose. On appeal, he claimed that the trial court improperly failed to instruct the jury that it should acquit him if it concluded that his use of force in caring for his daughter was an accident. *Held* that the trial court's charge to the jury was legally correct and adequately instructed the jury on the issue of accident; although that court did not provide the jury with a separate accident charge, a separate charge was not required under the law, as a claim of accident is not a justification for a crime and negates only the element of intent, and when a defendant asserts a claim of accident, namely, that the state failed to prove the intent element of the criminal offense, a separate jury instruction is not required because the court's instruction on the intent required for the commission of the crime is sufficient in such circumstances, and in the

* In accordance with our policy of protecting the privacy interests of the victims of 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.

present case, the trial court expressly mentioned accident in the context of the general intent requirement when it stated that the state was required to prove that the defendant intentionally, and not inadvertently or accidentally, engaged in his actions.

Argued January 15—officially released April 9, 2019

Procedural History

Substitute information charging the defendant with the crime of risk of injury to a child, brought to the Superior Court in the judicial district of Tolland and tried to the jury before *Graham*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Robert L. O'Brien, assigned counsel, with whom, on the brief, was *William A. Adsit*, assigned counsel, for the appellant (defendant).

Nancy L. Walker, assistant state's attorney, with whom, on the brief, were *Matthew C. Gedansky*, state's attorney, and *Elizabeth C. Leaming*, senior assistant state's attorney, for the appellee (state).

Opinion

EVELEIGH, J. The defendant, Euclides L., appeals from the judgment of conviction, rendered after a jury trial, of one count of risk of injury to a child in violation of General Statutes § 53-21 (a) (1).[1] On appeal, the defendant claims that the trial court violated his constitutional rights by failing to instruct the jury that it should acquit the defendant if it concluded that his use

[1] General Statutes § 53-21 (a) provides in relevant part: "Any person who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child . . . shall be guilty of . . . a class C felony . . . ." Although § 53-21 had been amended in 2015, those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

of force in caring for his daughter, V, was an accident. We disagree and, accordingly, affirm the judgment of the trial court.

The jury reasonably could have found the following facts. The defendant and J have one child together, V. From October, 2014, to January 9, 2015, the defendant, J and V lived together in an apartment in Vernon. During this time, the defendant and J were V's primary caregivers.

On January 9, 2015, V, who was four months old at the time, was fussy because she was suffering from a cold and had received vaccinations two days earlier. At approximately 9:30 p.m., the defendant and J took V upstairs to put her to bed. While the defendant prepared V for bed, J was downstairs, although she periodically came upstairs to check on the defendant and the child. At approximately 11:10 p.m., after V fell asleep, the defendant joined J downstairs.

After spending "about a minute [downstairs] . . . [the defendant] asked J if [he] should wake [V] up and feed her because she didn't eat before bed." After J agreed that they should try to feed V, the defendant "grabbed [V's] bottle and went upstairs and [woke] her up." When the defendant woke V, the child began to cry hysterically. Because V was congested and "mucous was coming out of her nose in bubbles," the defendant tried to suction mucous out of her nose using a plastic bulb syringe. V wiggled and resisted the defendant so the defendant "grabbed her face." This episode lasted approximately a minute to a minute and a half.

J, who was downstairs while the defendant attempted to suction V's nose, heard V crying and went upstairs to check on the defendant and the child. As J approached the room in which the defendant was tending to V, she heard a muffled cry. When J entered the room, she saw that there was blood around V's nose and that the

child's skin was blue in color. J believed that V needed oxygen and feared that this was a side effect of the vaccinations V had received two days earlier.[2]

J and the defendant immediately drove V to Rockville General Hospital (hospital). They arrived at the hospital at approximately 11:30 p.m. While the defendant parked the car, J ran into the hospital carrying V in her arms. J told the hospital staff that V was turning blue and needed oxygen. V was crying when she arrived, but stopped after being comforted by hospital staff.

Danielle Mailloux, a physician employed at the hospital, attended to V. Mailloux observed a red mark under the child's nose and a purple round mark that was approximately two centimeters in diameter on her left cheek. During the first two hours that V was at the hospital, this mark grew in size and two additional marks developed on the right side of the child's face. Mailloux believed that the marks on V's face were bruises.

Mailloux inquired as to V's medical history and concluded that the injuries could not be accounted for by any preexisting medical condition, including the vaccines V had received two days earlier. Mailloux asked V's parents how the child acquired the injuries, but neither the defendant nor J was able to provide Mailloux with an explanation. Because the unexplained bruising on V suggested abuse, Mailloux determined that she would need to file a report with the Department of Children and Families (department).

Mailloux recommended that V be transferred to Connecticut Children's Medical Center in Hartford for inpatient treatment. Mailloux informed the defendant and J that after V was transferred, the department was going

[2] J, who is a trained respiratory therapist, told the police that she took V to the hospital because she believed the child might have been suffering from encephalitis.

to become involved. At this point, the defendant became upset and said he would not sign the paperwork to have V transferred to Connecticut Children's Medical Center.

Despite the defendant's protestations, on January 10, 2015, V was transferred to Connecticut Children's Medical Center. Once V arrived, the police interviewed the defendant and J separately. During the interviews, neither the defendant nor J was able to explain how V had sustained her injuries. On January 12, 2015, William Olsen, an employee of the department, interviewed the defendant and J. Both the defendant and J indicated that they did not hurt V but again failed to provide an explanation for the child's injuries.

Also on January 12, 2015, Nina Livingston, a physician and the director of the Suspected Child Abuse and Neglect team at Connecticut Children's Medical Center, evaluated V. Livingston noted that V had "facial bruising in a wraparound distribution [from] ear to ear. . . ." Specifically, V had bruises on her forehead, left eyelid, cheeks, temples, jawline, both ears, and above and below her left eye. Additionally, V had abrasions below her right nostril, right ear, and left temple, as well as subconjunctival hemorrhages in both eyes. Because the injuries could not be accounted for by alternative medical causes and V could not yet roll over, Livingston concluded that V's injuries had been caused by someone else. On the basis of Olsen's and Livingston's findings, the department invoked a 96 hour administrative hold on behalf of V.

On January 19, 2015, a week after the department invoked the 96 hour hold, the defendant revealed to J that he had caused V's bruises by holding her face while trying to suction mucous from her nose. J encouraged the defendant to disclose this information to the police. The defendant agreed to speak with the police, and J drove him to the police station, where, in a recorded

video statement, the defendant admitted that he was responsible for V's bruises.

The defendant also provided the police with a written statement in which he stated the following in regard to his attempts to suction V's nose: "I was almost taking my anger out on [V]. It was almost like we were having a conversation and she was not letting me do it and I was going to do it. I was holding her face hard to keep her head still, I would say it was a 10 on a scale from 1 to 10. She was fighting me and flailing her face back and forth. I was holding [her] harder than I should hold a baby. . . . I am devastated . . . that I had to put my daughter through this because I couldn't control myself. . . . It was just the frustration of what I was going through and I lost control."

In February, 2015, the defendant was arrested in relation to V's injuries. On June 28, 2016, the state charged the defendant with one count of risk of injury to a child in violation of § 53-21 (a) (1). The defendant entered a not guilty plea and elected to be tried by a jury.

On September 29, 2016, following a trial before a jury, the defendant was convicted of one court of risk of injury to a child in violation of § 53-52 (a) (1). The defendant then filed the present appeal in which he argues that the trial court violated his constitutional rights by failing to instruct the jury that his use of force in caring for V was an accident. The state argues that the defendant's claim fails because (1) he waived his appellate claim by abandoning the precise language of his request to charge on accident, (2) the trial court's instruction on general intent was legally correct and gave ample guidance to the jury on the issue of accident, and (3) any error in failing to instruct the jury more fully on accident was harmless. Even if we assume, without deciding, that the defendant did not waive his appellate claim by abandoning the precise language of

his request to charge, we conclude that his claim fails on the merits because the court's charge was legally correct.[3]

The following facts are necessary for the resolution of this issue. On August 31, 2016, the defendant submitted the following request to charge: "For you to find the defendant guilty of risk of injury, you must find beyond a reasonable doubt that the defendant intentionally squeezed [V's] face too hard. If you find that the defendant accidentally used excessive force, i.e., he did not know that he was squeezing [V's] face too hard, then you must find him not guilty. The evidence to which this charge applies is the testimony of the defendant and [J] that the defendant held [V's] head while suctioning her nose."

On September 2, 2016, the state argued, with respect to the defendant's proposed charge: "I would also take issue with the claim of accident, when this is a . . . general intent . . . crime and all the state must prove is that the defendant intended to do the act. . . . [In a risk of injury charge] the state need only prove [the defendant] intended to do the act, not inflict the injury . . . . [A]n accident defense isn't relevant to this kind of charge. The defendant isn't claiming he accidentally grabbed the child's face. He's claiming he accidentally inflicted the injury. . . . [T]here is no accident defense in this case because . . . by [the defendant's] own admissions . . . he purposely grabbed the child's face, but thereafter used excessive force and inflicted the injury." The defendant did not respond to the state's objection to his request to charge.

On September 28, 2016, the court provided counsel with a draft of the proposed charge. This version of the

[3] Because we conclude that the charge was legally correct and affirm the decision on that basis, we do not address the state's argument that the court's failure to instruct the jury more fully on accident was harmless error.

charge provided: "Intent relates to the condition of mind of the person who commits the act, his purpose in doing it. I instruct you now as to general intent because it applies to the charge of risk of injury. General intent is the intent to engage in conduct. As to the charge of risk of injury, it is not necessary for the state to prove that the defendant specifically intended to endanger [V's] physical well-being. Rather, the state is required to prove that the defendant intentionally and not inadvertently or accidentally engaged in his actions which did constitute blatant physical abuse. In other words, the state must prove that the defendant's actions in forcefully covering her face with his hands were intentional, voluntary and knowing rather than unintentional, involuntary and unknowing."

In discussing the second draft of the charge with counsel, the court explained: "This [instruction] touches upon the issue of intent to engage in conduct as opposed to inadvertently or accidentally engaging in actions. This is the only part in the charge where some conjugation of the word accident is going to occur. I mention that . . . because of [the] prior request [of counsel for the defendant]. I also think it's consistent with *State* v. *Martin*, [189 Conn. 1, 454 A.2d 256, cert. denied, 461 U.S. 933, 103 S. Ct. 2098, 77 L. Ed. 2d 306 (1983)]." The court then asked if counsel had any problems with the instruction. The defendant did not reply to the court's inquiry. The court thereafter informed counsel that it would give charges on unanimity and parental justification and that accident was "subsumed under general intent." The following day, on September 29, 2016, the court suggested minor changes to the charge and asked whether counsel wanted to add anything before the jury was brought out for closing argument. Both counsel indicated that they had nothing to add.

During closing argument, defense counsel stated: "This is a case about a father trying to help his daughter,

not hurt her. She had a cold that he suctioned her nose with a bulb syringe to get the mucous out, caused the bruises, but he did that in order to treat her cold, to treat her stuffy nose and he held her head too hard, but he didn't do that on purpose. He did it accidentally. He is not the kind of father that would do that. He's calm. He's patient. He's gentle."

In response, the state argued: "The defendant wants you to consider the fact that this was an accident and you're not going to hear that as a defense, when the judge instructs you on the law. The judge is going to indicate to you that the state must prove that the defendant's actions in forcefully covering the face of a child with his hands were intentional, voluntary and knowing . . . rather than unintentional, involuntary and unknowing. So, the state must prove that the defendant intentionally and forcefully cover[ed] the child's face, but . . . need not prove the defendant desired the ultimate outcome or intended the ultimate outcome. So, he may not have meant to cause the bruising on the child, he may not have thought in advance that that is what's going to happen. That doesn't matter. That doesn't make [it] an accident that relieves him of his criminal responsibility for his actions."

Following closing argument, the court charged the jury with the following general intent instruction: "Intent relates to the condition of mind of the person who commits the act, his purpose in doing it. I instruct you now as to general intent because it applies to the charge of risk of injury. General intent is the intent to engage in conduct. As to the charge of risk of injury, it is not necessary for the state to prove that the defendant specifically intended to endanger [V's] physical well-being. Rather, the state is required to prove that the defendant intentionally and not inadvertently or accidentally engaged in his actions. In other words, the state must prove that the defendant's actions in forcefully

covering her face with his hand were intentional, voluntary, and knowing rather than unintentional, involuntary and unknowing."

The court further instructed the jury on the elements of the risk of injury to a child pursuant to § 53-21, stating: "The first element is that the defendant did an act that was likely to impair the health of the child. Please recall my earlier instruction on general intent. To be likely to impair the health of a minor, the statute requires that the defendant committed blatant physical abuse that endangered the child's physical well-being." Furthermore, the court instructed that "the state must prove beyond a reasonable doubt that . . . the defendant did an act of blatant physical abuse that endangered the child's physical well-being and was likely to impair the health of the child . . . ."

The court also instructed the jury on the defense of justification, stating: "The evidence in this case raises the issue that the defendant, as a parent, was justified in the use of physical force upon [V] because he was promoting her welfare by suctioning her nose. After you have considered all of the evidence in this case, if you find that the state has proved each element of risk of injury, you must go on to consider whether or not the defendant was justified in his use of force. When, as in this case, evidence of justification was introduced at trial, the state must not only prove beyond a reasonable doubt all the elements of the crime charged but must also disprove beyond a reasonable doubt that the defendant was justified in his use of force."

With these facts in mind, we set forth the relevant standard of review and legal principles that guide our analysis. "Our review of the defendant's claim requires that we examine the [trial] court's entire charge to determine whether it is reasonably possible that the jury could have been misled by the omission of the requested

instruction. . . . While a request to charge that is relevant to the issues in a case and that accurately states the applicable law must be honored, a [trial] court need not tailor its charge to the precise letter of such a request. . . . If a requested charge is in substance given, the [trial] court's failure to give a charge in exact conformance with the words of the request will not constitute a ground for reversal. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper." (Internal quotation marks omitted.) *State* v. *Boyd*, 176 Conn. App. 437, 449, 169 A.3d 842, cert. denied, 327 Conn. 972, 174 A.3d 192 (2017). A court, however, "is under no obligation to give a requested jury instruction that does not constitute an accurate statement of the law." (Internal quotation marks omitted.) *State* v. *Harper*, 184 Conn. App. 24, 40, 194 A.3d 846, cert. denied, 330 Conn. 936, 195 A.3d 386 (2018).

Section 53-21 (a) provides: "Any person who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child . . . shall be guilty of a class C felony . . . ."

"Specific intent is not an element of the crime defined in [§ 53-21 (a) (1)]. . . . A general intent to do the proscribed act is required, however, as it is ordinarily for crimes of commission rather than omission." (Citation omitted; internal quotation marks omitted.) *State* v. *Martin*, supra, 189 Conn. 12–13. Put another way, to support a conviction under § 53-21 (a) (1), the jury need not "find any intent to injure the child or impair its health. All that [is] required [is] the general intent on the part of the defendant to perform the act which

resulted in the injury, that is, that the bodily movement [that] resulted in the injury was volitional." (Emphasis omitted.) *State* v. *McClary*, 207 Conn. 233, 240, 541 A.2d 96 (1988).

"Accident is not a justification for a crime . . . it negates only one element of the crime, namely, intent. . . . A claim of accident, pursuant to which the defendant asserts that the state failed to prove the intent element of a criminal offense, does not require a separate jury instruction because the court's instruction on the intent required to commit the underlying crime is sufficient in such circumstances." (Citation omitted; internal quotation marks omitted.) *State* v. *Moye*, 119 Conn. App. 143, 153–54, 986 A.2d 1134, cert. denied, 297 Conn. 907, 995 A.2d 638 (2010).

The defendant argues that pursuant to our Supreme Court's decision in *State v. Martin*, supra, 189 Conn. 1, the trial court erred in failing to adequately instruct the jury on accident. The defendant's case, however, is distinguishable from *Martin*, in which the facts were uniquely suited to an accident instruction. In *Martin*, the defendant testified that he injured a child when he fell and reflexively put his hands out to prevent his fall, thereby pushing the child against a nearby table. Id., 10–11. Specifically, the defendant in *Martin* stated that "someone grabbed him from behind. He spun around, his plastic kneecap locked and he fell . . . . He did not know whether he had touched [the child] as he fell . . . but he admitted that his reflex action in swinging out his arms to prevent his fall might have caused the child to be pushed against a table." Id., 11. Whereas the resulting injury in *Martin* was "wholly accidental" and reflexive, the injury in the present case was a result of the defendant intentionally holding V's head in his effort to suction mucous from her nose. The defendant in the present case maintains that he inadvertently used too much force in holding V's face, thereby accidentally

causing the child's injuries. This, however, confuses an intentional act that causes an accidental outcome with a reflexive, involuntary act like that in *Martin*. Unlike in *Martin*, where the defendant placed his hands out as a reflexive reaction to external forces, in the present case, the defendant intentionally held his child's face.

Moreover, unlike in *Martin*, where the court entirely failed to mention accident in its charge, the court in the present case mentioned accident in its instruction on general intent. Our Supreme Court in *Martin* stated: "The failure of the court even to allude to this defense as one which the state had to disprove was a serious deficiency in the charge." Id., 13. Furthermore, our Supreme Court in *Martin* went on to state that "a curative instruction should have been given discussing the general intent requirement in the context of the defense of accident which had been raised." Id., 14. In the present case, the court did more than allude to accident. In fact, it expressly mentioned accident in the context of the general intent requirement, stating: "[T]he state is required to prove that the defendant intentionally and not inadvertently or accidentally engaged in his actions." Although the court in the present case did not provide the jury with a separate accident charge, a separate charge was not required under the law. See *State* v. *Singleton*, 292 Conn. 734, 752, 974 A.2d, 679 (2009).

On the basis of the foregoing, we conclude that the court's charge was legally correct and adequately instructed the jury on the issue of accident.

The judgment is affirmed.

In this opinion the other judges concurred.

KATE B. CYGANOVICH *v.* THOMAS J. CYGANOVICH (AC 41445)

Alvord, Sheldon and Eveleigh, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court resolving several of the parties' postjudgment motions. The defendant claimed, inter alia, that the trial court, in granting his motion for a modification of child support, improperly calculated his modified child support obligation. *Held* that the trial court did not abuse its discretion by ordering the defendant to pay child support in the amount of $225 per week, or $975 per month; it having been undisputed that the parties in the present case shared custody of their child, the defendant was not entitled to modified child support in an amount calculated according to the formula applicable to a split custody arrangement, and although the parties had a shared custody agreement in which they each have custody of their child 50 percent of the time, evidence was presented from which the court could have found that the parties do not spend equal amounts of money to support their child, and, therefore, the record did not support the defendant's contention that the parties spend equal amounts of money to support their child, or his claim that they testified as such at the hearing.

Argued January 8—officially released April 9, 2019

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Hon. Stanley Novack*, judge trial referee; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Heller*, *J.*, granted the defendant's motion for modification of child support and denied the plaintiff's motion for contempt, and the defendant appealed to this court. *Affirmed.*

Thomas J. Cyganovich, self-represented, the appellant (defendant).

Kate B. Cyganovich, self-represented, the appellee (plaintiff).

Opinion

ALVORD, J. In this postdissolution matter, the defendant, Thomas J. Cyganovich, appeals from the judgment of the trial court resolving several of the parties' postjudgment motions. On appeal, the defendant claims that the court improperly calculated his modified child support obligation.[1] We affirm the judgment of the trial court.

The record reveals the following undisputed facts and procedural history. The defendant married the plaintiff, Kate B. Cyganovich, on December 30, 2008. During the marriage, the parties had one child together. On June 13, 2016, the plaintiff filed the underlying complaint for

[1] On appeal, the defendant also claims that the court improperly calculated the amount of his 2016 net annual bonus income that he was obligated to pay to the plaintiff pursuant to the parties' separation agreement. Specifically, he argues that the court "holds the defendant responsible to pay the amount of $2813.93 which has no supporting documentation regarding the calculation and does not equate to 15% of the net bonus of $11,823. The correct calculation is $1773."

On February 5, 2019, after oral argument before this court, we ordered the trial court, pursuant to Practice Book § 60-2 (8), to resolve this factual issue. The trial court held a hearing on February 19, 2019, during which it heard testimony from each party and reviewed exhibits that were admitted into evidence. In its decision, issued on February 20, 2019, the court vacated the portion of its March 5, 2018 memorandum of decision in which it stated that the defendant owed $2813.93 to the plaintiff as 15 percent of his 2016 net annual bonus income, "because the amount found to be owed is not correct." The court determined that "the defendant's net annual bonus for 2016 was $11,823. The defendant owed 15 percent of his net annual bonus to the plaintiff, in the amount of $1773."

Because the defendant claims on appeal that "[t]he correct calculation [of 15 percent of his 2016 net annual bonus income] is $1773," the same conclusion reached by the trial court in its February 20, 2019 decision, the defendant's claim has been rendered moot. See *In re Emma F.*, 315 Conn. 414, 423–24, 107 A.3d 947 (2015) ("An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot." [Internal quotation marks omitted.]).

dissolution of marriage. On June 30, 2016,[2] the court rendered judgment dissolving the parties' marriage.

The judgment of dissolution incorporated by reference the terms of a separation agreement, which was dated June 22, 2016, and had been filed with the court on June 23, 2016. Under the terms of the separation agreement, the defendant was obligated to pay to the plaintiff $1291 per month, or $298 per week, in child support. In addition, the separation agreement provided for a shared custody arrangement with respect to the parties' child.[3]

In September, 2017, pursuant to the terms of the separation agreement,[4] the plaintiff informed the defendant that her income had increased. At the time the dissolution judgment was rendered, the plaintiff's net weekly income had been $674. Because she had changed employment, the plaintiff's net weekly income had increased to $1000.

On September 14, 2017, the defendant filed a motion for modification, postjudgment, in which he sought a reduction in the amount of child support that he is obligated to pay, due to a substantial change in the financial circumstances of the parties. On September 27, 2017, the plaintiff filed a motion for modification, postjudgment, to modify the terms of the dissolution judgment with respect to the allocation of the health insurance premiums paid by the parties for their minor child.

[2] The parties had filed a motion to waive the statutory time period pursuant to General Statutes § 46b-67 (a), on the ground that the parties had reached an agreement as to all of the terms of their divorce, which the court granted on June 27, 2016.

[3] The child lives with each parent fourteen days in a twenty-eight day cycle, or 50 percent of the time.

[4] The separation agreement provides in relevant part: "[E]ach parent shall inform the other parent of any change in his or her income of 15 [percent] or more by the end of the month in which such change in income occurs."

Prior to the parties' hearing on the postjudgment motions, a family relations officer prepared a child support guidelines worksheet for the parties. According to the worksheet, the family relations officer concluded that the presumptive child support obligation was $424 per week, of which the plaintiff's share was 37 percent, or $157 per week, and the defendant's share was 63 percent, or $267 per week. In addition, on the first page of the worksheet, the family relations officer provided a handwritten notation: "Split custody $110."

On November 6, 2017, the trial court, *Heller*, *J.*, held a hearing on the parties' postjudgment motions. In addition to arguing that the child support order should be modified due to a substantial change in the parties' financial circumstances, the defendant urged the court to deviate from the presumptive support amount because of the parties' shared custody arrangement.

The defendant also alerted the court to the family relations officer's calculation. He explained that the family relations officer "took [his] obligation and subtracted [the plaintiff]'s obligation amount so the [$110] was the difference from what [his] obligation would be minus hers." The court noted that it would look at the family relations officer's analysis.

In its memorandum of decision issued on March 5, 2018, the court granted the defendant's motion for modification and denied the plaintiff's motion for modification.[5] In granting the defendant's motion for modification, the court ordered the defendant to pay child

[5] With respect to the plaintiff's motion for modification, the court found that "the plaintiff has not sustained her burden of proving that a modification of the allocation of [the child]'s health insurance premiums is warranted as a result of the substantial change in the financial circumstances of the parties." It reasoned: "The defendant's financial affidavit reports that he pays $128 per week, for health insurance for himself and [the child]; however, the cost of [the child]'s health insurance is not separately stated. Without this information, the court is unable to determine the cost to each party of his or her share of [the child]'s health insurance premiums, and whether,

support in the amount of $225 per week, or $975 per month, a decrease of $316 per month. The court found that the defendant had met his burden of proving that there had been a substantial change in the financial circumstances of the parties since the rendering of the dissolution judgment. The court determined that, since the dissolution judgment, the plaintiff's net weekly income had increased by 50 percent and her weekly expenses had decreased by more than $500. In addition, the defendant's net weekly income had increased more modestly, but his weekly expenses had increased by almost $350. The court therefore concluded that modification of the child support order was warranted.

The court recalculated the parties' presumptive weekly child support obligations. According to the court's calculation, the parties' presumptive weekly child support obligation is $425, of which the plaintiff is responsible for 38 percent, or $161 per week, and the defendant is responsible for 62 percent, or $264 per week. The court further noted that the defendant's monthly child support obligation under the guidelines would be $1144 per month, absent a deviation.

The court found the presumptive support amount to be inequitable in light of the parties' shared custody arrangement and, therefore, concluded that a deviation was warranted. In deviating from the presumptive support amount, the court ordered the defendant to pay child support in the amount of $225 per week, or $975 per month, which represented a 14.77 percent downward deviation. This appeal followed.

On appeal, the defendant claims that the trial court improperly calculated his child support obligation when it granted his motion for modification, postjudgment. Specifically, he claims that the modified child support

as the plaintiff contends, her share is unduly burdensome." The plaintiff has not appealed from this judgment.

order "is not supported by the child support guidelines, financial affidavits and testimony in this case." We disagree.

We begin by setting forth the standard of review and legal principles that guide our analysis of the defendant's claim. "An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Trial courts have broad discretion in deciding motions for modification. . . . [T]o the extent that the trial court has made findings of fact, our review is limited to deciding whether those findings were clearly erroneous." (Citation omitted; internal quotation marks omitted.) *Robinson* v. *Robinson*, 172 Conn. App. 393, 399–400, 160 A.3d 376, cert. denied, 326 Conn. 921, 169 A.3d 233 (2017).

The defendant claims that the court improperly calculated his modified child support obligation. He first argues that because the parties have shared custody of their child, "the calculation for 50/50 shared custody is done by subtracting the parent with the higher income's obligation with the obligation of the parent with the lower income, therefore, the difference between the two would be the obligation of the parent with the higher income." The defendant argues that, using this formula, which had been provided to him by the family relations officer, his modified child support obligation should be $103 per week.

The formula set forth by the defendant, however, applies to cases involving *split* custody, not *shared*

custody.[6] Defined in the regulations, "[s]hared physical custody means a situation in which the physical residence of the child is shared by the parents in a manner that ensures the child has substantially equal time and contact with both parents. . . . Split custody means a situation in which there is more than one child in common and each parent is the custodial parent of at least one of the children." (Internal quotation marks omitted.) Regs., Conn. State Agencies §§ 46b-215a-1 (23), (24).

With respect to calculating child support in a shared physical custody situation, the regulations provide in relevant part: "[T]he presumptive current support order shall equal the presumptive current support amount of the parent with the higher net weekly income, payable to the parent with the lower net weekly income." Regs., Conn. State Agencies § 46b-215a-2c (7) (B). The regulations further provide that, with respect to split custody, child support is calculated in a different manner, reflecting that the parents share more than one child together. See Regs., Conn. State Agencies § 46b-215a-2c (7) (A). It is undisputed that the parties in the present case have *shared* custody of their child. Therefore, the defendant is not entitled to modified child support in an amount calculated according to the split custody formula.

Moreover, the defendant argues that the modified child support order "is not supported by the child support guidelines, financial affidavits and testimony in this case" because the parties have shared custody and they spend an equal amount of money to support the child. The defendant argues that at the November 6, 2017 hearing on the parties' motions, both he and the

[6] The court, in its memorandum of decision, recognized this distinction. It noted that "[h]andwritten notations on the child support guidelines worksheet reflect a split custody analysis, which is not at issue in this case."

plaintiff testified that they spend an equal amount of money to support their child.

We first note that the court's decisions to modify the child support order and deviate from the presumptive support amount are both discretionary in nature. See General Statutes § 46b-86 (a) ("any final order for the periodic payment of permanent alimony or support . . . *may*, at any time thereafter, be . . . modified by the court upon a showing of a substantial change in the circumstances of either party" [emphasis added]); Regs., Conn. State Agencies § 46b-215a-5c (b) (6) (A) ("[w]hen a shared physical custody arrangement exists, it *may* be appropriate to deviate from presumptive support amounts" [emphasis added]).

Moreover, despite the parties' shared custody arrangement in which they each have custody of their child 50 percent of the time, evidence was presented from which the court could find that the parties do not spend equal amounts of money to support their child. At the hearing on the parties' motions, the plaintiff testified that she purchases all of the clothes for the parties' child.[7] When asked whether she and the defendant spend equal amounts of money on their child, the plaintiff stated that "all of the clothes generally go to me . . . . But I think with toys and little things like that, going out to eat, I think, we equally, you know, treat [the child]."[8] The defendant responded that he agreed with the plaintiff's statement. Accordingly, the

[7] We also note that the court, in denying the plaintiff's motion for modification of her contribution for the cost of the child's insurance, recognized that the presentation of the motion was incomplete, in that on the defendant's financial affidavit, the cost of the child's health insurance premium is not separately stated from the cost of the defendant's health insurance premium. See footnote 5 of this opinion.

[8] The plaintiff explained: "I definitely do a big seasonal shop at the beginning of the season, so I bought all her winter stuff, new boots, jackets, snow stuff, and I'm buying, you know, whatever I go out if there's a sale I'll get her clothes, I just bought her a dress yesterday."

record does not support the defendant's contention that the parties spend equal amounts of money to support their child, or that they testified as such at the hearing.

For the foregoing reasons, we conclude that the court did not abuse its discretion by ordering the defendant to pay child support in the amount of $225 per week, or $975 per month.

The judgment is affirmed.

In this opinion the other judges concurred.

MICHELLE WILLIAMS *v.* STATE OF CONNECTICUT (AC 40294)

Prescott, Bright and Bishop, Js.

Syllabus

The plaintiff sought to recover damages from the defendant state of Connecticut for personal injuries she sustained as a result of an accident involving a motor vehicle owned and insured by the defendant. At the time of the accident, an employee of the Department of Transportation, L, was operating a department maintenance truck on the highway as part of a crew performing pothole repair work. The plaintiff was cresting a hill when the vehicle in front of her swerved to avoid colliding with the truck operated by L, who at the time was following another state vehicle that was performing the actual repairs. Thereafter, the plaintiff likewise swerved to avoid the truck operated by L, but instead hit a guardrail, became airborne, and then struck L's truck. The plaintiff claimed that her injuries were caused by the negligence of L and that the defendant was liable pursuant to the statute (§ 52-556) that permits an action against the state for injuries caused by the negligence of any state employee when operating a motor vehicle owned and insured by the state. In her complaint, the plaintiff alleged that L was negligent in a number of ways, including, inter alia, by failing to provide adequate warning signs to alert drivers of the presence of the department trucks on the highway, and failing to follow department rules, procedures and policies for operating the vehicle, diverting traffic and providing warning signs. Subsequently, the defendant filed a special defense asserting that the plaintiff's alleged injuries were proximately caused by her own negligence. Following a trial to the court, the court rendered judgment in favor of the defendant, from which the plaintiff appealed to this court. *Held*:

1. The plaintiff could not prevail on her claim that the trial court, in making its ruling, framed the issue of the case too narrowly and improperly failed to consider all of the instances of L's negligence alleged in the complaint; although the trial court's memorandum of decision focused almost entirely on whether warning signs had been in place at the time of the accident, the record was devoid of anything to support the plaintiff's assertion that the trial court failed to consider the forms of L's negligence alleged in the complaint that were not dependent on the presence of warning signs, as the court's overall conclusion that the plaintiff had failed to satisfy her burden of proving that her injuries were more likely than not caused by L's negligence, which largely was based on its credibility determinations of the witnesses, was not expressly limited to those instances of negligence alleged in the complaint that asserted a lack of warning signs, and reflected the trial court's general determination that the defendant's version of the facts surrounding the accident was more credible than that presented by the plaintiff, and to the extent that the court's memorandum of decision was ambiguous, the plaintiff failed to seek clarification or ask for reargument, and, in the absence of any evidence to the contrary, this court presumed that the trial court disposed of the matter properly.
2. This court declined to review the plaintiff's claim that the trial court improperly failed to consider certain statutes, regulations, and highway safety standards, the plaintiff having failed to preserve the claim for appellate review by raising it before the trial court: contrary to the plaintiff's contention that she had properly preserved this issue by alleging in her complaint that L had failed to follow department rules, policies and procedures, neither the plaintiff's complaint nor her posttrial brief cited to any particular statute or regulation with which L purportedly failed to comply, and although the plaintiff made passing reference to a certain statute (§ 14-298) and state regulation (§ 14-298-800) during a pretrial colloquy with the court, she did not offer any evidence or testimony pertaining to any particular statute or regulation during trial; moreover, although the plaintiff initially had sought, over the defendant's objection, to premark as exhibits certain excerpts of certain highway safety standards, of which the trial court could not take judicial notice, the trial court deferred ruling on that request, and the plaintiff did not seek to introduce those excerpts into evidence at trial, did not question any witness regarding those standards, and failed to refer to those standards in her posttrial brief.

Argued November 27, 2018—officially released April 9, 2019

Procedural History

Action to recover damages for the defendant's alleged negligence, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Elgo*, *J.*; judgment for the defendant, from which the plaintiff appealed to this court. *Affirmed.*

Austin Berescik-Johns, with whom was *David V. DeRosa*, for the appellant (plaintiff).

Edward P. Brady, with whom, on the brief, was *Catherine M. Blair*, for the appellee (defendant).

Opinion

PRESCOTT, J. The plaintiff, Michelle Williams, appeals, following a bench trial, from the judgment rendered on her complaint in favor of the defendant, the State of Connecticut. In her one count complaint, the plaintiff sought monetary damages for personal injuries she had sustained as a result of the alleged negligence of an employee of the Department of Transportation (department) while operating a state owned vehicle. See General Statutes § 52-556.[1] On appeal, the plaintiff claims that the trial court improperly (1) failed to consider all of the specifications of negligence that she alleged in her complaint and (2) failed to consider applicable statutes and highway safety regulations governing the actions of the department. We disagree with the plaintiff's first claim and conclude that the second claim was not preserved for appellate review. Accordingly, we affirm the judgment of the court.

The following facts found by the court and procedural history are relevant to our resolution of the plaintiff's appeal. "On January 24, 2012, around 10:40 a.m., the plaintiff was driving north on Route 15 near exit 38 [in Norwalk]. As she crested near the top of a hill, following one car length behind the vehicle ahead of her in the left lane, the vehicle before her swerved to avoid colliding with a [department] crash unit maintenance truck

[1] General Statutes § 52-556 provides: "Any person injured in person or property through the negligence of any state official or employee when operating a motor vehicle owned and insured by the state against personal injuries or property damage shall have a right of action against the state to recover damages for such injury."

driven by [department employee Terrence] Lynch, which was . . . traveling slowly in the . . . left-hand lane. Lynch had been part of a crew of [department] workers who were performing pothole repair work on the highway and was the second of two crash units following the vehicle doing the actual repairs. John McNamara, a witness to the accident, was traveling southbound on the right-hand lane of Route 15 and ascending the crest from the other direction when he saw the collision. He observed [the] plaintiff's car swerve to avoid hitting Lynch's truck, then hit the guardrail and [become] airborne, spinning 180 degrees when it landed and struck Lynch's truck. Trooper Carlo Marandola arrived at the scene and noted damage to the respective vehicles as well as 170 feet of tire marks, which were made by the plaintiff's vehicle."

The plaintiff commenced the underlying negligence action on January 6, 2014. She alleged that she had sustained serious personal injuries, some permanent in nature, as a result of the January 24, 2012 incident, and that the direct and proximate cause of her injuries was the negligence and carelessness of Lynch, who was a state employee operating a motor vehicle owned and insured by the state. The plaintiff alleged that Lynch was negligent in one or more of the following ways:

"a. he made unsafe movements upon the highway incidental to the operation of a state owned motor vehicle;

"b. he caused [the] defendant's vehicle to obstruct moving traffic on the highway making it unsafe for other motorists;

"c. he failed to follow established safety procedures and/or standards for diverting traffic on a highway while operating a state owned motor vehicle;

"d. he failed to take reasonable efforts to warn motorists of the presence of [the] defendant's vehicle in the travel portion of the highway;

"e. he was inattentive and failed to keep a proper lookout for other approaching motor vehicles on the highway;

"f. he unreasonably entered the left bound travel lane from the highway shoulder and/or median grass area where such movement could not be done with reasonable safety;

"g. he failed to follow [department] rules, policy or procedures in that a [department] truck was in the highway without adequate flagman and/or signs to warn of its presence;

"h. he failed to provide adequate signs or warnings to properly alert drivers of the presence of the [department] truck;

"i. he operated the [department] truck at a low rate of speed in the fast travel lane in an area over a hill crest without adequate warning to alert drivers coming over the hill crest creating a hazardous situation;

"j. he failed to keep the [department] truck under proper and reasonable control; and

"k. he positioned the [department] truck in a dangerous location on the highway."

The defendant filed an answer denying all of the allegations of negligence and asserting a special defense of comparative negligence. The plaintiff submitted a reply denying all allegations in the special defense.

The matter was tried to the court, *Elgo*, *J.*, on August 10, 2016. The court heard testimony from McNamara, Marandola, Lynch, and the plaintiff. After the parties

submitted posttrial briefs, the court issued its memorandum of decision finding in favor of the defendant on the plaintiff's complaint.

In its memorandum of decision, the court discussed in detail one primary issue in dispute, namely, whether the department had placed warning signs on the highway and on the maintenance truck operated by Lynch in order to alert oncoming traffic of the road repair. The court credited the testimony of Lynch that warning signs were present. The court also credited photographic evidence showing that Lynch's truck had an illuminated arrow redirecting traffic around the maintenance vehicles. The court did not credit the testimony of the plaintiff and McNamara that there had been no signs warning of the road maintenance on either the highway or on the defendant's vehicle. The court observed that the accident had occurred on the northbound side of the parkway and that McNamara had been driving on the opposite, southbound side and had exited the parkway prior to where any warning signs would have been posted. The court found that "it was far more likely that McNamara saw the dramatic accident in the seconds it took to pass by it, then got off the highway and called 911 with little ability or occasion to see or identify construction signs meant for northbound traffic." The court further noted the plaintiff's admission that she had been driving one car length behind a sports utility vehicle (SUV) with dark tinted windows, which prevented her from seeing the traffic in front of the SUV, meaning that it was more likely than not that she would have been unable to observe the warning signs.

The court did not individually discuss each of the plaintiff's separate specifications of negligence as set forth in the complaint, but generally concluded that the plaintiff had failed to satisfy her burden of proof. Specifically, the court concluded: "In a civil case, the

plaintiff has the burden of proof by a preponderance of the evidence. . . . In order to satisfy her burden, the plaintiff must demonstrate that the defendant was, more likely than not, negligent *in one or more ways alleged in her complaint*. . . . This court, however, cannot find the plaintiff's version of the accident more credible than the defendant's version of the facts. Because this court simply cannot resolve the disputed *issues* in favor of the plaintiff, it enters a verdict in favor of the defendant." (Citations omitted; emphasis added.) This appeal followed.

I

The plaintiff claims that the court too narrowly framed the issue of the case, which resulted in an incomplete ruling that failed to consider all specifications of negligence alleged in the complaint. More specifically, the plaintiff argues that the court's written memorandum of decision focuses almost exclusively on the contested issue regarding whether warning signs were in place at the time of the accident. According to the plaintiff, however, she had alleged other specifications of negligence in her complaint the proof of which were not dependent on the presence of warning signs. The defendant responds that the plain language of the court's decision indicates that it considered all of the plaintiff's claims of negligence and simply concluded that the plaintiff had failed to meet her burden of proof with respect to *all* disputed issues of negligence, not just whether adequate warning signs existed in the vicinity of the crash. On the basis of the record presented, we agree with the defendant.

Whether the court considered and decided all of the plaintiff's specifications of negligence requires us to construe the court's judgment as set forth in its memorandum of decision. "Because [t]he construction of a judgment is a question of law for the court . . . our

review . . . is plenary." (Citation omitted; internal quotation marks omitted.) *Chapman Lumber, Inc.* v. *Tager*, 288 Conn. 69, 91, 952 A.2d 1 (2008). "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.* . . . The interpretation of a judgment may involve the circumstances surrounding the making 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." (Emphasis added; internal quotation marks omitted.) Id., 91–92. "In Connecticut, our appellate courts do not presume error on the part of the trial court. . . . Rather, the burden rests with the appellant to demonstrate reversible error." (Internal quotation marks omitted.) *Pettiford* v. *State*, 179 Conn. App. 246, 260–61, 178 A.3d 1126, cert. denied, 328 Conn. 919, 180 A.3d 964 (2018).

Here, there is nothing in the record before us that supports the plaintiff's assertion that the trial court, in finding in favor of the defendant, failed to consider all of the specifications of negligence alleged in the complaint. Although the plaintiff is correct that the majority of the court's analysis focused on resolving the dispute over whether warning signs were present at the time of the accident, we also must look to the remainder of the court's decision, including the court's overall conclusion.

The court clearly indicated that the plaintiff was entitled to prevail if she demonstrated negligence "in one or more ways alleged in her complaint." This suggests that the court understood its duty to consider all aspects of the plaintiff's negligence claim. The trial court also concluded, largely on the basis of its determination

regarding the credibility of the witnesses, that the evidence presented by the plaintiff was insufficient to sustain her burden of convincing the court that her injuries were more likely than not caused by the negligence of the defendant. This court will not revisit credibility determinations on appeal; see *Somers* v. *Chan*, 110 Conn. App. 511, 530, 955 A.2d 667 (2008); nor can we substitute our own conclusion regarding the weight of the evidence for that of the fact finder. See *Kaplan* v. *Kaplan*, 186 Conn. 387, 391, 441 A.2d 629 (1982). The court's overall conclusion that the plaintiff had failed to satisfy her burden of proving negligence on the part of the defendant was in no way expressly limited only to those specifications of negligence that relied on allegations regarding a lack of warning signage. Rather, the court concluded more generally that it found the defendant's version of the facts surrounding the accident more credible than that presented by the plaintiff. That conclusion reasonably may be viewed as pertaining not only to the allegations of negligence related to the existence of warning signs but also to other specifications of negligence, including that Lynch had been operating his vehicle in an unreasonable fashion or had failed to keep a proper lookout for approaching traffic.

Reading the memorandum of decision as a whole, we simply are not persuaded that the court either too narrowly framed the issues presented by the parties or that it failed to consider all forms of negligence alleged by the plaintiff in her complaint. To the extent that the court's memorandum of decision is ambiguous, the plaintiff failed to seek clarification or ask for reargument, and, in the absence of any evidence to the contrary, we will presume that the court disposed of the matter properly. Because the plaintiff has failed to demonstrate that the court's judgment in favor of the defendant was legally incomplete, we reject the plaintiff's claim.

II

The plaintiff also claims that, in reaching its decision, the court improperly failed to consider applicable statutes, highway safety regulations, and standards governing the actions of the department. Specifically, the plaintiff claims that she "alleged in her complaint, and at trial before the court, that the defendant's actions prior to the . . . collision violated applicable Connecticut statutes, regulations, and safety procedures," and that she "presented evidence at trial to prove this claim." The defendant argues that the safety regulations and statutes relied on by the plaintiff in support of this claim on appeal were never pleaded or offered into evidence at trial and, therefore, this claim is not properly preserved for appellate review. Again, we agree with the defendant.

The following procedural history is relevant to our disposition of this claim. At the start of the trial, the court asked the parties whether there was anything preliminarily that the court needed to address. The plaintiff indicated that "[w]e have some regulations, Your Honor, that we have to talk about." The plaintiff explained: "So [General Statutes §] 14-298, Office of State Traffic Administration statute empowers . . . the Department of Transportation to prepare or to—to adopt regulations. And then there's § 14-298-800 [of the Regulations of Connecticut State Agencies] . . . .[2] [It

[2] Section 14-298-900 of the Regulations of Connecticut State Agencies provides in relevant part: "(a) All temporary traffic control devices used on road or street construction, maintenance work, or for incident management, shall be of the type approved by the Office of the State Traffic Administration and shall be in compliance with the provisions set forth in 23 CFR 655.603.

"(b) Such devices shall conform to the standards set forth in the following publications as applicable, except as provided otherwise in sections 14-298-500 to 14-298-900, inclusive, of the Regulations of Connecticut State Agencies:

"(1) The 2009 edition of the 'Manual on Uniform Traffic Control Devices for Streets and Highways' (MUTCD) approved by the Federal Highway Administration . . . ."

is] a Manual on Uniform Traffic Control [Devices] [MUTCD], 2009 edition. I have excerpts that I'm going to use from that edition. I brought the whole 2009 edition in with me today if counsel wanted to look at it, but I have excerpts. It deals with a mobile operation on a multilane road diagram that is one of their standard[s] and then some signs and I just wanted the court to take judicial notice of that." (Footnote added.)

The defendant objected, arguing as follows: "Preliminarily, counsel wants to introduce as a full exhibit, statutes. I think Your Honor—if a statute is relevant, Your Honor . . . has the ability, obviously, to review it and address it as necessary. So I don't think a statute has to be marked as a full exhibit, number one. Secondarily, Your Honor, there are certain regulations that I believe counsel wants to mark as full exhibits. Again, same—my position is the same on that. And, further, the relevancy of certain regulations may or may not come into issue. So until there is a foundation laid for the proper admissibility of a particular regulation, I object to it being premarked as a full exhibit. . . . And then last, Your Honor, as counsel referenced, there are certain exhibits I believe counsel wants to offer from the [MUTCD]. It's an engineering manual that engineers use in, my understanding is, designing and building of roads, highways, et cetera, and I would submit, Your Honor, that all that is not admissible on several grounds. One is no foundation. Number two, there has been no disclosure of any expert witness by the plaintiff in this matter relative to this particular issue, engineering standards, for anything having to do with liability for that matter."

The court agreed with the defendant that it was not necessary for copies of Connecticut statutes and regulations to be marked into evidence, as these may be judicially noticed by the court. See, e.g., General Statutes § 52-163. The court initially indicated that it was inclined

to agree with the defendant that the plaintiff needed to lay some foundation for admitting the MUTCD into evidence. The plaintiff responded that she did not believe an expert was necessary but that she had a witness through whom she would seek to admit the MUTCD. The court stated: "All right. Why don't we wait until then? All right? And then we'll find out what kind of foundation you lay and we can take a look at it then."

In support of her claim that the court failed to properly consider applicable statutes, regulations, and the MUTCD, and in responding to the defendant's argument that this claim was not raised to the trial court and thus not properly preserved for appellate review, the plaintiff directs us to paragraphs (c) and (g) of her specifications of negligence. Those paragraphs alleged that Lynch had "failed to follow established safety procedures and/or standards for diverting traffic on a highway while operating a state owned motor vehicle" and "failed to follow [department] rules, policy or procedures in that a [department] truck was in the highway without adequate flagman and/or signs to warn of its presence." On the basis of the record before us, however, we are not convinced that the plaintiff properly preserved for appellate review her claim that the court improperly failed to consider relevant state statutes, regulations or the MUTCD.

First, with respect to the court's alleged failure to consider relevant statutes, the plaintiff alleged in her complaint that Lynch failed to follow department rules and policies, as well as safety procedures or standards, but she never alleged a violation of any particular state statute. On appeal, the plaintiff identifies General Statutes § 14-298 as the statute that the court failed to consider. That statute, however, was not cited in the complaint or referred to in the plaintiff's posttrial brief. Furthermore, although the plaintiff mentioned § 14-298 in a pretrial colloquy with the court, she did so only to

indicate that § 14-298 was the statutory basis for the promulgation of a department regulation adopting the MUTCD.

With respect to highway safety regulations, we first note that none of the specifications of negligence, including those specifically relied on by the plaintiff, alleges a failure to comply with any particular regulation, or even contain the word "regulation." Second, although the plaintiff made brief reference to § 14-298-800 of the Regulations of Connecticut State Agencies in a pretrial colloquy regarding the marking of exhibits, the plaintiff made no further mention of § 14-298-800 or any other regulation in her presentation of evidence. After both sides rested, the court asked the parties whether they would like to submit posttrial briefs. The court indicated that posttrial briefs "might be helpful, especially if you're going to be citing regulations . . . that you might think are relevant." Counsel for the defendant responded: "Well, Your Honor, I have some concern, based upon what you just commented, about the briefs mentioning . . . regulations. There's no regulations that have come into evidence; there's been no regulations mentioned on the record. Clearly, I think counsel can argue statutes because that's been pled. . . . The complaint does not contain any allegations of any violation of any regulations, so I'm just a little concerned . . . in that regard." The plaintiff made no references to any regulations in her posttrial brief.

Finally, as to the MUTCD, although the plaintiff sought the court's permission prior to trial to premark, presumably as full exhibits, excerpts taken from the MUTCD, the defendant objected, arguing that some foundation would need to be laid as to their admissibility, and that an expert witness might be necessary for that purpose given the technical nature of the MUTCD. The court deferred ruling on the admissibility of the MUTCD, indicating it would do so if the plaintiff sought

to admit the excerpts at trial. The plaintiff, however, never sought to introduce the MUTCD or excerpts into evidence during trial, nor did she question any witness about the MUTCD. Even if the trial court had taken judicial notice of § 14-298-800, that regulation only refers to the MUTCD. It does not contain the contents of the manual, of which the court could not take judicial notice. The plaintiff did not refer to the MUTCD in her posttrial brief.

"Our appellate courts, as a general practice, will not review claims made for the first time on appeal. We repeatedly have held that [a] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one . . . . [A]n appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level. . . . [B]ecause our review is limited to matters in the record, we [also] will not address issues not decided by the trial court. . . . The requirement that [a] claim be raised distinctly means that it must be so stated as to bring to the attention of the court the precise matter on which its decision is being asked." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *White* v. *Mazda Motor of America, Inc.*, 313 Conn. 610, 619–20, 99 A.3d 1079 (2014).

Having thoroughly reviewed the pleadings, the trial transcript, and the parties' posttrial briefs, we conclude that the plaintiff's claim that the court failed to consider relevant statutes, department regulations, and the MUTCD is not preserved for appellate review because the plaintiff's arguments never properly were raised to or considered by the trial court. There were no references to any particular statute, regulation, or the MUTCD in the plaintiff's complaint. Although the court indicated its willingness to consider the relevance of the MUTCD at the time of trial, the plaintiff never sought to admit the manual or excerpts from it into

evidence and did not offer testimony pertaining to any particular statute, regulation or the MUTCD during trial. Furthermore, the plaintiff made no reference to regulations or to the MUTCD in her posttrial brief. We cannot review the court's purported failure to consider arguments that were never properly before it. Accordingly, we decline to entertain the plaintiff's claim.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ANGELA C. GRASSO (AC 41167)

Sheldon, Keller and Moll, Js.

Syllabus

Convicted of the crime of manslaughter in the first degree with a firearm, the defendant appealed, claiming, inter alia, that the state failed to disprove beyond a reasonable doubt that she acted in self-defense, pursuant to statute (§ 53a-19), when she shot the victim while he was driving the vehicle in which they were riding. The defendant, an employee of a bail bonds company, was romantically involved with the victim, and helped him financially by paying for rental automobiles when his vehicle needed repairs, and by giving him money to pay bills, rent and car repair expenses. On the day before the shooting, the victim accused the defendant of wanting to have sexual relations with his sister, and became violently angry and threatened the defendant's life. The next day, he sent the defendant text messages in which he repeatedly threatened to kill her and made statements to her that he would kill members of her family. He accused her of cheating on him and suggested that he had contracted a sexually transmitted disease from her. He repeatedly demanded money from the defendant and suggested that he would retaliate against her by exposing negative information that she had shared with him about the bail bonds company, which would jeopardize her employment there. The defendant thereafter visited a friend, Q, who knew the victim, and asked Q to intervene on her behalf because the victim was threatening her. During the defendant's conversation with Q, the victim called the defendant's cell phone, screamed that he was going to kill her and stated that he had guns everywhere. After the victim demanded that the defendant meet him to give him money, the defendant drove to a bank but did not transact any business there, and she told the victim that she could not get any money because the bank

was closed. After the victim drove to the bank and spoke to the defendant, she parked her car at a nearby restaurant and got into the victim's vehicle. The victim drove them to a medical clinic to be tested for sexually transmitted diseases, but a security guard informed them that the clinic was closed. Thereafter, the victim and the defendant left, with the victim driving. As they approached a restaurant, the victim took his attention away from the defendant, who retrieved a handgun from her purse and shot the victim. The defendant later told the police that she shot the victim because he had told her that he was going to drive to her home, kill her family members in her presence and then kill her. She claimed that shooting the defendant in the car was her last chance to stop him from killing her and her family. *Held*:

1. The state demonstrated beyond a reasonable doubt that the defendant did not use deadly physical force in self-defense and that, at the time of the shooting, the victim's use of deadly physical force was not imminent, the evidence having supported a finding that the defendant did not subjectively believe that the victim was about to use deadly physical force against her or that her use of deadly physical force was necessary to protect her physical well-being: it was reasonable for the jury to find that the defendant shot the victim to prevent him from continuing to blackmail her or harming her employment at the bail bonds company, as their text messages in the hours prior to the shooting reflected her recognition of the seriousness of the victim's threats to reveal information about the bail bonds company that could harm her employment, she labeled the victim a snitch who had betrayed her trust, she expressed deep concern about her ability to continue to care for herself and her children financially in light of the victim's threats, she told her former boyfriend that she would be dead or in jail soon, she made clear to the victim that she would have nothing to live for if he took away her way to work, and she expressed thoughts about her mortality when she told the victim that her children would be able to collect extra life insurance money if she died a tragic death; moreover, it was undisputed that the defendant voluntarily got into the victim's automobile prior to the shooting, she failed to use her cell phone to summon assistance during the lengthy period of time in which she was with the victim prior to the shooting, the state presented evidence that tended to undermine her version of the events at issue concerning her meeting with Q and her failure to withdraw money from the bank, and the evidence supported a finding that the defendant's use of deadly physical force was premature, as it was reasonable for the jury to conclude that, at the time of the shooting, the victim's threat to shoot her and members of her family reflected his intent to use deadly physical force at a future time, the defendant's claim was premised on a definition of imminent that she did not advance in her written request to charge and that was not provided to the jury, there was no evidence that the victim was using deadly physical force against her when she shot him, the shooting

occurred in a location that was not in close proximity to the defendant's residence, and she acknowledged that she did not know if the victim was in possession of a gun that day.

2. The defendant could not prevail on her unpreserved claim that her rights to due process and to the effective assistance of counsel were violated when the trial court denied the jury's request to rehear the closing arguments of the prosecutor and defense counsel, the defendant having waived that claim when defense counsel failed to object to the court's proposed response to the jury's request and affirmatively stated that he did not object to the court's response.

Argued October 12, 2018—officially released April 9, 2019

Procedural History

Substitute information charging the defendant with the crimes of murder and manslaughter in the first degree with a firearm, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Crawford*, *J.*; verdict and judgment of guilty of manslaughter in the first degree with a firearm, from which the defendant appealed. *Affirmed.*

Alice Osedach, senior assistant public defender, for the appellant (defendant).

Rocco A. Chiarenza, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Vicki Melchiorre*, supervisory assistant state's attorney, for the appellee (state).

Opinion

KELLER, J. The defendant, Angela C. Grasso, appeals from the judgment of conviction, rendered following a jury trial, of manslaughter in the first degree with a firearm in violation of General Statutes § 53a-55a.[1] The defendant claims that (1) the state failed to disprove beyond a reasonable doubt that she had acted in self-defense and (2) the trial court violated her rights to

[1] The court imposed a sentence of twenty-five years of incarceration, which included a five year mandatory minimum sentence. The jury found the defendant not guilty of murder in violation of General Statutes § 53a-54a.

due process and to the effective assistance of counsel by denying the jury's request to rehear the closing arguments of the prosecutor and defense counsel at trial. We affirm the judgment of the trial court.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. One evening in mid-March, 2014, the defendant stopped into a bar in Hartford, where she encountered an acquaintance, the victim, Jose Mendez. She had not spoken with the victim in many years. The defendant and the victim made eye contact, recognized one another, and engaged in light conversation. The victim flirted with the defendant, and he asked her for her telephone number. The defendant declined to give her number to the victim and stated to him that she was not interested in dating anyone. Then, the defendant and the victim parted ways.

At the time of the events underlying this appeal, the defendant had been employed for four years as a bail bondsperson by a bail bonds company. The day after the defendant spoke with the victim at the bar in Hartford, the defendant was in front of a Hartford courthouse distributing business cards for the bail bonds company by which she was employed, when she encountered the victim as he was exiting the courthouse. The victim then told the defendant that he might be in need of her professional services, and the defendant gave him her telephone number. Soon thereafter, the defendant and the victim spoke on the telephone and exchanged text messages. Before long, the victim expressed his romantic interest in the defendant, telling her that he had always had "a crush" on her and that she was "the woman of [his] dreams." On both days of the weekend that followed, the defendant drove to Hartford and spent time alone with the victim.

Thereafter, the defendant and the victim saw each other often. The victim expressed his desire to be in a

romantic relationship with the defendant. In the defendant's words, the victim told her "all of the things that a girl would want to hear . . . ." This included his desire to help support her financially, to live with her, and to marry her. After the first week, their relationship became sexual in nature. The defendant permitted the victim to spend the night with her at her home, but only after her two young children had fallen asleep.

Approximately one week after the relationship began, the victim, who was unemployed, told the defendant that his automobile needed to be repaired. The defendant paid for a rental automobile for the victim to use from March 28 through March 31, 2014. After the victim returned the rented automobile, however, his automobile needed additional repairs. The defendant then paid for a second rental automobile for the victim to use from April 2 through April 9, 2014.[2]

The defendant told the victim that she was not rich and could barely afford to pay her rent. She said that she was "obsessed" with money because, only a few months before she began her relationship with the victim, she was having difficulty obtaining food for herself and her children. Nevertheless, the defendant spent in excess of $500 on automobile rentals for the victim's benefit. In that same time frame, moreover, the defendant gave the victim $1000 after he told her that he needed money with which to pay his bills, rent, and car repair expenses.

During the morning of April 8, 2014, while repairs were being made to a tire on the defendant's automobile, the victim and the defendant visited the victim's sister at her home. Prior to the visit, the victim told the defendant that it would be nice if she befriended his

[2] The rental agreement was executed by the defendant and, pursuant to the rental car company's policies, the victim, who was neither her spouse nor resided with her, was not an authorized driver.

sister. When the visit was over, however, the victim accused the defendant of flirting with his sister and wanting to have sexual relations with her, which the defendant vehemently denied. As the victim drove the defendant from his sister's residence to the repair facility to retrieve her automobile, he became violently angry. He called the defendant a "stupid bitch," threatened her life if she ever touched his sister, and spat in her face. While he was driving on the highway, he tossed her cell phone out of the moving automobile. Soon after she retrieved her automobile, the defendant went to a store and obtained another telephone.

The victim and the defendant spoke again later that day. The victim apologized to the defendant and explained that a prior girlfriend of his had engaged in a sexual relationship with his sister. The defendant visited the victim later that day. In text messages exchanged between the defendant and the victim during the evening hours of April 8, 2014, into the early morning hours of April 9, 2014, both the defendant and the victim questioned their relationship. The victim suggested that the defendant find someone who could "buy and give [her] the world" and think about whether she really wanted to be with him. The defendant expressed her frustration with the way the victim was treating her. She told him that she was upset with him and that her hands were still shaking as a result of his behavior earlier that day. She said that, despite the fact that the victim claimed to love her, he did not really know her and that he was causing her pain. In her text messages to the victim late in the evening on April 8, 2014, the defendant suggested that the victim was welcome to come over to her house. He did not do so.

Shortly after 7 a.m. on April 9, 2014, the victim sent the defendant a text message in which he wished her a good morning. When the defendant did not reply immediately, the victim accused her of being with

another man, told her to enjoy her life, and told her that he would leave the rental automobile in his aunt's driveway. The defendant replied that she had not been with anyone and did not reply immediately to his text message because she was taking a shower. The defendant remarked that the victim was "paranoid." The defendant drove her son to school and ran an errand for work. In numerous telephone calls and text messages throughout the day, the disagreement between the defendant and the victim continued to escalate.

In a series of text messages sent by the victim to the defendant at or about 8:55 a.m., he called the defendant a "nasty bitch . . . ." He threatened to crash the automobile she had rented for him and mockingly observed that his doing so would ruin her credit. The defendant called the victim a "little boy" and warned him not to threaten her.[3] She stated that although she had spent $1500 on him, she had learned his "[true] colors."

Shortly thereafter, the victim sent the defendant another threatening text message, this time suggesting that he was going to disclose sensitive information that would hurt the company for which she worked, thereby jeopardizing her employer, her continued employment, or both. He warned her not to turn to the police for help.[4] In reply, the defendant told him to return the rented automobile.

The victim once again accused the defendant of cheating on him. He suggested that he had contracted a sexually transmitted disease from her and that they should both be tested. The victim once more suggested that he would retaliate against her by exposing negative

[3] After the victim threatened to crash the rental automobile, the defendant wrote: "Get ready 4 the saints gon visit u tnt lol u doNt [k]now me."

[4] In a text message, the victim stated: "Lol if ne cop comes my way or call my phone, don't for get we know where u rest ur head so don't do it to urself bby cause I'll make u lose ur job I have so much against u and that company that it not even funny . . . ."

information that she had shared with him about the bail bonds company for which she worked.[5] In a text message, the defendant attempted to defuse the victim's anger. She replied that he was not thinking clearly, she had never cheated on him, and they should act like adults. The defendant implored the victim to permit her to continue to earn a living.[6]

In text messages that followed, the victim suggested that he was about to disclose damaging information about her employer. He swore that he would "pull up [in] front of the court house and put u down to all the bondsman out there," adding, "try me I have the pictures and texts to back it up . . . ." When the defendant asked what she had done to the victim, he replied by demanding an additional $600 from her.[7]

Despite the victim's repeated threats to reveal detrimental information about the bail bonds company, the defendant did not ask the victim what information he was threatening to reveal or otherwise reflect confusion with respect to his threat. Instead, the defendant referred to the victim as a "snitch," and reminded him that she already had given him both money and a place to stay.[8] The victim assured her that she would not

[5] In text messages, the victim stated: "U did this bby u think u can cheat and me not find lmfao . . . bitches like u just get use and abuse . . . I have pictures of u. I'll exposes u like crazy . . . try me U messing with the wrong one, but remember I know all the dirt u and the company doing u put me on to the wrong shit lmfao . . . ."

[6] In a text message, the defendant stated: "Let me live and ill fall so far back . . . but if u take away my way 2 work ill have nothing 2 live 4 my kids get xtra lifE ins money if its a tragic death . . . ."

[7] In a text message, the victim stated: "I need 600 to get on [my] feet u got me or should I just call my attorney and get this in process cause honesty u know they [dying] to shut [the bail bonds company] down . . . or should I say shut Angela down lmfao . . . . U wanna leave me out here fucked up and broke . . . ."

[8] Rather than question why the defendant would call him a "snitch," the victim appeared to be amused with the label. He replied to the defendant via text message: "Lol snitch huh lmfao another one to add to my fame base . . . ."

leave him stranded without money or an automobile. After the defendant and the victim spoke on the telephone, the victim sent the defendant yet another text message in which he threatened to jeopardize her employment, warning her: "U hang up on me one more time kiss ur job by . . . ." He reiterated his demand for more money, telling her that he needed $600 by noon that day and that he was tired of letting her think that she could take advantage of him.

During the morning of April 9, 2014, the defendant communicated by text messaging with Jose Cotto. Cotto was her former boyfriend and the father of one of her two children. In a text message that the defendant sent to Cotto at 10:19 a.m., after Cotto discussed his desire to provide for his children, she revealed that she was in a predicament that jeopardized her freedom and her ability to parent her children. She wrote: "I will be dead or in jail soon so my dad will hav[e] them [t]hanks . . . ." Cotto replied, "Why?????," but the defendant did not respond.

In a text message sent by the victim to the defendant at 11:22 a.m. that same day, he questioned whether the defendant had called the police, and she replied that she had not done so. The victim, alluding to his statements to reveal information detrimental to the defendant, asked her "how [it's] gonna be" and stated that he was on his way to his attorney's office. By 1:30 p.m., however, the defendant and the victim had agreed to speak with one another in person later that afternoon.

Before the defendant and the victim saw one another during the afternoon of April 9, 2014, the defendant contacted and visited with Maria Quinonez. Although they had not spoken for many years, the defendant and Quinonez knew one another because the defendant and Quinonez' brother had a daughter together. Quinonez also had known the victim for a long time as well. She

was a mother figure in the victim's life and had cared for him when he was younger. The defendant was emotional and frightened when she called Quinonez; she told her that she needed her to intervene on her behalf with the victim because he was threatening her. Quinonez suggested that the defendant should contact the police, but the defendant did not want to do so because she feared that the victim would reveal information to the police that was detrimental to the bail bonds company and in fact could result in the company being "shut down . . . ." At one point during the defendant's conversation with Quinonez, the victim called the defendant's cell phone, and she put the call on speakerphone. The victim was unhappy that the defendant had involved Quinonez in their dispute, told the defendant that he wanted her to "get herself checked out," and screamed that he was going to kill her. Before the defendant ended the conversation by slamming the cell phone shut, however, she replied "that she had guns, too . . . ." After she ended her visit with Quinonez, the defendant went to her place of employment for a short period of time, where she obtained her paycheck. Meanwhile, the victim continued to demand that the defendant meet him to give him money.

Several minutes before 4 p.m., the defendant arrived at a bank located at the intersection of Sisson Avenue and Park Street in Hartford. Although the bank was still open when she arrived, the defendant did not transact any business there. Instead, the defendant waited in her automobile in the parking lot of the bank, called the victim, and told him that she was unable to get the money he had demanded from her because the bank was closed. At approximately 4:39 p.m., the victim arrived at the bank in the rented automobile, and the defendant and the victim spoke to one another through the driver's windows of their respective automobiles. Then, the defendant and the victim drove separately to

a restaurant that was located nearby on Park Street in Hartford. The defendant left her automobile in the restaurant's parking lot and got into the defendant's automobile.

As he had done throughout the day, the victim expressed his anger that he had contracted a sexually transmitted disease from the defendant. He drove the defendant from the restaurant parking lot to a medical clinic, which was located on Coventry Street in the north end of Hartford, to be tested. At approximately 5 p.m., they arrived at the clinic. The defendant and the victim exited the automobile and walked into the lobby of the clinic. There, the victim spoke with a security guard, who informed him that the clinic was closed for the day. The victim used a restroom at the clinic before he and the defendant left the clinic together.

After the victim left the clinic with the defendant, he drove on the highway for a period of time. He accused the defendant of having sexual relations with her former boyfriend, Cotto. In an attempt to prove the truthfulness of his accusation, he ordered the defendant to use her cell phone to call Cotto and to use the speakerphone function so that he could overhear the conversation. The defendant complied with the request. During the defendant's brief conversation with Cotto, the victim instructed the defendant to ask Cotto if he would have sexual relations with her. After Cotto declined the defendant's offer and questioned why it was being made, the victim ended the call.

By 6 p.m., the victim was driving the rental automobile on Prospect Avenue in West Hartford. As he approached a fast food restaurant, he stated to the defendant, who was in the front passenger seat, that he was hungry and wanted to get something to eat. He decreased the speed of the automobile and momentarily took his attention away from the defendant. As he

did so, the defendant reached for her purse, which was on the floor directly behind the passenger seat. The defendant quickly retrieved a handgun from her open purse and shot the victim in his right temple, incapacitating him immediately. The defendant dropped the handgun and grabbed the steering wheel in an attempt to control the automobile, but it crashed into a fence. Once the automobile came to a stop, the defendant frantically exited the vehicle. She was unable to open the passenger side door but climbed out of the automobile through the rear driver's side door.

The defendant called 911 to report that she had shot someone but ended the call before providing the 911 dispatcher with additional information. The police arrived on the scene soon thereafter. Emergency medical personnel treated the victim at the scene of the shooting and transported him to Saint Francis Hospital and Medical Center. The victim died from the gunshot wound shortly after his arrival at the hospital.

After the defendant was transported to West Hartford police headquarters, she submitted to a lengthy videotaped interview, and, in a written statement, memorialized her version of the events surrounding the victim's death. The defendant admitted that she had shot the victim but claimed that she had done so because he had stated that he was going to drive her to her home in Plainville, kill her family members in her presence, and then kill her. Additional facts will be set forth as necessary.

I

First, the defendant argues that the state failed to disprove beyond a reasonable doubt that she had acted in self-defense. We disagree.

Before we consider whether the state satisfied its burden to disprove beyond a reasonable doubt the

defendant's claimed defense, we first must explain the theory of defense that the defendant pursued at trial. See, e.g., *State* v. *Revels*, 313 Conn. 762, 779, 99 A.3d 1130 (2014) (in evaluating whether state has disproven defense beyond reasonable doubt, reviewing court focuses only on theory of defense advanced by defendant during trial), cert. denied, U.S. , 135 S. Ct. 1451, 191 L. Ed. 2d 404 (2015); *State* v. *Cruz*, 75 Conn. App. 500, 508–12, 816 A.2d 683 (2003) (same), aff'd, 269 Conn. 97, 848 A.2d 445 (2004). The defendant's theory of defense is reflected in her written request to charge, in which she asked the court to instruct the jury that it should consider whether her conduct was justified because she acted in defense of herself.[9]

"Under our Penal Code, self-defense, as defined in [General Statutes] § 53a-19 (a) . . . is a defense, rather than an affirmative defense. See General Statutes § 53a-16. Whereas an *affirmative defense* requires the defendant to establish his claim by a preponderance of the evidence, a properly raised *defense* places the burden on the state to disprove the defendant's claim beyond a reasonable doubt. See General Statutes § 53a-12. Consequently, a defendant has no burden of persuasion for a claim of self-defense; he has only a burden of production. That is, he merely is required to introduce sufficient evidence to warrant presenting his claim of self-defense to the jury. . . . Once the defendant has done so, it becomes the state's burden to disprove the defense beyond a reasonable doubt. General Statutes § 53a-12 (a) . . . ." (Citations omitted; emphasis in original; footnotes omitted; internal quotation marks

[9] In her appellate brief, the defendant inaccurately states that she "requested and the court found the evidence sufficient to charge the jury on self-defense *or defense of others*." (Emphasis added.) Our scrupulous examination of the request to charge reflects that the defendant requested an instruction on self-defense, not an instruction on defense of others. Consistent with the defendant's request to charge, the court did not provide the jury with an instruction on defense of others.

omitted.) *State* v. *Clark*, 264 Conn. 723, 730–31, 826 A.2d 128 (2003); see also *State* v. *Reddick*, 174 Conn. App. 536, 552, 166 A.3d 754, cert. denied, 327 Conn. 921, 171 A.3d 58 (2017), cert. denied, U.S. , 138 S. Ct. 1027, 200 L. Ed. 2d 285 (2018).

Section 53a-19 codifies the narrow circumstances in which a person is justified in using deadly physical force on another person in self-defense. Under § 53a-19 (a), "deadly physical force may not be used unless the actor reasonably believes that such other person is (1) using or about to use deadly physical force, or (2) inflicting or about to inflict great bodily harm." "It is well settled that under § 53a-19 (a), a person may justifiably use deadly physical force in self-defense only if he reasonably believes both that (1) his attacker is using or about to use deadly physical force against him, or is inflicting or about to inflict great bodily harm, and (2) that deadly physical force is necessary to repel such attack. . . . [Our Supreme Court] repeatedly [has] indicated that the test a jury must apply in analyzing the second requirement . . . is a subjective-objective one. The jury must view the situation from the perspective of the defendant. Section 53a-19 (a) requires, however, that the defendant's belief ultimately must be found to be reasonable." (Internal quotation marks omitted.) *State* v. *Reddick*, supra, 174 Conn. App. 552. Even then, however, "a person is not justified in using deadly physical force upon another person if he or she knows that he or she can avoid the necessity of using such force with complete safety (1) by retreating . . . or (2) by surrendering possession of property to a person asserting a claim of right thereto, or (3) by complying with a demand that he or she abstain from performing an act which he or she is not obliged to perform." General Statutes § 53a-19 (b). Moreover, under § 53a-19 (c), "a person is not justified in using physical force when (1) with intent to cause physical injury or death

to another person, he provokes the use of physical force by such other person, or (2) he is the initial aggressor, except that his use of physical force upon another person under such circumstances is justifiable if he withdraws from the encounter and effectively communicates to such other person his intent to do so, but such other person notwithstanding continues or threatens the use of physical force, or (3) the physical force involved was the product of a combat by agreement not specifically authorized by law."

To obtain a conviction, the state had to sustain its burden of disproving beyond a reasonable doubt any of the essential elements of self-defense involving the use of deadly physical force[10] or to sustain its burden of proving beyond a reasonable doubt that any of the statutory exceptions to self-defense codified in § 53a-19 (b) and (c) applied.[11] See *State* v. *Singleton*, 292 Conn. 734, 747–48, 974 A.2d 679 (2009); *State* v. *Corchado*, 188 Conn. 653, 663–64, 453 A.2d 427 (1982). "[U]pon a valid claim of self-defense, a defendant is entitled to proper jury instructions on the elements of self-defense so that the jury may ascertain whether the state has met its burden of proving beyond a reasonable doubt that the assault was not justified." (Internal quotation marks omitted.) *State* v. *Clark*, supra, 264 Conn. 731.

"On appeal, the standard for reviewing sufficiency claims in conjunction with a justification offered by the defense is the same standard used when examining claims of insufficiency of the evidence. . . . 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

[10] At trial, counsel stipulated that this case involved the use of deadly force.

[11] The facts of the present case do not implicate any of the exceptions set forth in § 53a-19 (c).

the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt . . . . This court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict. . . . Moreover, 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." (Citations omitted; internal quotation marks omitted.) *State* v. *Revels*, supra, 313 Conn. 778; see also *State* v. *Allan*, 311 Conn. 1, 25, 83 A.3d 326 (2014). As we have discussed previously in this opinion, the evidence, viewed in the light most favorable to sustaining the jury's verdict, must be sufficient to disprove one or more of the essential elements of the defense or to prove a statutory disability to rely on the defense. See, e.g., *State* v. *Singleton*, supra, 292 Conn. 747–48.

During closing argument, defense counsel discussed in great detail the evidence that he claimed to support the defense. Defense counsel did not dispute that the defendant used deadly physical force by shooting the victim.[12] In focusing on *why* the shooting occurred, defense counsel argued that the evidence reflected that the defendant had acted under extreme duress after the victim made viable threats that he would kill her and members of her family. Defense counsel argued that, under the circumstances, it was objectively reasonable for the defendant to believe that the killing of her or members of her family "was going to happen . . . . It's imminent . . . ."

The defendant did not testify at trial. In discussing the evidence, defense counsel heavily relied on the videotaped and written statements that the defendant provided to the police in the immediate aftermath of the

[12] See footnote 10 of this opinion.

shooting, as well as the text messages that had been exchanged between the victim and the defendant, several of which we have described previously in this opinion.

In relevant part, the evidence demonstrated that the defendant told the police that, throughout the day on April 9, 2014, the victim became increasingly angry with her. He accused her of being unfaithful, having given him a sexually transmitted disease, and not having provided him with money. The victim demanded money from the defendant, threatened to crash the automobile she had rented for him, and threatened to jeopardize her employment by publicizing sensitive information that she had revealed to the victim about the bail bonds company by which she was employed. Most important to the defense, however, was the fact that the defendant had told the police that, throughout the day, the victim repeatedly threatened to kill not only her, but members of her family.[13]

[13] There was evidence that the defendant told the police that, when she talked to the victim on the telephone early in the morning on April 9, 2014, he accused her of being with someone else and said, "I'm going to fucking kill you and him if I ever find out who it is . . . ." There was evidence that, in a text message that the victim sent to the defendant at 9:07 a.m., on April 9, 2014, he alluded to the fact that he or someone else could cause her physical harm. He warned her not to call the police and stated in relevant part, "don't for get we know where u rest ur head so don't do it to urself . . . ."

Additionally, the defendant stated to the police that, later that morning, when the victim was on speakerphone talking to her and Quinonez, he stated that he was going to kill her children and her father. She stated that, after Quinonez told him to stop making threats, the victim replied, "don't worry, I've got something for her. . . . He was, like, you know how we dwell here in these streets, I shot people before. It's nothing new. We got guns everywhere. Everywhere I want to go, I have a gun. . . . You're not going to find me. You're not going to know it's me."

The defendant stated that before she went to the bank, she spoke with the victim on the telephone and he said, "you either come meet me right now and bring me some money or I am going to shoot you, your kids, and your father in the face while you watch and you're going to be last and you better go to the bank before you come."

The defendant also recounted to the police statements that the victim allegedly made to her while he was driving her to the clinic. She stated:

Defense counsel also highlighted Quinonez' testimony that, on April 9, 2014, the defendant contacted her for advice about dealing with the threats made to the defendant by the victim. In particular, defense counsel highlighted the fact that Quinonez, who had a close bond with the victim, nevertheless testified that she overheard the victim threaten to kill the defendant. Additionally, there was evidence that the defendant told the police that although Quinonez told the victim that he was not going to harm the defendant or her family members, the victim replied to her that he had shot people before and that he had "guns everywhere."

Defense counsel urged the jury to consider the fact that, just prior to the shooting, the victim's threats were being made furiously and that they were "going through [the defendant's] mind." Additionally, defense counsel urged the jury to consider the evidence that the defendant told the police that, while she was a passenger in the victim's automobile on April 9, 2014, he was physically abusive to her.[14] Defense counsel also invited

"[I]f I gave him an STD [sexually transmitted disease], he's going to kill me for real and . . . he just started saying . . . how he was going to kill me and it . . . had to do with my private parts because I would burn him." In her videotaped statement to the police, the defendant stated that the victim told her that, if she was "dirty," he would kill her "from [her] inside out" and that he was going to kill her whole family by shooting them "in their faces while [she] watched." Similarly, in her written statement to the police, the defendant stated that the victim allegedly linked his threats to his belief that he had contracted a sexually transmitted disease from the defendant. She stated in relevant part: "He said that if I 'burned him' he would shoot my vagina and watch me bleed out after he killed my kids and my father in front of me. He pulled my hair [and] spit on me and said how I was going to watch as my kids died and then I would watch as I bled out from my 'dirty pussy.' " In her written statement, the defendant also stated that the victim told her that "all you bitches . . . deserve to be 'under the dirt,' " her children "would be better off dead than with a mother like [her]," and he "should kill [her]" to prevent her from spreading sexually transmitted diseases to other people.

[14] The defendant stated that, when she and the victim arrived at the clinic, he warned her, "don't run, or I'm going to get to your house before you can." The defendant told the police that, after she left the clinic with the victim and he was driving, he grabbed her by the hair and pulled her face down to where the gear shift was located. On one occasion, the defendant

the jury to consider the fact that the defendant, who was a victim of an abusive relationship with her prior boyfriend, Cotto, was aware of the fact that calling the police would offer her little protection because she was aware that the victim had a close relationship with another bail bondsperson and, following prior arrests, had "bonded out" several times before.[15]

Although defense counsel did not explicitly argue before the jury that the defendant shot the victim during the course of a kidnapping, he drew the jury's attention to the defendant's statements that just prior to the shooting, the victim continued to "driv[e] around" and would not permit her to return to her automobile. The defendant stated to the police that, after she and the victim left the clinic and just prior to the shooting, the victim drove past the restaurant parking lot where her automobile was parked, told her that she would not see her automobile again, and told her that he was on his way to her home, which was in Plainville. Specifically, the defendant told the police the following about what occurred after she and the victim left the clinic:

stated, "he put my face down . . . on his penis and was, like . . . [y]ou gave me an STD [sexually transmitted disease] and you're going to pay . . . ."

[15] Additionally, the defendant stated that earlier in the day, she thought about contacting the police but did not do so because the victim told her that doing so would be futile. She stated: "[H]e already told me . . . I've got a bondsman under my finger. . . . [Y]ou can call the cops on me. You can put me in jail. All these other girls have called the cops on me and, guess what, I bond right back out and I'll be at your door the next day. And I know that's true because when my ex did this, he bonded right out. . . . I know how bonds work. You don't stay in jail for more than a couple of hours if you have a good bondsman. . . . You don't. You come right back out."

The state presented testimony from Norman Landry, a bail bondsman who had posted at least three bonds for the victim prior to the events at issue in this case. Landry testified that, on April 9, 2014, he spoke with the victim several times throughout the day, and that the victim told him that he "had a situation" with the defendant in that he had been " 'burned by her' as far as an STD [sexually transmitted disease] was concerned." Additionally, Landry testified that the victim told him that "he had information about [the bail bonds company] as far as taking them down."

"[W]e went back to [my] car, and I said, listen, tomorrow when I cash my check, I'll give you the whole thing. I don't care about the money. Just drop me off and let me live my life. I'm not going to call the police on you. I'm not going to do nothing. Just let me go and just move on if you don't believe me, then fine. We don't have to be together. I won't . . . call the police. I won't press charges. Just let me go.

"And [the victim] was, like, no, not until I'm finished with you. I'm not finished yet. We didn't talk in front of your kids yet. We haven't talked to your father yet. We haven't talked to anybody yet. . . . I'm going to drive you by your car. So we drove by the [restaurant on Park Street] and he's, like, you see your car? That's the last time you're ever going to see your car." Also, the defendant told the police that, as the victim drove past the restaurant on Park Street where her automobile was parked, he told her, "Now we're going to your house."

The defendant explained the circumstances and her mindset at the moment that the shooting occurred. She told the police that, just after the victim drove her past the restaurant parking lot on Park Street where her automobile was parked, he approached the fast food restaurant on Prospect Avenue, near where the shooting occurred.[16] She stated: "And he was looking at [the

[16] The state presented evidence that the restaurant parking lot on Park Street was located approximately one block away from the fast food restaurant on Prospect Avenue. At trial, one West Hartford police officer described the two locations as being "just around the corner" from one another. Additionally, we observe that, in her videotaped statement to the police, the defendant expressed her belief that at the time she shot the victim in front of the fast food restaurant, he was driving in the direction of a nearby highway and was planning on going to her residence. She stated that the victim looked at the fast food restaurant, "[s]aying he wanted to get something to eat . . . [a]nd that he was going to get on the highway *right there*." (Emphasis added.) Additionally, the defendant expressed her belief that, after the victim passed the restaurant parking lot on Park Street, where her automobile was parked, she thought, "[w]e were going on the highway," because the victim told her that they were going to her residence in Plainville.

fast food restaurant], and he said I'm so hungry, I want to get something to eat. And I said . . . to myself, this is my only chance because he's not looking at me. Because he was going, he said, to get on the highway to go to my house, over there. We're going to your house now. We're going to see what your dad and your kids think about you giving me an STD [sexually transmitted disease]. . . . So I [reached for my purse]. He goes what the fuck are you doing? And I pulled it out and I . . . shot him."

The defendant stated: "He was looking at [the fast food restaurant] . . . talking about what he was going to eat and so I thought I could . . . I was like this is my only chance because he's been on top of me since I been in the car. . . . I was, like, let me get out, let me get out, let me get out. . . .

"He said go ahead and jump. He said we're going to go home and see your kids."

When asked by the police what her thought process was when she grabbed her purse, the defendant replied: "That he's going to take me to my house and kill everybody there and then kill me. . . .

"[O]nce I got the purse, once I said to myself, you need to get the purse, you need to get your gun, like, this dude is about to bring you back on the highway to your kids and he says he's going to kill everybody. I saw him with a gun before. I saw it in his pants. It was either a gun or it was something else. . . . I saw it there. Not today but another day. . . .

"I don't know if there was [a gun belonging to the victim] in the car or what he was planning on, like, shooting us all with, maybe my gun. I don't know." In her written statement to the police, the defendant stated in relevant part: "I pleaded and begged him for my life and the lives of my family. I offered to do whatever he

wanted and give him however much money he wanted. That wasn't enough he wanted us dead. I did what I did because I believed he was going to kill us when we got to my house."

Having discussed the evidence supporting the defense, defense counsel urged the jury to find that the defendant was "100 percent credible on everything" and that the state had not presented any evidence that undermined her belief that she acted reasonably by shooting the victim.[17] Defense counsel argued that, in light of the viable threats made by the victim and his violent conduct prior to the shooting, the defendant did not have "any other alternative at that point in time."[18]

During closing argument, the prosecutor directly challenged the defendant's reliance on the defense of self-defense. Referring to the evidence, particularly the text messages exchanged between the defendant and the victim, the prosecutor argued that it was clear that the victim had been blackmailing the defendant and that the defendant, believing her employment and financial

[17] In her appellate brief, the defendant accurately observes that the police corroborated several of the facts reflected in her statements. Thus, apart from her statements, there was evidence of the following facts: she rented two automobiles at the times and manner she described; her cell phone had been found along Interstate 84 in the Hartford area; she met with Quinonez on April 9, 2014; she was present in the bank parking lot on the afternoon of April 9, 2014; she and the victim were present at the clinic on the afternoon of April 9, 2014; on the day prior to the shooting, she spoke by telephone with her former boyfriend, Cotto, and told him that the victim was threatening her; on the afternoon of April 9, 2014, she spoke by telephone with Cotto and asked him if he would have sexual relations with her; after the shooting, police found her automobile in the parking lot of the restaurant on Park Street; and, on April 9, 2014, she did not have sufficient funds in her bank account to pay the victim the money that he requested of her that day.

[18] Defense counsel argued: "You judge whether or not she was facing a situation that was going to lead to imminent death, imminent—about to happen. Imminent is a word that's usually used with something bad about to happen, foreshadowing."

well-being were in serious jeopardy, retaliated by shooting him. The prosecutor argued that the evidence demonstrated that, after the defendant disclosed to the victim highly detrimental information about the bail bonds company early in their relationship, he successfully pressured her to rent automobiles for him and to provide him with $1000. The prosecutor argued that on the day of the shooting, the victim continued his blackmailing scheme by demanding even more money from the defendant, who, as she stated in her text messages, could not afford to continue supporting him to keep him silent. Thus, the prosecutor argued that the evidence did not demonstrate that the defendant had acted on a reasonable belief that the victim was about to use deadly physical force against her.

Additionally, the prosecutor argued that, even if the defendant reasonably believed that the victim was about to use deadly physical force against her, the evidence demonstrated that the defendant did not reasonably believe that deadly physical force was necessary to repel an attack. In this vein, the prosecutor referred to evidence that she claimed to reflect that there were numerous opportunities for the defendant to summon assistance or otherwise extricate herself from the victim's control on April 9, 2014. The prosecutor also argued that the use of deadly physical force was unreasonable because, when the defendant shot the victim, there was no indication that the victim was in possession of a gun or that his use of force against her was imminent. The prosecutor argued in relevant part: "No reasonable person could believe that deadly physical force was being used against her at that time. Nor could they believe deadly physical force was necessary to repel the attack. There simply was no attack at that moment in time." The prosecutor argued that, to the extent that the defendant attempted to prove that the

victim was on his way to kill her and her family members at her home in Plainville, as he had threatened, the possibility that the victim would harm the defendant at a future time did not warrant her use of deadly physical force in front of the fast food restaurant in West Hartford.[19]

In her appellate brief, the defendant argues primarily that the state did not present any evidence that contradicted her version of events. Moreover, the defendant relies on the fact that many of the facts reflected in her statements to the police were corroborated by other evidence.

Before this court, the defendant also argues: "Since only [the victim] and the defendant were present in the vehicle at the time of the shooting, the defendant's statements provided the only foundational evidence as to what led up to the shooting. The state presented no evidence that at the time the defendant fired the shot she did not believe that [the victim] was using or about to use deadly physical force against her or that the force used was necessary to defend herself. . . . The police verified and corroborated all the aspects of her account of events, and nothing she relayed had been found untrue. There is no doubt that the defendant actually and sincerely believed that there was an ongoing threat that [the victim] was about to use deadly physical force against her and her family." (Citation omitted.) The defendant argues that "[t]he jury had to resort to speculation and conjecture to conclude that she did not reasonably believe that her life was at risk

[19] Stressing the absence of evidence of an imminent use of force by the victim, the prosecutor argued in relevant part: "And what about the threats to kill her and the kids when they got to [the defendant's residence in] Plainville. Well, Plainville's [fifteen to twenty] minutes away from where they were. Who knows whether he would've even gone there? Who knows whether it would've happened? It's completely speculative to suggest that she had to kill him right then and there at that exact moment."

or that it was not necessary for her to use deadly force in response to the situation.

"From the defendant's videotaped and written statement, there is no doubt that at the time that she fired the shot she actually believed that [the victim's] use of force against her was escalating and that he was about to use deadly physical force against her. The state did not present any evidence otherwise. Viewing the circumstances from the defendant's perspective under the circumstances, a reasonable person would have shared her belief. . . . The defendant was credible in her explanation that she believed [that] when she shot the [victim] it was her only chance to stop him from killing her and her family, and that she honestly and sincerely believed that was the degree of force necessary."

The defendant further argues: "Since the only evidence presented as to what was going on in the vehicle prior to the shooting was the defendant's testimony, if the jury disbelieved her testimony regarding [the victim's] use and threats of force, it was not free to infer that the state's arguments that the decedent was not using or was not about to use deadly physical force was true." According to the defendant, "[a]t the moment she shot the [victim] she reasonably believed that was her only chance to stop him from killing her and her children. The fact that she was a passenger in a moving vehicle when she shot the [victim] reveals that her actions were borne out of absolute necessity."

The defendant suggests in her arguments that the state bore the burden of producing evidence that disproved her defense and that, because it failed to do so, the jury was bound to accept as credible the facts she provided in her statements to the police. As we explained previously in this opinion, however, after the defendant satisfied her burden of production, that is, presenting evidence in support of the defense on which

she explicitly relied at trial, the state did not bear a burden of *production* with respect to disproving the defense, but a burden of *persuading* the jury beyond a reasonable doubt that the defendant did not act in self-defense. See *State* v. *Clark*, supra, 264 Conn. 730–31 (discussing state's burden of persuasion for a claim of self-defense). It suffices to observe that the jury is not required to accept as credible the defendant's version of events and that the state may satisfy its burden of persuasion by convincing the jury that the evidence on which the defense relies is not credible.

This principle is reflected in relevant precedent. For example, in *State* v. *Gooch*, 186 Conn. 17, 26, 438 A.2d 867 (1982), our Supreme Court observed that a claim of self-defense "depends in the first instance on the credibility of the defendant and of his witnesses." In *Gooch*, the Supreme Court concluded that the jury's guilty verdict reflected a finding by the jury that there was no factual basis for the defense of self-defense. Id. In *State* v. *Boone*, 15 Conn. App. 34, 48, 544 A.2d 217, cert. denied, 209 Conn. 811, 550 A.2d 1084 (1988), this court, following *Gooch*, likewise reasoned that the defenses advanced by the defendant depended on the credibility of the defendant and his witnesses, and that the jury's verdict of guilty reflected that the jury had found that no factual basis existed for the defenses. Similarly, in *State* v. *Pauling*, 102 Conn. App. 556, 572, 925 A.2d 1200, cert. denied, 284 Conn. 924, 933 A.2d 727 (2007), this court rejected a claim that the state had failed to disprove the defense of self-defense. In relevant part, this court reasoned: "The jury was free to disbelieve the defendant's version of the events that resulted in the injuries to [the victim]. On the basis of the evidence and the reasonable inferences drawn from it, we conclude that the state presented sufficient evidence during the course of the trial to disprove the

defendant's claim of self-defense beyond a reasonable doubt." Id.

Having reviewed the evidence in its entirety, we conclude that there was a rational view of the evidence that supported a finding that the defendant did not subjectively believe either that the victim was about to use deadly physical force against her or that her use of deadly physical force was necessary to protect her physical well-being. The evidence reflects that in the weeks prior to the shooting, the defendant, who lacked the means to continue to support both her family and the victim financially, provided the victim with rented automobiles and $1000. As the defendant acknowledged in her statement and as is reflected in the text messages exchanged between the victim and the defendant on the day of the shooting, the victim angrily and repeatedly demanded even more money from the defendant. The defendant argues before this court that the evidence demonstrated that the victim threatened to harm her and her family if she failed to pay him. The evidence, however, directly reflected that the victim threatened to reveal information about the bail bonds company for which she worked if she failed to pay him. There was evidence that, soon after their relationship began, the victim learned such information from the defendant and that he quickly used it to his advantage. He drew an analogy between his ability to extract money from the defendant and playing a game.[20]

Moreover, a rational view of the evidence, particularly the extensive text messages that were exchanged between the defendant and the victim in the hours prior to the shooting,[21] reflects that the defendant understood

[20] In one of the text messages that the victim sent to the defendant on April 9, 2014, after the defendant referred to the $1500 she had spent on him, he stated: "[Rem]ember [two] could play the game only one can play it better . . . I believe I always told u that right . . . ."

[21] Previously in this opinion, we discussed and set forth the substance of many of the text messages relevant to our analysis.

what the victim was referring to when he told her that he would reveal information about the company for which she worked, she labeled the victim a "snitch" who had betrayed her trust, and she expressed deep concern about her ability to continue to care for herself and her children financially in light of the victim's threats. The evidence also showed that, in the hours before the shooting, the defendant recognized the seriousness of the victim's threats to reveal information about the bail bonds company for which she worked. She told her former boyfriend that she would either be "dead or in jail soon" and made it clear to the victim that if he took away her "way to work," she would have nothing to live for. Expressing further thoughts about her own mortality shortly before the defendant used deadly physical force against the victim, she also stated to the victim that her children would be able to collect extra life insurance money if she died "a tragic death . . . ." As the prosecutor vehemently argued before the jury, in light of this evidence of blackmail and its toll on the defendant, it was reasonable for the jury to find that the defendant did not shoot the victim in self-defense, but that she did so to prevent him from continuing to blackmail her or harming something that she valued, namely, her continued employment at the bail bonds company.[22]

This view of the evidence is supported by several undisputed facts, including that, despite the victim's repeated threats earlier that day, the defendant voluntarily got into the victim's automobile prior to the shooting, she failed to use her cell phone to summon assistance during the lengthy period of time in which

[22] Moreover, even if the jury found the defendant's statements that she feared that the victim was going to harm her and her family in the future to be credible, it would have been reasonable for the jury to find that her concern for her employment outweighed these other concerns and was the primary factor in her decision to utilize deadly physical force.

she was with the victim prior to the shooting, and she utilized deadly physical force when the victim was near a fast food restaurant in West Hartford. According to the defendant, she shot the victim just after he stated that he thought he would "get something to eat" and began to drive slowly toward the fast food restaurant on Prospect Avenue. The defendant stated that, at that time, she "thought he might go into [the restaurant]."

We also address the weight of the defendant's argument that "[t]he police verified and corroborated all the aspects of her account of events and nothing she relayed had been found untrue." We observe that the state presented evidence that tended to undermine some aspects of the defendant's version of events. For example, the defendant stated to the police that, during her meeting with Quinonez on the day of the shooting, Quinonez advised her to call the police and that she came to believe that it was the "only thing [she] can do." Quinonez testified, however, that after she advised the defendant to contact the police, the defendant stated that she did not want to do so because, if the victim was questioned by the police, "it could shut down her [bonds] company."

Moreover, the defendant told the police that, after the victim demanded money from her on the day of the shooting, she picked up her paycheck and went to the bank. She stated that the bank closed three minutes before she arrived and that she was unable to cash her paycheck at that time. She stated that she arrived at 4:04 p.m. The state, however, presented video surveillance evidence from the bank that reflected that the defendant arrived at the bank at 3:56 p.m., four minutes prior to the time at which the bank lobby was closed for the day, but she did not attempt to transact any business at the bank immediately after her arrival.

Additionally, the defendant told the police that when she "first got in" the victim's automobile on the day of

the shooting, he took possession of her purse and put it on the floor in the rear of the automobile because he was aware of the fact that she kept a handgun in her purse. She stated that, as he did that, he said, "just so you don't try no funny shit." The state, however, presented video surveillance evidence taken from the clinic that the defendant and the victim went to prior to the shooting. The video plainly shows that the defendant and the victim entered the clinic together and that the defendant carried her purse with her, on her shoulder, as she entered, remained in, and departed the clinic with the victim.[23]

Even if we were to assume that the state failed to persuade the jury beyond a reasonable doubt that the evidence did not support a finding that the defendant subjectively believed that an attack on her by the victim was imminent, or that the evidence did not support a finding that she subjectively believed that her use of deadly physical force was necessary to defend herself, we nonetheless conclude that the state persuaded the jury beyond a reasonable doubt that the evidence did not support a finding that she acted in self-defense because her subjective belief that an attack was imminent was not objectively reasonable. Before this court, the defendant argues that "imminent" does not necessarily mean "immediate." She argues: "In order to satisfy [§ 53a-19], the deadly physical force did not have to be actually . . . used against the defendant at the exact moment of the shooting. . . . The use of the word 'imminent' in self-defense statutes reflect[s] that the requirements of the timing of the use of force are not as stringent as if the use of force was 'immediate.' . . . The proper inquiry is not the immediacy of the

[23] The video surveillance evidence, as well as the testimony from the security guard stationed at the front desk of the clinic on the day of the shooting, reflected that, although the defendant had an opportunity to speak to the security guard outside of the victim's presence, she did not do so.

threat but the immediacy of the response necessary in defense. If a threatened harm is such that it cannot be avoided if the intended victim waits until the last moment, the principle of self-defense must permit him to act earlier—as early as is required to defend himself effectively. . . . That was the situation in the present case, the defendant had to react to the threat that was imminent or actually about to happen, the [victim's] words and actions were hanging threateningly over her head. Her actions were necessary to thwart his plan to kill her and her family when they reached her home. If the defendant did not seize the opportunity to grab her pocketbook that contained her gun, she risked not having another opportunity to defend herself." (Citations omitted.)

The problem with the defendant's analysis of the present claim is that it is premised on a definition of "imminent" that she did not advance in her written request to charge and that was not provided to the jury. In her written request to charge, the defendant asked the court to instruct the jury in relevant part: "[Section 53a-19] requires that, before a defendant uses physical force upon another person to defend herself, she must have two reasonable beliefs: (1) A reasonable belief that physical force is then being used or about to be used upon her, and (2) a reasonable belief that the degree of force she is using to defend herself is necessary for that purpose. . . . *The word 'imminent' means that the person is about to use physical force at that time. It does not encompass the possibility that an act of physical force may take place at some unspecified future time.*" (Emphasis added.) The parties agreed that the defendant used deadly physical force and, multiple times in her written request to charge, the defendant framed the proper inquiry concerning the imminency requirement in § 53a-19 to be

simply whether the victim was "using or about to use" deadly physical force against her at the time of the shooting.[24]

Consistent with the defendant's written request to charge, the court provided the jury with lengthy instructions concerning self-defense. In discussing the state's burden of proof with respect to self-defense, the court instructed the jury in relevant part: "The evidence in this case raises an issue of self-defense, and that applies to both charges. After you have considered all of the evidence in the case, if you find that the state has proved beyond a reasonable doubt each element of each crime charged you must then go on to consider whether or not the defendant acted in self-defense. A person is justified in the use of force against another person that would otherwise be illegal if she is acting in the defense of self. It is a complete defense to certain charges, including murder and manslaughter.

"When, as in this case, evidence of self-defense is introduced at trial, the state must not only prove beyond a reasonable doubt all of the elements of the crimes charged to obtain a conviction, but must also disprove beyond a reasonable doubt that the defendant acted in self-defense. If the state fails to disprove beyond a reasonable doubt that the defendant acted in self-defense, you must find the defendant not guilty, despite

[24] During closing argument, defense counsel discussed imminency in somewhat broader terms, likening it to "foreshadowing," but he did not devote a great deal of his argument to this issue. He emphasized the defendant's statements that the victim had threatened to kill her and her family members when he arrived at her residence in Plainville. Defense counsel stated: "You judge whether or not she was facing a situation that was going to lead to imminent death, imminent—about to happen. Imminent is a word that's usually used with something bad about to happen, foreshadowing." Later, defense counsel argued: "And it wasn't that long, it wasn't that long, ladies and gentlemen, from where this happened to where she lives in Plainville. So, it was going to happen. It's imminent, and if you believe what she believed, then she did what she had to do and it's reasonable."

the fact that you have found the elements of the crimes proved beyond a reasonable doubt. The defendant has no burden whatsoever with respect to the defense."

In its detailed instructions concerning the elements of self-defense, the court instructed the jury in relevant part that "[a] person is justified in using reasonable physical force upon another person to defend herself from what she reasonably believes to be the use or imminent use of physical force. And she may use such degree of force, which she reasonably believes to be necessary for that purpose." Later, in discussing the elements of self-defense in greater detail, the court once again instructed the jury with respect to the imminency requirement of self-defense, stating: "[T]he defense of self-defense has four elements. One, the defendant actually believed that someone [was] using or about to use physical force against her. If you have found that the force used by the defendant was deadly physical force, then the element requires that the defendant actually believed that the other person . . . was using or about to use deadly physical force against her, or was inflicting or about to inflict great bodily harm upon her." The court went on to instruct the jury in relevant part: "The first element is that when the defendant used defensive force against [the victim], she honestly and sincerely believed that he was using or about to use physical force against her. The word using has its ordinary meaning, that is, the other person has already begun to use force. *The word imminent means that the person is about to use physical force at that time. It does not encompass the possibility that an act of physical force may take place at some unspecified future time.*" (Emphasis added.)

Before concluding its detailed instructions with respect to self-defense, the court reiterated that the state, not the defendant, bore the burden of proof with respect to self-defense. The court stated in relevant

part: "Remember that the defendant has no burden of proof whatsoever . . . with respect to the defense of self-defense. Instead, it is the state's burden to prove beyond a reasonable doubt that the defendant did not act in self-defense if it is to prevail on the charges of murder and manslaughter. To meet this burden, the state need not disprove all four of the elements of self-defense. Instead, the state can defeat the defense of self-defense by disproving any one of four elements of self-defense beyond a reasonable doubt to your unanimous satisfaction." The defendant did not take an exception to the court's instruction.[25]

We must presume that the jury carefully followed the court's instructions, rather than any contrary principles of law on which defense counsel relied during closing argument. "In the absence of any indication to the contrary, we presume that the jury followed the court's instruction." *State* v. *Reynolds*, 264 Conn. 1, 141, 836 A.2d 224 (2003), cert. denied, 541 U.S. 908, 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004). We reiterate that the court's self-defense instruction, which is not challenged on appeal, was consistent with the self-defense instruction requested by the defendant at trial.[26]

[25] During its deliberations, the jury asked the court to provide clarity with respect to its use of the word "imminent." In response, the court reiterated the self-defense instruction that it provided during its charge. Defense counsel did not object to the manner in which the court responded to the jury's inquiry.

[26] The defendant stated to the police that she shot the victim after he drove past her automobile, which was parked in the parking lot of a restaurant on Park Street, and made it clear to her that she was not free to leave his presence. Additionally, the victim stated that she considered shooting the victim as her "only option" to prevent him from killing her and members of her family. The victim stated: "There was no other way out of it. Even if I jumped out of the car . . . I would have either died right there or he would have gotten to my house first and killed everybody."

We observe that the defendant relied on the precise language of § 53a-19, which applies in circumstances in which the use or imminent use of force is shown. She did not rely on any common-law defenses that, although not *expressly* sanctioned by statute, may have applied. Our courts have recognized that statutes that enumerate the instances in which the use of

Our legislature did not provide a definition for the word "imminent" as it is used in § 53a-19. "It is well established that, when determining the meaning of a word, it is appropriate to look to the common understanding of the term as expressed in a dictionary. . . . This precept . . . pertains primarily to the situation where no statutory definition is available." (Citation omitted; internal quotation marks omitted.) *State* v. *Spillane*, 255 Conn. 746, 755, 770 A.2d 898 (2001); see also *State* v. *Panek*, 328 Conn. 219, 237, 177 A.3d 1113 (2018) (same). "Imminent" is defined as "likely to occur *at any moment*; impending." (Emphasis added.) Random House Webster's Unabridged Dictionary (2d Ed. 2001).

Consistent with this definition, which describes an occurrence that is almost immediately at hand, our case law reflects that "[t]he defense of self-defense does not encompass a preemptive strike." *State* v. *Lewis*, 220 Conn. 602, 620, 600 A.2d 1330 (1991); *Daniel* v. *Commissioner of Correction*, 57 Conn. App. 651, 676, 751 A.2d 398 (same), cert. denied, 254 Conn. 918, 759 A.2d 1024 (2000). "The actor should not be permitted to use force when such force would be equally as effective at a later

force is justified generally should be interpreted to encompass any defenses related to the use of force that are available at common law. See, e.g., *State* v. *Havican*, 213 Conn. 593, 598–99, 569 A.2d 1089 (1990) (interpreting § 53a-19 to incorporate common-law rule that persons may justifiably use deadly force in self-defense against sodomy and rape). Thus, the defendant did not advance a theory of defense that might have been more closely tailored to her expressed belief that, in light of the victim's repeated threats to harm her and the fact that he would not permit her to leave, she was compelled to use deadly physical force at the time that she did because doing so was necessary to defend herself effectively. Under such a theory of defense, the defendant might have been able to demonstrate that, despite the fact that at the moment of the shooting the victim was neither using nor immediately about to use force against her, it was reasonable for her to have used deadly physical force when she did. See, e.g., 2 P. Robinson, Criminal Law Defenses (1984) § 131 (c), pp. 77–79 (discussing defensive force defenses that are based on immediate necessity to defend rather than those that are based on use or imminent use of force).

time and the actor suffers no harm or risk by waiting." (Internal quotation marks omitted.) *State* v. *Bryan*, 307 Conn. 823, 833, 60 A.3d 246 (2013); *State* v. *Hall-Davis*, 177 Conn. App. 211, 225–26, 172 A.3d 222, cert. denied, 327 Conn. 987, 175 A.3d 43 (2017). As this court has observed, self-defense depends on a showing that an aggressor is using or about to use physical force. See *State* v. *Peters*, 40 Conn. App. 805, 814–15, 673 A.2d 1158 ("the defendant must entertain an honest belief that the other person is using or is about to use physical force, and the defendant's decision to use defensive force must be based on this sincere belief as opposed to anger, malice or revenge"), cert. denied, 237 Conn. 925, 677 A.2d 949 (1996).

In this appeal, the defendant does not claim that the court did not accurately instruct the jury with respect to the imminency requirement of § 53a-19, and, as the authorities cited previously reflect, the court's instruction was consistent with the instruction requested by the defendant at trial, the plain language of the statute, and our case law interpreting the statute. Applying the law as provided to it by the court, the jury reasonably could have found that, at the time of the shooting, the victim was neither using nor about to use deadly physical force against the defendant. There was no evidence, and the defendant does not argue, that the victim was using deadly physical force against her when she shot him in the head. Rather, in her statement to the police, the defendant explained that she shot the victim as he approached a fast food restaurant and indicated that he wanted to purchase something to eat. The shooting occurred in West Hartford, not in close proximity to the defendant's residence in Plainville. The defendant acknowledged that she did not know if the victim was in possession of a gun that day. Thus, even if the jury relied on the defendant's version of the facts, it was reasonable for the jury to have concluded that, at the

time of the shooting, the victim's threat to shoot the defendant and members of her family reflected his intent to use deadly physical force at a future time. Despite the defendant's belief that the moment at which she shot the victim was her last chance to stop the victim from harming her in the future, the evidence supported a finding that the defendant's use of deadly physical force was premature. Accordingly, we conclude that the state satisfied its burden of disproving that, at the time of the shooting, the victim's use of deadly physical force was imminent.

In light of the foregoing, we conclude that the state demonstrated beyond a reasonable doubt that the defendant did not use deadly physical force in self-defense.

II

Next, the defendant claims that the court violated her right to due process and her right to the effective assistance of counsel by denying the jury's request to rehear the closing arguments of the prosecutor and defense counsel at trial. We disagree.

The following additional facts are relevant to the present claim. Jury deliberations occurred over the course of three days. During its deliberations, the jury asked to rehear the testimony of several witnesses, to further examine some of the videotaped materials shown to it during the trial, and for additional instruction with respect to some of the legal principles that applied. The court responded to these inquiries, which are not relevant to the present claim. At issue in the present claim is the manner in which the court responded to a note that the jury sent to the court on the third and final day of its deliberations. The note stated: "Can we re-listen to both closing arguments again, please?"

Outside of the jury's presence, the following colloquy between the court and counsel occurred:

"The Court: . . . There is a note from the jurors. It reads as follows: Can we re-listen to both closing arguments again, please?

"And obviously the answer is no, but my intention was to read to them the section from the instruction on direct and circumstantial evidence, which tells them . . . the evidence from which you're to make the decision, and the first paragraph in terms of what is not evidence. So, let me know if there [are] any problems with that.

"[The Prosecutor]: No, Your Honor.

"[Defense Counsel]: I don't think so, no.

"The Court: Okay."

Thereafter, the jury returned to the courtroom and, in relevant part, the court replied to the jury's written request as follows: "And the answer is no. And I'm going to go over with you the instruction so that you understand why.

"The evidence from which you are to decide what the facts are consists of one, the sworn testimony of witnesses both on direct and cross-examination, the exhibits that have been admitted into evidence, and any stipulations of the parties. . . .

"In reaching your verdict, you should consider all the testimony and exhibits admitted into evidence. Certain things, however, are not evidence, and you may not consider them in deciding what the facts are.

"These include arguments and statements by the lawyers. The lawyers are not witnesses. What they have said in their closing arguments is intended to help you interpret the evidence, but it is not evidence.

"If the facts as you remember them differ from the way the lawyers stated them, your memory of the facts controls. It is not proper for the attorneys to express their opinions on the ultimate issues in the case or to appeal to your emotions.

"And what else is also not evidence is the document called the information, which you do have with you. The information is merely the formal manner of accusing the person.

"And so, as I indicated, the answer is no, and I just read you why you wouldn't be able to hear it. So, with that, you can resume deliberation."

Thereafter, the jury resumed its deliberations. Neither the prosecutor nor defense counsel addressed the issue again, and the jury did not communicate further with the court with respect to its request to rehear closing arguments. Later that day, the jury returned its verdict.

Before this court, the defendant argues that the trial court's response to the jury's request violated her right to due process and her right to the effective assistance of counsel as guaranteed under the state and federal constitutions.[27] The defendant acknowledges that defense counsel did not object to the court's response to the jury's inquiry but argues that the claim is reviewable pursuant to the bypass doctrine set forth in *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).[28]

[27] The defendant has not provided this court with an independent analysis of her claim under the state constitution. Thus, we deem that aspect of her claim to be abandoned. See *State* v. *Hearl*, 182 Conn. App. 237, 271 n.28, 190 A.3d 42, cert. denied, 330 Conn. 903, 192 A.3d 425 (2018).

[28] Pursuant to *Golding*, a defendant may prevail on a claim of constitutional error not preserved at trial only if all four of the following conditions are satisfied: "(1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . .

The state argues, and we agree, that the defendant is unable to prevail under *Golding* because defense counsel waived any objection to the manner in which the court responded to the jury's request.

"[W]aiver is [t]he voluntary relinquishment or abandonment—express or implied—of a legal right or notice. . . . In determining waiver, the conduct of the parties is of great importance. . . . [W]aiver may be effected by action of counsel. . . . When a party consents to or expresses satisfaction with an issue at trial, claims arising from that issue are deemed waived and may not be reviewed on appeal. . . . Thus, [w]aiver . . . involves the idea of assent, and assent is an act of understanding." (Internal quotation marks omitted.) *State* v. *Cancel*, 149 Conn. App. 86, 100, 87 A.3d 618, cert. denied, 311 Conn. 954, 97 A.3d 985 (2014). "The rule is applicable that no one shall be permitted to deny that he intended the natural consequences of his acts and conduct. . . . In order to waive a claim of law it is not necessary . . . that a party be certain of the correctness of the claim and its legal efficacy. It is enough if he knows of the existence of the claim and of its reasonably possible efficacy. . . . Connecticut courts have consistently held that when a party fails to raise in the trial court the constitutional claim presented on appeal and affirmatively acquiesces to the trial court's order, that party waives any such claim." (Internal quotation marks omitted.) *State* v. *Velez*, 113 Conn. App. 347, 357–58, 966 A.2d 743, cert. denied, 291 Conn. 917, 970 A.2d 729 (2009).

"Both our Supreme Court and this court have stated the principle that, when a party abandons a claim or

deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40; see also *In re Yasiel R.*, supra, 317 Conn. 781 (modifying third prong of *Golding* by eliminating word "clearly" before words "exists" and "deprived").

argument before the trial court, that party waives the right to appellate review of such claim because a contrary conclusion would result in an ambush of the trial court . . . .'' (Internal quotation marks omitted.) *State* v. *Reddick*, 153 Conn. App. 69, 85, 100 A.3d 439, cert. denied, 315 Conn. 904, 104 A.3d 757 (2014). This principle applies to review pursuant to *Golding*. ''[A] constitutional claim that has been waived does not satisfy the third prong of the *Golding* test because, in such circumstances, we simply cannot conclude that injustice [has been] done to either party . . . .'' (Emphasis omitted; internal quotation marks omitted.) *State* v. *Hampton*, 293 Conn. 435, 448–49, 988 A.2d 167 (2009); see also *State* v. *Frazier*, 181 Conn. App. 1, 36, 185 A.3d 621 (valid waiver thwarts relief under third prong of *Golding*), cert. denied, 328 Conn. 938, 184 A.3d 268 (2018).

As the colloquy between the court and counsel, which was set forth previously in this opinion, reflects, after the court received the jury's request, it told counsel how it intended to respond to the inquiry. The court then invited feedback from counsel by expressly asking whether there were ''any problems'' with its proposed response. Both the prosecutor and defense counsel affirmatively replied that there were no objections to the court's response and, even after the court addressed the jury in the manner it had proposed, neither the prosecutor nor defense counsel stated any reservations or objections to the court's response.[29] The court

[29] The defendant urges us to conclude that defense counsel did not waive the present claim of error because he was compelled to respond quickly to the jury's unexpected request and ''did not have time to reflect on the ramifications of the judge's response to this unusual request.'' As our case law reflects, however, waiver is not dependent on a showing that a party was aware of the ''legal efficacy'' of the claim, but merely that he is aware of its existence and its ''reasonably possible efficacy.'' (Internal quotation marks omitted.) *State* v. *Velez*, supra, 113 Conn. 357–58. It belies the sweeping nature of the claim raised on appeal to suggest that it is unreasonable to apply the waiver doctrine in the context of this claim. ''We recognize that, during the heat of trial, it is typical for counsel to set forth objections and responses thereto that may not be as complete or well researched as the

directly asked counsel to weigh in with respect to the request made by the jury and its proposed response, thereby serving the important function of alerting the trial court to any error while there was still an opportunity to correct it in the absence of a new trial, and defense counsel unambiguously led the court to the conclusion that he accepted the court's proposal as appropriate. Beyond merely failing to object to the court's proposed response, defense counsel affirmatively stated that he did not object to it. Permitting the defendant now to object to the court's response, after defense counsel acquiesced in it at the time of trial, would constitute an ambuscade of the trial court. See, e.g., *State* v. *Rosado*, 147 Conn. App. 688, 698–704, 83 A.3d 351 (2014) (defense counsel's acquiescence in court's decision not to respond to note from jury prior to accepting jury's verdict constitutes waiver and precludes relief under *Golding*), cert. denied, 311 Conn. 928, 86 A.3d 1058 (2014), overruled in part on other grounds by *State* v. *McClain*, 324 Conn. 802, 815 n.10, 155 A.3d 209 (2017).[30] Accordingly, we conclude that the

arguments set forth in an appellate brief . . . ." *State* v. *Papineau*, 182 Conn. App. 756, 770, 190 A.3d 913, cert. denied, 330 Conn. 916, 193 A.3d 1212 (2018). Nonetheless, "[t]he defendant's counsel, acting on the defendant's behalf, had an immediate duty to object to the court's proposed instruction if he deemed it improper." *State* v. *Diaz*, 109 Conn. App. 519, 537, 952 A.2d 124, cert. denied, 289 Conn. 930, 958 A.2d 161 (2008). The court, hearing no objection from defense counsel or a request for additional time to consider the issue, was under no obligation to evaluate counsel's understanding of the relevant law before relying on counsel's agreement on how to proceed. See, e.g., *State* v. *Holness*, 289 Conn. 535, 544, 958 A.2d 754 (2008) (defense counsel may waive potential constitutional claims in exercise of his or her professional judgment, and court need not canvass counsel with respect to his or her understanding of relevant constitutional principles before accepting counsel's agreement on how to proceed).

[30] In *State* v. *McClain*, supra, 324 Conn. 815 n.10, our Supreme Court expressly overruled this court's decision in *State* v. *Rosado*, supra, 147 Conn. App. 702, to the extent that it stated that an implied waiver of a claim of instructional error pursuant to *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2016), precluded relief under the plain error doctrine. The defendant in the present case does not raise a claim of plain error.

defendant, having waived the claim of error, is unable to prevail under *Golding*.

The judgment is affirmed.

In this opinion the other judges concurred.

JOHN A. MOUNTAIN *v.* HEIDI L. MOUNTAIN (AC 41041)

Sheldon, Keller and Bear, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the trial court's denial of his second postjudgment motion for modification of his unallocated alimony and child support obligation to the defendant. The dissolution judgment, which had incorporated the parties' separation agreement, referred to the plaintiff's ability to borrow funds from several sources, including his current wife, to meet his financial obligations to his minor children and to the defendant. In the plaintiff's first motion to modify his unallocated alimony and child support obligation, he claimed that there had been a substantial change in circumstances because, inter alia, he and his current wife had been paying directly for the vast majority of the expenses for the minor children, his income had decreased since the date of dissolution, he no longer had the ability to borrow money to satisfy his unallocated alimony and support obligation, and he was spending more time with the children than he had been at the time of dissolution. The plaintiff did not appeal from the trial court's denial of that motion. In the plaintiff's second motion to modify his unallocated alimony and child support obligation, he alleged that there had been a substantial change in circumstances since the denial of the first motion to modify. The only change in circumstances that he alleged in the second motion was that he was no longer able to borrow money to meet his financial obligations to the children and to the defendant. The trial court determined that although the plaintiff no longer had the ability to borrow funds from certain sources that were referred to in the separation agreement, he failed to meet his burden of proof to show that he no longer had the ability to borrow funds from his current wife. On appeal to this court, the plaintiff asserted that the trial court improperly rejected his claim that there had been a substantial change in circumstances due to a decrease in his income, an increase in his parenting time and the loss of his ability to borrow money from his current wife to satisfy his financial obligations to the defendant. *Held* that the trial court did not err in finding that there had been no substantial change in the plaintiff's circumstances to support a modification of his

unallocated alimony and child support obligation: the plaintiff's claims that there had been a substantial change in circumstances on the basis of the alleged decrease in his income or increase in his parenting time, which had been addressed and rejected by the trial court in its denial of his first motion to modify, were not raised in his second motion to modify and, thus, the trial court properly declined to address them in ruling on that motion and they were not properly before this court; moreover, the plaintiff's claim that the court erred in finding that he had failed to prove that he was no longer able to meet his financial obligations to the defendant by borrowing money from his current wife was not reviewable, the plaintiff having failed to brief the claim adequately, and even if he had properly briefed that claim, the court's rejection of it was well supported by its unchallenged factual finding that he continued to borrow money from his current wife to meet his financial obligations since the date that he filed his second motion to modify.

Argued January 14—officially released April 9, 2019

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Danbury and tried to the court, *Winslow*, *J.*; judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Hon. Sidney Axelrod*, judge trial referee, granted in part the plaintiff's motion to modify custody of the parties' minor children, and denied the plaintiff's motion to modify alimony and child support, and the plaintiff appealed to this court. *Affirmed.*

John A. Mountain, self-represented, the appellant (plaintiff).

Opinion

SHELDON, J. The plaintiff, John A. Mountain, appeals from the judgment of the trial court denying his post-judgment motion to modify his unallocated alimony and child support obligation to the defendant, Heidi L. Mountain, pursuant to the judgment dissolving their marriage. The plaintiff claims that the court erred in

finding that he failed to prove that there was a substantial change in circumstances warranting such a modification. We affirm the judgment of the trial court.

The marriage of the parties, who share four minor children, was dissolved on January 9, 2014. The court approved the separation agreement and the parenting plan filed by the parties, and incorporated them into the judgment of dissolution. The judgment provided, inter alia, that the parties would share joint legal and physical custody of their four children and that the children's primary physical residence would remain at the marital home in Ridgefield, with the defendant. The plaintiff agreed to pay the defendant the sum of $6700 per month as unallocated alimony and child support for a term of nine years beginning on February 1, 2014. The judgment provided: "The [plaintiff]'s obligation to pay alimony and child support at the rate stated above is conditioned upon his current financial and personal opportunities and his ability to borrow the funds necessary to meet his obligations. Any significant change in these circumstances warrants a substantial change of circumstances."[1]

On March 13, 2015, the plaintiff filed a motion to modify custody of the minor children due to his relocation from Westport to Weston. By way of memorandum of decision filed October 29, 2015, the court found that there had been a substantial change in circumstances due to the plaintiff's relocation to Weston, but it denied the plaintiff's request to modify the children's primary residence to Weston. Instead, it modified the parties' parenting plan to afford the plaintiff additional time with the children.

Also on March 13, 2015, the plaintiff filed a motion to modify his unallocated alimony and child support

[1] The plaintiff was represented by counsel when he agreed to the terms of the separation agreement that was incorporated into the judgment of dissolution.

obligation, wherein he claimed that there had been a substantial change in circumstances for the following reasons: his income had decreased since the date of dissolution; he no longer had the ability to borrow money to satisfy his unallocated alimony and support obligation; he was spending more time with the children than he had been at the time of dissolution; he and his current wife had been paying directly for the "vast majority of the expenses for the minor children such as clothes, camp, therapy, and activities," although the separation agreement entered into at the time of dissolution contemplated that those expenses would be paid by the defendant; the defendant was cohabiting; and the defendant was working and earning more income than she had been at the time of dissolution. By memorandum of decision filed February 1, 2016, the court rejected all of the plaintiff's claims and denied his motion to modify.

On July 8, 2016, the plaintiff filed a second motion to modify his unallocated alimony and child support obligation, claiming that there had been a substantial change in circumstances since the denial of his previous motion to modify on February 1, 2016. Apart from reciting the actions he had taken to satisfy his financial obligations since the denial of his previous motion to modify, the only change in circumstances that the plaintiff alleged in his second motion to modify was that he was no longer able to borrow money to meet those obligations.

By way of memorandum of decision filed October 24, 2017, following an evidentiary hearing, the court denied the plaintiff's motion to modify. The court explained that the dissolution judgment "refers to [the plaintiff's] ability to borrow funds necessary to meet his obligations from [his current wife], the Jim Torrey Fund, and his parents . . . ." The court found that the plaintiff no longer had the ability to borrow funds from

the Jim Torrey Fund or from his parents, but that he had "failed to meet his burden of proof that he no longer has the ability to borrow funds from [his current wife]." The court based that determination on the fact that the plaintiff had, in fact, borrowed money from his current wife to satisfy his financial obligations to the defendant since the date that he filed his second motion to modify in which he claimed that he had lost that ability. This appeal followed.

"Modification of . . . support is governed by General Statutes § 46b-86 (a), which provides in relevant part: Unless and to the extent that the decree precludes modification, any final order for the periodic payment of . . . support . . . may, at any time thereafter, be continued, set aside, altered or modified by the court upon a showing of a substantial change in the circumstances of either party . . . .

"We previously have explained the specific method by which a trial court should proceed with a motion brought pursuant to § 46b-86 (a). When presented with a motion for modification, a court must first determine whether there has been a substantial change in the financial circumstances of one or both of the parties. . . . Second, if the court finds a substantial change in circumstances, it may properly consider the motion and, on the basis of the . . . [General Statutes] § 46b-82 criteria, make an order for modification. . . . The court has authority to issue a modification only if it conforms the order to the distinct and definite changes in the circumstances of the parties. . . . Simply put, before the court may modify . . . [a child support order] pursuant to § 46b-86, it must make a threshold finding of a substantial change in circumstances with respect to one of the parties.

"The party seeking the modification has the burden of proving a substantial change in circumstances. . . .

To obtain a modification, the moving party must demonstrate that circumstances have changed since the last court order such that it would be unjust or inequitable to hold either party to it. Because the establishment of changed circumstances is a condition precedent to a party's relief, it is pertinent for the trial court to inquire as to what, if any, new circumstance warrants a modification of the existing order. In making such an inquiry, the trial court's discretion is essential." (Internal quotation marks omitted.) *Bolat* v. *Bolat*, 182 Conn. App. 468, 475–76, 190 A.3d 96 (2018).

"[W]e will not disturb the trial court's ruling on a motion for modification of alimony or child support unless the court has abused its discretion or reasonably could not conclude as it did, on the basis of the facts presented. . . . Furthermore, [t]he trial court's findings [of fact] are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Becue* v. *Becue*, 185 Conn. App. 812, 832, 198 A.3d 601 (2018), cert. denied, 331 Conn. 902, A.3d (2019).

On appeal, the plaintiff claims that the court erred in denying his second motion to modify because it improperly rejected his claim that there had been a substantial change in circumstances, which was based on the decrease in his income, the increase in his parenting time, and the loss of his ability to borrow money from his current wife to satisfy his financial obligations to the defendant. In his second motion to modify, however, the plaintiff did not claim a substantial change in circumstances on the basis of the alleged decrease in

his income or the alleged increase in his parenting time. Indeed, those alleged changes in circumstances had previously been addressed by the trial court, and rejected as not substantial, in denying the plaintiff's first motion to modify, from which he did not appeal. Because those claims were not raised by the plaintiff in his second motion to modify, and the court properly did not address them in ruling on that motion, they are not properly before us now.

The plaintiff also claims that the court erred in finding that he had failed to prove that he was no longer able to meet his financial obligations to the defendant by borrowing money from his current wife. His brief is wholly devoid of any legal authority to support his claim and is thus inadequately briefed for our review. Even, however, if he had properly briefed that claim, the court's rejection of his claim that he could no longer borrow funds from his current wife to meet his financial obligations to the defendant was well supported by the court's unchallenged factual finding that he had in fact continued to borrow money from his current wife for motion to modify. We thus conclude that the court did not err in finding that there had been no substantial change in circumstances as alleged by the plaintiff to support a modification of the unallocated alimony and child support obligation.

The judgment is affirmed.

In this opinion the other judges concurred.

Cumulative Table of Cases
Connecticut Appellate Reports
Volume 189

(Replaces Prior Cumulative Table)

Cohen *v.* King 85
Defamation; fraud; absolute immunity; litigation privilege; motion to dismiss; claim that trial court improperly concluded that doctrine of litigation privilege barred action against defendant attorney based on allegedly defamatory and false statements made by defendant in answer to grievance complaint filed by plaintiff against defendant; whether trial court properly concluded that litigation privilege extends absolute immunity to statements made to attorney disciplinary authority by attorney who was subject of grievance complaint; claim that litigation privilege did not apply because complaint pleads facts suggesting that defendant abused judicial process and breached professional duty of candor.
Countrywide Home Loans Servicing, LP *v.* Pires (Memorandum Decision) 903
Cyganovich *v.* Cyganovich 164
Dissolution of marriage; appeal from judgment of trial court resolving postjudgment motions of parties; whether trial court, in granting motion for modification of child support, improperly calculated defendant's modified child support obligation; whether defendant was entitled to modified child support in amount calculated according to formula applicable to split custody arrangement where parties had shared custody of child; whether record supported contention that parties spend equal amounts of money to support child.
Deutsche Bank National Trust Co. *v.* Siladi (Memorandum Decision) 902
Garden Homes Profit Sharing Trust, L.P. *v.* Cyr. 75
Summary process; nonjoinder of party; whether trial court had authority to raise, sua sponte, issue of nonjoinder of necessary party in absence of motion to strike filed by defendant; whether trial court improperly rendered judgment in favor of defendant on basis of nonjoinder without giving plaintiff opportunity to add necessary party to action in violation of relevant statute (§ 52-108) and rules of practice (§§ 9-19 and 10-44).
Harris *v.* Commissioner of Correction (Memorandum Decision) 903
Harvey *v.* Dept. of Correction 93
Wrongful death; sovereign immunity; claim that trial court improperly granted motion to dismiss action for lack of subject matter jurisdiction; whether action was time barred pursuant to statute (§ 4-160 [d]) that requires plaintiff who has been granted authorization to sue state by Claims Commissioner to bring action within one year from date authorization was granted; claim that action was not untimely because applicable statute of limitations (§ 52-555) for wrongful death action, which permits action to be brought within two years from date of decedent's death, had not expired and is not limited by § 4-160 (d); whether plaintiff was required to comply with both one year limitation period provided in § 4-160 (d) and statute of limitations for wrongful death action set forth in § 52-555; claim that action was timely because limitation period prescribed in § 4-160 (d) was extended by statute (§ 52-594).
Holbrook *v.* Commissioner of Correction 108
Habeas corpus; whether habeas court properly denied petition for writ of habeas corpus; whether habeas court properly determined that petitioner failed to prove that prior habeas counsel rendered ineffective assistance by failing to pursue claim that trial counsel had been ineffective; claim that trial counsel's decision not to call witness constituted deficient performance; claim that prosecution suppressed favorable evidence when it delayed making plea offer to eyewitness until after eyewitness testified in petitioner's criminal trial.
Ibrahim *v.* Chapdelaine (Memorandum Decision) 901
Ion Bank *v.* J.C.C. Custom Homes, LLC 30
Replevin; action by way of replevin to recover certain collateral in defendants' possession; claim that trial court improperly granted defendants' motion to dismiss because amended complaint filed by plaintiff cured any defect regarding plaintiff's standing; claim that plaintiff properly substituted proper party as plaintiff

by operation of law by filing amended complaint in compliance with relevant rule of practice (§ 10-59); whether plaintiff was required to file motion for permission to substitute proper party as plaintiff; whether trial court abused its discretion in declining to treat amended complaint as motion to substitute parties; claim that plaintiff, as assignor of note, had standing to maintain replevin action on behalf of its assignee.

Lively *v.* Commissioner of Correction (Memorandum Decision) 901

Marino *v.* Statewide Grievance Committee. 7

Attorney discipline; appeal to trial court from decision of reviewing committee of defendant Statewide Grievance Committee finding that plaintiff violated rule 4.4 (a) of Rules of Professional Conduct; whether trial court's decision that defendant properly concluded that plaintiff violated rule 4.4 (a) was based on clear and convincing evidence; whether there was clear and convincing proof that plaintiff filed motion for capias for no substantial purpose other than to embarrass or burden complainant; whether there is statutory authority or rule of practice that requires attorney to contact court or to check judicial website prior to filing motion for capias; whether motion for capias may properly be requested when party is served with subpoena duces tecum and fails to appear for scheduled deposition; whether rule 4.4 (a) imposes additional obligations on attorney when dealing with self-represented party.

McKiernan *v.* Civil Service Commission 50

Declaratory judgment; action seeking declaratory judgment that plaintiff be allowed to retake oral assessment portion of certain police detective promotional examination; claim that trial court erred by rendering judgment in favor of defendants on basis of its finding that oral assessment was administered in accordance with requirements of city charter; whether trial court's finding that test administrators provided plaintiff with all necessary test materials for oral assessment was clearly erroneous; whether trial court's finding that supervising test administrator's description of procedures followed during examination was corroborated by other witnesses was clearly erroneous; claim that trial court erred in concluding that examination was administered in reasonable manner even though test administrators failed to take any steps to provide plaintiff with allegedly missing test materials; whether oral assessment was given in compliance with requirements of city charter despite lack of system to keep track of test materials; claim that examination was unreasonable and arbitrary because it was not administered in uniform manner; claim that instructions given to test participants on video in assessment room were different from those set forth in documents given in preparation room.

Mountain *v.* Mountain. 228

Dissolution of marriage; whether trial court erred in denying postjudgment motion for modification of unallocated alimony and child support obligation; whether trial court erred in finding that there had been no substantial change in circumstances to support modification of unallocated alimony and child support obligation; reviewability of claim that trial court erred in finding that plaintiff failed to prove that he was no longer able to meet financial obligations to defendant by borrowing money from his current wife.

Premier Capital, LLC *v.* Shaw 1

Standing; action to enforce judgment; whether trial court lacked subject matter jurisdiction due to plaintiff's lack of standing; whether designation of wrong entity as plaintiff was scrivener's error; whether trial court should have dismissed case rather than deciding it on merits.

Saint Francis Hospital & Medical Center *v.* Malley 68

Default judgment; default for failure to appear; claim that rendering of default judgment was improper and constituted plain error; whether it was improper to enter default against defendant for failure to appear where defendant's counsel was present in court; whether consequences of court's error were so grievous as to be fundamentally unfair or manifestly unjust; whether unwarranted rendering of default judgment against defendant was likely to undermine public confidence in judiciary.

Simpson *v.* Lee (Memorandum Decision) 901

State *v.* Bischoff 119

Possession of narcotics; possession of less than four ounces of cannabis-type substance; motion to correct illegal sentence; claim that 2015 amendment of statute applicable to possession of narcotics (§ 21a-279 [a]) applied retroactively and entitled defendant to resentencing on conviction of possession of narcotics;

whether this court is bound by precedent from our Supreme Court; whether trial court should have rendered judgment denying rather than dismissing motion to correct illegal sentence.

State *v.* Euclides L. 151

Risk of injury to child; claim that trial court improperly failed to instruct jury that it should acquit defendant if it concluded that his use of force in caring for his daughter was accident; whether trial court's charge to jury was legally correct and adequately instructed jury on issue of accident; whether separate accident charge was required; whether trial court's general intent instruction adequately addressed issue of accident.

State *v.* Grasso 186

Manslaughter in first degree with firearm; whether state failed to disprove beyond reasonable doubt claim that defendant acted in self-defense when she shot victim; whether evidence supported finding that defendant's use of deadly physical force was premature; unpreserved claim that defendant's rights to due process and to effective assistance of counsel were violated when trial court denied jury's request to rehear closing arguments of prosecutor and defense counsel; claim that defendant waived claim when defense counsel failed to object to court's proposed response to request of jury and affirmatively stated that he did not object to it.

State *v.* Mukhtaar 144

Murder; motion to correct illegal sentence; whether court properly concluded that it lacked jurisdiction to consider issues raised in motion to correct illegal sentence; whether claims raised by defendant in motion to correct addressed pretrial proceedings and criminal trial and did not attack sentencing proceeding itself.

Taing *v.* CAMRAC, LLC 23

Employment discrimination; pregnancy discrimination; whether trial court properly granted motion for summary judgment in favor of defendant; claim that genuine issue of material fact existed as to whether defendant's proffered reason for terminating plaintiff's employment was pretextual.

U.S. Bank National Assn. *v.* Rago (Memorandum Decision) 902

Vazzano *v.* Reveron (Memorandum Decision) 902

Williams *v.* State 172

Negligence; claim that trial court framed issue of case too narrowly and improperly failed to consider all instances of negligence alleged in complaint; reviewability of claim that trial court improperly failed to consider certain statutes, state highway safety regulations, and standards in ruling on complaint.

Yuille *v.* Parnoff 124

Conversion; statutory theft; alleged misappropriation of funds held in escrow pending resolution of parties' dispute over attorney's fees; claim that trial court abused its discretion by ordering defendant to commence trial after allowing his attorney to withdraw, without affording him time to obtain new counsel; claim that verdict in favor of plaintiff on counts of conversion and statutory theft was irreconcilably inconsistent with verdict in favor defendant on count alleging breach of fiduciary duty; claim that trial court improperly declined to submit special defense of waiver to jury.

NOTICES

STATE OF CONNECTICUT

DIVISION OF CRIMINAL JUSTICE

JOB OPPORTUNITY

DCJ Deputy Assistant State's Attorney
Office of the Chief State's Attorney
Appellate Bureau

PLEASE FOLLOW THE SPECIFIC APPLICATION FILING INSTRUCTIONS ON THE LAST PAGE

LOCATION: 300 Corporate Place, Rocky Hill, CT 06067

HOURS: 8:00 a.m. – 5:00 p.m.

SALARY RANGE: $67,641.02 - $141,217.18 Yearly

PCN: 4925/5044

CLOSING DATE: April 19, 2019

Examples of Duties

Appellate Bureau prosecutors represent the State of Connecticut in criminal and habeas corpus appeals before the Appellate Court and Supreme Court. In addition, they perform various other assignments requiring research and writing skills. They also perform related duties, including field support, as required.

Preferred Qualifications

Applicants should have law review, judicial clerkship or equivalent legal writing experience; oral advocacy experience; and the ability to work both independently and cooperatively with other attorneys. Applicants also should have the ability to engage in peer review by editing written work and participating in moot court arguments. Computerized legal research and word processing skills also are essential. Experience handling criminal or habeas corpus appeals is preferred.

Minimum Qualifications

Membership in the Connecticut Bar and residency in the State of Connecticut.

Application Procedure

In addition to meeting the above requirements, candidates must submit the following information to be considered for this position.

1. Cover letter

2. Division of Criminal Justice Application for Employment - available online at **www.ct.gov/csao**

3. Resume

4. Copy of law school transcript

5. Writing sample (maximum 10 pages)

6. The names and contact information for three (3) professional references

By e-mail to: DCJ.HR@ct.gov with a copy to DCJ.OCSA.Appellate@ct.gov.

All documents must be combined into a single pdf
(This is the Preferred Method)

Or

Office of the Chief State's Attorney
300 Corporate Place
Rocky Hill, CT 06067
Attn: Human Resources

Application packages must be received or postal stamped no later than **April 19, 2019**

Applications received by facsimile will not be accepted

A complete job specification for DCJ Deputy Assistant State's Attorney is available here.

Notice of Reprimand of Attorneys

Pursuant to Practice Book Section 2-54, notice is hereby given of the following reprimands ordered by reviewing committees of the Statewide Grievance Committee:

Reviewing Committee Reprimands

February 1, 2019: Corey Allen Heiks, East Haven, Connecticut – 432852

Copies of the full text of the decision of the Statewide Grievance Committee is available through the Committee's offices at Second Floor, Suite Two, 287 Main Street, East Hartford, Connecticut 06118-1885. The fee for copies is $.25 (twenty-five cents) per page. The full text of the decision is also available on the Connecticut Judicial Branch website (www.jud.ct.gov).

Attest:

Michael P. Bowler
Statewide Bar Counsel